Nos. 11-2814 & 11-2817

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Petitioners-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellant.

On Appeal from the United States Tax Court

BRIEF FOR PETITIONERS-APPELLEES EXXON MOBIL CORPORATION AND AFFILIATED COMPANIES

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January 25, 2012

CORPORATE DISCLOSURE STATEMENT

Exxon Mobil Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Affiliates of Exxon Mobil Corporation are interested parties. Most of these affiliates are not publicly traded. The following affiliates have publicly traded equity and/or debt:

Castle Peak Power Company Limited

Esso Malaysia Berhad

Esso Societe Anonyme Francaise

Esso (Thailand) Public Company Limited

Exxon Capital Corporation

Exxon Capital Ventures Inc.

Exxon Mobil Corporation

ExxonMobil Oil Corporation

ExxonMobil Pipeline Company

Imperial Oil Limited

Mobil Corporation

Mobil Oil Ghana Limited

Mobil Oil Nigeria Public Limited Company

Mobil Oil Refining Corporation

Mobil Producing Nigeria Ltd.

SeaRiver Maritime Financial Holdings, Inc.

Societe Francaise ExxonMobil Chemical SCA

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STATEMENT OF THE ISSUE

Internal Revenue Code section 6621(d) provides for an interest rate adjustment to yield a zero net interest rate for overlapping tax underpayments and overpayments. An uncodified "special rule" makes section 6621(d) applicable in certain circumstances to such periods of overlapping indebtedness occurring before the July 22, 1998, effective date of the statute.

The question presented is whether the special rule makes section 6621(d) applicable when an applicable statute of limitations was open on the effective date for one, but not both, of the legs of the period of overlapping overpayment and underpayment obligations.

STATEMENT OF FACTS

1. Overview. This case concerns the applicability of a statute enacted by Congress to correct the inequitable IRS practice of charging net interest for periods during which taxpayers did not owe any net tax. Since 1987, the Internal Revenue Code ("the Code" or "I.R.C.") has provided for differential interest rates in connection with tax underpayments and overpayments. When the government collects interest from corporate taxpayers who underpay their taxes, it charges a higher interest rate than it uses when it pays interest to corporate taxpayers who overpay their taxes. Until Congress acted to stop the practice in 1998, the IRS effectively collected this interest rate differential in many situations where no net

tax was due — that is, where the taxpayer and the government had overlapping mutual indebtedness.

After unsuccessfully urging the IRS for many years to take administrative action to halt this unfair practice, Congress in 1998 expressly prohibited the practice by statute. Code Section 6621(d) (26 U.S.C.) requires "interest netting" — that is, use of a zero net interest rate for overlapping periods of tax underpayment and overpayment. Through the operation of a "special rule," Congress provided that the interest netting requirement not only would operate prospectively, but also would apply to prior periods under certain circumstances. Specifically, the special rule makes the interest rate rules of section 6621(d) applicable to prior periods so long as certain administrative filing requirements are met and statute of limitations constraints did not prevent enforcement as of the effective date of the statute.

The issue here is whether Appellees' situation falls within the scope of that "special rule." The Tax Court held that it does, consistent with Congress's intent to make interest netting widely available to correct the unfairness of the IRS's prior policy. The government contends, however, that Appellees are not entitled to interest netting because the statute of limitations had expired on the relevant date with respect to the tax years that constitute one "leg" of the period of overlapping indebtedness. According to the government, Congress determined that interest

netting should not be available for such taxpayers, even though the statute of limitations unquestionably had not expired with respect to the years for which interest rate adjustment relief is being sought – namely, the years constituting the overpayment leg.

2. Statutory Background. Sections 6601(a) and 6611(a) of the Code respectively establish the obligations for the payment of interest by taxpayers on tax underpayments and by the government when it refunds or credits tax overpayments. The applicable interest rates, which have changed several times over the periods involved in this case, are set forth in Code section 6621. Currently, large corporate taxpayers like Appellees pay interest on underpayments exceeding $100,000 at a rate 4.5% higher than the government pays on refunds of overpayments. *Compare* I.R.C. § 6621(a)(1)(B) with § 6621(c)(1). *See also* 28 U.S.C. § 2411 (court judgment for tax overpayment must include interest at the overpayment rate set forth in section 6621).

When Congress first created this differential interest regime in 1986, it recognized the need for a global interest netting procedure that would prevent taxpayers from having to pay net interest when no net tax was due. Congress also recognized, however, that the IRS needed "substantial lead time to develop the data processing capability to net such underpayments and overpayments in applying differential interest rates." S. Rep. No. 99-313, at 185 (1986).

Accordingly, Congress specified a "transition period" after which "the IRS should have implemented the most comprehensive netting procedures that are consistent with sound administrative practice." H.R. Rep. No. 99-841, pt. 2, at II-785 (1986) (Conf. Rep.); *see also* S. Rep. No. 99-313, at 185 (1986); Pub. L. No. 99-514, § 1511(b), 100 Stat. 2085, 2744 (1986).

The IRS, however, did not comply with Congress's directive to implement comprehensive netting procedures. When Congress made adjustments to the interest provisions in both 1990 and 1994, it again urged the IRS to implement such procedures, but to no avail. *See* H.R. Rep. No. 103-826, pt. 1, at 178 (1994); H.R. Rep. No. 101-964, at 1101 (1990) (Conf. Rep.). Eventually, in July 1996 Congress enacted legislation directing the Secretary of the Treasury to "conduct a study of the manner in which the Internal Revenue Service has implemented the netting of interest on overpayments and underpayments and of the policy and administrative implications of global netting" and to submit that study to Congress within six months. Pub. L. No. 104-168, § 1208, 110 Stat. 1452, 1473 (1996). *See generally* A214-15.

In response, the Treasury Department submitted a report to Congress in April 1997 in which it stated that it lacked statutory authority to implement global interest netting procedures. *See* Dep't of the Treasury, Office of Tax Policy, *Report to the Congress on Netting of Interest on Tax Overpayments and*

Underpayments (Apr. 1997) (Treasury Report), http://www.treasury.gov/resource-center/tax-policy/Documents/t0neting.pdf. The Report recommended that any new legislation enacted by Congress to supply this authority should include "certain limitations" to aid administrative feasibility. *Id*. at 40. The recommended restrictions included limiting netting to interest on income taxes and making it applicable only to tax years not barred by the statute of limitations. *Id*. at 41-42. Congress thereafter enacted Code section 6621(d) in July 1998 to require global interest netting, but it "rejected most of the [Treasury Report's] recommendations" for limitations on that netting relief. A216.

Section 6621(d) provides as follows:

> 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.

Pub. L. No. 105-206, § 3301(a), 112 Stat. 685, 741 (1998) (reprinted at SPA6). In other words, when there are overlapping tax obligations running in both directions for a given period, the IRS is forbidden from collecting an interest rate differential on the overlapping amount; the net interest rate on that amount must be zero. Significantly, the zero net interest rate can be implemented either by increasing the interest rate applied to the taxpayer's overpayment or by decreasing the interest rate applied to the taxpayer's underpayment. *See* Rev. Proc. 99-43, § 4.04, 1999-2

C.B. 579, 581; H.R. Rep. No. 105-364, pt. 1, at 64 & n.41 (1997). That approach accords with the Treasury Report's recommendation for using the "interest equalization" method to implement global interest netting. Treasury Report at 31-32, 41; *see id*. at 32 ("a taxpayer would simply be charged less underpayment interest (or paid more overpayment interest) to effectively equalize the interest during any period of mutual indebtedness").

The bill passed by the House provided for the interest netting requirement to become applicable going forward from the effective date of the statute. *See* H.R. 2676, 105th Cong., § 331 (Nov. 5, 1997). The Senate, however, determined that the House bill did not afford sufficient relief to taxpayers. Among other liberalizing changes that "significantly broadened the availability of interest netting beyond what was recommended by the Treasury Report" (A217), the Senate amended the bill to apply interest netting to past periods, consistent with ordinary statute of limitations principles. Congress enacted the more generous Senate version. It mandates interest netting relief for past periods in a "special rule," which provides as follows:

> 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 [July 22, 1998] 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, as added by subsection (a), to such periods.

Pub. L. No. 105-206, § 3301(c)(2), 112 Stat. 685, 741 (1998) (as amended by Pub. L. No. 105-277, § 4002(d), 112 Stat. 2681, 2681-906 to -907 (1998)) (reprinted at SPA1-2). The dispute in this case centers on the meaning of the opening "subject to" clause in the special rule.[1]

3. Factual Background. During the period between January 1, 1987, and October 27, 1989, Appellees simultaneously had overpaid their income tax liabilities for the 1979-80 taxable years and had underpaid their income tax liabilities for the 1975-78 taxable years. A88 ¶ 8. Those overlapping overpayments and underpayments arose as follows.

