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

REPLY BRIEF FOR THE APPELLANT

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GLOSSARY

GATT: General Agreement on Tariffs and Trade

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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Seeking to avoid application of the strict construction rule for waivers of sovereign immunity, Exxon spends much of its responsive brief arguing that its expansive reading of the special rule, 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), is preferable to the narrower reading asserted by the Commissioner and asserting that the special rule is not a waiver of sovereign immunity. Exxon's efforts, however, do

not alter the conclusion, shared by the Tax Court below (A232), that the critical statutory language—"[s]ubject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment"—is ambiguous, *i.e.*, it is equally subject to the proffered interpretations of both Exxon and the Commissioner. *See Federal Nat'l Mtge. Assoc. v. United States*, 379 F.3d 1303, 1307 (Fed. Cir. 2004) ("*Fannie Mae I*"). Given that ambiguity, and given that the relief which Exxon seeks is a payment from the United States Treasury, this Court should follow the reasoning of the Federal Circuit in *Fannie Mae I*, 379 F.3d at 1310, and *Federal National Mortgage Association v. United States*, 469 F.3d 968, 972-73 (Fed. Cir. 2006) ("*Fannie Mae II*"), and reverse the Tax Court's grant of summary judgment to Exxon in this case.

A. The canon requiring strict construction of waivers of sovereign immunity applies here because the special rule is a waiver of sovereign immunity

The Supreme Court repeatedly has held that waivers of sovereign immunity must be strictly construed in favor of the United States. *See, e.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (applying sovereign immunity canon where there were multiple

"plausible" interpretations of the relevant statutory text); *Block v. North Dakota*, 461 U.S. 273, 287 (1983) (requiring "clear indication" of Congressional intent to exempt States from statute of limitations attached to a waiver of sovereign immunity); *see also Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004) ("If a statute is susceptible to a plausible reading under which sovereign immunity is not waived, the statute fails to establish an unambiguous waiver and sovereign immunity therefore remains intact.").

1. The special rule is a waiver of sovereign immunity because it conditionally authorizes certain monetary claims against the Treasury

As the Commissioner explained in his opening brief (at 22-25), the decision of the Federal Circuit in *Fannie Mae I*, 379 F.3d at 1310, is correct: the special rule is a waiver of sovereign immunity because it "discriminates between those claims for overpaid interest Congress has authorized and those it has not." Indeed, Exxon implicitly recognizes this (Ans. Br. 11)[1] when it asserts that the special rule contains

[1] "Br." references are to the Commissioner's opening brief. "Ans. Br." references are to Exxon's responsive brief. "A" references are to the joint appendix filed simultaneously with the opening brief.

"qualifying" conditions.[2] Contrary to the central theme of Exxon's argument, the special rule is not simply a substantive provision. In 1998, Congress provided statutory authority in I.R.C. § 6621(d) for *prospective* interest-netting relief on overlapping periods of overpayment and underpayment of taxes from different tax years. But, in the special rule, it expressly conditioned a taxpayer's eligibility for *retroactive* application of § 6621(d) on the taxpayer satisfying certain conditions, including a statute-of-limitations condition. Contrary to Exxon's argument (Ans. Br. 12-13, 33-39), the issue in this case is whether Exxon has satisfied the threshold statutory conditions for seeking a refund of interest based on the retroactive application of I.R.C. § 6621(d). Thus, although I.R.C. § 6621(d) is a substantive provision that contains no statute of limitations of its own that must be satisfied in order to obtain relief thereunder, the same cannot be said of the special rule. On the contrary, relief under the special rule is available only if the taxpayer,

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[2] That said, Exxon's attempt to distinguish (Ans. Br. 11, 20-21) between "qualifying" and "disqualifying" conditions is nonsensical. The special rule discriminates between those taxpayers who satisfy the eligibility requirements for monetary payments based on retroactive interest-netting relief (*i.e.*, those "qualified" to receive such monetary relief from the Treasury), and those who are not eligible to seek such retroactive interest-netting relief (*i.e.*, those "disqualified").

inter alia, satisfies the threshold special statute of limitations contained therein.

