No. ____

In the Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When, if ever, may a court exercising jurisdiction pursuant to a waiver of sovereign immunity invoke the strict construction canon applicable to such waivers to construe a separate statutory provision that creates the substantive rights at issue?

RULE 29.6 STATEMENT

Ford Motor Company (Ford) has no parent corporation. There are publicly-traded corporations that may, from time to time, own more than 10% of Ford's stock as trustee or independent fiduciary for various employee plans. The most recent trustee owner in this capacity is State Street Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company (Ford) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is available at 2012 U.S. App. LEXIS 25725. The order of the court of appeals denying rehearing (App. 40a-41a) is not reported. The order of the district court granting the government's motion for judgment on the pleadings and denying Ford's motion for summary judgment (*id.* at 22a-39a) is available at 2010 U.S. Dist. LEXIS 54987.

JURISDICTION

The court of appeals entered judgment on December 17, 2012 (App. 1a) and denied Ford's timely petition for rehearing on March 25, 2013 (*id.* at 40a). On June 13, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 24, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1346 of Title 28 of the United States Code is reproduced at App. 56a-58a. Sections 6601 and 6611 of the Internal Revenue Code (Title 26 of the United States Code) are reproduced at App. 42a-55a. Revenue Procedure 84-58, 1984-2 C.B. 501 is reproduced at App. 59a-69a.

INTRODUCTION

This case concerns a question of touchstone importance across a broad spectrum of cases: When, if ever, may a court exercising jurisdiction pursuant to a waiver of sovereign immunity invoke the strict construction canon applicable to such waivers to construe a separate statutory provision that creates the substantive rights at issue?

It is settled that waivers of sovereign immunity must be strictly construed in favor of the government. But this Court has further admonished that this strict construction canon does not apply to substantive provisions establishing one's rights against the government. *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 (2003); *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983). In other words, plaintiffs are not required to surmount the onerous strict construction canon *twice* in a suit against the government. As Justice Cardozo observed, "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld," so the Court is "not to add to its rigor by refinement of construction where consent has been announced." *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926); *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (quoting *Anderson*); *Mitchell*, 463 U.S. at 219 (same). Although simply stated, lower courts have struggled with these principles—as the government repeatedly, and reflexively, seeks refuge in the canon when fighting claims on the merits.

This case underscores that further guidance is needed from the Court on this critical issue. It involves a claim under 26 U.S.C. § 6611 for hundreds of millions

of dollars of interest on tax *over*payments that Ford indisputably made. Section 6611 unambiguously creates a substantive right to overpayment interest. But the government disputes that such interest begins to accrue when the funds at issue are remitted to the IRS and placed in the U.S. Treasury. From the outset of this case, the government has conceded that 28 U.S.C. § 1346(a)(1) supplies the jurisdictional basis for this suit—and thus the necessary waiver of sovereign immunity for Ford's overpayment-interest claim. Yet, the Sixth Circuit invoked the strict construction canon in interpreting § 6611, and then specifically anchored its ruling that Ford is not entitled to the interest at issue on its conclusion that Ford had failed to pass the strict construction hurdle. App. 20a-21a.

The Sixth Circuit's decision directly conflicts with this Court's precedents holding that the strict construction canon does not apply to separate, substantive provisions where, as here, a valid waiver of sovereign immunity exists. It improperly expands the canon from a tool to ensure that the government has actually consented *to suit* into a significant, unintended advantage for the government in construing the applicable substantive provisions *on the merits*. And it exacerbates the conflict and confusion in the lower courts on when the canon may be invoked. This Court's review is therefore warranted.

STATEMENT OF THE CASE

A. Statutory And Regulatory Backdrop

This case concerns the interest that a taxpayer is due under § 6611 on amounts that a taxpayer has overpaid to the government, an issue that frequently recurs with corporate taxpayers. Often years go by between when a corporation files and pays its income

taxes, and when the IRS completes its audit and ultimately assesses the corporation's tax liability. It frequently takes even longer before the correctness of that liability is finally determined. To address this delay, Congress enacted two parallel and symmetrical provisions governing interest on tax payments, which address in complementary terms the possibility that taxes may be overpaid or underpaid up front.