The IRS audited Appellees' consolidated federal income returns for the 1975-80 taxable years and proposed adjustments for each taxable year. A89 ¶¶ 10-11. For the 1975-78 underpayment years, Appellees paid the assessed deficiencies, including the underpayment interest due on those deficiencies. A89-92 ¶¶ 13-16,

[1] The final version of the special rule resulted from a "technical correction" in Pub. L. No. 105-277, which restored language that was in the bill that emerged from conference but apparently was dropped inadvertently from the enrolled version of the bill. The enrolled version of the bill did not include the opening "subject to" clause, but instead simply provided that "[t]he amendments made by this section shall apply . . . ." 112 Stat. 685, 741. *See* A218, 236-37.

19, 23. Thereafter, Appellees requested refunds of some of those deficiencies and obtained relief either from the IRS, or after filing refund suits. A93-94 ¶¶ 29-33, A97-100 ¶¶ 49-65. Those refunds reduced, but did not eliminate, underpayments that had previously been assessed and paid by petitioners for the 1975-78 taxable years. A94 ¶ 34, A98-100 ¶¶ 54, 60, 66.

For the 1979 and 1980 tax years, Appellees filed petitions in the Tax Court, arguing not only that the deficiencies asserted by the IRS were erroneous but also that Appellees in fact had overpaid their taxes for those years. The Tax Court issued a number of opinions addressing the substantive issues raised in these cases, and the parties later settled the remaining issues. A95 ¶¶ 40-41. The final decisions reflected a determination that Appellees had overpaid income tax for the taxable years 1979 and 1980. It was not until this point that the overlapping mutual indebtedness could be confirmed. The IRS refunded or credited income tax and underpayment interest in accordance with the court's decisions, along with overpayment interest on the total overpayment amounts. A96 ¶¶ 44-47. The IRS's calculations of overpayment interest pursuant to those decisions did not take into account the interest netting requirement of section 6621(d).

As noted above, the special rule makes the interest netting statute applicable to periods beginning before July 22, 1998, subject to any applicable statute of limitations not having expired by that date. There is no dispute that the applicable

limitations period for tax overpayments under the special rule had not expired by that date for Appellees' taxable years 1979 and 1980. A102 ¶ 73. Accordingly, Appellees concluded that section 6621(d) applied to their periods of overlapping indebtedness, and they timely filed with the IRS Form 843 requesting interest netting. A100 ¶ 67; A211, A219. The IRS took no action on that request.

4. The Tax Court's Consideration of the Interest Issue. On February 28, 2005, petitioners timely filed a motion in the Tax Court under I.R.C. § 7481(c)(1) requesting additional interest necessary to implement the zero net interest rate required by section 6621(d) for the January 1, 1987, to October 27, 1989, period of mutual indebtedness. A87-88 ¶¶ 6-7.[2] The government opposed the motion, arguing that the special rule is inapplicable because the statutes of limitations for the underpayment years 1975-78 were not open on July 22, 1998. On cross-motions for summary judgment, the Tax Court ruled for Appellees, holding that the special rule applies so long as the statute of limitations was open on the relevant date for at least one leg of the period of overlapping indebtedness.

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[2] Appellees' motion sought *additional overpayment interest* on the overpayments that had been refunded for the 1979 and 1980 tax years. The government erroneously describes the motion as seeking "a refund of previously paid underpayment interest." Gov't Br. at 18; *see also id*. at 24. The issue before this Court is not affected by this discrepancy; interest netting can be implemented either by seeking additional overpayment interest for the overpayment years or by seeking a refund of overpaid underpayment interest for the underpayment years. *See supra*, at 5-6.

The government relied primarily on the Federal Circuit's decision in *Federal National Mortgage Ass'n v. United States*, 379 F.3d 1303 (Fed. Cir. 2004) (*Fannie Mae I*), which had ruled that the special rule must be construed narrowly in favor of the government because it is a waiver of sovereign immunity. The Tax Court rejected that approach for several reasons.

The court first held that "the special rule is not a waiver of sovereign immunity but an interest rate provision," and therefore it is not "governed by the strict construction principle." A236. Moreover, the court explained, even if the special rule were a waiver of sovereign immunity, the strict construction principle relied upon by the government would not necessitate a ruling in its favor because that principle "is actually 'no more than an aid in the task of determining congressional intent.'" A235 (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 293 (1983) (O'Connor, J., dissenting)). In this statute, the court found, Congress intended "to achieve the remedial purpose" of providing "taxpayer relief from disparate interest rates" because it had "recognized that taxpayers should not be paying interest to the Government if no net tax was due." A234, A210. The Tax Court concluded: "After considering the statutory text, legislative history and relevant policies surrounding section 6621(d), and the special rule, we hold that interest netting should be available even if only one applicable limitations period was open on July 22, 1998." A237.

SUMMARY OF ARGUMENT

A. The Tax Court's decision accords with the text and evident purpose of the special rule. In order to correct the injustice of the IRS collecting net interest when no net tax was due, Congress sought to make interest netting relief available to the maximum extent feasible. The special rule furthered this goal by extending the availability of interest netting to past periods, subject to existing statute of limitations constraints. The government's proffered interpretation thwarts this goal, however, by imposing a pointless restriction that would deny interest netting relief to a class of taxpayers who could have enforced their interest netting rights on the effective date without violating existing statute of limitations constraints.

The natural reading of the text aligns with the congressional purpose to make interest netting broadly available. Although the language is convoluted in using the phrase "not having expired" to describe a statute of limitations remaining open, the special rule is logically read as providing that interest netting is available when either the underpayment or overpayment leg of the period of overlapping indebtedness was open on the relevant date. Conversely, the government's interpretation does not fit the text because it appears to treat the relevant language as describing a *disqualifying* condition under which interest netting would be unavailable – even though the other stated conditions clearly are qualifying conditions.

B. The legislative history further supports the Tax Court's interpretation. The Conference Report provides a clearer description that states two alternative scenarios under which the interest netting statute is applicable to a past period, and this case falls within one of those because the statute of limitations had not expired on the relevant date with respect to the overpayment. The "Blue Book" is also supportive because it highlights that a drafter would almost surely use the word "both" if intending to achieve the result the government seeks; using the "either/or" construction instead reflects an intent to have section 6621(d) apply if a statute of limitations was open for either leg of the period of overlapping indebtedness.

C. 1. The principle that waivers of sovereign immunity must be strictly construed is inapplicable here. A waiver of sovereign immunity is a consent by the government to be sued, but the special rule has nothing to say about lawsuits and does not create jurisdiction in any court. It addresses the applicability of a substantive rule of tax law that helps determine what overpayment interest rate should have been applied to the tax refund received by Appellees. This suit for additional overpayment interest contends that, because of section 6621(d) and the special rule, the IRS used a rate that was too low. The parties' dispute over the meaning of the special rule goes to the *merits* of that contention, not to Appellees' right to sue. The government's consent to such a suit is found in waivers of

sovereign immunity and jurisdictional provisions contained in other statutes – specifically, I.R.C. § 6512(b)(1) (liability to refund tax overpayments), I.R.C. § 6611(a) (obligation to pay interest on tax overpayments), and I.R.C. § 7481(c) (Tax Court jurisdiction to consider claims for additional interest) – not in the special rule.

The government's argument confuses substantive provisions with waivers of sovereign immunity and, if accepted, would mistakenly subject many substantive provisions to a rule of strict construction. That position flies directly in the face of Supreme Court precedent. *See, e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003).

2. The government's other theories of strict construction are without merit. The special rule is not a statute of limitations and, in any event, there is no distinct principle calling for strictly construing tax statutes of limitations in favor of the government. Nor is there any rule requiring strict construction of a statute that determines how much interest is owed by the government.

3. The government errs in arguing that the canon of strict construction, even if applicable, would require this Court to accept the government's interpretation. That canon of construction is simply a guide to congressional intent that must be

considered along with other indicia so that a court can best implement the waiver of sovereign immunity that Congress intended.

ARGUMENT

THE SPECIAL RULE APPLIES § 6621(d) TO PRE-1998 PERIODS SO LONG AS AN APPLICABLE STATUTE OF LIMITATIONS WAS OPEN ON THE RELEVANT DATE FOR *EITHER* THE OVERPAYMENT OR UNDERPAYMENT LEGS OF THE PERIOD OF OVERLAPPING OBLIGATIONS

The special rule provides that interest netting applies to pre-1998 periods consistent with established statute of limitations constraints – that is, "[s]ubject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment." The Tax Court correctly interpreted this language as applying interest netting rules when an applicable statute of limitations was open for at least one of the legs of the period of overlapping indebtedness, which would allow a taxpayer to enforce its interest netting rights by filing a timely suit under existing procedures – either for additional overpayment interest (if the overpayment leg was open) or for a refund of overpaid underpayment interest (if the underpayment leg was open). The Tax Court based its decision on "the statutory text, legislative history and relevant policies surrounding section 6621(d), and the special rule." A237.

