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

BRIEF FOR THE APPELLEES

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United States Court of Appeals for the Third Circuit Print Form

Corporate Disclosure Statement and Statement of Financial Interest

No. 09-2423

Sunoco, Inc. and Subsidiaries

v.

Commissioner

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Sunoco, Inc. and Subsidiaries makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

Sunoco, Inc.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Sunoco, Inc.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

(Signature of Counsel or Party)

Dated: June 3, 2009

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases and proceedings.

STATEMENT OF THE ISSUES

Did Congress intend for the Tax Court to address the subject of interest on tax overpayments to the extent necessary to enable the court to provide a complete adjudication of the cases before it?

Suggested Answer: Yes

Was the Tax Court right in concluding that it had jurisdiction to determine overpayment interest here in "determin[ing] the amount of such overpayment" under I.R.C. §6512(b)(1)?

Suggested Answer: Yes

Are determinations of interest on tax overpayments inextricably intertwined with determinations of tax underpayments, tax overpayments, and interest on tax underpayments – all of which the IRS concedes are within the Tax Court's jurisdiction?

Suggested Answer: Yes

STATEMENT OF THE CASE

1. Factual Background.

Sunoco, Inc. ("Sunoco"), formerly Sun Company, Inc., headquartered in Philadelphia, Pennsylvania, is the parent of a group of companies engaged primarily in the manufacturing and marketing of petroleum products, logistics businesses, and cokemaking operations, in the United States and elsewhere. Sunoco shares are traded on the New York Stock Exchange. For many years, Sunoco has filed a consolidated return for Federal income tax purposes that includes several hundred subsidiaries (A61-74).[1]

As is typical of most large public companies, Sunoco is audited by the Internal Revenue Service (the "IRS") on essentially a continuous basis. And, as is also typical, the audits generally result in various adjustments – both up and down – to Sunoco's tax liabilities for any particular year, as items are identified by the IRS Revenue Agents involved in the audits and by Sunoco's in-house tax personnel. Generally, the audit process leads to a number of proposed adjustments, many of which are resolved administratively within the IRS – some at the audit level and some at the IRS appeals office level (*e.g.*, A45-52).

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[1] For purposes of this brief, the term "Sunoco" will be used to refer to Sunoco, Inc. and to refer the group of which Sunoco, Inc. is the common parent. Page references to the joint appendix are identified as A.

For a large corporate taxpayer, the IRS audit and appeals process typically takes a number of years to complete, during which time the parties generally agree to extend the applicable statute of limitations periods for assessment of deficiencies by means of IRS Form 872-A, Special Consent to Extend the Time to Assess Tax. As a *quid pro quo* for the extension of time to assess deficiencies, Form 872-A also extends the time in which the taxpayer "may file a claim for credit or refund."[2]

In 1997, after completion of one such audit cycle and IRS administrative appeals process, the IRS issued a notice of deficiency to Sunoco for the taxable years 1979, 1981, and 1983, asserting tax deficiencies in the amounts of $10,563,157, $5,163,449, and $35,916,359, respectively. The notice of deficiency was timely because the limitations periods for assessment of deficiencies and for refund claims had been extended as a result of IRS Form 872-A executed by Sunoco and the IRS.

2. <u>Tax Court Proceedings.</u>

In response to the notice of deficiency, Sunoco filed a timely petition in the Tax Court in September of 1997. In that petition, Sunoco contested the IRS's determination of deficiencies for each of 1979, 1981, and 1983 and also asserted

[2] IRS Form 872, Consent to Extend the Time to Assess Tax, which extends the statute of limitations period to a date certain, and is used in some instances, contains exactly the same provisions about refund claims as Form 872-A.

that there had been tax overpayments for those years in the amounts of at least $25,082,591, $6,881,055, and $14,137,211, respectively. Sunoco raised seventeen distinct issues with respect to the notice of deficiency and sought a refund of the overpayment together with interest thereon. (A7-74)

In November of 1997, Sunoco amended its petition to add, *inter alia*, allegations relating to certain errors that the IRS had made in computing underpayment and overpayment interest – errors that Sunoco had managed to identify through a review of IRS transcripts of tax payments, refunds, credits and interest accruals for the relevant years. In particular, Sunoco claimed that the IRS computations of interest (1) had used a number of incorrect starting and ending dates for the running of interest and incorrect dates in applying payments and credits and making transfers to and from other accounts, (2) had failed to credit or refund the correct amounts of interest on overpayments, and (3) had failed properly to net underpayments against overpayments for purposes of computing interest on underpayment amounts and overpayment amounts. Sunoco alleged that these miscalculations of interest amounted to at least $2,637,217, $37,390,963, and $2,466,601 for 1979, 1981, and 1983, respectively. (A75-80)

In 1999, the Tax Court held a trial on the merits with respect to certain issues in the case – but not interest-related issues. The court subsequently issued two opinions on the disputed substantive tax issues.[3]

Meanwhile, the IRS moved on jurisdictional grounds to dismiss Sunoco's claims regarding the underpayment of interest on overpayments. (A102-04) After full briefing and argument (A106-282), the Tax Court denied that motion in an opinion dated February 4, 2004.[4]

3. Tax Court Opinion on Jurisdiction with Respect to Overpayment Interest.

In its opinion, the Tax Court concluded that its statutory jurisdiction to determine overpayments of tax in cases before it includes the power to determine interest with respect to those overpayments, at least in certain circumstances – including, in particular, where overpayments and interest on overpayments have been refunded to the taxpayer or otherwise credited to the taxpayer's account by the time the case arrives in Tax Court.

A central element of the Tax Court's reasoning was its observation that the calculation of interest on overpayments is often inextricably intertwined with the

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[3] *Sunoco, Inc. v. Commissioner,* 118 T.C. 181 (2002); *Sunoco, Inc. v. Commissioner,* T.C. Memo. 2004-29.

[4] A copy of the Tax Court's opinion on the interest issue is attached as an Appendix to Appellant's brief. Page references to that Appendix are indicated here as App. The opinion is also reported at 122 T.C. 88.

calculation of interest on underpayments. To illustrate this point, the court demonstrated how both underpayment and overpayment interest would change as a result of single adjustment in this very case. In Appendix 4 to his opinion, Judge Whalen shows how one change in the timing of a foreign tax credit carryback has a ripple effect that alters the balance in the account – and the interest computations with respect to that balance – for years thereafter. As of December 14, 1993,[5] the net effect of this one change would have been to increase the amount of accrued underpayment interest payable by Sunoco from $1,353,083.46 (App. 35, col. I) to $2,021,766.73 (App. 43, col. I) and to decrease the amount of accrued overpayment interest payable to Sunoco from $6,346,670.45 (App. 35, col. H) to $5,272,357.21 (App. 43, col. H). In other words, the resolution of just the timing of the $3,876,645 foreign tax credit carryback significantly affects *both* the computation of underpayment interest payable by Sunoco and the computation of overpayment interest payable to Sunoco.

The Tax Court has previously held (and the IRS has conceded) that the Tax Court has jurisdiction to determine whether the taxpayer has overpaid interest on tax liabilities. *Estate of Baumgardner v. Commissioner,* 85 T.C. 445 (1985), *acq.,* 1986-2 C.B. 1. The Tax Court here concluded that the same rationale applied to

[5] Appendices 1 and 4 of Judge Whalen's opinion show interest computations up to December 14, 1993.

interest on tax overpayments, and that it would make no sense to make taxpayers litigate interest on underpayments in one forum and interest on overpayments in another – particularly when the two calculations impacted each other at each step.

4. Tax Court Proceedings Since the Decision on Jurisdiction.

After the Tax Court issued its opinion on jurisdiction, the IRS moved for reconsideration (A284-91). The issue was briefed for a second time (A292-333), and Tax Court denied the motion (App. 44-45). Thereafter, all other issues in the case were resolved by decision or stipulation, and final judgment was entered, with the IRS reserving the jurisdictional issue for this appeal.

All of the amounts in the case have been stipulated. Moreover, as required under the Tax Court's earlier decision in *Estate of Baumgardner v. Commissioner*, 85 T.C. 445 (1985) (which was reviewed and unanimously approved by the full Tax Court and has been acquiesced in by the IRS (1986-2 C.B. 1)), it is agreed that the Tax Court has jurisdiction to determine the extent to which there have been *overpayments* of interest on *underpayments*. Thus, the IRS is contesting only the Tax Court's jurisdiction to determine the extent to which there have been *underpayments* of interest on *overpayments*. Finally, the parties have also agreed on how the interest on both underpayments and overpayments should be computed

in the event that the Tax Court's jurisdictional determination is sustained on appeal.[6]

Summary of Argument

Commissioner's argument rests on a shaky foundation: an outdated view of the Tax Court's status that ignores Congress's clear intention that that court should have the power to provide a complete adjudication of the cases before it. Over forty years ago, Congress elevated the Tax Court to the status of an Article I court – it is no longer, as Commissioner here seems to think, a mere "judicial agency." Equally outdated is Commissioner's insistence that the Tax Court generally lacks jurisdiction over interest determinations such as those involved in this case. Indeed, 26 U.S.C. ("I.R.C.") §7481(c) – enacted in 1988 and amended in 1997 – now gives the Tax Court express authority to review underpayment *and* overpayment interest calculations on post-judgment motions by taxpayers. The provision of this post-judgment remedy made it clear that the Tax Court has

[6] The Second Stipulation of Settled Issues, filed February 2, 2009 (A334-55), contains the parties' agreements on the interest computations, including effective dates for various credits and debits to the accounts for the taxable years at issue, a detailed computation showing interest accruals through December 31, 2008 for each taxable year on a stand-alone basis (before any crediting of overpayments against underpayments), and agreement that the elimination of interest on overlapping periods of overpayments and underpayments pursuant to I.R.C. §6621(d) will be allowed as provided by law.

jurisdiction to resolve the overpayment interest determinations that are at issue on this appeal.

The literal language of I.R.C. §6512(b)(1) does not call for the narrow reading being propounded by Commissioner. The power granted in §6512(b)(1) – "to determine the amount of such overpayment" – can very reasonably be construed to include overpayment interest, as similar language in other statutory provisions has been construed. Indeed, the very statutory provision that gives U.S. district courts jurisdiction to determine overpayments – and which has repeatedly been held to encompass interest on overpayments – is no more explicit than the language here.

The determinations of interest on overpayments at issue here are interdependent with the determinations of tax underpayments, tax overpayments, and interest on tax underpayments – all of which Commissioner concedes were within the Tax Court's jurisdiction in this case. To require that overpayment interest be litigated in a separate court even before the IRS audit of the taxpayer has been completed – which is to say, even before the existence of an overpayment has been established – or else be tabled entirely until after completion of all Tax Court proceedings – would make absolutely no sense. Yet that is what Commissioner is demanding.

Argument

I. THE STANDARD OF REVIEW.

The Court of Appeals has jurisdiction pursuant to 26 U.S.C. §7482 and exercises plenary review over the Tax Court's construction of the Internal Revenue Code. *National Starch & Chem. Corp. v. Commissioner*, 918 F.2d 426, 428 (3d Cir. 1990), *aff'd sub nom.*, 503 U.S. 79 (1992). Because this is a question of law, the standard of review is *de novo*. *Stepnowski v. Commissioner*, 456 F.3d 320, 322 n.5 (3d Cir. 2006).

II. CONGRESS HAS GRANTED THE TAX COURT JURISDICTION TO REVIEW OVERPAYMENT INTEREST.

To frame the issue in this case, it may make sense to begin by outlining the statutory scheme of judicial remedies for taxpayers. In general, taxpayers have three potential judicial forums for resolving Federal income tax disputes. A taxpayer who receives a notice of deficiency from the IRS may contest the deficiency by filing a timely petition with the Tax Court. That gives the Tax Court jurisdiction to determine both the amount of any deficiency for the relevant tax year and the amount of any tax overpayment for that year.[7] Alternatively, a taxpayer may pay any disputed tax and then pursue a refund action in the United States Court of Federal Claims or the United States district court for the district in

[7] I.R.C. §§6214(a), 6512(b)(1).

which the corporate taxpayer has its principal place of business.[8] The jurisdictions of the three courts that can consider Federal income tax claims are mutually exclusive. In other words, if the Tax Court has jurisdiction to resolve a matter, then neither the Court of Federal Claims nor a district court will have concurrent jurisdiction, and vice versa.