Section 6611 provides that, when a taxpayer *overpays* his taxes, the IRS "shall" pay it interest on the overpayment from "the date of the overpayment" to a date within 30 days of the refund check. 26 U.S.C. § 6611(b)(2). Section 6601 provides that, when a taxpayer *underpays* his taxes, it must pay the IRS interest on the amount of underpayment from "the last date prescribed for payment" to "the date paid." *Id.* § 6601(a). Both provisions effectuate the use-of-money principle: taxpayers are "'compensated for the lost time-value of their money when they make overpayments of tax,'" App. 14a (citation omitted), and the IRS is compensated for the lost time-value of the government's money when taxpayers do not fully pay their taxes. And both statutory provisions express the trigger for interest in the same terms—the date of payment. 26 U.S.C. § 6611(b)(2) ("date of the overpayment"); *id.* § 6601(a) ("date paid").

The IRS adopted a revenue procedure to implement this scheme. Subsection 5.01 of Revenue Procedure 84-58, as in effect at the time of the events at issue (App. 66a), states that *under*payment interest "stop[s] on the date the remittance is received." Subsection 5.05 provides the general rule for *over*payment interest: "[r]emittances treated as payments of tax will be treated as any other assessed amount and compound

interest will be paid on any overpayment under section 6611 of the Code." *Id.* at 67a. It then carves out an exception: When a deposit is "posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02 [a unique situation not presented here], interest will run on an overpayment later determined to be due *only from the date the amount was posted as a payment of tax*." *Id.* (emphasis added).

In this case, the Sixth Circuit acknowledged that the statutory provisions for underpayment and overpayment interest are "functionally parallel," *id.* at 4a, and that the Revenue Procedure implements those provisions in a symmetrical fashion, *id.* at 15a-17a. But—believing it was required to narrowly construe § 6611 as a waiver of sovereign immunity rather than a substantive rule on the merits—the court embraced an illogical interpretation of these provisions that assigns the *same* remittance a *different* date of payment based on whether overpayment or underpayment interest is at stake. As a result, Ford was deprived of nearly a half billion dollars of overpayment interest due to it under any even-handed interpretation. *Id.* at 18a-20a.

B. Underlying Facts

The facts are undisputed. Ford seeks interest pursuant to § 6611 on taxes that Ford overpaid for the 1983-89, 1992, and 1994 tax years. After the IRS advised Ford that it had underpaid its taxes for 1983-89, Ford submitted an additional $875 million to the IRS in 1991, 1992, and 1994, as deposits pursuant to Revenue Procedure 84-58, 1984-2 C.B. 501. It is undisputed that those remittances stopped the accrual of *underpayment* interest under § 6601 on the date that they were received by the IRS. Ford later requested that the IRS treat the deposits as advance payments

towards any additional taxes Ford might owe. Several years after that, the IRS used Ford's remittances to satisfy tax liabilities it assessed against Ford. Ultimately, however, years later still, the IRS found that Ford had overpaid its taxes—by hundreds of millions of dollars—for the years at issue, refunded the overpayments to Ford, and paid Ford some of the overpayment interest it claimed under § 6611 but not the overpayment interest at issue here.

The parties disputed *when* the overpayment interest began to accrue. Ford claimed that, under § 6611 and Revenue Procedure 84-58, interest began to accrue on the date that Ford first remitted the funds to the IRS. After all, the funds went directly to the U.S. Treasury and the government had complete use of the funds from the date of remittance on. Moreover, the remittances stopped the accrual of underpayment interest (§ 6601) on later assessed taxes as soon as the remittances were received, so it follows that overpayment interest (§ 6611)—which operates based on the same date-of-payment trigger—would begin accruing at the same time. Contradicting its own Revenue Procedure and prior pronouncements, however, the IRS paid interest only from the date that Ford told the IRS to treat the deposits as advance payments, not from the date Ford gave the funds to the IRS. Because of the large sum Ford overpaid, the difference in interest amounts to over $470 million.

C. District Court Proceedings

Ford filed suit against the United States in the U.S. District Court for the Eastern District of Michigan, seeking the overpayment interest that the IRS had refused to pay. Ford's complaint invoked the district court's jurisdiction under, *inter alia*, 28 U.S.C.