The government disagrees, arguing that the special rule requires that a statute of limitations must have been open on July 22, 1998, for *both* the

underpayment leg and the overpayment leg in order for interest netting rules to apply to a pre-1998 period of mutual indebtedness. The government, however, does not contest the Tax Court's analysis of "the statutory text, legislative history and relevant policies" (A237) – that is, the bedrock sources of divining congressional intent. Instead, the government argues that these guides to statutory interpretation are rendered irrelevant by a singular principle of statutory construction – namely, that waivers of sovereign immunity are strictly construed in favor of the government. This argument is misconceived, as the principle of statutory construction invoked by the government has no relevance to this case.

We begin by examining the statutory text and purpose and then proceed to respond to the government's misguided attempt to defeat that purpose by invoking principles of sovereign immunity.

A. The Text and Evident Purpose of the Special Rule to Make Interest Netting Widely Available for Pre-1998 Periods Indicate That Congress Authorized Interest Netting Claims in Situations Where an Applicable Statute of Limitations Remained Open for Only One Leg of the Period of Overlap

The special rule authorizes taxpayers to invoke § 6621(d), and thus obtain the benefit of a zero net interest rate, for periods of overlap prior to the statute's effective date — so long as the condition set forth in the opening clause of the rule is satisfied. That condition is stated as follows: "Subject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax

overpayment." Although the phrasing is awkward, the special rule is most naturally read as making § 6621(d) applicable to periods of overlapping underpayments and overpayments for which an applicable statute of limitations was open on the relevant date for *either* leg of the overlap. And that reading is strongly reinforced when the context and evident purpose of the special rule is taken into account. *See generally King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context").

The context in which Congress enacted § 6621(d) and the special rule was one in which Congress sought to "remedy a perceived injustice in the tax laws" that it had repeatedly and unsuccessfully urged the IRS to correct for many years. *Fed. Nat'l Mortg. Ass'n v. United States*, 56 Fed. Cl. 228, 238 (2003), *rev'd on other grounds*, 379 F.3d 1303 (Fed. Cir. 2004); *see* A210-11. Congress sought to provide broad relief from this injustice, but it did not want to override existing procedural constraints on the ability to obtain relief. Specifically, Congress did not want to deviate from usual statute of limitations constraints by allowing claims to be brought for tax years that were already closed. *See* 144 Cong. Rec. S4518 (daily ed. May 7, 1998) (stated purpose of Senate amendment adding the special rule was to apply interest netting "to open taxable periods occurring before the date of the enactment of this Act"). Congress accommodated these two competing

considerations by authorizing interest netting for past periods, "subject to any applicable statute of limitation not having expired."

There can be no doubt that applying the interest netting statute when one leg of the overlap period is closed does not violate ordinary statute of limitations principles. As the language of the special rule reflects, the existing mechanisms for resolving interest disputes enable requests for interest netting relief to be brought "with regard to either a tax underpayment or a tax overpayment." This is because, as the government acknowledges, the zero net interest rate can be implemented either by increasing the interest rate applied to the taxpayer's overpayment or by decreasing the interest rate applied to the taxpayer's underpayment. *See* Rev. Proc. 99-43, § 4.04, 1999-2 C.B. 579, 581; H.R. Rep. No. 105-364, pt. 1, at 64 & n.41 (1997). Hence, there is no need to adjust both the underpayment leg and the overpayment leg in order to produce the zero "net rate" of interest prescribed by section 6621(d).

For example, if a tax underpayment year is open, the taxpayer can argue that the underpayment interest rate should be reduced and seek interest netting relief by requesting or suing for a refund of excess underpayment interest that it paid when it satisfied the tax underpayment. *See* 28 U.S.C. § 1346(a)(1); I.R.C. §§ 6511, 6532, 7422. If a tax overpayment year is open, the taxpayer can argue for a higher overpayment interest rate and request or sue for additional interest owed by the

IRS on the refund of the tax overpayment. *See* 28 U.S.C. §§ 1491, 2401, 2501. If, as here, a tax year is docketed in the Tax Court, a taxpayer can seek interest netting relief by filing a timely motion under Code § 7481(c)(1) requesting either additional overpayment interest or a refund of excess underpayment interest, depending on which leg is before the court.

All of these possibilities create avenues for interest netting relief consistent with ordinary statute of limitations principles, and these avenues are available without regard to whether the statute of limitations has closed with respect to the other leg of the period of overlap. Indeed, the IRS's own Revenue Procedure explicitly recognizes that statute of limitations constraints on interest netting are generally satisfied when only one leg is open, stating that requests for administrative interest netting relief must be filed "on or before the date on which the last applicable period of limitation . . . closes." Rev. Proc. 2000-26, § 4.01, 2000-1 C.B. 1257, 1258. *See also id*. at § 4.03(2) (stating that interest netting relief will be implemented by allowing additional overpayment interest when the limitations period for the underpayment leg is "closed"); Rev. Proc. 99-43, § 4.04(2), 1999-2 C.B. 579, 581 (same); *Fed. Nat'l Mortg. Ass'n v. United States*, 56 Fed. Cl. at 239. In other words, the government concedes that interest netting generally is available when only one leg of the period of overlapping indebtedness is open; it argues for a more restrictive approach only for pre-1998 periods.

Thus, the Tax Court's interpretation of the special rule – as applying § 6621(d) when either the overpayment or underpayment legs of the overlap period are open on the relevant date – best implements the policy determination that Congress sought to embody in the special rule. It maximizes the availability of interest netting consistent with adherence to established statute of limitations constraints. *See* Treasury Report at 2 ("Congress has previously concluded that comprehensive interest netting is desirable to the maximum extent feasible.").

The natural reading of the text of the special rule aligns exactly with that policy determination. The statute sets forth a series of three qualifying conditions that must be met in order for interest netting to apply to past periods – namely, (1) satisfying the statute of limitations condition at issue here; (2) identifying the period and amount of overlapping indebtedness; and (3) filing an administrative request for interest netting relief not later than December 31, 1999. The opening clause in the first condition refers to "*either* a tax underpayment or a tax overpayment" (emphasis added). Thus, interest netting should apply if the qualifying condition is met with respect to "either" leg of the overlap period.

In addition, the use of the expansive word "any" in the special rule further emphasizes that Congress intended that the rule should operate broadly in conferring interest netting relief. *See generally United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 7 (2008) (by using the word "any," "Congress meant the

statute to have expansive reach"); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-22 (2008) (statutory use of the word "any" is "expansive" and "all-encompassing"). When "any" applicable statute of limitations is open on the relevant date, whether for the underpayment leg or the overpayment leg, the special rule authorizes interest netting.

To be sure, the opening clause uses an awkward double-negative type of construction in referring to a statute of limitations "not having expired." But that phrase is just a convoluted way of saying that a statute of limitations remains open. In other words, so long as the statute of limitations remains open for either leg of the period of overlapping indebtedness, the special rule entitles the taxpayer to invoke interest netting in connection with that open leg and thereby to eliminate the IRS's retention of the interest differential for a period when the taxpayer did not owe any net tax. Interpreting the special rule in this manner therefore both accords with the natural reading of the text and implements Congress's intent broadly to provide interest netting relief while adhering to established statute of limitations constraints.

Conversely, the government's interpretation of the special rule strains the text and does not further any apparent congressional purpose. The government apparently reads the opening clause of the special rule as setting forth a *disqualifying* condition – that is, as providing that section 6621(d) is *not* applicable

if the statute of limitations is closed for "either" leg of the overlap period. That is a tortuous reading of the statute, since there can be no doubt that the other two conditions that immediately follow in the special rule (filing a timely administrative claim and identifying the overlap periods) are qualifying conditions that must be met to make section 6621(d) apply.[3]

With respect to purpose, the fundamental principles of finality and repose that underlie the statute of limitations are not advanced by barring taxpayers from raising an interest netting claim for a year when an applicable limitations period remains open. The restriction on interest netting relief that the government urges thus goes far beyond the policy of preserving existing statute of limitations constraints and does not serve any other evident policy goal.

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[3] Moreover, as the Tax Court observed, the government's interpretation as a disqualifying condition, taken together with the use of the word "any," leads to an absurd result. Because there can be multiple statutes of limitations applicable to the same tax year, the government's suggested reading of the text would mean that interest netting could be barred even when there is no statute of limitations constraint upon a redetermination of interest for either leg of the overlap period, so long as some other applicable statute of limitations had expired for one of the years. *See* A237 (when "a taxpayer can file a timely suit for additional overpayment interest for a given tax year, such a year should be considered 'open' even if a suit to redetermine the underlying tax liability is time barred"). The IRS itself recognizes in its Revenue Procedure that Congress did not intend this result. *See* Rev. Proc. 99-43, § 4.02(2), 1999-2 C.B. 579, 580 (providing that an overpayment year is "open" for purposes of the special rule as long as the six-year statute of limitations for suits for additional interest is open, even though the statute of limitations for redetermining the underlying tax liability could be closed).

