Nos. 11-2814 & 11-2817

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXXON MOBIL CORPORATION & AFFILIATED COMPANIES, FKA EXXON CORPORATION & AFFILIATED COMPANIES

Petitioners-Appellees

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant

ON APPEAL FROM THE DECISIONS OF
THE UNITED STATES TAX COURT

OPENING BRIEF FOR THE APPELLANT

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GLOSSARY

Exxon: Appellees-Cross-Appellants Exxon Mobil Corp. & Affiliated Companies, f.k.a. Exxon Corp. & Affiliated Companies

GATT: General Agreement on Tariffs and Trade

IRC: Internal Revenue Code (26 U.S.C.)

IRSRRA: Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685

Special rule: IRSRRA, Pub. L. No. 105-206, § 3301(c)(2), 112 Stat. 685 (1998), *as amended by* Pub. L. No. 105-277, § 4002(d), 112 Stat. 2681 (1998).

Treasury Report: Department of the Treasury, Office of Tax Policy, Report to Congress on Netting of Interest on Tax Overpayments and Underpayments (April 1997)

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STATEMENT OF JURISDICTION

On June 29, 1989, the Commissioner issued a statutory notice of deficiency to taxpayers Exxon Mobil Corp. and Affiliated Cos. f.k.a. Exxon Corp. and Affilidated Cos. (collectively "Exxon") for tax years 1977 to 1979. (A91 ¶ 21.)[1] Exxon filed a timely petition for redetermination solely as to tax year 1979, docketed by the Tax Court

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[1] "A___" references are to the joint appendix of the parties. "Doc. 89-___" references are to documents from Tax Court docket no. 18618-19. "Doc. 90-___" references are to documents from Tax Court docket no. 18432-90.

as no. 18618-89. (*Id.* ¶ 22.) On July 16, 1990, the Commissioner issued a statutory notice of deficiency as to tax years 1980 to 1982. (A92 ¶ 27.) Exxon filed a timely petition for redetermination as to that notice, which was docketed by the Tax Court as no. 18432-90. (*Id.*) The Tax Court had jurisdiction over the petitions for redetermination pursuant to I.R.C. § 6213 and 6214.

On February 27, 2004, the Tax Court entered a revised stipulated decision in docket no. 18618-89, determining that Exxon had made an income tax overpayment of $283,835,221 for the tax year 1979. (A86-87 ¶ 2.) On May 27, 2004, the Tax Court entered a stipulated decision in docket no. 18432-90, determining, *inter alia*, that Exxon had made an income tax overpayment of $180,532,626 for tax year 1980. (A87 ¶ 4.) After the two decisions became final under I.R.C. § 7481(a), Exxon filed a timely motion to redetermine interest pursuant to Tax Court Rule 261 and I.R.C. § 7481(c) in docket nos. 18618-89 and 18432-90. (*Id.* ¶ 6.) The Tax Court had jurisdiction over the motions to redetermine interest under I.R.C. § 7481(c).

The motion cited two grounds. The Tax Court issued an opinion denying the motion as to the first ground—the applicability of the interest rate under the General Agreement of Tariffs and Trade ("GATT") Amendment—on January 17, 2006. (A87 ¶ 6.) The Tax Court issued an opinion granting the motion as to the second ground—the availability of retroactive netting of interest for overlapping of overpayments and underpayments of taxes during tax years 1975 to 1980—on February 3, 2011. *See Exxon Mobil Corp. v. Commissioner*, 136 T.C. No. 5 (2011). (A201-38.) The Tax Court issued final orders in both docket numbers 18618-89 and 18432-90 on April 5, 2011. (A240-41.) The Commissioner filed a timely notice of appeal from those orders as to the interest-netting issue on June 28, 2011. (A242-43.)[2] Fed. R. App. P. 13(a)(1); I.R.C. § 7483.

[2] Exxon filed a timely notice of cross-appeal as to the GATT-interest issue, leading to the docketing of cross-appeals 11-3039 and 11-3042, but voluntarily dismissed its cross-appeals with prejudice.

STATEMENT OF THE ISSUE

Whether the Tax Court erred in holding that Exxon was entitled to retroactive interest-netting with respect to its overlapping tax underpayments and overpayments during tax years 1975 to 1980, pursuant to I.R.C. § 6621(d) and an uncodified "special rule" set forth in the IRS Restructuring and Reform Act of 1998 ("IRSRRA").

STATEMENT OF THE CASE

Exxon filed a consolidated motion to redetermine interest in Tax Court docket numbers 18618-89 and 18432-90. (A76-83.) On stipulated facts (A84-103), the Tax Court (Senior Judge Harry A. Haines) issued an opinion, published at 136 T.C. No. 5 (2011), holding that taxpayer was entitled to retroactive netting of interest for overlapping overpayments and underpayment of taxes during tax years 1975 through 1980. (A201-38.) The Commissioner appeals that ruling.

STATEMENT OF FACTS

Facts relevant to this appeal largely have been stipulated by the parties. (A84-103.)

A. Tax examinations and proceedings for tax years 1975 to 1980

Exxon filed timely federal income tax returns for the tax years 1975 through 1980. (A89 ¶ 10.) The IRS's Examination Division began an examination of Exxon's returns for these years, resulting in many proposed adjustments. (*Id.* ¶ 11.) Exxon consented to some of these adjustments, which were then assessed by the IRS and promptly paid by Exxon. (*Id.*) Many of the other proposed adjustments led to protests, appeals, and court cases in both the Tax Court and district courts. (A89 ¶¶ 12–A100 ¶ 66.)

The following is a summary of Exxon's overlapping income tax underpayment and overpayment balances for the period beginning January 1, 1987, and ending October 27, 1989, as determined through the various tax examinations and judicial proceedings:

Year	(Over)-/Under-Payment Balance	Start Date	End Date
1975	$45,327,497.19	1/1/87	12/22/87
	$3,164,434.00	12/22/87	12/28/88
1976	$6,218,939.14	1/1/87	12/22/87
1977	$135,679,108.00	1/1/87	12/22/87

Year	(Over)-/Under-Payment Balance	Start Date	End Date
	$119,043,520.00	12/22/87	7/18/88
1978	$103,645,011.00	1/1/87	10/27/89
1979	($137,750,546.00)	1/1/87	10/27/89
1980	($208,122,341.00)	1/1/87	10/27/89

(A88 ¶ 8; A101 ¶ 69.)