§ 1346(a)(1), which grants district courts jurisdiction over claims against the United States for the recovery of erroneously assessed taxes "or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." *Id.*; *see* Complaint for Interest and Jury Demand ¶ 3, *Ford Motor Co. v. United States*, No. 08-cv-12960 (E.D. Mich. filed July 10, 2008). In its Answer, the government did not raise a jurisdictional sovereign immunity defense but rather agreed with Ford that jurisdiction was proper under § 1346(a)(1). United States' Answer to Complaint ¶ 3, *Ford Motor Co. v. United States*, No. 08-12960 (E.D. Mich. filed Dec. 19, 2008).

The district court granted the government's motion for judgment on the pleadings, ruling—on the merits—that Ford was not entitled to overpayment interest from the dates that it remitted the deposits to the dates the deposits were converted to payments. App. 37a. The court recognized that there was "merit" to Ford's statutory interpretation and "d[id] not believe the Government addresse[d] sufficiently" § 5.05 of Revenue Procedure 84-58, but the court nevertheless found reasonable the government's interpretation of § 6611 and concluded that it was obliged to defer to that interpretation. *Id.* at 31a-37a. The government has since abandoned any argument for deference.

D. Sixth Circuit Proceedings

The Sixth Circuit affirmed. On appeal, both the government and Ford recognized in their briefs that § 1346(a)(1) supplied subject-matter jurisdiction in the case. *See* Ford Br. at 2; Govt. Br. at 1. Although the court of appeals recognized that § 1346(a)(1) provides a waiver of sovereign immunity (which the government has conceded applies to this case), the court dismissed

the relevance of that provision on the ground that it was a "different provision than the one at issue." App. 13a-14a. Instead, the court treated § 6611—the substantive provision governing when "[i]nterest shall be allowed and paid upon any overpayment," 26 U.S.C. § 6611(a)—as the waiver of sovereign immunity and repeatedly applied the canon of strict construction to that provision. As we explain later, that distinction was grounded in the court's failure to distinguish between a (strictly construed) waiver of sovereign immunity and a separate, substantive provision that should be interpreted in a straightforward fashion once the valid waiver of sovereign immunity is identified.

The court grounded its merits decision on the strict construction canon. At the outset, the court stated that "when interpreting § 6611, we bear foremost in mind that Ford's challenge involves construing a waiver of sovereign immunity," and that it was "bound to 'strictly construe[]' the waiver" in favor of the government. App. 7a (citation omitted). The court then proceeded to recognize that Ford's interpretation of § 6611 was "strong" (*id.* at 11a); that Ford's interpretation of Revenue Procedure 84-58 was "superior" to the IRS's "strained" reading of that provision (*id.* at 17a); and that the government's position was "contradicted" by a prior IRS pronouncement (*id.* at 18a n.6). But ultimately, the court nevertheless sided with the government's position on that ground that Ford had not overcome the strict construction canon. *Id.* at 20a-21a.

In a footnote, the court observed that "the Supreme Court has arguably softened its use of the strict construction principle since the 1990s," "when a party sought to apply the strict construction principle to a

statute or section of a statute entirely separate from the one that supplied the waiver of sovereign immunity itself." *Id.* at 9a n.3 (citing *Gomez-Perez* and *White Mountain*). But the court concluded that, "[h]ere, § 6611 itself" is the waiver of sovereign immunity, so "the strict construction principle applies." *Id.*

The court denied rehearing. *Id.* at 40a-41a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision in this case disregards this Court's holdings that the strict construction canon for waivers of sovereign immunity applies only to the waiver of sovereign immunity and not to separate, substantive provisions granting the rights at issue. The Sixth Circuit's fundamental misconception of the proper role of the strict construction canon is emblematic of the broader confusion and conflict in the lower courts over when to apply the canon. The proper application of the strict construction canon is an exceptionally important and recurring threshold issue in litigation against the federal government (and state governments) that cuts across a broad array of substantive areas of law, including tax. This case is an excellent vehicle to address this issue, and provide needed guidance, because the Sixth Circuit grounded its decision on the canon. Certiorari is warranted.