In 1998, Congress was acting specifically to *expand* the availability of interest netting beyond the limitations recommended in the Treasury Report and the original House bill, so that taxpayers with overlapping periods of indebtedness prior to 1998 could receive the same fair treatment as taxpayers with similar future periods of overlapping indebtedness. There is no reason to expect that at the same time Congress would have imposed a pointless restriction that would significantly curtail the availability of interest netting to the very group Congress was acting to include – a restriction that the government concedes would not apply to taxpayers going forward. If no statute of limitations related to the interest netting overlap years remained open, then relief logically should be barred because Congress did not intend to override statute of limitations rules, and there was no existing mechanism for obtaining relief on July 22, 1998, when the interest netting right was created. But if one applicable statute of limitations remained open on that date, there was such a mechanism, and allowing the interest netting claim for a prior period would not violate existing statute of limitations constraints. In that situation, Congress logically would have intended to make the relief available.

Thus, the common sense reading of the text of the special rule and the common sense understanding of the congressional purpose that animated the rule both point strongly toward the conclusion that the special rule authorizes interest netting claims for past periods as long as one leg of the overlap period remains

open. *See generally United States Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (statutory interpretation must examine the law's "object and policy") (internal quotation marks omitted); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (statutes should be construed by looking "to the design of the statute as a whole and to its object and policy").

B. The Legislative History Further Supports the Conclusion That Taxpayers Are Authorized to Bring Interest Netting Claims When Only One Leg of the Overlap Period Was Open

1. The Conference Report Further Buttresses the Tax Court's Interpretation of the Statutory Text

The bill that eventually became section 6621(d) originally provided for less expansive interest netting relief than did the final version. The bill passed by the House limited interest netting to income taxes and, of particular relevance here, it was designed to operate only prospectively – affording no interest netting for periods prior to the statute's effective date. *See* H.R. 2676(c), 105th Cong., § 331 (Nov. 5, 1997). The Senate, however, determined that this bill did not adequately address the unfairness of the IRS's policy, and it amended the bill to expand the availability of interest netting – extending it both to other kinds of taxes and to earlier, pre-enactment periods. The stated purpose for the floor amendment was "[t]o apply the interest netting provision to all Federal taxes and to open taxable periods occurring before the date of the enactment of this Act." 144 Cong. Rec. S4518 (daily ed. May 7, 1998). Thus, as previously noted, the Senate amendment

was intended to allow interest netting for past periods consistent with preexisting statute of limitations constraints. *See generally* A216-17.

The Conference Report buttresses that conclusion in its description of the effect of the Senate amendment, which the Conference expressly adopted. The report summarizes the language of the special rule in similar, but not identical, language. The report clarifies the statute by replacing the somewhat confusing phrase "subject to" with the simpler word "if" and the phrase "not having" with "has not." The result is a clearer description also supportive of Appellees' position that interest netting is available as long as the statute of limitations remains open for at least one leg of the overlap period: Interest netting is available "if . . . the statute of limitations has not expired with respect to either the underpayment or overpayment." H.R. Rep. No. 105-599, at 257 (1998) (Conf. Rep.).

That formulation states two alternative scenarios under which the interest netting statute is applicable to a past period, and one of those alternatives plainly is satisfied in this case. It is undisputed that, as of the relevant July 22, 1998, date, the statute of limitations had not expired with respect to Appellees' 1979 and 1980 overpayment years. Therefore, this case falls within the Conference Report's prescription that interest netting should be available "if . . . the statute of limitations has not expired with respect to . . . the . . . overpayment." *Id*.

2. The "Blue Book" Is More Supportive of the Tax Court's Interpretation Than It Is of the Government's

Although the government does not meaningfully address the text, policy, or legislative history of the special rule, it does assert in passing that its position "finds support" in the summary of legislation prepared by the Joint Committee on Taxation several months after the enactment of the statute, known as the "Blue Book." Gov't Br. at 33 n.10 (citing Staff of Jt. Comm. on Tax'n, 105th Cong., General Explanation of Tax Legislation Enacted in 1998 ("Blue Book"), at 74 (Jt. Comm. Print Nov. 24, 1998)); *see also* Gov't Br. at 20 (quoting *Fannie Mae I*, 379 F.3d at 1309, as stating that "the only relevant contemporaneous interpretation available is inconsistent with the judgment in [taxpayer's] favor"). Contrary to the government's assertion, however, that document does not support its position for two reasons. First, the Blue Book carries little independent weight as an indicator of congressional intent where, as here, it does not conform to the statute's legislative history. Second, the Blue Book discussion is self-contradictory and, indeed, is more supportive of the Tax Court's decision when read as a whole than it is of the government's position.

The Blue Book's description of section 6621(d) contains the following language:

> In addition, the provision applies to the determination of interest for periods beginning before the date of enactment if: (1) as of the date of enactment, a statute of limitations has not expired with respect to the underpayment or overpayment; [and the taxpayer meets the administrative filing requirements]. . . . A statute of limitations must not have expired as of the date of enactment with respect to both the underpayment and overpayment for the provision to apply.

Blue Book at 74. In *Fannie Mae I*, the government argued that the last sentence of this description was a strong indicator of congressional intent. The Federal Circuit rejected that argument in one sentence before turning to its sovereign immunity analysis (discussed *infra*, at 29-56), noting that, "[a]s a post-enactment explanation, the Blue Book interpretation is entitled to little weight." 379 F.3d at 1309. *See also, e.g.*, *Jones v. United States*, 526 U.S. 227, 238 (1999).

The Federal Circuit was correct to dismiss the significance of the Blue Book; if anything, the court's "little weight" observation overstates the probative value of the sentence on which the government relied. Courts sometimes cite the Blue Book as authority for a particular statutory interpretation – but only when the Blue Book is serving its intended role of summarizing and clarifying the intent of Congress as reflected in the actual legislative history. The courts typically accord no weight to the Blue Book standing alone and often note that it has little utility as a guide to congressional intent unless it is corroborated by the actual legislative

history. *See*, *e.g.*, *Estate of Wallace v. Comm'r*, 965 F.2d 1038, 1050 n.15 (11th Cir. 1992); *McDonald v.Comm'r*, 764 F.2d 322, 336 n.25 (5th Cir. 1985). Thus, the courts regularly disregard the Blue Book even when it clearly states a particular rule, if that statement goes beyond the actual legislative history. *See, e.g.*, *Condor Int'l, Inc. v. Commissioner*, 98 T.C. 203, 227 (1992) (Blue Book "is not a part of the legislative history of the statute it explains"), *aff'd in part and rev'd in part*, 78 F.3d 1355 (9th Cir. 1996); *Zinniel v. Comm'r*, 89 T.C. 357, 366-67 (1987) (Blue Book is not "available to [the legislators] when acting on the bill" and provides no "direct evidence of legislative intent") (internal quotation marks omitted), *aff'd*, 883 F.2d 1350 (7th Cir. 1989).

Moreover, even if it were more authoritative, the Blue Book discussion of the special rule is self-contradictory. The first reference closely tracks the language of the Conference Report (*compare* Blue Book at 74 *with* H.R. Rep. No. 105-599, at 257 (1998) (Conf. Rep.)), but the second reference – the one highlighted by the Federal Circuit – states a different rule. This contradiction is evident when the two descriptions are placed side-by-side. Interest netting applies if:

> the statute of limitations has not expired with respect to *either* the underpayment *or* overpayment (Conference Report) (emphasis added)
>
> A statute of limitations must not have expired . . . with respect to *both* the underpayment and overpayment (Blue Book second reference) (emphasis added))

The two formulations are essentially identical — with one critical difference. The Blue Book formulation changes the word "either" to "both." In so doing, it does not carry forward the intent of Congress; it turns that intent upside down.[4]

If anything, the Blue Book discussion is supportive of the Tax Court's decision because it highlights how unnatural the government's reading of the special rule is. The last sentence of the Blue Book discussion, just like every other document that tries to state the government's position, uses the word "both" to