A. The Tax Court Is Intended to Provide a Full Remedy to Taxpayers.

Although receipt of a notice of deficiency for a taxable year is a taxpayer's "ticket" to the Tax Court, once the case is in Tax Court, the Tax Court's jurisdiction is not limited to determining whether there is a tax deficiency for the year and the amount of any such deficiency. It is undisputed that the Tax Court's jurisdiction also encompasses:

- jurisdiction to determine the amount of any overpayment of tax for the year;[9]
- jurisdiction to determine whether there has been an overpayment of interest on tax for the year;[10]

[8] 28 U.S.C. §§1346, 1391(e)(3), 1491.

[9] I.R.C. §6512(b)(1).

[10] *Estate of Baumgardner v. Commissioner,* 85 T.C. 445 (1985), *acq.* 1986-2 C.B. 1.

- jurisdiction, after entry of a judgment for a deficiency or overpayment of tax, to entertain a post-judgment motion to correct the IRS's determination of interest with respect to such a deficiency or overpayment;[11] and
- jurisdiction, after entry of a judgment for an overpayment of tax, to entertain a post-judgment motion to order the refund of such overpayment, together with interest thereon, if the IRS has failed to do so.[12]

The statutory grants of jurisdiction to the Tax Court are found in several different sections of the Internal Revenue Code. One key provision is I.R.C. §6512, entitled "LIMITATIONS IN CASE OF PETITION TO TAX COURT." Subsection (a) of §6512 precludes a taxpayer from pursuing a refund action in a district court or the Court of Federal Claims "to recover any part of the tax" for a taxable year that is before the Tax Court, while subsection (b) gives the Tax Court jurisdiction over such a refund claim:

> (b) OVERPAYMENT DETERMINED BY TAX COURT.—
>
> (1) JURISDICTION TO DETERMINE.—Except as provided by paragraph (3) and by section 7463, 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 taxpayer has made an overpayment of such tax, *the Tax Court shall have jurisdiction to determine the amount of such*

[11] I.R.C. §6512(b)(2).

[12] I.R.C. §7481(c).

> *overpayment*, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. . . .
>
> (2) JURISDICTION TO ENFORCE.—If, 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 as provided in subchapter B of chapter 67, then the Tax Court . . . shall have jurisdiction to order the refund of such overpayment and interest. . . .

26 U.S.C. §6512(b) (emphasis added). The issue presented here is whether the statement in section 6512(b)(1) that the Tax Court shall have jurisdiction "to determine the amount of such overpayment" should be construed to encompass the ability to determine issues regarding the amount of interest on an overpayment for the taxable year that is before the Tax Court.

Commissioner's principal argument may be summarized in relatively simple terms. Reading §6512(b)(1) very narrowly, Commissioner argues that because a taxpayer does not literally transmit interest on an overpayment to the IRS, that interest was not itself overpaid and thus should not be considered part of an "overpayment." In reaching this conclusion, Commissioner places great emphasis on the fact that the statute does not separately identify "interest."

If interest were expressly identified in every instance in which it appears in the tax statutes, perhaps Commissioner might have a point. But it is not. More significantly, the practical implications of Commissioner's interpretation would be absurd; and it cannot be that Congress intended such a result.

Commissioner intimates through his invocation of *Dudley v. Commissioner*, 258 F.2d 182, 183 (3d Cir. 1958), and *Commissioner v. Gooch Milling,* 320 U.S. 418, 420 (1943), that the Tax Court is merely "a judicial agency of the United States with limited statutory jurisdiction" (App. Br. 25-26). The problem with that assertion is that it is forty years out of date. In the Tax Reform Act of 1969, Congress changed the status of the Tax Court from an administrative forum (like its predecessor, the Board of Tax Appeals) to an Article I court. And, contrary to the impression conveyed in Commissioner's brief, it is now well-settled that the Tax Court "exercises its judicial power in much the same way as the federal district courts exercise theirs." *Freytag v. Commissioner*, 501 U.S. 868, 891 (1991). Indeed, in *Greene-Thapedi v. Commissioner*, 126 T.C. 1 (2006), cited by Commissioner, the Tax Court stated that it has "inherent equitable powers." *Id.* at 9 n.13. The status of the Tax Court today is closer to that of a Bankruptcy Court than that of an agency tribunal; once a matter is properly before it, all interrelated matters should be resolved in the same forum.

Commissioner cites a string of cases for the proposition the Tax Court is a tribunal of "limited jurisdiction," dependent on statutory grants from Congress.[13]

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[13] *See Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (per curiam); *L.V. Castle Investment Group v. Commissioner,* 465 F.3d 1243, 1247 n.4 (11th Cir. 2006) (whether a dissolved corporation or transferee against whom IRS has not yet filed notice of transferee liability can file Tax Court petition); *Boyd v. Commissioner*,

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That is undeniably so. The Tax Court's jurisdiction is "limited" to the subject of Federal taxes – not maritime matters, criminal prosecutions, patent infringement claims, diversity cases or any of a host of other subjects that U.S. district courts deal with. And it is Congress that controls the jurisdiction of the Tax Court – just as Congress controls the jurisdiction of *every* Federal court. That does not mean that the jurisdiction of the Tax Court must be narrowly circumscribed – or construed in a way that prevents it from fully resolving the cases before it.

Congress's intention that the Tax Court completely dispose of cases brought before it is well-established. Early on, in granting overpayment jurisdiction to the Tax Court's predecessor, Congress stated that the provision "confers jurisdiction upon the Board of Tax Appeals to determine not only that the taxpayer has made an overpayment of tax, but also whether such overpayment is refundable, so that the proceeding before the Board may result in a complete disposition of the tax

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451 F.3d 8, 11 (1st Cir. 2006) (whether procedural rules applicable to IRS levy also apply to IRS offset); *Moretti v. Commissioner,* 77 F.3d 637, 642 (2d Cir. 1996) (whether preliminary pre-filing notification letter constitutes a "notice of deficiency"); *Vivenzio v. Commissioner,* 283 F. App'x 40, 43 (3d Cir. 2008) (per curiam) (whether Tax Court petition can be filed in absence of requisite IRS notice of determination); *Greene-Thapedi v. Commissioner,* 126 T.C. 1, 11 (2006) (whether collection review action regarding propriety of proposed levy becomes moot once levy is satisfied). The jurisdictional issues in these cases have tended to be much more straightforward than the issue presented here, and the rote recitation in the opinions that the Tax Court is a court of limited jurisdiction does not connote the degree of limitation the Commissioner suggests.

case being considered." H.R. Rep. No. 73-704, at 38 (1934).[14] And, in a 1962 case, the Second Circuit had no difficulty remanding *to the Tax Court* (which had thought it lacked jurisdiction) *for the computation of overpayment interest. Colt's Manufacturing. Co. v. Commissioner*, 306 F.2d 929, 933 (2d Cir. 1962). Three years later, this Court, following *Colt's Manufacturing*, affirmed the jurisdiction of the Tax Court to determine whether an overpayment existed, when the only consequence of that finding would be an award of overpayment interest. *See Fortugno v. Commissioner*, 353 F.2d 429 (3d Cir. 1965).

In expanding the Tax Court's jurisdiction in 1988 under §6213(a) (jurisdiction to restrain certain premature assessments), §6512(b)(2) (jurisdiction to enforce overpayment determinations), and §7481(c) (jurisdiction to determine interest on deficiencies), Congress observed:

1. Taxpayers will "no longer be required to seek relief in a second forum when the taxpayer has already previously invoked the jurisdiction of the Tax Court. This is sensible because the Tax Court already has jurisdiction over the substantive tax matter and, arguably, greater

[14] In 1954, Congress added I.R.C. §7422(e), providing for a stay of any pending district court or Court of Claims refund action upon issuance of a notice of deficiency for the same year, with the stated goal that "the taxpayer is to be able to have *all issues* decided either in a district court (or Court of Claims) or in the Tax Court." H.R. Rep. No. 83-1337 (1954), *reprinted at* U.S. Code Cong. & Admin. News, 83rd Cong., 2nd Sess. 4019, 4136 (emphasis added).

understanding of the underlying issues at hand." 134 Cong. Rec. 29,273 (1988);

2. "[T]he Taxpayer should not have to incur the additional time, trouble, and expense of enforcing the Tax Court's decision in another forum." S. Rep. No. 100-309, at 17 (1988);

3. "The proposal would eliminate the need for taxpayers to seek relief in a court that did not consider the underlying issues of the case." 134 Cong. Rec. 29,273 (1988).

Nonetheless, here, where the Tax Court indisputably had jurisdiction over every other relevant question before it, the Commissioner is asking this Court to hold that overpayment interest alone – on the very claims and adjustments the Tax Court is already considering – must be adjudicated elsewhere.

B. The Availability of §7481(c) Post-Judgment Relief Confirms the Tax Court's Power to Review Overpayment Interest Determinations.

"Elsewhere" is not only not required by §6512(b) – it is *contradicted* by *Colt's Manufacturing* as well as amended §7481(c), which followed on the heels of the *Baumgardner* decision. Entitled "DATE WHEN TAX COURT DECISION BECOMES FINAL," much of §7481 deals with various time periods relevant to that issue. It is in that context that we find §7481(c), which reads, in relevant part:

(c) JURISDICTION OVER INTEREST DETERMINATIONS. –

> (1) IN GENERAL. – Notwithstanding subsection (a), if, within 1 year after the date the decision of the Tax Court becomes final under subsection (a) in a case to which this subsection applies, 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 taxpayer has made an overpayment of such interest or *the Secretary has made an underpayment of such interest* and the amount thereof.
>
> (2) CASES TO WHICH THIS SUBSECTION APPLIES. – This subsection shall apply where –
>
> (A)(i) an assessment has been made by the Secretary under section 6215 which includes interest as imposed by this title, and
>
> (ii) the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary, and
>
> (B) the Tax Court finds under section 6512(b) that the taxpayer has made an overpayment.

26 U.S.C. § 7481(c) (emphasis added).

When Congress originally enacted §7481(c) in 1988, the stated intent was to "eliminate the need for taxpayers to seek relief in a court that did not consider the underlying issues of the case." 134 Cong. Rec. 29,273 (1988). The original version of §7481(c) focused just on interest on underpayments and provided that the Tax Court's jurisdiction to redetermine interest on an underpayment would come into play only if "the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary." I.R.C. §7481(c)(2) (as enacted in 1988).

In the Taxpayer Relief Act of 1997, Congress amended §7481(c) to clarify and expand its scope. The Conference Committee Report on the 1997 Act says that the amendment "clarifies that the Tax Court's jurisdiction to redetermine the amount of interest under §7481(c) does not depend on whether the interest is underpayment interest or overpayment interest." H.R. Rep. No. 105-220, at 732-33 (Conf. Rep. 1997).[15]

Thus, whereas the former §7481(c) applied by its terms only to cases where "an assessment has been made ... which includes interest as imposed by this title," and "the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary" – language which was contained in subsections (1) and (2) of old §7481(c) and which was recodified, *in haec verba,* in subparagraphs (i) and (ii) of new §7481(c)(2)(A) – the new §7481(c)(2)(B) contained an alternate circumstance in which the section can come into play, *i.e.,* where "the Tax Court finds under §6512(b) that the taxpayer has made an overpayment." New §7481(c)(1) then authorizes the Tax Court to reopen the case "to determine whether ... the Secretary

[15] In amending §7481 in 1997, Congress also made it clear that "the conferees do not intend to limit any other remedies that taxpayers may currently have with respect to such [interest] determinations, including in particular refund proceedings *relating solely* to the amount of interest due." H. R. Rep. No. 105-220, at 733, (Conf. Rep. 1997) (emphasis added). Contrary to Commissioner's suggestion, that language reflects Congress's anticipation that there may be potential jurisdictional overlaps on interest issues in some cases – and not at all that Congress intended the Tax Court to be barred from addressing them.

has made an underpayment of such interest" upon a taxpayer's motion "for a redetermination of the amount of interest involved." And under §7481(c)(3), any determination by the Tax Court on a motion to redetermine underpayment interest or overpayment interest is to "be treated under §6512(b)(1) as a determination of an overpayment of tax."