The overpayments arise from Tax Court docket no. 18618-89, which covers tax year 1979 (A91-92 ¶ 22), and Tax Court docket no. 18432-90, which covers tax years 1980 to 1982 (A92 ¶ 27). The parties have stipulated that the statute of limitations relating to Exxon's overpayments for tax years 1979 and 1980 had not expired as of July 22, 1998. (A97 ¶ 48.) The statute of limitations applicable to Exxon's underpayments for tax years 1977 and 1978 expired prior to July 22, 1998, *see* I.R.C. § 6511(a). (A94 ¶ 35.) The parties are in dispute as to whether the statute of limitations relating to tax years 1975 and 1976 was still open as of July 22, 1998. (*Id.* ¶ 36.)

B. Claim for refund based on interest-netting and motions to redetermine interest

On December 17, 1999, Exxon filed a Form 843 (claim for refund and request for abatement), requesting a net interest rate of zero pursuant to Rev. Proc. 99-43 based on the claim that it had overlapping income tax underpayment and overpayments for tax years 1975 through 1980. (A100 ¶ 67.) On December 7, 2004, Exxon made a supplemental submission in support of its interest-netting claim. (*Id.* ¶ 68.) On February 28, 2005, Exxon filed a timely motion to redetermine interest pursuant to Tax Court Rule 261 and I.R.C. § 7481(c) in docket nos. 18618-89 and 18432-90, asserting, *inter alia*, that it was entitled to interest-netting on overlapping overpayments and underpayments for tax years 1975 through 1980. (A87 ¶ 6.)

C. Proceedings in the Tax Court on the interest-netting issue

Both Exxon (Docs. 89-531 & 90-484) and the Commissioner (Docs. 89-536 & 90-487) filed motions for summary judgment on the merits of the interest-netting issue.[3]

1. The parties' arguments

In support of his position that the special rule permitted retroactive interest-netting only where the period of limitations remained open as to both the underpayment years and the overpayment years on July 22, 1998 (the effective date for I.R.C. § 6621(d)), the Commissioner argued that the special rule is a waiver of the Government's sovereign immunity that must be strictly construed. (Docs. 89-536 at 14-17 & 90-487 at 14-17.) The Commissioner relied upon *Federal National Mortgage Association v. United States*, 379 F.3d 1303, 1310 (Fed. Cir. 2004) ("*Fannie Mae I*") and *Federal National Mortgage Association v. United States*, 469 F.3d 968, 972-73 (Fed Cir.

[3] The Commissioner also moved to dismiss the interest-netting claims for lack of subject-matter jurisdiction. The Tax Court rejected the Commissioner's jurisdictional argument (A226), and the Commissioner has not appealed the court's jurisdictional ruling.

2006) ("*Fannie Mae II*"), which strictly construed the special rule as a limited waiver of sovereign immunity and, on that basis, agreed with the Commissioner's interpretation of the special rule. (Docs. 89-536 at 14-15 & 90-487 at 14-15.)

In its motion for summary judgment, Exxon acknowledged that the critical portion of the special rule is "awkwardly phrased" (Docs. 89-531 at 16 & 90-484 at 16; *see also* Docs. 89-531 at 17 & 90-484 at 17), "somewhat confusing" (Docs. 89-531 at 21 & 90-484 at 21), and "convoluted" (Docs. 89-531 at 21 & 90-484 at 21). As such, it did not argue that the statutory text is unambiguous or has a plain meaning. Rather, Exxon argued that the underlying remedial purpose of the special rule supported its interpretation, namely, that retroactive interest-netting is available as long as the statute of limitations remained open on July 22, 1998, for either the overpayment or the underpayment years. (Docs. 89-531 at 17-26 & 90-484 at 17-26.) Because the parties agreed that the statute of limitations remained open on July 22, 1998, for Exxon's overpayment years of 1979 and 1980,

Exxon concluded that it was entitled to interest-netting as a matter of law. (Docs. 89-531 16 at & 90-484 at 16.)

2. The Tax Court's opinion and decisions on interest-netting

On February 3, 2011, the Tax Court issued an opinion adopting Exxon's interpretation of the special rule. (A201-38.) In so doing, the Tax Court expressly rejected the contrary decisions of the Federal Circuit in *Fannie Mae I* and *II*, concluding that "section 6621(d), as modified by the special rule, is a remedial statute that must be interpreted to achieve the remedial purpose Congress intended; i.e., taxpayer relief from disparate interest rates." (A234.) It held that such a liberal construction should be applied "regardless of whether the special rule constitutes a waiver of sovereign immunity." (*Id.*) But it also stated that "the special rule is not a waiver of sovereign immunity but an interest rate provision" that was "based on an existing waiver in [I.R.C.] section 6611." (A236.) Based on this reasoning, the Tax Court held "that interest netting should be available even if only one applicable limitations period was open on July 22, 1998." (A237.)

In accord with its interest-netting opinion, the Tax Court issued final decisions that Exxon had overpayment interest balances of $12,915,930.90 for its tax year 1979 and of $12,905,246.17 for its tax year 1980. (A240-41.)

SUMMARY OF ARGUMENT

The Tax Court erred as a matter of law in holding that Exxon was entitled to retroactive interest-netting with respect to its overlapping tax underpayments and overpayments for periods preceding July 22, 1998, under the uncodified special rule that supplements the provisions of I.R.C. § 6621(d). In so holding, the court construed the requirement of the special rule, that "any applicable statute of limitations not having expired with regard to either a tax underpayment or a tax overpayment," as being satisfied if the limitations period for either the taxpayer's underpayments or overpayments still was open as of July 22, 1998 (the effective date of I.R.C. § 6621(d)). That conclusion, in turn, was founded on the Tax Court's ruling that, because the special rule is a remedial provision, it should be liberally construed in favor of taxpayers.