Exxon's argument that this case involves nothing more than the merits of its claim that it is entitled to an interest refund pursuant to the application of interest-netting is misconceived. The merits of Exxon's claim only concerns the extent to which its underpayments of tax for certain years overlapped with its overpayments of tax for other years. Regardless, however, of the merits of Exxon's interest-netting claim, it is precluded from recovering on that claim unless it satisfies all of the threshold conditions imposed by Congress in the special rule, including the statute-of-limitations condition. As the Federal Circuit correctly held in *Fannie Mae I* and *Fannie Mae II*, because the statute-of-limitations conditions the waiver of sovereign immunity in the special rule permitting claims for retroactive interest-netting, it must be construed strictly in favor of the Government.

Exxon asserts that waivers of sovereign immunity must be jurisdictional in nature and that the special rule is not expressly jurisdictional, and then concludes that the special rule is therefore not a waiver of sovereign immunity. (*See* Ans. Br. 12, 31-39.) This analysis

is logically backwards. Courts do not determine whether a statutory provision is a waiver of sovereign immunity by determining if the provision is expressly jurisdictional. Rather, courts determine whether the provision is a waiver of sovereign immunity, and if it is, hold that as a matter of law, the terms and conditions of that waiver define the scope of jurisdiction. *See, e.g.*, *United States v. Testan*, 424 U.S. 392, 399 (1976) (determining that the plaintiff sought monetary relief from the United States and concluding that the doctrine of sovereign immunity applied to the proposed claims); *Diaz v. United States*, 517 F.3d 608, 611 (2d Cir. 2008) (plaintiff's claim for monetary damages barred by sovereign immunity because no statute allowed his suit). Here, the special rule created monetary claims based on the retroactive application of interest-netting, but made such claims subject to express conditions.[3]

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[3] The fact that the special rule both authorized certain retroactive claims for interest-netting and established express conditions for any retroactive claims establishes that the special rule is a conditional waiver of sovereign immunity. Exxon's assertion (Ans. Br. 35-38 & n.6) that there are other statutes that permitted actions for redetermination of interest based on interest-netting principles does not alter the fact that Congress has not authorized such retroactive relief outside of the special rule. Indeed, as this Court held in *Diaz v. United States*, 517 F.3d at 611-12, a waiver of sovereign immunity that specifies a particular kind of relief is not interpreted to provide other kinds of relief.

Thus, *Fannie Mae I*, 379 F.3d at 1310-11, correctly holds that the special rule is a conditional waiver of sovereign immunity.

Moreover, Exxon ignores two primary purposes of the doctrine of sovereign immunity: to preserve Congress's authority to determine what claims may be made against the Treasury and to protect the Treasury from unauthorized claims. *See United States v. Dalm*, 494 U.S. 596, 610 (1990) ("If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress."); *Diaz v. United States*, 517 F.3d at 611 (concluding that sovereign immunity doctrine applies to claim for "money from the fisc" even where that claim was in lieu of claim for return of seized property, for which sovereign immunity has been waived). The sovereign immunity canon serves both of these purposes

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That principle equally applies here, such that § 6621(d) which only authorizes relief based on the prospective application of interest-netting does not waive sovereign immunity for claims based on retroactive application of interest-netting. Only the special rule provides the requisite waiver. Similarly, contrary to Exxon's argument (Ans. Br. 37), the Eighth Circuit's rejection of an interest-netting claim before the special rule was enacted without mentioning "jurisdiction" does not constitute a holding that such a claim did not require a waiver of sovereign immunity. *See Northern States Power Co. v. United States*, 73 F.3d 764 (8th Cir. 1996).

by requiring that monetary claims against the Treasury are permissible only if clearly and expressly authorized by Congress in a statute. *See, e.g.*, *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986) (applying sovereign immunity canon to bar interest claim: "[i]n the absence of express congressional consent to the award of interest *separate from a general waiver of immunity to suit*, the United States is immune from an interest award") (emphasis added); *United States v. Idaho, ex rel, Director, Idaho Dep't of Nat. Resources*, 508 U.S. 1, 8-9 (1993) (applying sovereign immunity canon where there was no "specific waiver of sovereign immunity" as to fees and costs). Here, the special rule is a conditional waiver of sovereign immunity, because it permits, subject to certain conditions, monetary claims against the United States that would be barred absent the applicability of the special rule.[4] Indeed, Exxon makes no claim that it is entitled to the interest it seeks even if it is determined that the special rule is inapplicable. These conditions