Commissioner contends that unless all of the steps specified in §7481(c)(2) have been taken, the Tax Court has no jurisdiction over overpayment interest at all. (App. Br. at 35.) Moreover, Commissioner suggests that any consideration of overpayment interest under §7481(c) is limited to reviewing only fresh, new IRS mistakes in the computation of interest – and that any number of pre-petition mistakes by the IRS embedded in the computation of interest are grandfathered and must be blindly repeated in the §7481(c) computation.[16] (App. Br. at 36.). Both arguments fail.

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[16] In part, this is a reflection of a question that does not relate to the Tax Court's jurisdiction at all, but is an entirely distinct contention of the Commissioner – that Sunoco is not entitled to raise challenges to any errors in the IRS's computations of overpayment interest that originated more than 6 years earlier – despite the parties' execution of IRS Form 872-A, which, by its terms, kept open the periods during which both parties could seek relief as to the years in question. Only the jurisdictional question is before the Court. (Were there a question about the scope of Form 872-A, it would not arise here, and, in any event, contractual principles apply in construing such agreements, and when the IRS – like any other drafter – provides a taxpayer with a form agreement, any ambiguities should be construed against it. *E.g., Ripley v. Commissioner*, 103 F.3d 332, 337 (4th Cir. 1996).) In any event, (*i.e.,* even if Form 872-A were to be construed as not tolling the statute

(Continued)

As even the cases cited by Commissioner acknowledge, even prior to the 1997 amendment, courts recognized that the purpose of §7481 was to confer broader jurisdiction on the Tax Court than it already had by providing an exception to finality. *E.g., Med James, Inc. v. Commissioner*, 121 T.C. 147, 152 n.6 (2003). It makes no sense that the 1997 amendment – designed to broaden the Tax Court's jurisdictional reach further – would instead be construed to impose additional restrictions.

The only authorities Commissioner cites for that proposition are *Bax v. Commissioner,* 13 F.3d 54 (2d Cir. 1993), decided four years *before* the amendment of §7481(c),[17] and *ASA Investering Partnership v. Commissioner*, 118

(Continued)

of limitations for bringing an independent action for recovery of overpayment interest), once the Commissioner chooses to issue a notice of deficiency for a year, that opens the door of Tax Court to the taxpayer, and the Tax Court cannot be bound by erroneous IRS interest computations with respect to the year before it – whether or not the time for the taxpayer to initiate an independent action to challenge any particular mistake might have passed. So, in the context of a Tax Court proceeding, there is no relevance to the six-year statute that is relied on by Commissioner – and, even as to that statute, many transactions were not time-barred as of November 1997. In light of the fact that the years in question were before the Tax Court as a result of Commissioner's notice of deficiency, issued many years after the periods in question, Commissioner's disingenuous argument that the IRS should not be forced to incur the burden of retaining the relevant records "for years" – even though presumably it must keep those very records for its audits and claims – rings hollow.

[17] Indeed, even under the earlier version of §7481(c), its language was not interpreted as limiting the Tax Court's jurisdiction under §7481(c) to cases in

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T.C. 423 (2002), a case in which the taxpayer sought a redetermination of interest on a deficiency. The Tax Court in that case clearly viewed §§7481(c)(2)(A) and (B) as providing *alternative* circumstances in which §7481(c) relief can be granted, observing that the Tax Court has jurisdiction to redetermine interest where "[t]he entire amount of the deficiency plus … interest … has been paid … and … an assessment has been made … under §6215 which includes interest." *Id.* at 425. In other words, Appellant's overly restrictive interpretation of §7481(c) finds no support in the case law.

And, in any event, courts had looked past the letter of even the prior restrictions to fulfill the intent of the statute when necessary. *E.g., Hallmark Cards, Inc. v. Commissioner,* 111 T.C. 266, 271 (1998) (finding jurisdiction under prior §7481(c) even though there was a settlement agreement rather than an "assessment" of a "deficiency" resulting from a Tax Court decision in the usual sense). In the same way, the jurisdiction of the Tax Court in such matters certainly extends to determining whether the proper dates are recognized at each step – which, of course, is what gives rise to knowing when underpayment or

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which the Tax Court has determined a deficiency for the taxable year. *Hallmark Cards, Inc. v. Commissioner*, 111 T.C. 266, 270-71 (1998). Rather, the requirement that "the taxpayer has paid the entire amount of the deficiency" applied only if there was a deficiency that remained to be paid.

overpayment interest begins and ends. *See id.* at 268. Errors embedded in the IRS's post-judgment interest computations are not immune from §7481(c) review simply because they may be traced back to mistakes first made at an earlier date.

Estate of Smith v. Commissioner, 429 F.3d 533 (5th Cir. 2005) – another case cited by the Commissioner – confirms that all underpayment and overpayment interest computations with respect to a particular taxable year before the Tax Court are encompassed by the Tax Court's §7481(c) procedure. In *Smith*, the issue was whether the Tax Court in its original judgment for a tax overpayment could affirmatively preclude the IRS from offsetting underpaid deficiency interest against that overpayment. The Court of Appeals for the Fifth Circuit ruled for the IRS on that technical issue. But the court emphasized that the ultimate determination of all underpayment and overpayment interest computations for the taxable year in question could be made by the Tax Court in the post-judgment §7481(c) proceedings:

> Any issues related to overpayment or underpayment of interest can be raised in a subsequent proceeding. Section 7481 of the Internal Revenue Code allows the Tax Court to determine any interest overpayment or underpayment after the Tax Court has determined that there is an overpayment of tax pursuant to section 6512(b).

429 F.3d at 538. Thus, even though the *Smith* court did not affirm the Tax Court's jurisdiction to redetermine the IRS's determination of deficiency interest preemptively in the circumstances of that case (wholly different from Sunoco's

circumstances, of course), the Court of Appeals took pains to point out that the Tax Court would ultimately have the power to do so.

III. THE TAX COURT CORRECTLY CONSTRUED THE LANGUAGE OF §6512(b) AS ENCOMPASSING OVERPAYMENT INTEREST.

Given that there is no *per se* limitation on Tax Court jurisdiction, the question becomes whether the statute itself authorizes the Tax Court's actions here. Of course, the first step is an examination of the statutory language itself – which states in relevant part: "if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax. . . or finds that there is a deficiency but that taxpayer has made an overpayment of such tax, *the Tax Court shall have jurisdiction to determine the amount of such overpayment*." I.R.C. §6512(b)(1) (emphasis added). Commissioner contends that this language simply cannot be read to give the Tax Court power to determine the amount of interest on an overpayment. But that's just wrong. The fact is that similar statutory language has been construed to encompass interest by a number of courts. Commissioner's proffered reading of §6512(b) is not even consistent with his own reading of the statutory provision that provides jurisdiction to United States district courts to resolve interest issues in tax refund cases.

A. The Tax Court's Reading of §6512(b) Is Consistent with the Way 28 U.S.C. §1346 Has Repeatedly Been Read.

As Commissioner notes, 28 U.S.C. §1346(a)(1) gives the United States district courts and the Court of Federal Claims jurisdiction over any civil action against the United States for "the recovery of any internal-revenue tax alleged to have been erroneously or illegally *assessed or collected* . . . or any sum alleged to have been *excessive* or in any manner wrongfully *collected* under the internal-revenue laws" (emphasis added). That language has repeatedly been held to include interest on overpayments. *See, e.g., E.W. Scripps Co. v. United States,* 420 F.3d 589 (6th Cir. 2005); *Doolin v. United States*, 737 F. Supp. 732 (N.D.N.Y.), *rev'd on other grounds*, 918 F.2d 15 (2d Cir. 1990); *Triangle Corp. v. United States*, 592 F. Supp. 1311, *aff'd on motion for reconsid.*, 597 F. Supp. 507 (D. Conn. 1984); *Citadel Industries, Inc. v. United States*, 314 F. Supp. 245 (S.D.N.Y. 1970); *Draper v. United States*, 62-2 U.S.T.C. (CCH) ¶9697 (E.D. Wash., Aug. 17, 1962); *but see Amoco Prod. Co. v. United States*, 88-1 U.S.T.C. (CCH) ¶9272 (N.D. Ill. 1988), *criticized in E.W. Scripps*, 420 F.3d at 597. And, indeed, Commissioner's brief makes a point of this. (App. Br. at 26, 51) But on parsing, that language suffers from exactly the same alleged infirmity that Appellant focuses on in §6512(b): the language speaks only of amounts that have been

wrongfully assessed or collected by the government. There is no express reference to interest accruing on those amounts.

The phraseology of §6512(b)(1) and the phraseology of §1346(a)(1) are so similar that they have actually been used interchangeably in another tax-related section, 28 U.S.C. §2411 and its predecessor provision. *See Usibelli Coal Mine v. United States*, 54 Fed. Cl. 373, 383 (2002), *rev'd on other grounds,* 311 F. App'x 350 (Fed. Cir. 2008) (statutory phrases "for overpayment in respect of any internal-revenue tax" and "for any internal-revenue tax erroneously or illegally assessed or collected ... or for any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws" have been used interchangeably). Thus, the language in §1346(a)(1) is no broader than that in I.R.C. §6512(b)(1), which gives the Tax Court in a deficiency case the jurisdiction to "determine the amount of such overpayment." Interest on an overpayment is not an amount that has been "assessed or collected" or is "excessive." But §1346 has nonetheless been held to encompass such interest – as well it should be. There is no reason to read §6512(b)(1) more narrowly than §1346(a)(1).

Indeed, the reasoning of the Court of Appeals for the Sixth Circuit in *E.W. Scripps Co. v. United States,* holding that §1346(a)(1) gave the district court jurisdiction over interest, echoes that of Judge Whalen in this case. In *Scripps*, the court reasoned that: "If the Government does not compensate the taxpayer for the

time-value of the tax overpayment, the Government has retained more money than it is due, i.e., an 'excessive sum.'" 420 F.3d at 597. Similarly, Judge Whalen reasoned that "[i]f the Commissioner fails to include all or part of the interest that is allowable on the overpayment," then "[i]n effect, the taxpayer will have overpaid the liability by the amount of allowable interest that is not credited" (App. 30).

B. The Tax Court's Reading of §6512(b) Is Also Consistent with Other Statutory Provisions.

The Tax Court's reading of "overpayment" to include interest accruing thereon is consistent with the way "overpayment" is used in a number of other provisions as well. These include I.R.C. §§6402, 6514(a), 6601(f) and 6621(d) and 11 U.S.C. §505(a)(1).

For starters, consider I.R.C. §6402. Section 6402(a) authorizes the IRS to "credit the amount of such overpayment, *including* any interest allowed thereon" (emphasis added) against various other liabilities. The use of the word "including" implies that the interest on an overpayment is part of the overpayment. If the interest were not part of an "overpayment," §6402(a) should have said "*and* any interest allowed thereon" or "*together with* any interest allowed thereon." Other subsections of §6402 authorize the IRS to offset any "overpayment" against various obligations of the taxpayer, and in each case it is clearly intended that the word "overpayment" encompass interest that has accrued on the overpayment of

tax – although the word "interest" is not expressly mentioned in any of those subsections. Thus, §6402(c) provides that "[t]he amount of any overpayment to be refunded to the person making the overpayment shall be reduced by" the amount of unpaid child support obligations reported by a State under §464(c) of the Social Security Act. Section 6402(d) gives the IRS the power to "reduce the amount of any overpayment" by the amount of any debt owed by the taxpayer to another Federal agency. Section 6402(e) gives the IRS the power to "reduce the amount of any overpayment" by the amount of a state income tax obligation of the taxpayer. Section 6402(f) gives the IRS the power to "reduce the amount of any overpayment" by the amount of a covered unemployment compensation debt owed by the taxpayer to a state. In each case, the statute authorizes the offset of amounts owed to the taxpayer against amounts owed by the taxpayer – and the government would doubtless be very surprised and unhappy were a court to reach the peculiar conclusion that the power to offset does not extend to interest.[18]

[18] Congress added the reference to interest to IRC §6402(a) in 1954 "so as to permit *expressly* the crediting of interest on an overpayment against any outstanding liability for any tax." H.R. Rep. No. 83-1337 (1954), *reprinted at* U.S. Code Cong. & Admin. News, 83rd Cong., 2nd Sess. 4019, 4559 (emphasis added). When other subsections of §6402 were added later, there was no indication in the legislative history that interest was not intended to be encompassed within the term "overpayment" in those subsections.