The Tax Court's decision is in direct conflict with those of the Federal Circuit, which twice has held that the special rule, as a waiver of the Government's sovereign immunity, must be strictly construed in favor of the Government and that, consequently, the courts are constrained to accept the Government's interpretation of the special rule as allowing retroactive interest-netting only if the limitations periods for *both* the taxpayer's underpayments and overpayments still were open as of July 22, 1998. *Federal Nat'l Mort. Assoc. v. United States*, 379 F.3d 1303, 1310 (Fed. Cir. 2004) ("*Fannie Mae I*") and *Federal Nat'l Mort. Assoc. v. United States*, 469 F.3d 968, 972-73 (Fed Cir. 2006) ("*Fannie Mae II*")

The primary basis for the Tax Court's refusal to follow the decisions of the Federal Circuit in *Fannie Mae I* and *Fannie Mae II* was its rejection of the Federal Circuit's determination that the special rule constitutes a waiver of sovereign immunity. As the Federal Circuit correctly held in these cases, however, the special rule is a waiver of sovereign immunity because it authorizes recovery of certain retroactive refund claims for overpaid interest and thus "discriminates between

those claims for overpaid interest Congress has authorized and those it has not." *Fannie Mae I*, 379 F.3d at 1310. Equally unfounded is the Tax Court's alternative holding that, even if the special rule is a waiver of sovereign immunity, it still should be liberally construed in favor of taxpayers in order to accomplish its remedial purpose. The decisions of the Supreme Court, as well as those of this Court, make clear that waivers of sovereign immunity must be strictly construed in favor of the United States, that such waivers cannot be implied, but instead, must be unequivocally expressed, and that, therefore, a consent to suit against the United States cannot be established by means of ambiguous statutory language. The Tax Court committed reversible error in failing to heed these controlling authorities.

ARGUMENT

THE TAX COURT ERRED AS A MATTER OF LAW IN GRANTING EXXON'S MOTION FOR RETROACTIVE INTEREST-NETTING

Standard of review

This Court "accept[s] the stipulated facts the parties submitted to the Tax Court" and "review[s] the Tax Court's legal conclusions *de*

novo." *Nathel v. Commissioner*, 615 F.3d 83, 87 (2d Cir. 2010). In making this review, the Court "'owe[s] no deference to the Tax Court's statutory interpretations, its relationship to [this Court] being that of a district court to a court of appeals, not that of an administrative agency to a court of appeals.'" *Madison Recycling Assocs. v. Commissioner*, 295 F.3d 280, 285 (2d Cir. 2002). (citation omitted).

A. Interest-netting principles

In general, if a taxpayer pays less tax than it owes, interest accrues on the underpayment from the time the tax was due to be paid until it is paid. I.R.C. § 6601. On the other hand, if the taxpayer pays more tax than it owes, interest similarly accrues from the date of the overpayment. I.R.C. § 6611(a). Until 1986, interest generally accrued on underpayments and overpayments at the same rate (except as to underpayments attributable to tax-motivated transactions). *See* I.R.C. § 6621 (26 U.S.C., 1982 ed.); Department of the Treasury, Office of Tax Policy, Report to Congress on Netting of Interest on Tax Overpayments and Underpayments, at 7 (April 1997) ((hereinafter, "Treasury Report"). In 1986, however, Congress amended I.R.C. § 6621, effective

for interest accruing on and after January 1, 1987, providing for a rate of interest on underpayments that was one percentage point higher than the rate on overpayments. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1511(a), 100 Stat. 2085, 2744. Subsequent amendments to § 6621 further increased the maximum possible interest rate differential between the overpayment rate and the underpayment rate applicable to corporations. Treasury Report at 1, 11-12.[4]

In the IRSRRA of 1998, Pub. L. No. 105-206, § 3302, 112 Stat. 685, 741, Congress realigned overpayment and underpayment interest rates to make them the same for individual taxpayers, but maintained

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[4] In 1990, Congress increased the underpayment rate in § 6621(c) for "large corporate underpayments," providing that if a C corporation (*i.e.* a corporation governed by subchapter C of the Code) has an underpayment for any tax year that exceeds $100,000, the applicable underpayment rate of interest is the Federal short-term rate plus 5 percentage points. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11341(a), 104 Stat. 1388, 1388-470 (amending § 6621(c)). In 1994, Congress again amended the interest provisions applicable to large corporate taxpayers, reducing the interest payable to large corporate taxpayers with overpayments of over $10,000, to the Federal short-term rate plus .5 percentage points. Uruguay Round Agreements Act, Pub. L. No. 103-465, § 713, 108 Stat. 4809, 5001 (1994). This increased the potential interest rate differential between the overpayment rate and the underpayment rates applicable to C corporations. *Id.*; *see also* Treasury Report at 12.

the differential in overpayment and underpayment interest rates for corporate taxpayers. *Id.* § 3302 (codified as I.R.C. § 6621(a)(1)) (providing for an overpayment rate of the federal short-term rate plus 3 percentage points, but "plus 2 percentage points in the case of a corporation," or plus "0.5 percentage point" if a corporation has an overpayment exceeding $10,000); *see also* I.R.C. § 6621(c)(maintaining a larger differential for C corporations with underpayments exceeding $100,000). To ameliorate the effect of the continued discrepancy between overpayment and underpayment interest rates for corporate taxpayers, however, Congress also added § 6621(d) to the Code, which provides for interest-netting on overlapping periods of overpayments and underpayments (*i.e.*, an interest rate of zero). IRSRRA § 3301 (codified as I.R.C. § 6621(d)). Section 6621(d) provides:

> To the extent that, for any period, interest is payable under subchapter A [interest on underpayments] and allowable under subchapter B [interest on overpayments], on equivalent underpayments and overpayments by the same taxpayer of tax imposed by . . . title [26] [of the United States Code], the net rate of interest under this section on such amounts shall be zero for such period.