[4] Exxon complains (Ans. Br. 9 n.2) that the Commissioner asserted that it had requested "a refund for previously paid underpayment interest" when it believes it is seeking "additional overpayment interest." As Exxon acknowledges (*id.*), this "discrepancy" is inconsequential, as the monetary payment from the Treasury remains the same regardless of the label given to it by the parties. (*See also id.* 17-18.)

apply solely to monetary claims based on retroactive application of interest-netting pursuant to the special rule, and not to claims seeking only prospective application of interest-netting pursuant to § 6621(d).[5]

Thus, Exxon is incorrect to assert (Ans. Br. 48) that this case does not involve a waiver of sovereign immunity but "involves the construction of the special rule, which helps determine the *amount* of interest that is owed in a particular case." Rather, this case involves a statute which authorizes certain taxpayers to make claims for monetary payments based on the retroactive application of interest-netting principles. Neither *Doolin v. United States*, 918 F.2d 15 (2d Cir. 1990), nor *J.F. Shea Co. v. United States*, 754 F.2d 338, 340 (Fed. Cir. 1985),

[5] The fact that the statutory conditions do not apply to prospective relief explains the purported discrepancy that Exxon purports to have found in the regulatory treatment of prospective and retroactive claims for interest-netting. (Ans. Br. 18.) The Commissioner's exercise of his authority in Rev. Proc. 99-43, §§ 1.02(2), 4.03(2), 1999-2 C.B. 579, 579, 580-81, to alter the deadline for filing claims subject to the special rule which are not final on December 31, 1999, is not in any way a concession that the special rule is not a waiver of sovereign immunity. (*See* Ans. Br. 46-47.) As §§ 1.01 and 1.02 of the Rev. Proc. 99-43, explain, the revenue procedure in question was issued after notice and comment to discuss "how to comply with" the special rule where it was not possible for a taxpayer to file a request for retroactive interest-netting on December 31, 1999. Using its authority to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code, 26 U.S.C. § 7805(a), the IRS created the procedure cited by Exxon.

which both concluded that the plaintiff in question was entitled to the interest claimed under the plain language of the relevant statutes, reject the application of the sovereign immunity canon to an ambiguous statute which conditionally authorizes certain interest claims. In short, as the Federal Circuit has held, the special rule is a conditional waiver of sovereign immunity which should be strictly construed. *Fannie Mae I*, 379 F.3d at 1310-11; *Fannie Mae II*, 469 F.3d at 972-73.

2. The sovereign immunity canon properly applies here because the special rule is ambiguous

Exxon spends much of its brief (Ans. Br. 14-29) arguing that its reading of the special rule is preferable to the Government's reading. As explained below, the Government does not agree with Exxon's argument. In any event, Exxon does not challenge the determination of the Federal Circuit in *Fannie Mae I*, 379 F.3d at 1307, and the Tax Court below (A232), that the special rule is ambiguous. Rather, Exxon (Ans. Br. 16, 20) admits, as it did below (Doc. 89-531 at 16-17, 21; Doc. 90-484 at 16-17, 21), that the special rule is "awkward" and "convoluted." It is this very "awkward," "convoluted" phrasing that creates the ambiguity and properly compelled the Federal Circuit in *Fannie Mae I* and *II* to rule

for the Government on the grounds that waivers of sovereign immunity must be strictly construed in favor of the Government.

Exxon's resort to legislative history (Ans. Br. 23-29) to try to resolve the textual ambiguity fails. Indeed, a waiver of sovereign immunity must be clearly and unambiguously set forth in *statutory text*—legislative history cannot provide the clear statement needed to establish the waiver. *See Nordic Village*, 503 U.S. at 37 ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."). Thus, even clear legislative history could not alter the conclusion that this ambiguous waiver of sovereign immunity should be strictly construed. In any event, the legislative history is, at best, ambiguous, and to the extent that it leans in either direction, it favors the Commissioner's reading.