I. THE SIXTH CIRCUIT'S DECISION DIRECTLY CONTRAVENES THIS COURT'S DECISIONS HOLDING THAT THE STRICT CONSTRUCTION CANON FOR WAIVERS OF SOVEREIGN IMMUNITY IS LIMITED TO THE WAIVER OF IMMUNITY ITSELF

A. As This Court Has Recognized, Sovereign Immunity Is An Immunity From Suit

In its broadest sense, the question presented implicates what "sovereign immunity" means, and the interests that this doctrine was designed to protect.

The sovereign immunity doctrine is not explicit in the Constitution, but it is historically rooted in the English common law concept that the King could not be sued without his consent. *See, e.g.*, Aaron Tang, *Double Immunity*, 65 Stan. L. Rev. 279, 286 (2013); Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 Okla. L. Rev. 439, 443 (2005). As Alexander Hamilton wrote in *The Federalist No. 81*, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." Caleb Nelson, *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1575 (2002). In other words, an unconsenting sovereign "could not be commanded to appear or otherwise brought within a court's power." *Id.* at 1576.

This Court first recognized the doctrine in 1821 when Chief Justice Marshall explained that "[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821). That view is consistent with the Court's more recent explanations. "Sovereign immunity is jurisdictional in nature." *FDIC v. Meyer*, 510 U.S. 471,

475 (1994). It establishes that the United States "is immune from suit save as it consents to be sued," and that "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941); *Hercules, Inc. v. United States*, 516 U.S. 417, 422-23 (1996) (same). In other words, sovereign immunity is an immunity *from suit*, and a waiver of sovereign immunity is "a consent *to be sued*." *United States v. Bormes*, 133 S. Ct. 12, 16 (2012) (emphasis added).

As a "necessary corollary" to the principle of sovereign immunity, *Block v. North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 287 (1983), the Court has long applied the canon "that the Government's consent to be sued 'must be construed strictly in favor of the sovereign.'" *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951)); *see also The Davis*, 77 U.S. (10 Wall.) 15, 19 (1870). Accordingly, sovereign immunity "shields the United States from suit absent a consent to be sued that is 'unequivocally expressed.'" *Bormes*, 133 S. Ct. at 16 (quoting *Nordic Vill.*, 503 U.S. at 33-34).

B. This Court Repeatedly Has Made Clear That The Strict Construction Canon Does Not Apply To Separate, Substantive Provisions

Although the Court has held that waivers of sovereign immunity must be strictly construed, it has also long recognized that "the exemption of the sovereign from suit involves hardship enough where consent has been withheld," so courts are "'not to add to its rigor by refinement of construction where consent has been announced.'" *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (citation

omitted). Accordingly, the Court has repeatedly held that the strict construction canon applies only to the waiver of sovereign immunity—not to separate provisions that define the substantive rights at issue.

In *United States v. Mitchell*, 463 U.S. 206 (1983), the plaintiff filed suit in the Court of Federal Claims pursuant to the Tucker Act, which provides jurisdiction for claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1491(a)(1). The Court explained that the Tucker Act is a "clear" waiver of sovereign immunity—or "consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages." 463 U.S. at 218. "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." *Id.* at 218-19. Instead, courts must look at the "analytically distinct" question whether the "source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 218.

The Court further emphasized the distinction between waivers of sovereign immunity and substantive rights in *United States v. Navajo Nation*, 537 U.S. 488 (2003). The Court explained that the Indian Tucker Act confers jurisdiction upon the Court of Federal Claims and the plaintiff must "invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Id.*

at 503 (citation omitted)). As in *Mitchell*, the Court emphasized that, because the Indian Tucker Act provides the necessary consent to suit, the "rights-creating statute or regulation need not contain a second waiver of sovereign immunity." *Id.* (citation and internal quotations marks omitted).