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[4] The scholarly commentary discussing when it is appropriate for courts to rely on the Blue Book provides some insight into how such a deviation from the actual legislative history could have occurred and why it is inappropriate here to rely on this particular Blue Book excerpt. *See especially* Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of "Subsequent" Tax Legislative History,* 11 Am. J. Tax Pol'y 91 (Spring 1994). Professor Livingston maintains that "[t]he Blue Book is on especially weak ground when it adopts anti-taxpayer positions not taken in the committee reports" (*id*. at 93), explaining that the Joint Committee staff will likely have many contacts with Treasury officials during the drafting process, but "members of Congress (and thus taxpayers) in theory have reduced leverage over the Blue Book." *Id*. at 118. Therefore, "pro-government positions (which may be an attempt to undo previous concessions to taxpayers) should be greeted with more suspicion[;] . . . it seems somehow unfair to disadvantage taxpayers once the legislative process is over, and courts are right to be skeptical of such efforts." *Id.* at 118-19. *See also id.* at 122-23 (new Blue Book material "is especially problematic when it adopts an anti-taxpayer position, to which taxpayers may have only limited opportunity to respond"); Bradford L. Ferguson, Frederic W. Hickman, and Donald C. Lubick, *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 Taxes 804, 821 (1989) (criticizing "[t]he temptation of [Joint Committee] staff members to 'make law'").

express the concept that both statutes of limitations must be open for section 6621(a) to apply. *See* Blue Book at 74; *Fannie Mae I*, 379 F.3d at 1307; Rev. Proc. 99-43, § 3.01(1), 1999-2 C.B. 579, 580; Gov't Br. at 8, 12, 19, 33 n.10. This is by far the simplest way to express the rule that the government seeks, and it is unnatural for a drafter to try to express that concept without using the word "both." Thus, it is highly likely that the drafters of the special rule, in using an "either/or" construction and eschewing the word "both," were intending to provide that the qualifying condition of an open statute of limitations can be satisfied by one or the other leg of the overlap period. And, as previously discussed, that interpretation of the special rule is strongly buttressed by Congress's evident intent to "to remedy a perceived injustice in the tax laws" (*Fed. Nat'l Mortg. Ass'n v. United States*, 56 Fed. Cl. 228, 238 (2003), *rev'd on other grounds*, 379 F.3d 1303 (Fed. Cir. 2004)) by expanding the availability of interest netting "to the maximum extent feasible" (Treasury Report at 2).

In sum, the text, evident purpose, and legislative history of the special rule all strongly support the Tax Court's interpretation.

C. The Principle That Waivers of Sovereign Immunity Must Be Strictly Construed Is Inapplicable Here and Does Not Justify Interpreting the Special Rule in a Way That Would Undermine Its Evident Purpose

The government's brief does not ask this Court to concern itself with the text or purpose of the special rule. Instead, the government urges the Court to adopt the

reasoning of the Federal Circuit in *Fannie Mae I*, which held that the government's interpretation of the special rule is compelled by the "requirement that a sovereign immunity waiver be strictly construed" in favor of the government. 379 F.3d at 1310.[5] The trial court in that case had ruled against the government, applying the normal guides to statutory interpretation and concluding that the special rule makes section 6621(d) applicable if one leg of the overlap period was open on the relevant date. *Federal Nat'l Mortg. Ass'n v. United States*, 56 Fed. Cl. 228 (2003), *rev'd*, 379 F.3d 1303 (Fed. Cir. 2004). On appeal, the Federal Circuit did not disagree with the trial court's statutory analysis, praising it as "very careful and thorough." 379 F.3d at 1307. The Federal Circuit held, however, that "sovereign immunity assumes primacy over any other tools or principles of statutory construction and obviates the need for further consideration of the bases for the decision of the Court of Federal Claims." *Id*. at 1311 n.8.

The Federal Circuit's sovereign immunity analysis is erroneous, and this Court must reject the government's request that it follow that decision. First and foremost, the special rule is not a waiver of sovereign immunity, and therefore the principle of statutory construction on which the government relies is entirely

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[5] In its brief, the government also cites *Federal National Mortgage Ass'n v. United States*, 469 F.3d 968 (Fed. Cir. 2006), as support. In that case, however, the court, did not independently analyze the issue, but simply ruled that the law of the case doctrine precluded it from reconsidering its prior decision in *Fannie Mae I*.

irrelevant. Second, even if that principle did somehow come into play, it would not justify adopting the government's proposed interpretation in derogation of the text and purpose of the special rule.

1. The Special Rule Is Not a Waiver of Sovereign Immunity

a. A Waiver of Sovereign Immunity Is a Statute in Which the Government Consents to Be Sued

The critical threshold question in assessing the government's argument is whether the special rule is a waiver of sovereign immunity. If not, then the principle that such waivers are strictly construed has no application to this case, and the government's only asserted ground for challenging the Tax Court's decision disappears. The government, however, devotes little attention to this point, simply gliding over this key issue after quoting a couple of sentences from the *Fannie Mae I* opinion. *See* Gov't Br. at 22-24. The government thereby ignores a well-developed body of law on what constitutes a waiver of sovereign immunity and when the strict construction principle is implicated – a body of law that requires rejection of the government's argument.

Sovereign immunity refers to "the principle that the United States cannot be sued without its consent." *Fed. Housing Admin. v. Burr*, 309 U.S. 242, 244 (1940). The government and the Federal Circuit similarly emphasize the government's immunity from being sued when describing the essence of sovereign immunity. "[T]he 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)) (quoted at Gov't Br. at 25-26 and *Fannie Mae I*, 379 F.3d at 1310); *see also* Gov't Br. at 26 (quoting *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983) ("The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress.")).

A waiver of sovereign immunity therefore is a statute in which Congress relinquishes this immunity from suit by agreeing to be sued for a particular kind of claim. *See also* Gov't Br. at 13 (recognizing that a waiver of sovereign immunity is "a consent to suit against the United States"). Thus, when the government waives its sovereign immunity, the result is to create jurisdiction in a court that otherwise would have no jurisdiction to entertain such a suit against the government. For this reason, the Supreme Court has observed that "[s]overeign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("the existence of consent is a prerequisite for jurisdiction"). Indeed, in *Fannie Mae I*, the court relied on the jurisdictional nature of sovereign immunity to justify its holding, because the government had not raised its sovereign immunity argument below and therefore it would have been waived on appeal if it were not "jurisdictional." *See*

379 F.3d at 1310 n.7. *See also, e.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 32 (1992) (noting that the sovereign immunity argument there was "a jurisdictional defense (raised for the first time on appeal)").

b. The Special Rule Is a Substantive Provision That Is Relevant to the Determination of the Merits of a Lawsuit Whose Jurisdiction Rests on Waivers of Sovereign Immunity Found in Other Statutes

With these principles in mind, it is apparent from the face of the statute that the special rule is not a waiver of sovereign immunity. The special rule has nothing to say about consent to suit and does not create jurisdiction in any court. It simply provides that "the amendments made by this section [6621(d)] shall apply" to pre-1998 periods of overlapping indebtedness if certain conditions are satisfied. Indeed, the special rule does not even address courts or lawsuits. It is just another substantive provision of tax law, in this instance instructing the IRS how to do interest calculations for pre-1998 periods in light of the new interest netting rule of section 6621(d).

To be sure, if a taxpayer believes that the IRS did not properly follow the dictates of the special rule or section 6621(d), the taxpayer may want to seek relief from a court – just as Appellees have done in this case. The government states, and Appellees agree, that a court cannot have jurisdiction to provide relief against the government in such a suit absent a waiver of sovereign immunity. *See* Gov't Br. at 24-25; *see also, e.g.*, *FDIC v. Meyer*, 510 U.S. at 475; *Diaz v. United States*,

517 F.3d 608, 611 (2d Cir. 2008). But what the government fails to acknowledge is that this recourse to the courts rests not on the special rule, but rather on other waivers of sovereign immunity found in longstanding Code and jurisdictional provisions enumerated below that generally authorize suits for relief from improper calculations of interest. This case is just one such suit, in which the special rule and section 6621(d) govern the outcome of the dispute *on the merits* but have nothing to do with the court's jurisdiction to hear the suit in the first place.

Congress has waived sovereign immunity by expressly authorizing the payment of refunds of tax overpayments through timely administrative claims (I.R.C. §§ 6402, 6511(a)), through lawsuits in district court or the Court of Federal Claims (28 U.S.C. §§ 1346(a)(1), 1491; I.R.C. §§ 6532(a), 7422), or when overpayments are determined in a deficiency action in the Tax Court (I.R.C. § 6512(b)(1)). *See generally United States v. Forma*, 42 F.3d 759, 763 (2d Cir. 1994).

Under the "no-interest rule" discussed in *Library of Congress v. Shaw*, 478 U.S. 310, 314-20 (1986), these basic waivers of sovereign immunity standing alone would not obligate the government to pay interest on its refunds of tax overpayments; rather, there must be an "express congressional consent to the award of interest separate from a general waiver of immunity to suit." *Id*. at 314;

see also id. at 323 (Brennan, J., dissenting) ("no-interest rule" is "a corollary of the general sovereign immunity doctrine"). But Congress long ago supplied the necessary separate waiver for interest as well. Code section 6611(a) provides that "[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." *See also* 28 U.S.C. § 2411 (directing courts to include in their judgments overpayment interest on tax refunds "at the overpayment rate established under [Code] section 6621"); *Shaw*, 478 U.S. at 318 n.6 (pointing to 28 U.S.C. § 2411 as an example of an express waiver of sovereign immunity for interest). And if a taxpayer believes that he did not receive all of the overpayment interest to which he was legally entitled, the courts have jurisdiction to entertain a suit seeking additional overpayment interest under the Tucker Act (28 U.S.C. §§ 1346(a) and 1491(a)) (district court or Court of Federal Claims) or, as in this case, in the Tax Court under Code section 7481(c)(1).