I.R.C. § 6621(d).

Although Section 6621(d) was made effective only for periods beginning after July 22, 1998, the uncodified special rule at issue here permits taxpayers to seek interest-netting for taxable periods beginning before July 22, 1998, where certain qualifying requirements are met. The special rule provides:

> Special rule. - Subject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment, the amendments made by this section shall apply to interest for periods beginning before the date of the enactment of this Act if the taxpayer–
>
> (A) reasonably identifies and establishes periods of such tax overpayments and underpayments for which the zero rate applies; and
>
> (B) not later than December 31, 1999, requests the Secretary of the Treasury to apply section 6621(d) of the Internal Revenue Code of 1986 . . . to such periods.

IRSRRA § 3301(c)(2), as amended by Pub. L. No. 105-277, § 4002(d), 112 Stat. 2681, 2681-906 (1998).

B. As the Federal Circuit held in *Fannie Mae I* and *II*, the special rule, as a waiver of the sovereign immunity, should be narrowly construed so as to preclude retroactive interest-netting where the statute of limitations has expired as of July 22, 1998, as to any of the relevant periods

In this case, Exxon seeks to use interest-netting for periods of overlapping tax overpayments and underpayments from 1987 to 1989 in order to attain a refund of previously paid underpayment interest. Because those overlapping periods occurred before July 22, 1998, the effective date for the interest-netting provisions of I.R.C. § 6621(d), Exxon can obtain the refund that it seeks only if it is eligible for retroactive interest-netting pursuant to the special rule. In this regard, the only question before the Court is whether Exxon's interest-netting claim satisfies the special rule's requirement of "any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment."

Exxon argues that its claim satisfies this requirement because, it asserts, it is sufficient under the special rule if the limitations period for *either* the overpayment periods *or* the underpayment periods remained

open on July 22, 1998, and because it is undisputed that the statute of limitations as to its overpayment periods for 1979 and 1980 remained open on July 22, 1998. The Commissioner maintains that the statute of limitations must be open on July 22, 1998, as to *both* the overpayment *and* underpayment periods in order for a taxpayer to be eligible for retroactive interest-netting under the special rule. Because there is an unresolved factual dispute as to whether the statute of limitations remained open on July 22, 1998, as to the relevant underpayment periods (A94 ¶ 36), it was reversible error, we submit, for the Court to hold that Exxon was entitled to retroactive interest-netting as a matter of law.

These are the same positions taken by the taxpayer and the Commissioner, respectively, in *Federal National Mortgage Assoc. v. United States*, 379 F.3d 1303 (Fed. Cir. 2004) ("*Fannie Mae I*") and *Federal National Mortgage Association v. United States*, 469 F.3d 968 (Fed. Cir. 2006) ("*Fannie Mae II*"), which are the sole appellate decisions to interpret the special rule's "[s]ubject to any applicable statute of limitation not having expired with regard to either a tax

underpayment or a tax overpayment" language. *See also Computervision Corp. v. United States*, 445 F.3d 1355, 1373-74 (Fed. Cir. 2006) (applying *Fannie Mae I*). In *Fannie Mae I*, the Federal Circuit first determined that "the language at issue . . . is equally subject to both proffered interpretations, the parties' efforts to persuade us to the contrary notwithstanding." 379 F.3d at 1307. It further determined that the legislative history did not definitively favor either interpretation, although "the only relevant contemporaneous interpretation available is inconsistent with the judgment in [taxpayer's] favor." *Id*. at 1309. The Federal Circuit then concluded that, because the special rule "authorizes claims against the government to recover interest paid, if the taxpayer satisfies certain specified conditions" and "discriminates between those claims for overpaid interest Congress has authorized and those it has not," the special rule constituted "a waiver of sovereign immunity, and, moreover, one expressly made conditional." *Id*. at 1310. The court thus rejected the taxpayer's claim that "the disputed language in the special rule . . . merely relate[s] to the rate of interest the government must

pay" and held, instead, that because the special rule was a waiver of the Government's sovereign immunity, the rule must be strictly construed in the Government's favor. *Id.* Applying such strict construction, the Federal Circuit concluded that "[a] waiver to the extent urged by [taxpayer], i.e., as to claims for overlapping indebtedness periods for which either the overpayment or the underpayment limitations period remains open, has . . . not been 'equivocally expressed,' as is essential to its recovery here." *Id.* at 1311. In *Fannie Mae II*, 469 F.3d at 972-73, the Federal Circuit reaffirmed its previous ruling, rejecting the argument that the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), and a subsequent Federal Circuit decision had vitiated the analysis in *Fannie Mae I*, because those cases "do not address whether, in cases against the government, limitations periods are jurisdictional or whether they must be strictly construed."

As we explain below, the Tax Court's decision in this case is directly contrary to the *Fannie Mae* decisions, as well as the substantial body of sovereign immunity case law on which the Federal Circuit relied in those decision. Specifically, although it agreed (A232) with the

conclusion in *Fannie Mae I*, 379 F.3d at 1307, that the critical language of the special rule is ambiguous, the Tax Court refused to strictly construe that language in favor of the Government. The Tax Court relied on two grounds to justify its refusal to apply strict construction: (1) that "the special rule is not a waiver of sovereign immunity but an interest rate provision" (A236) and (2) that, even if the special rule were a waiver of sovereign immunity, strict construction should not apply because the special rule is a remedial provision and, as such, should be liberally construed in favor of taxpayers (A234-37). Neither of these grounds, however, is well-founded.