Specifically, Exxon cites three pieces of legislative history in support of its reading, two of which are ambiguous, and one of which plainly supports the Government's reading. First, Exxon cites (Ans. Br. 23-24) H.R. Conf. Rep. No. 105-599, at 257 (1998), *reprinted in* 1998-3 C.B. 747, 1011, which states that the net interest rate of zero applies

retroactively if: "(1) the statute of limitations has not expired with respect to either the underpayment or overpayment. . . ." This snippet shares the same ambiguity as the statutory text and reasonably could be read broadly or narrowly.[6] Second, Exxon relies (Ans. Br. 16, 23) on a statement from the Senate floor that Section 6621(d) was intended to "apply the interest netting provision to all Federal taxes and to open taxable periods occurring before the date of the enactment of this Act." *See* 144 Cong. Rec. S4518 (daily ed. May 7, 1998). However, nothing in this language establishes that the special rule would allow retroactive netting when a relevant limitations period is not open. If anything, the plural reference to "open taxable periods" supports the Commissioner's reading of the special rule: that interest-netting applies retroactively only where both relevant taxable periods are open.

The third piece of legislative history cited by Exxon (Ans. Br. 25-29) is the Staff of Joint Committee on Taxation, 105th Congress, General

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[6] Exxon illustrates the weakness of its argument in restating (inaccurately) the clause: "the Conference Report's prescription that interest netting should be available "if . . . the statute of limitations has not expired with respect to . . . the . . . overpayment." (Ans. Br. 24.) The deletions made by Exxon are necessary to remove the ambiguity created by the clause's "either/or" construction.

Explanation of Tax Legislation Enacted in 1998 ("Blue Book"), at 74 (Jt. Comm. Print Nov. 24, 1998). The Blue Book restates the statute of limitations restriction in the same form used in the Conference Report, and then goes on to explain that, under the special rule, "[a] statute of limitations must not have expired . . . with respect to *both* the underpayment and overpayment." *Id.* at 74 (emphasis added). The IRS long ago adopted the same interpretation of the special rule as in the Blue Book. *See* Rev. Proc. 99-43, § 4.01, 1999-2 C.B. 579. The Federal Circuit concluded that the Blue Book, which it termed "the only relevant contemporaneous interpretation available," supports the narrower reading of the special rule, although it also declined to treat the Blue Book as determinative. *Fannie Mae I*, 379 F.3d at 1309.[7] Exxon seeks to avoid that conclusion by arguing (Ans. Br. 28) that the clarity of the Blue Book's explanation somehow "highlights how unnatural the

[7] The Commissioner is not arguing that the Blue Book controls here, but that it supports its narrower reading of the special rule. Although courts have been reluctant to accord the Blue Book the same persuasive value as committee reports, courts routinely look to the Blue Book as a means of interpreting tax laws. *See, e.g.*, *National Life Ins. Co. & Subs. v. Commissioner*, 103 F.3d 5, 9 (2d Cir. 1996) (citing Blue Book as persuasive authority in accepting Commissioner's interpretation of the Internal Revenue Code); *Alfaro v. Commissioner*, 349 F.3d 225, 230 (5th Cir. 2003) (same).

government's reading of the special rule is." But all that means is that there is a *less ambiguous* way of phrasing the rule to more clearly express the narrow reading of the special rule urged by the Commissioner. There are likewise *less ambiguous* ways of phrasing the rule to express the broad reading sought by Exxon, *e.g.*, "Subject to a statute-of-limitations remaining open as to at least one of the overlapping periods." (*See, e.g.*, Ans. Br. 20.) In short, Exxon's attempt to twist the Blue Book passage to support its reading of the special rule merely highlights the fact that the special rule is ambiguous and, thus, subject to the sovereign immunity canon.

Indeed, Exxon's analysis does not alter the conclusion that, in fact, the Commissioner's reading of the special rule is reasonable and is the only reading that finds contemporaneous support in the relevant legislative history and regulatory materials. As the Federal Circuit, *Fannie Mae I*, 379 F.3d at 1307, and the Tax Court, (A232), both concluded, the special rule can reasonably be read as stating that a monetary claim based on retroactive interest-netting is only available if "any" (meaning each and every) applicable statute of limitations remains open and "not. . . expired." And, as the Federal Circuit acknowledged,

Fannie Mae I, 379 F.3d at 1309, the only contemporaneous legislative history which addresses how the special rule should be interpreted—*i.e.*, the Blue Book—supports the Commissioner's reading. Finally, although the Federal Circuit did not defer the IRS's regulatory interpretation, *id.* at 1308-09, the fact remains that Rev. Proc. 99-43, § 4.01, 1999-2 C.B. 579, which was issued by the IRS as the agency charged with administering the Internal Revenue Code, likewise directly supports the Commissioner's reading herein of the special rule. Thus, even if the sovereign immunity canon were not applicable, the Commissioner's interpretation of the special rule not only is reasonable, but is preferable to Exxon's given that the Commissioner's position finds direct support in the Blue Book and reflects the IRS's official, and long-standing interpretation of the statutory language at issue. *See* Rev. Proc. 99-43.