These statutory provisions reflect the government's consent to be sued for a refund of a tax overpayment and for the payment of interest on that refund, as well as delineating the courts' jurisdiction to hear such suits. The government ignores these provisions, however, and argues that the special rule is the waiver of sovereign immunity that permits the suit in this case to go forward. The government explains its position as follows: "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 . . . ." Gov't Br. at 23 (quoting *Fannie Mae I*, 379 F.3d at 1310). This statement is incorrect because the special rule does not "authorize" bringing claims against the government. Congress had already "authorized" taxpayers to bring *any* claim for overpaid interest or for additional overpayment interest, pursuant to the waivers of sovereign immunity described above.

What the special rule does is to help "discriminate[ ] between those claims for overpaid [or underpaid] interest" that will prevail *on the merits* and those claims that will fail. The merits of such claims turn on whether the government in fact paid overpayment interest "at the overpayment rate established under section 6621" (I.R.C. § 6611(a)). The correct rate of interest in turn depends on whether section 6621(d) applies, which is the point addressed by the special rule. In other words, the special rule is just a substantive provision, like the rest of the interest rate rules in section 6621.[6]

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[6] The government criticizes the Tax Court for stating that section 6611(a) waives sovereign immunity, arguing that it "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)." Gov't Br. at 22-23 n.5. That statement is a non sequitur. Section 6611(a) generally consents to the imposition of overpayment interest on the government at the rate established by section 6621, and that waiver of immunity covers any taxpayer claim that the government failed to meet its section 6611(a) interest obligations. The government offers no reason why its failure to

(footnote continued on next page)

The rest of the government's explanation for why it believes the special rule is a waiver of sovereign immunity similarly seeks to confuse the merits of the dispute with the authorization to sue. Thus, the government states that "[w]ithout the special rule, Exxon's attempt to obtain interest refunds based on . . . interest-netting . . . would have been *prohibited*." Gov't Br. at 24 (emphasis added); *see also id*. at 22. Not so. Appellees could have brought suit seeking additional overpayment interest on an interest netting theory without the special rule or section 6621(d). They likely would have lost that suit *on the merits*, just as a different taxpayer did when it brought exactly that kind of suit before section 6621(d) and the special rule were enacted. *See Northern States Power Co. v. United States*, 73 F.3d 764, 767 (8th Cir. 1996). But the *Northern States Power* case was not dismissed for lack of jurisdiction, and there was no suggestion that the lawsuit was "prohibited" by sovereign immunity. The government similarly errs in stating that "the special rule extended interest-netting to permit interest refund claims that otherwise would not have been *available* to taxpayers." Gov't Br. at 24 n.6 (emphasis added). Refund claims premised on an interest-netting theory likely would not have been *successful* without the special rule, but they

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(footnote continued from previous page)
meet its interest netting obligations is different from any other violation of section 6611 or the interest rate provisions of section 6621. *See Doolin v. United States*, 918 F.2d 15, 18 (2d Cir. 1990) (government argues that "section 6611 must be strictly construed since it is a waiver of governmental immunity").

were certainly "available" in the jurisdictional sense. *See also id*. at 23 (erroneously stating that section 6621(d) "created a new claim") *id*. at 24-25 (erroneously stating that the special rule "permits certain monetary claims against the United States that otherwise would be barred by the Government's sovereign immunity").

If the government were correct in its explanation for why the special rule is a waiver of sovereign immunity, then many substantive provisions (both tax and non-tax) would be governed by the strict construction principle because the government's formulation can be tailored to fit many different substantive provisions. For example, Code section 170 provides the familiar deduction for charitable contributions, and the statute contains many conditions concerning eligibility that are subject to interpretation. If the IRS denies a claimed section 170 deduction and the taxpayer seeks judicial relief contending that the IRS misconstrued the statute, the court does not resolve the case by reference to the principle that waivers of sovereign immunity must be strictly construed. *See, e.g., Glass v. Comm'r*, 124 T.C. 258, 276-84 (2005), *aff'd*, 471 F.3d 698 (6th Cir. 2006). But the government can characterize section 170 in the same way that it and the Federal Circuit characterize the special rule – namely, section 170 "'discriminates between those claims for [charitable contribution deductions] Congress has authorized and those it has not.'" *See* Gov't Br. at 23 (quoting

Fannie Mae I, 379 F.3d at 1310). The government's tortured efforts to force the special rule into the jurisdictional and consent-to-suit framework of sovereign immunity waivers is simply unsustainable.[7]

c. The Government's Position Is Contradicted by Supreme Court Precedent That Differentiates Between Waivers of Sovereign Immunity and Substantive Provisions That Are Not to Be Strictly Construed in Favor of the Government

The Supreme Court has provided guidance on the question of when to apply the principle of narrowly construing waivers of sovereign immunity, repeatedly cautioning against overbroad invocation of that principle. In particular, the Court has emphasized that the strict construction principle applies only to the actual waivers of sovereign immunity that consent to suit, not to the substantive provisions that determine when a plaintiff should prevail in such lawsuits.

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[7] Indeed, there is a particular irony in the government's efforts to shoehorn the special rule into the sovereign immunity framework since the purpose of the disputed language was actually to *avoid* interfering with the existing waivers of sovereign immunity. As discussed *infra* (at 44-45), there are statute of limitations constraints on claims for tax overpayments and interest thereon. Those are conditions on the relevant waivers of sovereign immunity, and Congress could have chosen to relax those conditions for interest netting claims. The disputed language in the special rule reflects Congress's decision not to relax those conditions, but instead to ensure that taxpayers who seek interest netting relief must do so within the constraints of the existing waivers of sovereign immunity. It is therefore completely illogical to treat that language as if it were a new waiver of sovereign immunity.

The leading decisions are *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472-73 (2003), and *United States v. Mitchell*, 463 U.S. 206, 216-19 (1983), which addressed the same waiver of sovereign immunity that allowed the taxpayer to sue for additional overpayment interest in *Fannie Mae I*. The Supreme Court explained that in suits to recover money in the Court of Federal Claims, the Tucker Act, 28 U.S.C. § 1491(a)(1), is the waiver of sovereign immunity and the other statutes that pertain to the substance of the claim are not subject to the principle of strict construction. "'Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, *nor need they be construed in the manner appropriate to waivers of sovereign immunity*.'" *White Mountain*, 537 U.S. at 472-73 (quoting *Mitchell*, 463 U.S. at 218-19) (emphasis added); *see also C.H. Sanders Co. v. BHAP Housing Dev. Fund Co.*, 903 F.2d 114, 119 (2d Cir. 1990) (noting that the Tucker Act is the waiver of sovereign immunity for non-tort claims against the United States).

Although a plaintiff cannot obtain a recovery without pointing to a statute other than the Tucker Act that "creates a substantive right enforceable against the Government by a claim for money damages" (*White Mountain*, 537 U.S. at 472), that substantive statute is not narrowly construed in favor of the government. To the contrary, it is enough if the substantive statute "'can fairly be interpreted as

mandating compensation by the Federal Government for the damage sustained,'" a standard that "demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity." *Id*. (quoting *Mitchell*, 463 U.S. at 217). Therefore, the strict construction principle on which the government relies has no application to statutes like the special rule that are relevant only to the merits of the litigation – that is, to whether the plaintiff will prevail on a claim authorized by the Tucker Act or an analogous waiver of sovereign immunity. The Federal Circuit's contrary determination simply cannot be reconciled with *White Mountain* and *Mitchell*.

The Supreme Court has also addressed the difference between substantive provisions and waivers of sovereign immunity outside of the Tucker Act context. Particularly instructive is *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), where the Court held that the protection against "discrimination" in the Age Discrimination in Employment Act gave federal workers a right to bring suit claiming retaliation for having filed an age discrimination complaint. The government had argued that the relevant provision creating the right to sue for discrimination, 29 U.S.C. § 633a, was a waiver of sovereign immunity that had to be construed narrowly in favor of the government. The Court, however, rejected that contention, holding that the government was seeking to apply the strict construction principle beyond its proper bounds.

The Court explained that the waiver of sovereign immunity is completely contained in the subsection of that statute that consents to suit. 553 U.S. at 491. That subsection provides that "[a]ny person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act." 29 U.S.C. § 633a(c). But the subsection that was at issue before the Court is "not a waiver of sovereign immunity; it is a substantive provision outlawing 'discrimination.'" *Id*. (quoting 29 U.S.C. § 633a(a)). Therefore, the Court concluded, the substantive provision did not have to "surmount the same high hurdle as § 633a(c)" of being narrowly construed in favor of the government, even though the waiver of sovereign immunity "applies to" the substantive provision by authorizing suits to redress discrimination. *Id. (*citing *White Mountain* and *Mitchell*).