1. The special rule is a waiver of sovereign immunity because it authorizes certain monetary claims against the Government that otherwise would be prohibited

The Federal Circuit in *Fannie Mae I* gave clear—and correct—reasons for holding that the special rule is a waiver of sovereign immunity.[5] As it explained, the special rule "authorizes

[5] To the extent the Tax Court gave any reason for its threshold determination that the special rule is "not a waiver of sovereign immunity but an interest rate provision," its determination appears to (continued...)

claims against the government to recover interest paid, if the taxpayer satisfies certain specified conditions . . . for certain pre-enactment periods, namely those pre-enactment periods that satisfied the conditioned expressed in the '[s]ubject to any applicable statute of limitation not having expired . . .' introductory language." *Fannie Mae I*, 379 F.3d at 1310. Because the special rule "discriminates between those claims for overpaid interest Congress has authorized and those it has not," it is a waiver of sovereign immunity with express conditions attached. *Id.*

This case illustrates the correctness of that analysis. Exxon has made claims for refund of interest payments based on the application of interest-netting to its overlapping overpayments and underpayments for years before Congress enacted Section 6621(d). Although Section 6621(d) created a new claim for interest-netting, Congress made that

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[5](...continued)
arise from its conclusion that "Section 6611(a) waives sovereign immunity." (A235-36.) Section 6611(a), however, does not waive sovereign immunity for claims for interest refunds based on the retroactive application of the interest-netting rule of I.R.C. § 6621(d). On the contrary, it is only the special rule that allows retroactive application of I.R.C. § 6621(d) in certain, prescribed circumstances.

provision effective only with respect to periods beginning after July 22, 1998. *See* IRSRRA § 3301(c)(1) (stating that amendments to § 6621 made by IRSRRA "shall apply to interest for periods beginning after the date of the enactment of this Act," *i.e.*, July 22, 1998, unless covered by the special rule). Without the special rule, Exxon's attempt to obtain interest refunds based on *retroactive* interest-netting for periods prior to July 22, 1998, would have been prohibited.[6] Under I.R.C. § 6611, Exxon was entitled to interest on its tax overpayments, but unless the special rule is applicable, Exxon will unquestionably remain liable for the underpayment interest it seeks to recover herein pursuant to its claim for retroactive interest-netting. It is therefore apparent, as the Federal Circuit held in *Fannie Mae I* and *Fannie Mae II*, that the special rule is a waiver of sovereign immunity because it permits certain monetary claims against the United States that otherwise would be barred by the

[6] Indeed, the Tax Court implicitly recognized this fact when it stated (A237) that the special rule "extend[ed] interest netting relief to periods of overlap preceding July 22, 1998, that were open on that date." Although the Tax Court misconstrued what it meant for periods of overlap to be "open on that date," it was correct to acknowledge that the special rule extended interest-netting to permit interest refund claims that otherwise would not have been available to taxpayers.

Government's sovereign immunity. *See Diaz v. United States*, 517 F.3d 608, 611 (2d Cir. 2008) and cases cited therein. Indeed, as this Court recognized in *Diaz v. United States*, 517 F.3d at 611, a claim for money from the federal fisc is the quintessential example of a claim that is prohibited absent a waiver of sovereign immunity. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). In short, the Tax Court plainly erred in rejecting the decisions of the Federal Circuit in *Fannie Mae I* and *Fannie Mae II* that the special rule constitutes a waiver of the Government's sovereign immunity and therefore must be strictly construed in the Government's favor.

2. As a waiver of sovereign immunity, the special rule must be strictly construed in favor of the Government

"It long has been established, of course, that the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Testan*, 424 U.S. 392, 399 (1976) (quoting *United States v. Sherwood*, 312 U.S. 584, 586

(1941)). The United States cannot be sued except in strict accordance with the terms of a specific waiver of sovereign immunity granted by Congress. *United States v. Nordic Village, Inc.*, 503 U.S. at 33; *United States v. Dalm*, 494 U.S. 596, 608 (1990); *Adeleke v. United States*, 355 F.3d 144, 150 (2d Cir. 2004). Waivers of sovereign immunity are strictly construed in favor of the Government. *Nordic Village*, 503 U.S. at 34, 37; *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). As the Supreme Court explained in *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (citations omitted):

> The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied. When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.

The Tax Court refused to strictly construe the special rule in favor of the Government primarily on the basis of its determination (A235-36) that the special rule does not constitute a waiver of the Government's

sovereign immunity. As we demonstrated above, however, the Tax Court's decision in this regard is wrong, unsupported by any relevant authority, and contrary to the decisions of the Federal Circuit in *Fannie Mae I* and *Fannie Mae II*, which are on all fours with the instant case. Accordingly, to the extent the Tax Court's liberal construction of the special rule in favor of Exxon is founded on its threshold determination that the special rule is not a waiver of sovereign immunity, the court's statutory construction necessarily fails.

The Tax Court's fallback position that, even if the special rule is a waiver of sovereign immunity, it still should not be strictly construed in favor of the Government, fares no better. First, the Tax Court's attempt (A236-37) to support its decision by reference to the fact that the disputed statute-of-limitations language in the special rule was inserted therein by means of a technical correction is misconceived.[7] The "technical correction" was to remedy a scrivener's error in which the critical language regarding the statute of limitations not having expired

[7] The Tax Court stated in this regard (A236-37) that "[a]s a technical correction there is no doubt that the special rule was not intended to restrict interest netting."

was inadvertently omitted from the special rule as initially enacted. *See* H.R. Conf. Rep. 105-599, at 257, *reprinted at* 1998 U.S.C.C.A.N. 288, 1998 WL 915495, at *218-19 (1998) (stating conference agreement to adopt special rule proposed by the Senate that would permit retroactive interest-netting provided, *inter alia*, that "the statute of limitations has not expired with respect to either the underpayment or overpayment"); IRSRRA, *supra*, § 3301(c)(2) (enacting special rule without statute of limitations condition); Omnibus Consolidated & Emerg. Suppl. Approp. Act, Pub. L. No. 105-277 § 4002(d) (amending special rule to insert statute of limitations condition).

It is therefore apparent that the statute of limitations language in the special rule is what it purports to be, *i.e.*, a condition that must be satisfied in order for the waiver of sovereign immunity provided by the special rule to be applicable. As explained by the Federal Circuit in *Fannie Mae I*, 379 F.3d at 1310-11:

> The issue here concerns the limits of the condition set forth in the special rule's preface: the requirement that certain periods of limitation be open as of July 22, 1998. Such time bars, when they condition recovery from the government, are strictly construed. *See United States v. Dalm*, 494 U.S. 596,

> 608-09, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990) ("'[A]lthough we should not construe . . . a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'" (quoting *Block v. North Dakota*, 461 U.S. 273, 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983) (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)))).