I.R.C. §6514(a) says that a "refund of any portion of an internal revenue tax" after the statute of limitations has expired shall be considered erroneous and a credit of any such amount shall be void. Here, again, although overpayment interest is not expressly mentioned, the IRS seems to think that such a "refund of any portion of a tax" includes a refund of interest on that tax. Treasury Regulation §301.6514(a)-1 says that §6514(a) applies to a refund of "any internal revenue tax (or any *interest*, additional amount, addition to tax, or assessable penalty)." 26 C.F.R. §301.6514(a)-1 (emphasis added).

The Tax Court's reading of "overpayment" in our case also makes good sense in the context of I.R.C. §§6601(f) and 6621(d), which provide that an "overpayment" and an "underpayment" by the same taxpayer should generally be offset against each other for purposes of interest computations. Under §6601(f), with respect to the portion of any tax "underpayment" that is satisfied by a credit of an "overpayment," no interest is to be imposed during an overlapping period when interest would otherwise have been accruing on both the underpayment and the overpayment. Section 6621(d) provides a similar rule even when an underpayment and an overpayment are ultimately satisfied separately. Under §6621(d), interest that would otherwise accrue on an "underpayment" and an "overpayment" of the same amount by the same taxpayer during the same period is supposed to be netted to zero. These provisions evince Congress's intent that amounts owed to and from

a taxpayer should be offset against one another, so that the taxpayer does not have to pay interest on a tax underpayment while receiving interest on a tax overpayment.[19] This is important both because the Internal Revenue Code generally imposes a higher rate of interest on underpayments than on overpayments and because, in the case of noncorporate taxpayers, interest received from the IRS is taxable income but interest paid to the IRS is nondeductible. Those statutory provisions speak only of equal amounts of "overpayment" and "underpayment." But it would be perfectly consistent with Congress's stated

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[19] *See, e.g.*, S. Rep. No. 105-174, at 61-62 & n.33 (1998):

> The legislative history to the General Agreement on Trade and Tariffs (GATT) (1994) stated that the Secretary should implement the most comprehensive crediting procedures that are consistent with sound administrative practice, and should do so as rapidly as is practicable. A similar statement was included in the Conference Report to the Omnibus Budget Reconciliation Act of 1990.
>
> .....
>
> The Committee does not believe that the different interest rates provided for overpayments and underpayments were ever intended to result in the charging of the differential on periods of mutual indebtedness.
>
> .....
>
> In light of past Congressional statements urging the Secretary to eliminate interest rate differentials in these circumstances, and taking into consideration Congress' belief that the Secretary may do so, the Committee continues to expect that the Secretary will implement the most comprehensive interest netting procedures that are consistent with sound administrative practice, and not only those affected by this provision.

intent for the word "overpayment," as used in these sections to encompass overpayment interest. That would mean, for example, that an overpayment of $100 of tax in year 1, plus $7 of interest that accrues by year 2, should be offset against a $107 tax deficiency incurred in year 2, so that interest will cease to accrue on either at that point.

Looking beyond the I.R.C. itself, one finds 11 U.S.C. §505(a)(1), which empowers Bankruptcy Courts to "determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax." Jurisdiction to "determine the amount . . . of any tax" has been construed to encompass overpayment and underpayment interest. *See, e.g.*, *In re Vendell Healthcare, Inc.*, 222 B.R. 564, 568 (Bankr. M.D. Tenn. 1998) ("Clearly, § 505(a) endows the court with jurisdiction to compute an interest calculation as part of a determination of the 'amount' of a tax.").

In contrast, Commissioner cites no court decisions under §6512(b) or any other provision that directly support his narrow reading of "overpayment." He lifts a definition of "overpayment" from *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947), *Binder v. United States*, 590 F.2d 68, 71 (3d Cir. 1978), and *United States v. Dalm*, 494 U.S. 596, 609 n.6 (1990). But none of those decisions even addressed whether the term "overpayment" should be construed to include interest on an overpayment. In *Liberty Glass*, the issue was whether an "overpayment"

encompassed taxes "erroneously or illegally assessed" or was limited to excess payments that had been made by the taxpayer as a result of taxpayer error. The Supreme Court adopted the broader interpretation. *Dalm*, similarly, involved a question whether "overpayment" encompassed all cases in which a taxpayer has paid more than what was owed, including instances of "wrongful collection." Here, again, the Supreme Court adopted the broader interpretation. And, in *Binder*, the question was whether certain payments that had been made into "escrow" should be considered deposits or overpayments for purposes of commencing the two-year statute of limitations on refund claims; the court held that the amounts should be treated as overpayments. Thus, each of these decisions actually adopted the more expansive construction of "overpayment" with respect to the matters at issue. In none of those cases was there an issue presented as to whether overpayment jurisdiction encompassed overpayment interest.[20]

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[20] Commissioner also quotes language from *Marsh & McLennan Cos. v. United States,* 302 F.3d 1369 (Fed. Cir. 2002), but that case has nothing to do with the issues in Sunoco's case. In determining the periods of time during which interest accrued on the taxpayer's overpayments, the court of appeals in *Marsh* simply followed the express language of I.R.C. §6611(b)(1) and Treas. Reg. §301.6611-1(h)(2), in affirming the well-established principle that a taxpayer who prepays or overpays an estimated tax installment is not entitled to interest while that sum is in the government's hands.

IV. TAX COURT JURISDICTION OVER OVERPAYMENT INTEREST IS DICTATED BY CONSIDERATIONS OF JUDICIAL ECONOMY AND COMMON SENSE.

A. Determinations of Overpayment Interest Are Intertwined with Determinations of Tax Deficiencies, Tax Overpayments, and Overpayments of Interest on Deficiencies – All of Which Are Within Tax Court Jurisdiction.

The narrow reading of §6512(b) advanced by Commissioner would lead to a bizarre and cumbersome procedural maze for tax litigants such as Sunoco – a procedural maze that is plainly at odds with Congress's expressed intentions. This is because the computation of overpayment interest issue that Appellant contends is beyond the Tax Court's reach will often be, in many instances, inextricably intertwined with the computational matters that are conceded to be within the Tax Court's exclusive jurisdiction: the determination of whether there is a deficiency or an overpayment and the determination of whether interest has been overpaid on a deficiency. Cash is fungible. Interest on underpayments and overpayments compounds. Overpayments and underpayments are required to be offset for purposes of computing interest.

Under the procedural approach now advocated by Commissioner, if the IRS makes an underpayment of interest on an overpayment of tax for a given taxable year, the taxpayer's only remedy is to bring an action in a district court or in the Court of Federal Claims. And, according to Commissioner, that action must be commenced within six years of the IRS's error.

But if that same taxpayer is under IRS audit for the taxable year involved – and, as is almost invariably the case, the statute of limitations on assessments and on refund claims has been extended while the audit and IRS administrative proceedings for the year are continuing – then the ultimate determination whether there was, in fact, an overpayment of tax for the taxable year, and the amount of any such overpayment, will remain to be decided. Unless the court hearing the interest refund case wishes to proceed on a parallel track to the IRS's own audit and administrative processes, that court will need to stay its case pending the resolution of those proceedings.

Moreover, if the IRS were to issue a notice of deficiency for the year, and if the taxpayer were to file a petition with the Tax Court, it is the Tax Court that then would have the exclusive jurisdiction to make the ultimate determination of the tax liability for the year. As a result, the court with jurisdiction over the taxpayer's interest refund case – the district court or Court of Federal Claims – would need to stay its case to await the final decision in the Tax Court case. Thus, for all practical purposes, appellant's insistence that the taxpayer must bring a separate refund action to recover any interest underpayment within six years of the relevant "scheduling" of the overpayment by the IRS amounts to a "hurry up and wait" requirement.

Alternatively, presumably, the Court of Federal Claims or district court hearing the taxpayer's interest refund case could proceed to adjudicate the taxpayer's tax liability for the year – a necessary fact to enable the court to determine whether there has been an underpayment of overpayment interest – and do so *before* the taxpayer has an opportunity to file a petition in Tax Court. In that way, the court handling the interest refund case would avoid running afoul of the Tax Court's exclusive jurisdiction that attaches once such a petition has been filed.

But that would produce a remarkably odd procedural situation. The determination of tax liability by the court handling the interest refund case would be taking place before the completion of the very IRS audit and administrative appeals process designed to develop the facts relevant to the tax determination. Moreover, the determination of tax liability by the Court of Federal Claims or district court in the interest refund case would then, under principles of collateral estoppel, bar the taxpayer and the IRS from relitigating the tax issues in the Tax Court. In effect, the taxpayer's right to have its case heard in the Tax Court would have been largely vitiated.

In the case of large corporate taxpayers such as Sunoco, Commissioner's proposed jurisdictional scheme would not only bifurcate the issues for a given taxable year into two separate legal actions in two separate forums but would also make it highly likely that multiple lawsuits would be required. This is because

there will typically be many different occasions for the IRS to be crediting or refunding overpayment amounts to such a taxpayer with respect to any one taxable year. For the 1981 year in Sunoco's case, for example, there were a total of eleven such events at different times during the period 1982-94.[21] Were the Commissioner's theory accepted, Sunoco would have been required to pursue a refund action in the district court or the Court of Federal Claims with respect to each of these events as to which there was an issue regarding overpayment interest – and each of those claims would have its own separate statute of limitations. Yet, in none of those cases would the court that heard the case have been in a position to resolve the matter without a resolution of the underlying tax liability –which would ultimately have been pending in the Tax Court.

In the present case, as it happens, the amount of overpayment interest (and deficiency interest) that properly accrued to Sunoco depended dramatically on the outcome of the IRS's audit of the relevant taxable years, on adjustments made during the IRS appeals office considerations of the case, and on the resolution of the tax deficiencies asserted in the IRS notice of deficiency and the tax overpayments claimed by Sunoco in its Tax Court petition:

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[21] *See* App. 36-38, which shows overpayments being credited or refunded on 11/19/82, 12/27/82, 8/20/84, 10/8/84, 6/21/85, 9/25/85, 2/25/87, 9/24/91, 1/29/93, 12/3/93 and 11/1/94.

First, issues agreed to at the IRS audit and appeals office stages amounted to, by our computations, a $5,944,793 decrease in tax for 1979, a $5,584,797 decrease for 1981, and a $44,407 increase for 1983. These changed the amounts of Sunoco's overpayments as of the original due date of each such return (or, for adjustments of carrybacks, as of the date those carrybacks applied) – which, in turn, changed Sunoco's overpayment interest (and deficiency interest) for each year.

Second, the tax increases proposed in the notice of deficiency were $10,563,157 for 1979, $5,163,449 for 1981, and $35,916,359 for 1983. Those tax increases, if fully sustained, would have reduced or eliminated entirely Sunoco's overpayment interest for each of those years. For 1979, there would have been no overpayment interest at all. For 1981, by our computations, there would have been $13,961,000 of overpayment interest as of 3/03/97, as opposed to the $48,785,131.68 figure in the computations attached to the Tax Court opinion (App. 38). And, for 1983, the overpayment interest as of 6/14/93 would have been $191,067, as opposed to $5,759,613.32 (App. 40).

By contrast, the reductions in tax claimed by Sunoco in its Tax Court petition – of $25,082,591 for 1979, $6,881,055 for 1981, and $14,137,211 for 1983 – would have substantially *increased* Sunoco's overpayment interest for each year.