The reasoning of *Gomez-Perez* is directly applicable here. The special rule established a new substantive principle that changed the interest rate to eliminate the government's ability to collect and retain the interest rate differential; taxpayers claiming the benefit of this new principle could enforce their rights through the existing waivers of sovereign immunity identified above. *See supra*, at 34-35. The fact that those waivers of sovereign immunity "apply to" the special rule, in the sense that they permit taxpayers to sue to vindicate the substantive right to

interest netting conferred by the special rule, does not mean that the special rule itself is governed by the strict construction principle.

The government purports to address in its brief why these Supreme Court cases are not fatal to its position, but its response begs the question. *See* Gov't Br. at 37-38. The government states that these cases are "readily distinguishable" because they "do not address the construction of provisions (such as the special rule) which in themselves constitute the waiver of sovereign immunity." *Id*. at 38. But the government argued in *White Mountain*, *Mitchell*, and *Gomez-Perez* that the provisions being construed were waivers of sovereign immunity that should be strictly construed. The Supreme Court told the government it was wrong. The same is true here; the government argues that the special rule is a waiver of sovereign immunity, but it is wrong. In other words, the point of these cases is to identify which statutory provisions constitute waivers of sovereign immunity, and the cases demonstrate that the special rule is not such a waiver. The government's naked assertion here that the special rule is a waiver, and hence the cases are irrelevant, simply assumes away the defect in its position.

2. There Is No Basis for the Government's Invocation of Other Asserted Rules of Strict Construction

The government asserts that "waivers of sovereign immunity in the context of taxation in particular are strictly construed" and, "[m]ost particularly, strict construction is applied to statute-of-limitations requirements in the context of

taxation." Gov't Br. at 31 (citing cases); *see also id*. at 32, 40. The cited authority, however, does not remotely support the assertion that there is some "particular" stringency in construing tax legislation or statutes of limitations for tax claims. Rather, such provisions are governed by the same general principles of statutory construction applicable to other waivers of sovereign immunity. *See, e.g., United States v. Forma*, 42 F.3d 759, 766 (2d Cir. 1994) ("the standard jurisdictional principles typically operate in the same fashion in tax as in all other fields"). In any event, even if tax statutes of limitations were subject to some unique principle of statutory construction, that principle would be inapplicable here because this case does not involve construction of a statute of limitations.

According to the very authority relied upon by respondent, a statute of limitations is a statutory provision that requires that "a suit . . . be brought within a certain time period." *United States v. Dalm*, 494 U.S. 596, 608 (1990); *see* Gov't Br. at 31-32, 40. *See generally Black's Law Dictionary* 1546 (9th ed. 2009) (defining a "statute of limitations" as a "law that bars claims after a specified period; specif., a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued"). The special rule places no time restriction on a taxpayer's bringing suit to vindicate its right to interest netting.

There are, of course, relevant time restrictions found elsewhere that apply if a taxpayer seeks judicial relief to enforce its interest netting rights. Appellees'

motion to redetermine interest was governed by the one-year period set forth in Code section 7481(c), with which they complied. A87 ¶ 6. Other statutes of limitations would govern if a taxpayer sought to enforce its interest netting rights through a suit for refund of underpayment interest or a suit for additional overpayment interest in the Court of Federal Claims. *See* I.R.C. § 6511; 28 U.S.C. §§ 2401, 2501. But the special rule merely sets forth criteria that determine whether the interest netting rule of § 6621(d) is applicable in a suit that is otherwise timely filed. The fact that those criteria include a *reference* to statutes of limitations set forth in other statutes does not turn the special rule itself into a statute of limitations.[8]

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[8] The government's claim for a special rule of construction for tax statutes of limitations appears to rest principally on the holding of *United States v. Brockamp*, 519 U.S. 347, 350-54 (1997), that the limitations period of Code section 6511 is not subject to equitable tolling, even though some other statutes of limitations have been construed to allow equitable tolling. *See* Gov't Br. at 32 & n.9. But the *Brockamp* holding rests on a conventional analysis of the text and "congressional objective" (519 U.S. at 353) of section 6511; the Court did not even mention, much less rely upon, any rule of strict construction. In general, statutes of limitations are to be construed evenhandedly, not strictly in favor of the government. *See Scarborough v. Principi*, 541 U.S. 401, 421 (2004) ("limitation principles should generally apply to the Government in the same way that they apply to private parties") (quotation marks omitted)); *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002) (government's request to apply strict construction principle to Tucker Act statute of limitations seeks "an unduly restrictive reading of the congressional waiver of sovereign immunity") (quotation marks omitted); *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (equitable tolling is applicable to suits against the government "in the same way that it is applicable to private suits," which "amounts to little, if any, broadening of the congressional waiver").

Ironically, a portion of the special rule not at issue here does contain a specific time limitation, albeit not a true statute of limitations bar to suit, and examination of that portion further undermines the government's position. One of the conditions set forth in the special rule for applying section 6621(d) to pre-1998 periods is filing a request for such application with the Secretary of the Treasury "not later than December 31, 1999." The IRS, however, waived that condition in its Revenue Procedure for situations in which at least one statute of limitations would remain open beyond December 31, 1999. Rev. Proc. 99-43, §§ 1.02(2), 4.03(2), 1999-2 C.B. 579, 579, 580-81. That action is inconsistent with the government's attempt now to characterize the special rule as a waiver of sovereign immunity.

Federal officers or administrative agencies do not have the authority to waive sovereign immunity when Congress has not chosen to do so. *See*, *e.g.*, *Munro v. United States*, 303 U.S. 36, 41 (1938); *Finn v. United States*, 123 U.S. 227, 233 (1887). Nor does an agency have "the power to entertain claims that do not meet the conditions limiting the waiver of immunity." *Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477 (2d Cir. 1988). Thus, if the special rule truly were a waiver of sovereign immunity, the IRS would have exceeded its authority in promulgating section 1.02(2) of Rev. Proc. 99-43. Plainly, the IRS did not regard

the special rule as a waiver of sovereign immunity until it detected a litigation advantage in taking that position.

Finally, the government asserts that the "rule of strict construction especially holds true in cases, such as the instant one, claiming a waiver of sovereign immunity pertaining to claims for interest against the United States." Gov't Br. at 33-34. The source for this assertion is *Library of Congress v. Shaw*, 478 U.S 310 (1986), which, as noted above (*supra*, at 34-35), addressed the "no-interest" rule that requires a separate waiver of sovereign immunity to authorize the payment of interest on a judgment against the United States. But *Shaw* says nothing about an "especially" strict construction principle and, in any event, the relevant waivers of immunity for interest are the express authorizations for payment of interest on tax overpayments found in Code section 6611(a) and 28 U.S.C. § 2411, not the special rule. *See supra*, at 35; *see also Shaw*, 478 U.S. at 318 n.6 (identifying 28 U.S.C. § 2411 as the waiver of sovereign immunity for interest on court judgments for tax overpayments).

If there were some dispute over the meaning of the term "overpayment" in those waivers of the no-interest rule, for example, then the principle of strictly construing such waivers of sovereign immunity could be relevant. *See Marathon Oil Co. v. United States*, 374 F.3d 1123, 1126 (Fed. Cir. 2004) (applying principle of strict construction in interpreting the term "final judgment" in 28 U.S.C.

§ 1961(c)(2), which provides that "interest shall be allowed on all final judgments against the United States in the" Federal Circuit). This case, however, does not involve the construction of language in a statute that waives sovereign immunity for interest. Rather, it involves the construction of the special rule, which helps determine the *amount* of interest that is owed in a particular case. That kind of statute is not subject to the strict construction principle, any more than would be a statute that helps determine the amount of a tax overpayment or any other kind of damages award against the government. *See, e.g.*, *Doolin v. United States*, 918 F.2d 15, 18 (2d Cir. 1990) (ruling for the taxpayer in a dispute over the period for which overpayment interest was owed, notwithstanding the government's assertion that the statute should be "strictly construed since it is a waiver of sovereign immunity"); *J.F. Shea Co. v. United States*, 754 F.2d 338, 340 (Fed. Cir. 1985) (sovereign immunity is "irrelevant" where a "dispute concerns not *whether* interest runs against the United States but *how* the interest is to be calculated").