The Tax Court was equally wrong in further concluding (A234) that the requirement that waivers of sovereign immunity be strictly construed in favor of the Government was inapplicable here because the special rule is a remedial provision and, as such, should be liberally construed in favor of taxpayers. The reasoning of the Tax Court closely parallels that of the Court of Federal Claims in *Fannie Mae I*, 56 Fed. Cl. 228, 239 (2003), which the Federal Circuit rejected in reversing its decision in that case. *See Fannie Mae I*, 379 F.3d at 1310-11. The Supreme Court has not recognized any exception to the fundamental rule that waivers of sovereign immunity must be strictly construed for waivers involving remedial statutes. On the contrary, the Court repeatedly has emphasized that a waiver of sovereign immunity cannot be implied but, instead, must be "unequivocally expressed." *United*

States v. King, 395 U.S. 1, 4 (1969) ("We think this approach runs counter to the settled propositions that the Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and that such a waiver cannot be implied but must be unequivocally expressed."). *Accord Nordic Village*, 503 U.S. at 33; *Dalm*, 494 U.S. at 608-09; *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) (while a court should not seek to narrow the waiver of sovereign immunity that Congress intended, "in construing the statute of limitations, which is a condition of that waiver, [the court] should not take it upon [itself] to extend the waiver beyond that which Congress intended"); *see also SEC v. Credit Bancorp, Ltd.*, 297 F.3d 127, 136 (2d Cir. 2002) ("[T]he court has no power to broaden a limited waiver of immunity.").

In short, where Congress has indicated that it is providing only a *limited* waiver of sovereign immunity, courts must strictly construe and enforce those limits. *Millares Guilraldes de Tineo v. United States*, 137 F.3d 715, 719 (2d Cir. 1998) ("Any limitations imposed by the waiver

statute, whether they be substantive, procedural, or temporal, are to be strictly applied against the claimant"); *see also Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 778 n.2 (5th Cir. 2010) ("In cases where Congress has provided a limited waiver of sovereign immunity not only must that waiver be strictly construed but it must, in fact, be construed in favor of the sovereign").[8]

Moreover, waivers of sovereign immunity in the context of taxation in particular are strictly construed. *See Duffie v. United States*, 600 F.3d 362, 384 (5th Cir. 2010); *see also United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 8-9 (2008); *Dalm*, 494 U.S. at 601; *Flora v. United States*, 362 U.S. 145, 176-77 (1960); *United States v. Forma*, 42 F.3d 759, 763 (2d Cir. 1994). Most particularly, strict construction is applied to statute-of-limitations requirements in the context of taxation. *Dalm*, 494 U.S. at 608 ("[a]lthough [courts] should not construe such a time-bar provision unduly restrictively,

[8] Indeed, while the Tax Court (A235) cited the *dissent* in *Block v. North Dakota*, 461 U.S. 273, 293 (1983), in justifying its holding here, it ignored the majority decision, *id.* at 287, which strictly applied a limitations period attached to a waiver of sovereign immunity.

[courts] must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended") (citations and internal quotation marks removed); *see also Webb v. United States*, 66 F.3d 691, 693 (4th Cir. 1995)). As the Supreme Court explained in *United States v. Brockamp*, 519 U.S. 347, 352 (1997), in holding that equitable tolling does not apply to the statute of limitations found in I.R.C. § 6511, statutes of limitations in the context of taxation have multiple purposes, including the need to avoid "serious administrative problems" that could threaten the need to "maintain a more workable tax enforcement system." Thus, "Congress would likely have wanted to decide *explicitly* whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires." *Id.* at 352-53.[9]

[9] Thus, *Brockamp*, 519 U.S. at 350-54, distinguished statutes of limitation in the tax context from other statutes of limitation applicable to the United States which may be subject to equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

As the Federal Circuit held in *Fannie Mae I*, 379 F.3d at 1310-11, the necessary consequence of the requirement that a waiver of sovereign immunity be unequivocally expressed is that there can be no consent to suit through the use of ambiguous language.[10] In other words, if a statute is susceptible to a plausible reading under which sovereign immunity is not waived, the statute necessarily fails to provide the requisite unequivocal waiver. *Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004) (citing *Nordic Village*, 503 U.S. at 37).

This rule of strict construction especially holds true in cases, such as the instant one, claiming a waiver of sovereign immunity pertaining

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[10] The Commissioner long has taken the position that the statute-of-limitations language in the special rule means that both the limitations period for the taxpayer's underpayments and its overpayments must be open as of July 22, 1998. *See* Rev. Proc. 99-43, 1999-2 C.B. 579. That position finds support in the General Explanation of the IRSRRA of 1998 prepared by the Staff of the Joint Committee on Taxation, commonly referred to as the "Blue Book." *See Staff of the Joint Comm. on Tax Legislation Enacted in 1998*, at 74 (Comm. Print 1998). The Federal Circuit held in *Fannie Mae I*, 379 F.3d at 1307, however, that neither of these authorities was sufficient to resolve the ambiguity in the statute of limitations language in the special rule.

to claims for interest against the United States. *Id.* (citing *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). As the Supreme Court held in *Shaw*, 478 U.S. at 318, to conclude that a statute waives immunity for interest:

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

(Citation omitted; alteration in original.)