Third, the tax adjustments ultimately arrived at in this case of a $14,587,489 reduction in tax for 1979, a $287,345 tax increase for 1981, and a $24,139,971 tax increase for 1983 (A356-68; App. 4-5) necessarily also affect Sunoco's overpayment interest.

In this light, Commissioner's contention that Sunoco "is seeking additional interest on previously agreed overpayments of tax" (App. Br. 53) seems rather misleading. There were no definitive "agreed overpayments of tax" until completion of the Tax Court case. The amounts, and even the existence, of any overpayments resulting from agreements on particular issues as the case progressed were necessarily contingent until a final determination of Sunoco's tax liability for each year.

Calculating the precise interest impact of each of these tax changes requires that every transaction with respect to the taxpayer's accounts for those years be taken into account; the effect of each change in tax liability, which hits the taxpayer's account as of the original due date of the relevant tax return, ripples forward through all the ensuing years until one reaches the present day. That makes the interest computations complicated, because there have been so many

events in the interim that have affected Sunoco's outstanding balances.[22] And this, in turn, presents another big practical obstacle for a large corporate taxpayer such as Sunoco – contemporaneously detecting every interim IRS mistake in the computation of overpayment interest amounts can be next to impossible because the IRS does not actually volunteer its interim interest computations as the audit progresses. Lastly, as the Tax Court opinion amply illustrates, computations of interest on overpayments and underpayments are themselves intertwined.

In short, the jurisdictional approach Commissioner is asking this Court to mandate would be a mess. The Tax Court recognized that reality and held against Commissioner's crazyquilt scheme – as would almost anyone else.

B. Principles of Judicial Economy and Common Sense Are Proper Considerations in Interpreting Congress's Grant of Jurisdiction to the Tax Court.

Contrary to Commissioner's assertion, considerations of judicial economy have frequently and properly been considered by the courts in interpreting jurisdictional statutes. *See, e.g., Barton v. Commissioner*, 97 T.C. 548, 554 (1991); *Judge v. Commissioner*, 88 T.C. 1175, 1186 (1987). That principle makes a great deal of sense, and it is hardly surprising that Congress is on record in favor of it.[23]

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[22] The interest netting requirements, which require the IRS to offset overpayments for one year against underpayments for other years, further complicate the calculation. I.R.C. §§6601(f), 6621(d). *See* pages 29-31 *supra.*

[23] *See* pages 15-17 *supra.*

In *Judge*, for example, the Tax Court held that it has jurisdiction to determine overpayments of additions to tax in any case where it has jurisdiction over the taxes on which the additions are based. Judicial economy was an important consideration cited by the court in reaching its conclusion:

> Where these additions are determined with respect to the same taxable year, the determinations with respect to these additions may often be overlapping. For potentially identical determinations to be required in multiple forums in order for a taxpayer to fully litigate his income tax liability for a given year is neither sensible nor does it serve judicial economy.

88 T.C. at 1186. Exactly the same considerations apply here. For "potentially identical determinations to be required in multiple forums" in order for Sunoco "to fully litigate its income tax liability for a given year is neither sensible nor does it serve judicial economy."

Similarly, in *Barton*, the Tax Court held that the jurisdiction to determine an overpayment of tax includes the jurisdiction to determine whether increased interest under I.R.C. §6621(c) should have been paid on the tax. Here, again, the court, in analyzing the jurisdictional issue, reasoned that:

> We cannot fathom any reason why Congress would have intended to preclude this Court from applying the language of sections 6601(e)(1) and 6512(b) to resolve all issues regarding both deficiencies and overpayments with respect to the year that are properly before the Court ...
>
> Respondent's position, on the other hand, would necessitate a bifurcation of overpayment litigation, i.e., one proceeding for "tax"

> and another for §6621(c) interest. We do not believe Congress intended such a result.

97 T.C. at 553-54. Nor would the proposed bifurcation of overpayment litigation make any more sense or be any more consistent with Congressional intent in Sunoco's case.

And, in *Baumgardner* itself, the Tax Court reasoned that "[u]nless there is a clear jurisdictional prohibition or inability, it would be most unjust to require petitioner to seek an overpayment of the tax in this forum and an overpayment of the interest in another." 85 T.C. at 446. The same logic applies here.[24]

C. Jurisdiction in this Case is Consistent with the Principles of *Baumgardner*, Which the IRS Concedes Was Correctly Decided.

In rejecting Commissioner's position, Judge Whalen relied on the Tax Court's earlier decision in *Estate of Baumgardner v. Commissioner*, 85 T.C. 445

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[24] Commissioner cites several Court of Appeals decisions holding that the Tax Court lacked jurisdiction to resolve certain issues and opining that procedural convenience alone would not warrant a different conclusion. But those cases involved different jurisdictional issues, different statutory language and other considerations, none of which applies here. *See Transport Manufacturing. & Equipment Co. v. Commissioner* 434 F.2d 373, 382 (8th Cir. 1970) (lacking jurisdiction to determine interest on jeopardy assessment); *Ferguson v. Commissioner,* 568 F.3d 498, 506 (5th Cir. 2009) (lacking jurisdiction to determine whether tax deficiency was discharged in bankruptcy); *Heffley v. Commissioner,* 884 F.2d 279 (7th Cir. 1989) (in estate tax deficiency case lacking jurisdiction over deduction for interest that will be payable on deficiency after Tax Court decision becomes final).

(1985), *acq.*, 1986-2 C.B. 1, which held that a prior payment of interest on tax should be treated as part of an overpayment of tax for purposes of §6512(b), so that the Tax Court would have jurisdiction to determine such interest concurrently with the Tax Court jurisdiction to determine the overpayment of tax. Commissioner criticizes Judge Whalen's reliance on *Baumgardner*, arguing that overpayment interest should be treated differently from underpayment interest. But notwithstanding Commissioner's protestations, *Baumgardner* effectively compels the result the Tax Court reached here.

Baumgardner involved an estate that elected to pay estate tax in installments over a period of up to ten years, as is authorized for an estate consisting largely of an interest in a closely-held business. The estate had made interest payments with respect to the deferred tax amounts. After an audit, the IRS issued a notice of deficiency in the estate tax reported. The estate filed a Tax Court petition contesting the deficiency and asserting that, in fact, there had been an overpayment of estate tax. Ultimately, the parties agreed that there was no deficiency and that the estate tax had been overpaid. The issue presented, then, was whether the Tax Court jurisdiction to determine the overpayment of estate tax included the power to determine that there had been an overpayment of interest with respect to that estate tax. The Tax Court concluded that it had that power.

The statutory grant of jurisdiction relied upon by the Tax Court in *Baumgardner* is exactly the same provision that is involved in our case – I.R.C. §6512(b). And the interpretive issue is very similar. In *Baumgardner,* the question was whether, in the case of an "overpayment of income tax . . . or of estate tax," the Tax Court's "jurisdiction to determine the amount of such overpayment" encompasses the power to determine the amount of any interest that has been overpaid by the taxpayer to the government with respect to such overpayment of tax. In our case, the question is whether the Tax Court's "jurisdiction to determine the amount of such overpayment" encompasses the power to determine the amount of any interest that is owed by the government to the taxpayer with respect to such overpayment of tax.

In interpreting §6512(b), the *Baumgardner* court described its task as being to "determine whether the use of 'estate tax' in section 6512(b) limits our jurisdiction to overpayments of tax alone or whether a broader meaning is intended to permit consideration of overpayments of interest." 85 T.C. at 449. Similarly, the issue in our case is whether the use of "income tax" in §6512(b) limits the Tax Court's jurisdiction to overpayments of tax alone or whether a "broader meaning is intended to permit consideration of" interest on overpayments.

In *Baumgardner*, the court reasoned that it would make no sense for the Tax Court to be without jurisdiction to include interest in a determination of an

overpayment, because such a narrow construction of §6512(b) would force a taxpayer desiring to contest a notice of deficiency in the Tax Court to pursue two separate actions with respect to any refund claim – a Tax Court case for a refund of the overpayment of tax and a separate case in United States district court or the Court of Claims for a refund of any overpayment of interest associated with that overpayment of tax. The Tax Court concluded that this would force Tax Court litigants to try to file protective claims in district court or the Court of Claims to preserve any interest refund that should accompany a refund of tax, and that such duplicative litigation would serve no purpose other than to waste the resources of litigants and judges and to create a risk of unfair results if a litigant failed to file such a protective claim before the expiration of the statute of limitations for such an action.

Exactly the same reasoning applies here. If 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.[25] Such multiple bifurcated

[25] Indeed, Sunoco did file a protective action in the Court of Federal Claims for overpayment interest for the first two of the three taxable years at issue in our case.

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litigations make no more sense for interest on overpayments of tax than they do for overpayments of interest on tax.

Indeed, Commissioner's position in our case is even more illogical than was its position was in *Baumgardner*, because the IRS now concedes that *Baumgardner* was correctly decided. The IRS ultimately acquiesced in *Baumgardner;* the decision has been consistently followed by the courts many times in the ensuing twenty-four years (*see* cases cited at App.27-29); and there has been no attempt to overrule that holding legislatively. Given *Baumgardner*, Commissioner has conceded that the Tax Court has jurisdiction to determine the amount of excess underpayment interest that has been paid by the taxpayer. That concession makes the Commissioner's resistance to the Tax Court's jurisdiction to consider the amount of overpayment interest that is due all the more untenable, particularly given that the two matters are often inextricably intertwined.

Appellant contends that the Tax Court's aside in *Baumgardner* that "we remain unable to enter a decision for interest upon an overpayment" (85 T.C. at 453), undercuts the Tax Court's holding in Sunoco's case. But there are two key points to be noted as to this argument:

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The government's response to that action was to assert that it should be dismissed once the Tax Court took jurisdiction of the interest issue. Sunoco consented to the dismissal.

First, the *Baumgardner* decision pre-dated the enactment of Internal Revenue Code §7481(c) in 1988 – and thus, of course, its amendment in 1997. That section created for the first time a post-judgment remedy in the Tax Court for a taxpayer challenging the IRS's computations of interest on an overpayment. Given the existence of §7481(c), the Tax Court's ability today "to enter a decision for interest on an overpayment" is unchallengeable.

Second, Judge Whalen's opinion here distinguishes between a case in which there has been an 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 (which Judge Whalen concluded he had the power to review as part of his initial decision), and 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 (which can be remedied only through the post-judgment §7481(c) procedure because those kinds of errors are not ripe for review until then). The *Baumgardner* opinion was probably just referring to that latter category of overpayment interest – which is not at issue here.

V. COMMISSIONER'S REMAINING ARGUMENTS ARE RED HERRINGS.

A. Section 6512(b)(4) Does Not Preclude Tax Court Review of Overpayment Interest Computations.

Commissioner's reliance on I.R.C. §6512(b)(4) as a bar to the Tax Court's jurisdiction to determine overpayment interest in this case is entirely misplaced. The issues involved in the determination of overpayment interest here were issues regarding the *timing* of various credits and debits made by the IRS to Sunoco's account for the taxable years before the Tax Court and the *dates* on which interest should or should not have begun to accrue. None of these involved the Tax Court's reviewing the merits of the IRS's credits or reductions under §6402.

Section 6402 gives the IRS the ability to offset income tax rebates that would otherwise be owed to the taxpayer against various other specified kinds of liabilities that the taxpayer owes to the government. The legislative history of §6512(b)(4) makes it clear that the purpose of that subsection is to "clarify[] that the Tax Court does not have jurisdiction over the validity or merits of the credits or offsets that reduce or eliminate the refund to which the taxpayer was otherwise entitled." This was necessary, according to the House Committee Report, because under the pre-section 6512(b)(4) state of the law,

> it is unclear whether the Tax Court has jurisdiction over the validity or merits of certain credits or offsets (e.g., providing for collection of student loans, child support, etc.) made by the IRS that reduce or eliminate the refund to which the taxpayer was otherwise entitled.

H.R. Rep. No. 105-148, at 637 (1997); H.R. Rep. No. 105-220, at 732 (Conf. Rep. 1997).