B. The canon that remedial statutes are liberally construed does not trump the requirement that waivers of sovereign immunity, such as the special rule, are strictly construed

Given that the statutory text is ambiguous, and the legislative history provides no support for Exxon's interpretation, Exxon, like the

Tax Court, is left to rely on the canon that a remedial statute should be liberally construed to effect its remedial purpose.[8] (Ans. Br. 22-23, 53-56.) The statutory conditions specifically set forth in the special rule to limit the availability of retroactive interest-netting claims indicate that Exxon (Ans. Br. 54-56) and the Tax Court (A234) have overstated Congress's remedial purpose as to retroactive claims. But, even if Exxon had properly divined the remedial purpose here, the sovereign immunity canon trumps the canon of liberal construction relied on by Exxon and the Tax Court.

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[8] Exxon argues that the Tax Court relied on the text and legislative history, in addition to the statute's purpose, based on an isolated sentence from the Tax Court opinion. (Ans. Br. 14-15 (citing A237).) The Tax Court, however, expressly concluded that the text was ambiguous (A232), and did not rely on the legislative history for anything other than support of its findings as to the statute's remedial purpose (A233-37). Nor could the Tax Court reasonably have relied on the text or legislative history to conclude that the special rule must be interpreted broadly, as we have explained. (*See*, *supra*, 10-15.) Exxon also asserts (Ans. Br. 54) that, because the Tax Court did not expressly use the word "liberal" in its opinion, that somehow means that the Tax Court did not apply a canon of liberal construction. But the canon for interpreting remedial statutes is one of liberal construction, as the cases cited by Exxon indicate, and the Tax Court relied on that canon to rule for Exxon. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557, 562 (1987). The result here is that the Tax Court used that canon to adopt the broader, more "liberal" interpretation of the special rule proposed by Exxon (A234), rather than the strict construction that should have been applied to it, as a waiver of sovereign immunity.

As we explain in our opening brief (36-37), any other result would eviscerate the sovereign immunity canon, because such waivers are always remedial. *See Premachandra v. Mitts*, 753 F.2d 635, 641 n.8 (8th Cir. 1985). Exxon has no real answer to this point, but instead, argues (Ans. Br. 13-14, 49) that the canon of strict construction is only a "guide" of statutory interpretation. But none of the cases cited by Exxon (Ans. Br. 22-23, 50-56) reject the rule that, where a statute arguably waiving sovereign immunity remains ambiguous after applying the tools of statutory interpretation, the statute must be strictly construed in favor of the Government. *See, e.g.*, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589-90 (2008) (concluding that "[t]here is no need for us to resort to the sovereign immunity canon because there is no ambiguity left for us to construe"); *United States v. Williams*, 514 U.S. 527, 531-32 (1995) (acknowledging the sovereign immunity canon but concluding that the petitioner's claim "falls squarely within" the relevant language of the waiver of sovereign immunity); *United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (interpreting substantive statute and not addressing sovereign immunity); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (same); *Atchison, Topeka &*

Santa Fe Ry. v. Buell, 480 U.S. 557, 561-62 (1987) (applying liberal construction to Federal Employers' Liability Act, which reflected the Court's traditional treatment of the act as "a broad remedial statute"; not addressing sovereign immunity); *Block*, 461 U.S. at 287 (applying strict construction rule to condition attached to sovereign immunity waiver); *Peyton v. Rowe*, 391 U.S. 54, 64 (1968) (applying liberal construction to habeas corpus statute; not addressing sovereign immunity); *Williams v. Bowen*, 859 F.2d 255, 260 (2d Cir. 1988) (applying liberal construction to Social Security Act; not addressing sovereign immunity). Moreover, none of the cases support the conclusion that the remedial statute canon should be applied to a waiver of sovereign immunity, or to the terms and conditions of a waiver. Indeed, the Court in *Block*, 461 U.S. at 287-90, refused to permit another "well-known canon of statutory construction," designed to protect the states, to trump the sovereign immunity canon, and in *United States v. Idaho, ex rel, Director, Idaho Department of Natural Resources*, 508 U.S. at 8, concluded that the sovereign immunity canon barred application of a claim of fees and costs against the United States because the statute relied upon by the claimant was ambiguous.