The Tax Court here expressly agreed (A231-32) with the determination of the Federal Circuit in *Fannie Mae I*, 379 F.3d at 1307, that the language at issue—"subject to any applicable statute of limitations not having expired with regard to either a tax underpayment or a tax overpayment"—was ambiguous in that it was equally susceptible to the proffered interpretation of both the taxpayer and the United States. Indeed, it was because the Tax Court regarded the language as ambiguous that the court resorted to a rule of statutory construction (remedial statutes should be liberally construed) in order

to rule for Exxon. The Tax Court, therefore, was constrained by Supreme Court precedent to conclude that the ambiguous language of the special rule did not provide the requisite unequivocal waiver of sovereign immunity needed to grant Exxon summary judgment on its claims for interest refunds.[11] *See Nordic Village*, 503 U.S. at 37; *Shaw*, 478 U.S. at 318; *Fannie Mae I*, 379 F.3d at 1310-11; *Marathon Oil*, 374 F.3d at 1127. In holding to the contrary, the Tax Court committed reversible error.

3. The authorities cited by the Tax Court do not support its decision to liberally construe the special rule in favor of Exxon

None of the authorities cited by the Tax Court in its opinion supports its decision that, even if the special rule constitutes a waiver of

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[11] As indicated above, Exxon disputes the Commissioner's determination that the statute of limitations applicable to all of its underpayments for tax years 1975 to 1978 was no longer open as of July 22, 1998. (At a minimum, the parties dispute whether the statute of limitations remained open as to tax years 1975 and 1976.) Accordingly, in the event this Court were to reverse the Tax Court's decision that, under the special rule, retroactive interest-netting is available if either the limitations period applicable to the taxpayer's overpayments or to the taxpayer's underpayments still is open as of July 22, 1998, the case should be remanded to the Tax Court for resolution by the Tax Court of the statute of limitations issue pertaining to Exxon's underpayments.

the Government's sovereign immunity, the ambiguous statute of limitations language of the rule should nevertheless be liberally construed in favor of Exxon. As we have demonstrated above, the decisions of the Supreme Court, this Court, and other courts of appeal establish that a waiver of sovereign immunity must be strictly construed and cannot be implied, but, instead, must be unequivocally expressed, such that consent to suit cannot be founded on ambiguous statutory language. To the extent the Ninth Circuit's decision in *Sullivan v. Town & Country Home Nursing Services*, 963 F.2d 1146, 1151-52 (9th Cir. 1991) (cited at A234), can be read as standing for the proposition that a waiver of sovereign immunity need not be strictly construed in favor of the Government if the waiver is contained in a remedial statute, it is an outlier ruling that cannot be reconciled with the decisions of the Supreme Court and this Court cited herein. Indeed, even in the Ninth Circuit, the remedial rule of *Sullivan* has been limited to "the context of [the Federal Torts Claims Act, *i.e.*,] the FTCA," in light of subsequent "decisions from the Supreme Court emphasizing that strict, pro-government construction should be given to

waivers of immunity." *Blair v. IRS*, 304 F.3d 861, 868 n.4 (9th Cir. 2002) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996), *United States v. Williams*, 514 U.S. 527, 531 (1995), and *Nordic Village*, 503 U.S. at 34). It makes sense that such a rule has not been generally applied in the context of sovereign immunity—as the Eighth Circuit has noted, "every statute waiving sovereign immunity is remedial." *Premachandra v. Mitts*, 753 F.2d 635, 641 n.8 (8th Cir. 1985). Accordingly, if waivers of sovereign immunity contained in "remedial" statutes were given a liberal construction, it would eviscerate the repeated pronouncements of the Supreme Court that waivers of sovereign immunity must be strictly construed in favor of the Government and unequivocally expressed.

The Tax Court also cited (A235-36) a trio of cases for the proposition that a separate provision related to a waiver of sovereign immunity need not be strictly construed. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003); *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983) ("*Mitchell II*"). Beyond the fact that the Tax Court's analysis in this regard relies on its erroneous conclusion that the special

rule is not itself a waiver of sovereign immunity (*see supra*, 22-25), these cases are readily distinguishable. *Gomez-Perez*, 553 U.S. at 491, involved a waiver of sovereign immunity in one portion of 29 U.S.C. § 633a(c) which, by its terms, covered a claim based on the substantive right set forth in 29 U.S.C. § 633a(a). The Supreme Court concluded that the substantive right separately set forth in Section 633a(a) need not be strictly construed. *Id*. *White Mountain Apache Tribe*, 537 U.S. at 472-73, and *Mitchell II*, 463 U.S. at 218-19, involved the question whether substantive provisions that could potentially be read to permit money damages claims covered by the waiver of sovereign immunity found in the Tucker Act, 28 U.S.C. § 1491(a)(1), or Indian Tucker Act, 28 U.S.C. § 1505, should be strictly construed or given a "fair interpretation." These cases, however, do not address the construction of provisions (such as the special rule) which in themselves constitute the waiver of sovereign immunity.

The unique jurisprudence applicable to the construction of exceptions to the FTCA distinguishes the two FTCA cases cited (A236) by the Tax Court in support of its decision. *See Dolan v. USPS*, 546

U.S. 481, 491-92 (2006); *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984). Similarly, the Tax Court's reliance (A235) on *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 521 (1984), is misplaced. That case, unlike the instant case, involved a "sue or be sued" waiver of immunity. Unlike other waivers of sovereign immunity, "sue or be sued" waivers are typically liberally construed, at least as to funds that are within the agency's control and would not be paid out of general Treasury funds. *FHA v. Burr*, 309 U.S. 242, 245-46 (1940); *C.H. Sanders Co. v. BHAP Housing Dev. Fund Co.*, 903 F.2d 114, 120 (2d Cir. 1990); *Active Fire Sprinkler Corp. v. USPS*, 811 F.2d 747, 752 (1987). Thus, although the Supreme Court has "on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act, or as in the context of equally broad 'sue and be sued' clauses," it has made clear that "[t]hese cases do not . . . eradicate the traditional principle that the Government's consent to be sued 'must be construed in favor of the sovereign' and not 'enlarge[d] . . . beyond what the language requires."

Nordic Village, 503 U.S. at 34 (citations omitted). This is particularly true in the case of a statute of limitations that conditions waivers of sovereign immunity in federal tax cases. *See Clintwood Elkhorn Mining Co.*, 553 U.S. at 8-9 (2008); *Dalm*, 494 U.S. at 601, 608; *Brockamp*, 519 U.S. at 352 (1997).