Thus, §6512(b)(4) is designed to ensure that the Tax Court is not asked to delve into *non-tax subject matter* over which it has no expertise simply because an income tax refund has been applied to satisfy a non-tax liability – *i.e.,* "the section was enacted in order to prevent the Tax Court from second-guessing the IRS's determination to reduce a refund by the amount of child-support payments or payments due on government loans." *Malachinski v. Commissioner,* 268 F.3d 497, 511 (7th Cir. 2001) (Posner, J., concurring in part and dissenting in part). There is obviously nothing in that provision that was intended to preclude the Tax Court from determining the proper computation of overpayment interest with respect to an income tax refund – a subject that *is* within the Tax Court's province and expertise.

The Tax Court's decision in *Winn-Dixie Stores Inc. v. Commissioner*, 110 T.C. 291 (1998), focuses on precisely this point. In *Winn-Dixie*, taxpayer alleged that the IRS had abused its discretion in failing to offset overpayments and underpayments from different years for purposes of computing interest, and that as a result the taxpayer had made overpayments of interest on underpayments. The IRS asserted that §6512(b)(4) precluded review of the IRS's failure to net

overpayments against underpayments for purposes of computing interest accordingly. The Tax Court rejected the assertion, reasoning:

> We are not being asked to restrain or review a reduction of a refund under section 6402. Therefore, section 6512(b)(4) does not operate to deny us jurisdiction to entertain petitioner's claim that it has made overpayments as a result of respondent's failure to offset overpayments for 1984 and 1987 against agreed underpayments for 1988 through 1991.

110 T.C. at 294-95.

Exactly the same reasoning applies here. The Tax Court was not "asked to restrain or review a reduction of a refund under section 6402." Rather, the Tax Court was asked to determine the correct timing and amount of various credits and debits to the taxpayer's accounts for the taxable years before the Court, and the proper interest accruals for those years. That determination did not cause the Tax Court to restrain or review the amounts of credit or reduction made against other liabilities of the taxpayer that were not before the Court.[26]

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[26] Commissioner cites two cases on §6512(b)(4) – *Estate of Smith v. Commissioner*, 429 F.3d 533 (5th Cir. 2005), and *Malachinski v. Commissioner*, 268 F.3d 497 (7th Cir. 2001) – neither of which actually advances his position here. To start with, both are somewhat questionable in their reasoning – and very fact-specific. *Smith*, reversing the Tax Court, invoked §6512(b)(4) to allow the IRS to offset an agreed-upon overpayment amount with unpaid deficiency interest that had erroneously been omitted from the computation of the overpayment; *Smith* may have been a case of "bad facts" make "bad law." *Malachinski*, a 2-1 decision, involved whether a deposit constituted an overpayment and whether the Tax Court

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B. None of the Other Decisions Cited by Commissioner Supports Reversal of the Tax Court's Decision in this Case.

Besides the cases we have already discussed, Commissioner has also cited others that, on examination, prove equally unsupportive of his position. In the interest of completeness, these are discussed briefly:

1. Commissioner string-cites six cases for the proposition that Tax Court jurisdiction over interest is limited (App. Br. 30). None of them dealt with overpayment interest, and each is readily distinguishable from Sunoco's case. Thus, *Med James,* 121 T.C. at 152, actually held that the Tax Court *did* have jurisdiction over the interest issue there; *McCoy*, 484 U.S. at 5-6, did not even address a question of Tax Court jurisdiction; *Zfass v. Commissioner*, 118 F.3d 184, 191 (4th Cir. 1997), *White v. Commissioner*, 95 T.C. 209, 213 (1990), *Melin v. Commissioner*, 54 F.3d 432, 434 (7th Cir. 1995), and *Bax*, 13 F.3d at 56, dealt only

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could review the IRS's decision to credit the amount to a deficiency in a year not before the court; the majority there invoked §6512(b)(4) *sua sponte* as an alternate ground for its holding; Judge Posner's dissent seems much more persuasive than the majority's opinion. In any event, Sunoco, unlike the taxpayers in those two cases, is not challenging the *merits* of the IRS's decision to offset overpayments against liabilities that *are* not before the court. Rather, to the extent Sunoco's case involves offsets, the issues here involve only the *timing* of any such offsets, and the impact of that timing on the accrual of interest for the *years* that *are* before the court.

with deficiency interest. Those last two decisions were also promptly overruled by Congress.

2. *Pacific Gas & Electric Co. v. United States*, 417 F.3d 1375 (Fed. Cir. 2005), addressed whether overpaid interest that the IRS would otherwise need to sue for – but could not because the statute of limitations had expired – could be offset against a later-determined tax refund that was due to the taxpayer for the same taxable year. The Court of Appeals, reversing the Court of Federal Claims, held the statute of limitations to be a bar. One could debate the merits of that statute of limitations holding at some length, but it is irrelevant here, because the only issue on this appeal is the issue of Tax Court jurisdiction.

3. *Alexander Proudfoot Co. v United States*, 454 F.2d 1379 (Ct. Cl. 1972), presaged the *Baumgardner* decision by treating interest on an underpayment as part of "an overpayment of any tax" in interpreting the statute of limitations provision under I.R.C. §6511. Commissioner quotes the *Proudfoot* court's *dicta* that, for statute of limitation purposes, interest paid on tax underpayments is treated differently from interest accruing on tax overpayments – an unremarkable fact that adds nothing to the merits of his jurisdictional position here. And, the question at issue in *Proudfoot* – whether I.R.C §6511 (two years) or 28 U.S.C. §1491 (six years) should apply a claim for refund of overpaid interest – is certainly not at issue in this case.

4. Commissioner quotes from the district court opinion in *Chase Manhattan Bank, N.A. v. Government of Virgin Islands*, 173 F. Supp. 2d 386 (D.V.I. 2001), *rev'd*, 300 F.3d 320 (3d Cir. 2002), for the proposition that Internal Revenue Code provisions on accrual of interest on overpayments are "merely administrative provisions," rather than being provisions that bear on a taxpayer's "substantive tax liability," and therefore are not incorporated into the Virgin Island's mirror Internal Revenue Code. But that entire distinction between "substantive" and "nonsubstantive" tax liability provisions was squarely rejected by this Court on appeal. Judge Ambro, writing for a unanimous panel, held that the reference to the "income-tax laws in force in the United States of America" in 48 U.S.C. § 1397, which establishes that a "mirror code" should apply in the Virgin Islands, does not exclude overpayment interest provisions from the scope of the mirror code – *i.e.*, that the provisions governing interest on overpayments *are* part of the "income-tax laws" – rejecting the government's attempt to treat overpayment interest as something separate and apart from the core tax provisions of the Internal Revenue Code – the same sort of artificial distinction that Commissioner is attempting to draw in this case.[27]

[27] Commissioner cites two other decisions of this Court. *Bachner v. Commissioner*, 81 F.3d 1274 (3d Cir. 1996), was not addressing overpayment interest at all; the only question there was whether – when the IRS filed an untimely notice of deficiency – the *court of appeals* could be asked in the first

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5. Commissioner cites *General Electric Company v. United States*, 384 F.3d 1307 (Fed. Cir. 2004), where the issue was whether the reduced rate of interest under Internal Revenue Code section 6621(a)(1) that applies to large corporate overpayments of tax (*i.e.,* overpayments in excess of $10,000) should apply in GE's case. The Tax Court had held that GE had overpaid its income taxes for 1978 by $15,497,938. The IRS subsequently applied the overpaid tax and interest thereon to other liabilities of GE, including GE's tax liability for 1988, but, in so doing, the IRS undercalculated the interest amount by $810,006.94. The IRS ultimately paid the $810,006.94 to GE, together with interest that had accrued on the shortfall. GE argued that the lower interest rate for large corporate overpayments should not apply to interest on the $810,006.94, because the interest was interest on interest, not interest on an overpayment. GE's position was obviously contrary to the legislative intent of the provision, given that the dollar amount owed far exceeded the $10,000 threshold set by Congress. And, not

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instance to order the IRS to refund all taxes that had been withheld from his salary. *Estate of Bender v. Commissioner*, 827 F.2d 884, 887 (3d Cir. 1987), which Commissioner cites for the proposition that the IRS has broad discretion in determining whether to apply an overpayment as a credit toward a different liability of the taxpayer, was a case in which this Court reached the unsurprising conclusion that amounts owed to an individual by the IRS and amounts owed by that same individual to the IRS should be netted against one another for purposes of determining the gross estate of the individual at the time of his death. Obviously, neither of those decisions is of much relevance here.

surprisingly, the Court of Appeals ruled against GE on the ground that the interest rate should be determined by the initial amount owed, not by the amount owing after payments and adjustments had been made. Although the case is not directly on point, the court's emphasis there on common sense, and what the statute is intended to achieve, is actually exactly what Sunoco asks for here.

CONCLUSION

Oscar Wilde held that "there is no sin except stupidity." While Wilde's theology is suspect (and his litigation track record hardly to be envied), his aphorism may be fairly applied to almost all jurisdictional questions. It is neither "right" nor "wrong" to rule that a given question should be decided in one court rather than another – or even that a given question should not be addressed in any court. But it is an obviously bad idea to require that the amount of interest due on an overpayment of tax should be addressed by one judge while the amount of interest due on an underpayment of tax by the same taxpayer should be addressed by another judge – particularly when substantive decisions made by the first judge will necessarily require changes in decisions reached by the other. Surely, it would be sinful, in the Oscar Wilde sense, to require two judges in different courts to swap partial and interim answers back and forth, only to revise those answers based on what the other judge does. Nor can any reasonable person favor the multiplication of the number of proceedings required to resolve a tax dispute given

the consequent multiplication in the time and treasure expended. That would not be good for taxpayers. And it would not be good for the government.

Reduced to its essence, Commissioner's argument on this appeal is that Congress is allowed to create stupid procedures when it so chooses. And that may well be so. But it does not follow that Congress chose to do so in this particular instance and on this particular subject. And the Tax Court – which is expected to know something about Federal tax policy – has held that it did not. Instead, the Tax Court says, Congress intended that questions regarding interest owed on underpayments of tax and questions regarding interest owed on overpayments of tax by the same taxpayer could indeed be addressed in the same place, at the same time, and by the same jurist. Which result, with all due respect, will not come as a surprise to any reasonably intelligent person who has had the occasion to consider the question. After all, what sense would it make to hold otherwise?

Dated: February 8, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen D. D. Hamilton, hereby certify on the 8th day of February, 2010, a true and correct copy of the foregoing brief has been filed electronically using the Court's Electronic Case Filing ("ECF") System. The document is available for viewing and downloading from the Court's ECF System.

Dated: February 8, 2010 s/ Stephen D. D. Hamilton

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Rule 28.3(d) of the Third Circuit Local Appellate Rules, I hereby certify that Stephen D. D. Hamilton, Alfred W. Putnam Jr. and D. Alicia Hickok are members of the bar of this Court.

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FEDERAL RULE OF APPELLATE PROCEDURE 32(c) CERTIFICATE OF COMPLIANCE WITH WORD COUNT

This brief was prepared with a proportionally-spaced font in 14-point type, and it contains 13,172 words (exclusive of those that do not count toward the word limit) in compliance with Federal Rule of Appellate Procedure 32(C)(i), as counted by Microsoft Word.

Dated: February 8, 2010 DRINKER BIDDLE & REATH LLP

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CERTIFICATE OF VIRUS SCAN

I hereby certify that (1) the text of the electronic version of the foregoing brief is identical to the text in the paper copies and (2) that I caused the file containing the electronic version to be scanned using Symantec Anti-Virus, version 10.0.1000 , and that the file was found to be virus-free.

Dated: February 8, 2010 s/ Stephen D. D. Hamilton

Addendum of Statutes

Effective: October 1, 2009

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 65. Abatements, Credits, and Refunds
Subchapter A. Procedure in General (Refs & Annos)
→ **§ 6402. Authority to make credits or refunds**

(a) General rule.--In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any 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, subject to subsections (c), (d), (e), and (f), refund any balance to such person.