C. The cases cited by Exxon do not undermine the conclusion that the special rule should be strictly construed as a condition of a waiver of sovereign immunity

As the Government explained in its opening brief (36-40), the authorities cited by the Tax Court in support of its liberal reading of the special rule are inapposite.

Exxon, like the Tax Court, cites (Ans. Br. 51) cases involving the Federal Tort Claims Act ("FTCA") and, most particularly, exceptions to that Act. *See, e.g.*, *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). But exceptions to the waiver of sovereign immunity found in the FTCA are narrowly construed, but that is an exception to the general rule of strict construction of sovereign immunity waivers. (*See* Br. 39-40 & cases cited therein.) Similarly, Exxon cites cases (Ans. Br. 50-51) where the federal government entity is subject to a "sue or be sued" clause or is involved in a business contract. *Franchise Tax Bd. v. USPS*, 467 U.S. 512, 521 (1984) ("sue or be sued" clause); *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (business contract). As we have explained, such cases also present exceptions to the sovereign immunity canon. (*See* Br. 39-40 & cases cited therein.) But

the exceptions 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).

Exxon, like the Tax Court, also cites (Ans. Br. 13, 39-43) a number of cases involving substantive provisions that are separate from the statutory provision creating the waiver of sovereign immunity. *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, 216-19 (1983). As we explained in our opening brief (37-38), these cases are inapplicable to the situation where, as here, the provision in question is the actual waiver itself. Here, there was no statutory authorization for a monetary claim against the United States based on the retroactive application of interest-netting prior to the special rule. The special rule authorized such a monetary claim—but imposed conditions limiting the waiver of sovereign immunity. None of the cases cited by Exxon alter the conclusion that such a provision should be strictly construed.

This case, moreover, involves a waiver of sovereign immunity in the context of taxes, conditioned on satisfying statute-of-limitations requirements. As such, rule of strict construction for waivers of sovereign immunity is plainly applicable. *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 8-9 (2008); *Dalm*, 494 U.S. at 601, 608; *United States v. Brockamp*, 519 U.S. 347, 352 (1997). Exxon seeks to avoid the principles set forth in this trio of cases (Ans. Br. 13, 43-45 & n.8), but its argument in this regard is not persuasive. In particular, Exxon seeks to avoid the impact of *Brockamp* by stating (Ans. Br. 45 n.8) that it did not mention sovereign immunity. But *Brockamp* specifically addressed the question whether equitable tolling applies to a statute-of-limitations applicable to a claim against the Government under the Internal Revenue Code, and specifically cited *Dalm*, 494 U.S. at 608 (a sovereign immunity case) and distinguished *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), which allowed equitable tolling of non-tax claims against the Government over a claim of sovereign immunity. Indeed, a comparison of *Brockamp*, 519 U.S. at 350-54, against the other cases cited in footnote 8 of Exxon's responsive brief (at 45) illustrates that statute-of-limitations provisions in the

context of taxation *are* construed more strictly than similar provisions are interpreted in the context of other waivers of sovereign immunity. *See Scarborough v. Principi*, 541 U.S. 401, 421 (2004); *Franconia Assocs.*, 536 U.S. at 145. Exxon also isolates (Ans. Br. 44) a single sentence from this Court's decision in *United States v. Forma*, 42 F.3d 759, 766 (2d Cir. 1994), for the proposition that "the standard jurisdictional principles typically operate in the same fashion in tax as in all other fields." The Court in *Forma*, 42 F.3d at 766, however, made this statement in the context of *rejecting* a request for a relaxed reading of jurisdictional requirements in the context of taxation, and further noted that "many courts have . . . said that, in tax, jurisdictional rules 'must be strictly construed, requiring compliance with even purely formal or technical conditions imposed.'" (Citation omitted.)

CONCLUSION

For the reasons stated above and in the Government's opening brief, 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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February 8, 2012

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/s/ Jennifer M. Rubin
JENNIFER M. RUBIN
Attorney

February 8, 2012

CERTIFICATE OF SERVICE

It is hereby certified that, on this 8th day of February, 2012, (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.

/s/ Jennifer M. Rubin
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