CONCLUSION

For the reasons stated above, the decision of the Tax Court regarding interest-netting is erroneous and should be reversed, and the case should be remanded for a determination as to whether the statute of limitations was still open on July 22, 1998, with respect to Exxon's underpayments for tax years 1975 to 1978.

Respectfully submitted,

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SPECIAL APPENDIX

IRS RESTRUCTURING AND REFORM ACT OF 1998, Pub. L. No. 105-206, 112 Stat. 685:

SECTION 3301(a) (codified as Internal Revenue Code (26 U.S.C.) Section 6621(d)):

Elimination of interest on overlapping periods of tax overpayments and underpayments.--To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

* * *

SECTION 3301(c)(1)(uncodified):

In general. --Except as provided under paragraph (2), the amendments made by this section shall apply to interest for periods beginning after the date of the enactment of this Act.

SECTION 3301(c)(2), *as amended by* Pub. L. 105-277, § 4002(d), 112 Stat. 2681, 2681-906 (1998) (uncodified):

Special rule. - Subject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment, the amendments made by this section shall apply to interest for periods beginning before the date of the enactment of this Act if the taxpayer–

> **(A)** reasonably identifies and establishes periods of such tax overpayments and underpayments for which the zero rate applies; and

> **(B)** not later than December 31, 1999, requests the Secretary of the Treasury to apply section 6621(d) of the Internal Revenue Code of 1986 . . . to such periods.

INTERNAL REVENUE CODE (26 U.S.C.):

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

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

* * *

SECTION 6611. Interest on overpayments

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

* * *

SECTION 6621. Determination of rate of interest

(a) General rule.--

(1) Overpayment rate.--The overpayment rate established under this section shall be the sum of--

(A) the Federal short-term rate determined under subsection (b), plus

(B) 3 percentage points (2 percentage points in the case of a corporation).

To the extent that an overpayment of tax by a corporation for any taxable period (as defined in subsection (c)(3), applied by substituting "overpayment" for "underpayment") exceeds $10,000, subparagraph (B) shall be applied by substituting "0.5 percentage point" for "2 percentage points".

(2) Underpayment rate.--The underpayment rate established under this section shall be the sum of--

(A) the Federal short-term rate determined under subsection (b), plus

(B) 3 percentage points.

(b) Federal short-term rate.--For purposes of this section--

(1) General rule.--The Secretary shall determine the Federal short-term rate for the first month in each calendar quarter.

(2) Period during which rate applies.--

(A) In general.--Except as provided in subparagraph (B), the Federal short-term rate determined under paragraph (1) for any month shall apply during the first calendar quarter beginning after such month.

(B) Special rule for individual estimated tax.--In determining the addition to tax under section 6654 for failure to pay estimated tax for any taxable year, the Federal short-term rate which applies during the 3rd month following such taxable year shall also apply during the first 15 days of the 4th month following such taxable year.

(3) Federal short-term rate.--The Federal short-term rate for any month shall be the Federal short-term rate determined during such month by the Secretary in accordance with section 1274(d). Any such rate shall be rounded to the nearest full percent (or, if a multiple of ½ of 1 percent, such rate shall be increased to the next highest full percent).

(c) Increase in underpayment rate for large corporate underpayments.--

(1) In general.--For purposes of determining the amount of interest payable under section 6601 on any large corporate underpayment for periods after the applicable date, paragraph (2) of subsection (a) shall be applied by substituting "5 percentage points" for "3 percentage points".

(2) Applicable date.--For purposes of this subsection--

(A) In general.--The applicable date is the 30th day after the earlier of--

(I) the date on which the 1st letter of proposed deficiency which allows the taxpayer an opportunity for

administrative review in the Internal Revenue Service Office of Appeals is sent, or

(ii) the date on which the deficiency notice under section 6212 is sent.

The preceding sentence shall be applied without regard to any such letter or notice which is withdrawn by the Secretary.

(B) Special rules.--

(I) Nondeficiency procedures.--In the case of any underpayment of any tax imposed by this title to which the deficiency procedures do not apply, subparagraph (A) shall be applied by taking into account any letter or notice provided by the Secretary which notifies the taxpayer of the assessment or proposed assessment of the tax.

(ii) Exception where amounts paid in full.--For purposes of subparagraph (A), a letter or notice shall be disregarded if, during the 30-day period beginning on the day on which it was sent, the taxpayer makes a payment equal to the amount shown as due in such letter or notice, as the case may be.

(iii) Exception for letters or notices involving small amounts.--For purposes of this paragraph, any letter or notice shall be disregarded if the amount of the deficiency or proposed deficiency (or the assessment or proposed assessment) set forth in such letter or notice is not greater than $100,000 (determined by not taking into account any interest, penalties, or additions to tax).

(3) Large corporate underpayment.--For purposes of this subsection–

(A) In general.--The term "large corporate underpayment" means any underpayment of a tax by a C corporation for any taxable period if the amount of such underpayment for such period exceeds $100,000.

(B) Taxable period.--For purposes of subparagraph (A), the term "taxable period" means--

(I) in the case of any tax imposed by subtitle A, the taxable year, or

(ii) in the case of any other tax, the period to which the underpayment relates.

(d) Elimination of interest on overlapping periods of tax overpayments and underpayments.--To the extent that, for any period, interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

SEC. 6622. INTEREST COMPOUNDED DAILY.

(a) General rule.—In computing the amount of any interest required to be paid under this title or sections 1961(c)(1) or 2411 of title 28, United States Code, by the Secretary or by the taxpayer, or any other amount determined by reference to such amount of interest, such interest and such amount shall be compounded daily.

. . . .

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/s/ Jennifer M. Rubin
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Attorney

October 26, 2011

CERTIFICATE OF SERVICE

It is hereby certified that, on this 26th day of October 2011, (1) six paper copies of this brief were mailed to the Court, and (2) I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. Counsel for the appellee are registered CM/ECF users and will be served by the CM/ECF system.

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