(b) Credits against estimated tax.--The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

(c) Offset of past-due support against overpayments.--The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of such Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State collecting such support and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. The Secretary shall apply a reduction under this subsection first to an amount certified by the State as past due support under section 464 of the Social Security Act before any other reductions allowed by law. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

(d) Collection of debts owed to Federal agencies.--

(1) In general.--Upon receiving notice from any Federal agency that a named person owes a past-due legally enforceable debt (other than past-due support subject to the provisions of subsection (c)) to such agency, the Secretary shall--

(A) reduce the amount of any overpayment payable to such person by the amount of such debt;

(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such agency; and

(C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt.

(2) Priorities for offset.--Any overpayment by a person shall be reduced pursuant to this subsection after such overpayment is reduced pursuant to subsection (c) with respect to past-due support collected pursuant to an assignment under section 402(a)(26) of the Social Security Act and before such overpayment is reduced pursuant to subsections (e) and (f) and before such overpayment is credited to the future liability for tax of such person pursuant to subsection (b). If the Secretary receives notice from a Federal agency or agencies of more than one debt subject to paragraph (1) that is owed by a person to such agency or agencies, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(3) Treatment of OASDI overpayments.--

(A) Requirements.--Paragraph (1) shall apply with respect to an OASDI overpayment only if the requirements of paragraphs (1) and (2) of section 3720A(f) of title 31, United States Code, are met with respect to such overpayment.

(B) Notice; protection of other persons filing joint return.--

(i) Notice.--In the case of a debt consisting of an OASDI overpayment, if the Secretary determines upon receipt of the notice referred to in paragraph (1) that the refund from which the reduction described in paragraph (1)(A) would be made is based upon a joint return, the Secretary shall--

(I) notify each taxpayer filing such joint return that the reduction is being made from a refund based upon such return, and

(II) include in such notification a description of the procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

(ii) Adjustments based on protections given to other taxpayers on joint return.--If the other person filing a joint return with the person owing the OASDI overpayment

takes appropriate action to secure his or her proper share of the refund subject to reduction under this subsection, the Secretary shall pay such share to such other person. The Secretary shall deduct the amount of such payment from amounts which are derived from subsequent reductions in refunds under this subsection and are payable to a trust fund referred to in subparagraph (C).

(C) Deposit of amount of reduction into appropriate trust fund.--In lieu of payment, pursuant to paragraph (1)(B), of the amount of any reduction under this subsection to the Commissioner of Social Security, the Secretary shall deposit such amount in the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, whichever is certified to the Secretary as appropriate by the Commissioner of Social Security.

(D) O ASDI overpaym ent.--For purposes of this paragraph, the term "OASDI overpayment" means any overpayment of benefits made to an individual under title II of the Social Security Act.

(e) Collection of past-due, legally enforceable state income tax obligations.--

(1) In general.--Upon receiving notice from any State that a named person owes a past-due, legally enforceable State income tax obligation to such State, the Secretary shall, under such conditions as may be prescribed by the Secretary--

(A) reduce the amount of any overpayment payable to such person by the amount of such State income tax obligation;

(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such State and notify such State of such person's name, taxpayer identification number, address, and the amount collected; and

(C) notify the person making such overpayment that the overpayment has been reduced by an amount necessary to satisfy a past-due, legally enforceable State income tax obligation.

If an offset is made pursuant to a joint return, the notice under subparagraph (B) shall include the names, taxpayer identification numbers, and addresses of each person filing such return.

(2) Offset permitted only against residents of state seeking offset.--Paragraph (1) shall apply to an overpayment by any person for a taxable year only if the address shown on the Federal return for such taxable year of the overpayment is an address within the State seeking the offset.

(3) Priorities for offset.--Any overpayment by a person shall be reduced pursuant to this subsection--

(A) after such overpayment is reduced pursuant to.--

(i) subsection (a) with respect to any liability for any internal revenue tax on the part of the person who made the overpayment;

(ii) subsection (c) with respect to past-due support; and

(iii) subsection (d) with respect to any past-due, legally enforceable debt owed to a Federal agency; and

(B) before such overpayment is credited to the future liability for any Federal internal revenue tax of such person pursuant to subsection (b).

If the Secretary receives notice from one or more agencies of the State of more than one debt subject to paragraph (1) or subsection (f) that is owed by such person to such an agency, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(4) Notice; consideration of evidence.--No State may take action under this subsection until such State--

(A) notifies by certified mail with return receipt the person owing the past-due State income tax liability that the State proposes to take action pursuant to this section;

(B) gives such person at least 60 days to present evidence that all or part of such liability is not past-due or not legally enforceable;

(C) considers any evidence presented by such person and determines that an amount of such debt is past-due and legally enforceable; and

(D) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under subparagraph (C) is valid and that the State has made reasonable efforts to obtain payment of such State income tax obligation.

(5) Past-due, legally enforceable State income tax obligation.--For purposes of this subsection, the term "past-due, legally enforceable State income tax obligation" means a debt--

(A)(i) which resulted from.--

(I) a judgment rendered by a court of competent jurisdiction which has determined an amount of State income tax to be due; or

(II) a determination after an administrative hearing which has determined an amount of State income tax to be due; and

(ii) which is no longer subject to judicial review; or

(B) which resulted from a State income tax which has been assessed but not collected, the time for redetermination of which has expired, and which has not been delinquent for more than 10 years.

For purposes of this paragraph, the term "State income tax" includes any local income tax administered by the chief tax administration agency of the State.

(6) Regulations.--The Secretary shall issue regulations prescribing the time and manner in which States must submit notices of past-due, legally enforceable State income tax obligations and the necessary information that must be contained in or accompany such notices. The regulations shall specify the types of State income taxes and the minimum amount of debt to which the reduction procedure established by paragraph (1) may be applied. The regulations may require States to pay a fee to reimburse the Secretary for the cost of applying such procedure. Any fee paid to the Secretary pursuant to the preceding sentence shall be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

(7) Erroneous payment to State.--Any State receiving notice from the Secretary that an erroneous payment has been made to such State under paragraph (1) shall pay promptly to the Secretary, in accordance with such regulations as the Secretary may prescribe, an amount equal to the amount of such erroneous payment (without regard to whether any other amounts payable to such State under such paragraph have been paid to such State).

(f) Collection of unemployment compensation debts resulting from fraud.--

(1) In general.--Upon receiving notice from any State that a named person owes a covered unemployment compensation debt to such State, the Secretary shall, under such conditions as may be prescribed by the Secretary--

(A) reduce the amount of any overpayment payable to such person by the amount of such covered unemployment compensation debt;

(B) pay the amount by which such overpayment is reduced under subparagraph (A) to such State and notify such State of such person's name, taxpayer identification number, address, and the amount collected; and

(C) notify the person making such overpayment that the overpayment has been reduced by an amount necessary to satisfy a covered unemployment compensation debt.

If an offset is made pursuant to a joint return, the notice under subparagraph (C) shall include information related to the rights of a spouse of a person subject to such an offset.

(2) Priorities for offset.--Any overpayment by a person shall be reduced pursuant to this subsection--

(A) after such overpayment is reduced pursuant to--

(i) subsection (a) with respect to any liability for any internal revenue tax on the part of the person who made the overpayment;

(ii) subsection (c) with respect to past-due support; and

(iii) subsection (d) with respect to any past-due, legally enforceable debt owed to a Federal agency; and

(B) before such overpayment is credited to the future liability for any Federal internal revenue tax of such person pursuant to subsection (b).

If the Secretary receives notice from a State or States of more than one debt subject to paragraph (1) or subsection (e) that is owed by a person to such State or States, any overpayment by such person shall be applied against such debts in the order in which such debts accrued.

(3) Offset permitted only against residents of State seeking offset.--Paragraph (1) shall apply to an overpayment by any person for a taxable year only if the address shown on the Federal return for such taxable year of the overpayment is an address within the State seeking the offset.

(4) Notice; consideration of evidence.--No State may take action under this subsection until such State--

(A) notifies by certified mail with return receipt the person owing the covered unemployment compensation debt that the State proposes to take action pursuant to this section;

(B) provides such person at least 60 days to present evidence that all or part of such liability is not legally enforceable or due to fraud;

(C) considers any evidence presented by such person and determines that an amount of such debt is legally enforceable and due to fraud; and

(D) satisfies such other conditions as the Secretary may prescribe to ensure that the determination made under subparagraph (C) is valid and that the State has made reasonable efforts to obtain payment of such covered unemployment compensation debt.

(5) Covered unemployment compensation debt.--For purposes of this subsection, the term "covered unemployment compensation debt" means--

(A) a past-due debt for erroneous payment of unemployment compensation due to fraud which has become final under the law of a State certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected for not more than 10 years;

(B) contributions due to the unemployment fund of a State for which the State has determined the person to be liable due to fraud and which remain uncollected for not more than 10 years; and

(C) any penalties and interest assessed on such debt.

(6) Regulations.--

(A) In general.--The Secretary may issue regulations prescribing the time and manner in which States must submit notices of covered unemployment compensation debt and the necessary information that must be contained in or accompany such notices. The regulations may specify the minimum amount of debt to which the reduction procedure established by paragraph (1) may be applied.

(B) Fee payable to Secretary.--The regulations may require States to pay a fee to the Secretary, which may be deducted from amounts collected, to reimburse the Secretary for the cost of applying such procedure. Any fee paid to the Secretary pursuant to the preceding sentence shall be used to reimburse appropriations which bore all or part of the cost of applying such procedure.

(C) Submission of notices through Secretary of Labor.--The regulations may include a requirement that States submit notices of covered unemployment compensation debt to the Secretary via the Secretary of Labor in accordance with procedures established by the Secretary of Labor. Such procedures may require States to pay a fee to the Secretary of Labor to reimburse the Secretary of Labor for the costs of applying this subsection. Any such fee shall be established in consultation with the Secretary of the Treasury. Any fee paid to the Secretary of Labor may be deducted from amounts collected and shall be used to reimburse the appropriation account which bore all or part of the cost of applying this subsection.

(7) Erroneous payment to State.--Any State receiving notice from the Secretary that an erroneous payment has been made to such State under paragraph (1) shall pay promptly to the Secretary, in accordance with such regulations as the Secretary may prescribe, an amount equal to the amount of such erroneous payment (without regard to whether any other amounts payable to such State under such paragraph have been paid to such State).

(8) Termination.--This section shall not apply to refunds payable after the date which is 10 years after the date of the enactment of this subsection.

(g) Review of reductions.--No court of the United States shall have jurisdiction to hear any action, whether legal or equitable, brought to restrain or review a reduction authorized by subsection (c), (d), (e), or (f). No such reduction shall be subject to review by the Secretary in an administrative proceeding. No action brought against the United States to recover the amount of any such reduction shall be considered to be a suit for refund of tax. This subsection does not preclude any legal, equitable, or administrative action against the Federal agency or State to which the amount of such reduction was paid or any such action against the Commissioner of Social Security which is otherwise available with respect to recoveries of overpayments of benefits under section 204 of the Social Security Act.

(h) Federal agency.--For purposes of this section, the term "Federal agency" means a department, agency, or instrumentality of the United States, and includes a Government corporation (as such term is defined in section 103 of title 5, United States Code).

(i) Treatment of payments to States.--The Secretary may provide that, for purposes of determining interest, the payment of any amount withheld under subsection (c), (e), or (f) to a State shall be treated as a payment to the person or persons making the overpayment.

(j) Cross reference.--For procedures relating to agency notification of the Secretary, see section 3721 of title 31, United States Code.

(k) Refunds to certain fiduciaries of insolvent members of affiliated groups.-

-Notwithstanding any other provision of law, in the case of an insolvent corporation which is a member of an affiliated group of corporations filing a consolidated return for any taxable year and which is subject to a statutory or court-appointed fiduciary, the Secretary may by regulation provide that any refund for such taxable year may be paid on behalf of such insolvent corporation to such fiduciary to the extent that the Secretary determines that the refund is attributable to losses or credits of such insolvent corporation.