3. Even if the Principle of Narrowly Construing Waivers of Sovereign Immunity Were Applicable Here, That Principle Is Just Another Aid to Statutory Construction and Would Not Override the Other Indicia of Congressional Intent to Make Interest Netting Available for Pre-1998 Periods Subject to Existing Statute of Limitations Constraints

The government argues that the Tax Court also erred in rejecting a second aspect of the Federal Circuit's decision – namely, its holding that the principle of strict construction "assumes primacy over any other tools or principles of statutory

construction and obviates the need for further consideration" of the text and purpose of the statute. *Fannie Mae I*, 379 F.3d at 1311 n.8; *see* Gov't Br. at 12 (if the special rule is a waiver of sovereign immunity, "the courts are constrained to accept the Government's interpretation of the special rule"). That argument is incorrect. Even if the special rule were a waiver of sovereign immunity, the strict construction principle is simply a guide to congressional intent that must be considered along with other indicia that could demonstrate that Congress intended a broader construction.

a. The Principle That Waivers of Sovereign Immunity Should Be Strictly Construed Does Not Eliminate the Need to Consider Other Indicia of Congressional Intent, Including the Purpose of the Statute

The Supreme Court's unanimous opinion in *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571 (2008), directly refutes the government's argument here that the principle of strictly construing waivers of sovereign immunity is dispositive. The Court emphasized there that the "sovereign immunity canon is just that—a canon of construction." *Id*. at 589. Like other such canons, the Court explained, "[i]t is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Id*.

In this connection, the Tax Court correctly cited to Justice O'Connor's dissenting opinion in *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461

U.S. 273, 293-94 (1983), which elaborates on the proper method of applying the principle of narrowly construing waivers of sovereign immunity (A235):

> Although it is indeed true that the Court construes waivers of sovereign immunity strictly, that principle of statutory construction is no more than an aid in the task of determining congressional intent. In a close case, it may help the Court choose between two equally plausible constructions. It cannot, however, grant the Court authority to narrow judicially the waiver that Congress intended. . . . The mere observation that a statute waives sovereign immunity, then, cannot resolve questions of construction. The Court still must consider all indicia of congressional intent.

The government criticizes the Tax Court for having "ignored the majority opinion" (Gov't Br. at 31 n.8), but the majority disagreed with Justice O'Connor only with respect to the ultimate issue in *Block*, not with respect to her description of the proper methodology. After invoking the principle of strict construction, the majority proceeded to consider the legislative history (461 U.S. at 282-86, 288 & n.24, 290), other provisions of the statute (*id*. at 286-87), and a competing "canon of statutory construction" (*id*. at 288-90), rather than treating the strict construction principle as dispositive of congressional intent.

Thus, the ultimate inquiry must seek to determine congressional intent, and that inquiry should not be cut off by according dispositive effect to a canon of statutory construction. Rather, the "intent to waive [sovereign] immunity and the scope of such a waiver can only be ascertained by

reference to underlying congressional policy." *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 521 (1984). *See also*, *e.g.*, *United States v. Idaho ex rel. Director, Idaho Dep't of Water Res.*, 508 U.S. 1, 7 (1993) (courts should not "assume the authority to narrow the waiver that Congress intended"); *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) ("Neither should [a court] as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."). A court cannot possibly determine whether its statutory construction is frustrating "congressional policy" or "narrow[ing] the waiver that Congress intended" unless it examines indicia of congressional intent. The government's position erroneously prohibits that essential inquiry.

The government dismisses this line of authority as restricted to the "unique jurisprudence applicable to" waivers of sovereign immunity in the Federal Tort Claims Act (28 U.S.C. §§ 1346(b)(1), 2674) or in agency "sue or be sued" clauses. Gov't Br. at 38-39. But that observation is incorrect. For example, the *Idaho* case cited above involved the McCarran Amendment, 43 U.S.C. § 666(a) (*see* 508 U.S. at 5-6), and *Richlin* involved the attorneys' fees provision of the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (*see* 553 U.S. at 573).

Indeed, even in context of tax refund suits, the Court has rejected the notion that the principle of narrowly construing waivers of sovereign immunity is necessarily dispositive. *United States v. Williams*, 514 U.S. 527 (1995), involved the question whether the plaintiff in that case was authorized to bring a tax refund suit when she had not been assessed a tax. Citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992), the Court in *Williams* recognized that it could "not enlarge the waiver beyond the purview of the statutory language" and therefore should generally construe "ambiguities in favor of immunity." 514 U.S. at 531. But that observation did not impel the Court to adopt the government's proffered narrow interpretation of the statute without examining congressional intent and the purpose of the statute. Noting its "preference for commonsense inquiries over formalism," the Court pointed out that the government was making a "technical argument" that "would leave people in [the plaintiff's] position without a remedy." *Id*. at 536. After an extensive examination of the policy implications of the respective positions, the Court ruled that congressional intent was best implemented by rejecting the government's

argument for a narrow construction of the waiver of sovereign immunity. *Id*. at 536-40.[9]

b. The Tax Court Correctly Took Into Account That the Government's Interpretation of the Special Rule Would Thwart the Statute's Remedial Purpose

The government unfairly criticizes the Tax Court for allegedly holding that the special rule must "be liberally construed in favor of taxpayers in order to accomplish its remedial purpose." Gov't Br. at 13; *see also id*. at 11, 22, 29, 34, 35, 36. It is true that courts sometimes invoke a "canon of construction that remedial statutes should be liberally construed." *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *see also, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987); *Williams v. Bowen*, 859

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[9] Indeed, even when bound by the Federal Circuit's *Fannie Mae I* decision, courts have not adopted the government's rigid approach to the strict construction principle. In a recent case, the Court of Federal Claims considered a different statutory interpretation issue involving interest netting – namely, whether two different companies within a consolidated group that files a single consolidated tax return are considered to be the "same taxpayer" under section 6621(d). *See Magma Power Co. v. United States*, No. 09-419 (Fed. Cl. Oct. 28, 2011). The government argued that interest netting was not available and relied upon the "fundamental principle that waivers of sovereign immunity, especially in the context of interest, must be narrowly construed." Cross Motion of the United States for Summary Judgment at 6, *Magma Power Co. v. United States*, No. 09-419 (Fed. Cl. Jan. 5, 2011) (citing *Fannie Mae I*, 379 F.3d at 1310). The court, however, looked beyond the statutory construction principle and ruled against the government, explaining that it was "not inclined to adopt a construction plainly at variance with the policy of the legislative scheme and the stated purpose of the legislation." Slip op. at 21.

F.2d 255, 260 (2d Cir. 1988); 3 Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutory Construction* § 57.12, at 57 (7th ed. 2008). And even the dissenters in *United States v. Williams, supra* – who voted to adopt the government's proposed narrow construction in that case – disagreed with the government's position here (*see* Gov't Br. at 36-37) that this canon of construction can never be relevant in a case involving a waiver of sovereign immunity. 514 U.S. at 548 (Rehnquist, C.J., dissenting) ("If this case involved the interpretation of a statute designed to confer new benefits or rights upon a class of individuals, today's decision would be more understandable, since such a statute would be entitled to a liberal construction to accomplish its beneficent purposes.") (internal quotation marks omitted).

But the Tax Court did not rely on any canon of liberal construction, and it certainly did not treat this case as turning on a conflict between two dueling maxims of statutory construction. (As best we can determine, the words "liberal" or "liberally" do not appear in the Tax Court's opinion.). What the Tax Court did was to invoke the overriding general principle of statutory construction that courts should endeavor to interpret statutes in accordance with Congress's intent and to further their designed purpose. Here, the government does not dispute the Tax Court's conclusion that the

statute was intended to achieve a "remedial purpose . . .; i.e., taxpayer relief from disparate interest rates." A234. The Tax Court merely stated that, even if the special rule were a waiver of sovereign immunity, it should not be interpreted to defeat Congress's purpose.

There can be little doubt here that the government's proposed interpretation of the special rule would seriously undermine the goal that Congress sought to achieve. The unquestioned purpose of the special rule was to provide taxpayers relief from disparate interest rates for past periods consistent with existing statute of limitations constraints. That remedial purpose is advanced by the Tax Court's interpretation and disserved by the interpretation urged by the government. The statutory construction issue before this Court poses a choice between two alternatives: (1) advancing the remedial purpose consistent with the normal jurisdictional limitations by applying interest netting to all taxpayers with an applicable open year on July 22, 1998, that would have enabled them to enforce that right; or (2) thwarting the remedial purpose for many taxpayers with such open years, merely because their interest-netting calculations would depend upon information from a closed year. The Tax Court was correct to consider whether its interpretation would advance or thwart the statutory purpose, and the government errs in contending that this Court should ignore that critical

evidence of congressional intent. *See Magma Power Co. v. United States*, slip op. at 21 ("the government's rigid interpretation . . . would completely undermine Congress' direction . . . and would frustrate the remedial goal to limit taxpayer obligations to interest only on the amount they actually owe").

CONCLUSION

The judgment of the Tax Court should be affirmed.

Respectfully submitted,

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January 25, 2012 /s/ Alan I. Horowitz

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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