(l) Explanation of reason for refund disallowance.--In the case of a disallowance of a claim for refund, the Secretary shall provide the taxpayer with an explanation for such disallowance.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 791; Oct. 4, 1976, Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), (K), 90 Stat. 1834, 1835; Aug. 13, 1981, Pub.L. 97-35, Title XXIII, § 2331(c), 95 Stat. 861; July 18, 1984, Pub.L. 98-369, Div. B, Title VI, § 2653(b)(1), (2), 98 Stat. 1154, 1155; Aug. 16, 1984, Pub.L. 98-378, § 21(e), 98 Stat. 1325; Nov. 10, 1988, Pub.L. 100-647, Title VI, § 6276, 102 Stat. 3753; Nov. 5, 1990, Pub.L. 101-508, Title V, § 5129(c), 104 Stat. 1388-288; Aug. 15, 1994, Pub.L. 103-296, Title I, § 108(h)(7), 108 Stat. 1487; Apr. 26, 1996, Pub.L. 104-134, Title III, § 31001(u)(2), 110 Stat. 1321-375; Aug. 22, 1996, Pub.L. 104-193, Title I, § 110(l)(7), 110 Stat. 2173; Aug. 5, 1997, Pub.L. 105-33, Title V, § 5514(a)(1), 111 Stat. 620; July 22, 1998, Pub.L. 105-206, Title III, §§ 3505(a), 3711(a), (c), 112 Stat. 771, 779, 781; Feb. 8, 2006, Pub.L. 109-171, Title VII, § 7301(d), 120 Stat. 144; Sept. 30, 2008, Pub.L. 110-328, § 3(a), (d), 122 Stat. 3570, 3573.)

Amendments by section 3711 of Pub.L. 105-206 to apply to refunds payable under this section after Dec. 31, 1999, see section 3711(d) of Pub.L. 105-206, set out as a note under section 6103 of this title.

Current through P.L. 111-135 (excluding P.L. 111-127) approved 1-29-10

END OF DOCUMENT

I.R.C. § 6512

Effective: December 21, 2000

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 66. Limitations (Refs & Annos)
Subchapter B. Limitations on Credit or Refund (Refs & Annos)
§ 6512. Limitations in case of petition to Tax Court

(a) Effect of petition to Tax Court.--If the Secretary has mailed to the taxpayer a notice of deficiency under section 6212(a) (relating to deficiencies of income, estate, gift, and certain excise taxes) and if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) (or 7481(c) with respect to a determination of statutory interest or section 7481(d) solely with respect to a determination of estate tax by the Tax Court), no credit or refund 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 has determined the deficiency 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--

(1) As to overpayments determined by a decision of the Tax Court which has become final, and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final, and

(3) As to any amount collected after the period of limitation upon the making of levy or beginning a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive, and

(4) As to overpayments attributable to partnership items, in accordance with subchapter C of chapter 63, and

(5) As to any amount collected within the period during which the Secretary is prohibited from making the assessment or from collecting by levy or through a proceeding in court un-

der the provisions of section 6213(a), and

(6) As to overpayments the Secretary is authorized to refund or credit pending appeal as provided in subsection (b).

(b) Overpayment determined by Tax Court.--

(1) Jurisdiction to determine.--Except as provided by paragraph (3) and by section 7463, 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. If a notice of appeal in respect of the decision of the Tax Court is filed under section 7483, the Secretary is authorized to refund or credit the overpayment determined by the Tax Court to the extent the overpayment is not contested on appeal.

(2) Jurisdiction to enforce.--If, 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 as provided in subchapter B of chapter 67, then the Tax Court, upon motion by the taxpayer, shall have jurisdiction to order the refund of such overpayment and interest. An order of the Tax Court disposing of a motion under this paragraph shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

(3) Limit on amount of credit or refund.--No such 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--

(A) after the mailing of the notice of deficiency,

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment, or

(C) within the period which would be applicable under section 6511(b)(2), (c), or (d), in respect of any claim for refund filed within the applicable period specified in section 6511 and before the date of the mailing of the notice of deficiency--

(i) which had not been disallowed before that date,

(ii) which had been disallowed before that date and in respect of which a timely suit for refund could have been commenced as of that date, or

(iii) in respect of which a suit for refund had been commenced before that date and within the period specified in section 6532.

In the case of a credit or refund relating to an affected item (within the meaning of section 6231(a)(5)), the preceding sentence shall be applied by substituting the periods under sections 6229 and 6230(d) for the periods under section 6511(b)(2), (c), and (d).

In a case described in subparagraph (B) where the date of the mailing of the notice of deficiency is during the third year after the due date (with extensions) for filing the return of tax and no return was filed before such date, the applicable period under subsections (a) and (b)(2) of section 6511 shall be 3 years.

(4) Denial of jurisdiction regarding certain credits and reductions.--The Tax Court shall have no jurisdiction under this subsection to restrain or review any credit or reduction made by the Secretary under section 6402.

(c) Cross references.--

(1) For provisions allowing determination of tax in title 11 cases, see section 505(a) of title 11 of the United States Code.

(2) For provision giving the Tax Court jurisdiction to award reasonable litigation costs in proceedings to enforce an overpayment determined by such court, see section 7430.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 811; Oct. 23, 1962, Pub.L. 87-870, § 4, 76 Stat. 1161; Dec. 30, 1969, Pub.L. 91-172, Title I, § 101(j)(47), (48), Title IX, § 960(b), 83 Stat. 531, 734; Dec. 31, 1970, Pub.L. 91-614, Title I, § 102(d)(9), 84 Stat. 1842; Sept. 2, 1974, Pub.L. 93-406, Title II, § 1016(a)(16), 88 Stat. 930; Oct. 4, 1976, Pub.L. 94-455, Title XIII, § 1307(d)(2)(F)(vii), Title XVI, § 1605(b)(9), Title XIX, § 1906(b)(13)(A), 90 Stat. 1728, 1755, 1834; Nov. 6, 1978, Pub.L. 95-600, Title II, § 212(b)(2), 92 Stat. 2819; Apr. 2, 1980, Pub.L. 96-223, Title I, § 101(f)(6), 94 Stat. 253; Dec. 24, 1980, Pub.L. 96-589, § 6(d)(3), 94 Stat. 3408; Sept. 3, 1982, Pub.L. 97-248, Title IV, § 402(c)(8), (9), 96 Stat. 668; Aug. 23, 1988, Pub.L. 100-418, Title I, § 1941(b)(2)(J), (K), 102 Stat. 1323; Nov. 10, 1988, Pub.L. 100-647, Title VI, §§ 6244(a), (b)(2), 6246(b)(1), 6247(b)(1), 102 Stat. 3750, 3751, 3752; Aug. 5, 1997, Pub.L.

105-34, Title XII, §§ 1239(c)(2), 1282(a), Title XIV, § 1451(b), 111 Stat. 1028, 1037, 1054; Pub.L. 105-206, Title III, § 3464(b), (c), July 22, 1998, 112 Stat. 767; Pub.L. 106-554, § 1(a)(7) [Title III, § 319(19)], Dec. 21, 2000, 114 Stat. 2763, 2763A-647.)

Current through P.L. 111-135 (excluding P.L. 111-127) approved 1-29-10

END OF DOCUMENT

Effective: August 5, 1997

United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle F. Procedure and Administration (Refs & Annos)
Chapter 76. Judicial Proceedings
Subchapter D. Court Review of Tax Court Decisions (Refs & Annos)

§ 7481. Date when Tax Court decision becomes final

(a) Reviewable decisions.--Except as provided in subsections (b), (c), and (d), the decision of the Tax Court shall become final--

(1) Timely notice of appeal not filed.--Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or

(2) Decision affirmed or appeal dismissed.--

(A) Petition for certiorari not filed on time.--Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals and no petition for certiorari has been duly filed; or

(B) Petition for certiorari denied.--Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals; or

(C) After mandate of Supreme Court.--Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the appeal dismissed.

(3) Decision modified or reversed.--

(A) Upon mandate of Supreme Court.--If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Tax Court shall become final when so correc-

ted.

(B) Upon mandate of the Court of Appeals.--If the decision of the Tax Court is modified or reversed by the United States Court of Appeals, and if--

(i) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(ii) the petition for certiorari has been denied, or

(iii) the decision of the United States Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(4) Rehearing.--If the Supreme Court orders a rehearing; or if the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, and if--

(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(B) the petition for certiorari has been denied, or

(C) the decision of the United States Court of Appeals has been affirmed by the Supreme Court,

then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered.

(5) Definition of "mandate".--As used in this section, the term "mandate", in case a mandate has been recalled prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

(b) Nonreviewable decisions.--The decision of the Tax Court in a proceeding conducted under section 7436(c) or 7463 shall become final upon the expiration of 90 days after the decision is entered.

(c) Jurisdiction over interest determinations.--

(1) In general.--Notwithstanding subsection (a), if, within 1 year after the date the decision of the Tax Court becomes final under subsection (a) in a case to which this subsection applies, 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 taxpayer has made an overpayment of such interest or the Secretary has made an underpayment of such interest and the amount thereof.

(2) Cases to which this subsection applies.--This subsection shall apply where--

(A)(i) an assessment has been made by the Secretary under section 6215 which includes interest as imposed by this title, and

(ii) the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary, and

(B) the Tax Court finds under section 6512(b) that the taxpayer has made an overpayment.

(3) Special rules.--If the Tax Court determines under this subsection 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. An order of the Tax Court redetermining interest, when entered upon the records of the court, shall be reviewable in the same manner as a decision of the Tax Court.

(d) Decisions relating to estate tax extended under section 6166.--If with respect to a decedent's estate subject to a decision of the Tax Court--

(1) the time for payment of an amount of tax imposed by chapter 11 is extended under section 6166, and

(2) there is treated as an administrative expense under section 2053 either--

(A) any amount of interest which a decedent's estate pays on any portion of the tax imposed by section 2001 on such estate for which the time of payment is extended under section 6166, or

(B) interest on any estate, succession, legacy, or inheritance tax imposed by a State on such estate during the period of the extension of time for payment under section 6166,

then, upon a motion by the petitioner in such case in which such time for payment of tax has been extended under section 6166, the Tax Court may reopen the case solely to modify the Court's decision to reflect such estate's entitlement to a deduction for such administration expenses under section 2053 and may hold further trial solely with respect to the claim for such deduction if, within the discretion of the Tax Court, such a hearing is deemed necessary. An order of the Tax Court disposing of a motion under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

CREDIT(S)

(Aug. 16, 1954, c. 736, 68A Stat. 889; Dec. 30, 1969, Pub.L. 91-172, Title IX, § 960(h)(1), 83 Stat. 734; Oct. 4, 1976, Pub.L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834; Nov. 10, 1988, Pub.L. 100-647, Title VI, §§ 6246(a), (b)(2), 6247(a), (b)(2), 102 Stat. 3751, 3752; Aug. 5, 1997, Pub.L. 105-34, Title XIV, §§ 1452(a), 1454(b)(3), 111 Stat. 1055, 1057.)

Current through P.L. 111-135 (excluding P.L. 111-127) approved 1-29-10

END OF DOCUMENT

Effective: October 1, 1997

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)
§ 1346. United States as defendant

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

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

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

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

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

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

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

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

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

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

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub.L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, § 1, 86 Stat. 1176; Oct. 4, 1976, Pub.L. 94-455, Title XII, § 1204(c) (1), Title XIII, § 1306(b) (7), 90 Stat. 1697, 1719; Nov. 1, 1978, Pub.L. 95-563, § 14(a), 92 Stat. 2389; Apr. 2, 1982, Pub.L. 97-164, Title I, § 129, 96 Stat. 39; Sept. 3, 1982, Pub.L. 97-248, Title IV, § 402(c) (17), 96 Stat. 669; Oct. 22, 1986, Pub.L. 99-514, § 2, 100 Stat. 2095; Oct. 29, 1992, Pub.L. 102-572, Title IX, § 902(b)(1), 106 Stat. 4516; Apr. 26, 1996, Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 806], 110 Stat. 1321-75; renumbered Title I May 2, 1996, Pub.L. 104-140, § 1(a), 110 Stat. 1327, and amended Oct. 26, 1996, Pub.L. 104-331, § 3(b)(1), 110 Stat. 4069.)

Current through P.L. 111-135 (excluding P.L. 111-127) approved 1-29-10

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