The Court again emphasized the distinction in *United States v. White Mountain Apache*, 537 U.S. 465 (2003). The Court noted at the outset that "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity," and also "a claim falling within the terms of the waiver." *Id.* at 472. The Court reiterated that "[t]he terms of consent to be sued may not be inferred, but must be 'unequivocally expressed.'" *Id.* (citation omitted). But the Court also stressed that the interpretation of the existence or scope of the *substantive right* at issue was different. As the Court explained, a statute creates a substantive right "capable of grounding a claim within the waiver of sovereign immunity [under the Indian Tucker Act] if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* (quoting *Mitchell*, 463 U.S. at 217). But that standard, the Court held, is "demonstrably lower than the standard for the initial waiver of sovereign immunity." *Id.*

Importantly, the Court has also recognized the distinction between substantive rights and waivers of sovereign immunity outside of the Tucker Act context. In *Gomez-Perez v. Potter*, the plaintiff brought a retaliation suit under the Age Discrimination in Employment Act of 1967. 553 U.S. 474 (2008). The Court identified 29 U.S.C. § 633a(c)—which authorizes

individuals to bring "Civil actions" in federal court for violations of § 633a(a)—as the waiver of sovereign immunity from suit that must satisfy the strict construction rule. 553 U.S. at 491. By contrast, the Court explained, § 633a(a)—which states that federal personnel actions "shall be made free from any discrimination based on age"—is "a substantive provision." *Id.* The Court then explained that the fact "that the waiver in § 633a(c) applies to § 633a(a) claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c)." *Id.* In doing so, the Court again relied on the *Mitchell* rule: "where one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity.'" *Id.* (citation omitted). *Gomez-Perez* therefore refutes any argument that the *Mitchell* line of cases is confined to Tucker Act cases.

And just last year, in *Bormes*, the Court likewise held that the Little Tucker Act, 28 U.S.C. § 1346(a)(2), satisfied the strict construction canon for waivers of sovereign immunity because it "unequivocally provides the Federal Government's consent to suit for certain money-damages claims." 133 S. Ct. at 16. Like the Tucker Act, the Court explained, the Little Tucker Act is a "'jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised on other sources of law,'" and a separate statute creates the "'substantive rights'" to be enforced in exercising that jurisdiction. *Id.* at 16-17 (citation omitted).

In short, the Court has repeatedly held that the strict construction canon applies only to the waiver of sovereign immunity—the jurisdictional provision that

provides the government's consent *to be sued*. Conversely, the Court has emphasized, the canon does not apply to the separate substantive provision that governs the merits of the underlying dispute. That paradigm is built on the understanding that the strict construction canon is "hardship enough" when it comes to establishing the government's consent to be sued. *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.). And it preserves the historical role of sovereign immunity—as a means of ensuring that the sovereign is not made to answer for claims without having consented *to suit*.

C. The Sixth Circuit's Decision Directly Conflicts With This Court's Teachings

This case fits hand-in-glove with the paradigm recognized by this Court's cases, with one statutory provision waiving sovereign immunity from suit (§ 1346(a)(1)) and another (§ 6611) conferring the substantive right underlying the claims asserted. Yet, in direct conflict with this Court's precedents, the Sixth Circuit invoked the strict construction canon to construe not the waiver of sovereign immunity, but instead the separate, substantive provision. That error stacked the deck against the taxpayer in construing the statutory provision at issue on the merits, and undeniably resulted in the Sixth Circuit's disposition rejecting Ford's overpayment-interest claim.

Section 1346(a)(1) is a prototypical waiver of sovereign immunity because it allows suit against the United States to enforce particular claims or rights. This Court and others have repeatedly recognized that § 1346(a)(1) is a waiver of sovereign immunity. *See United States v. Williams*, 514 U.S. 527, 530-31 (1995); *Dunn & Black, P.S. v. United States*, 492 F.3d 1084,

1088 (9th Cir. 2007); *Roberts v. United States*, 242 F.3d 1065, 1067 (Fed. Cir. 2001); *Begner v. United States*, 428 F.3d 998, 1002 (11th Cir. 2005); *E.W. Scripps Co. v. United States*, 420 F.3d 589, 498 (6th Cir. 2005). In *Williams*, the Court explained that § 1346(a)(1) "waives the Government's sovereign immunity from suit by authorizing federal courts to adjudicate" certain claims. 514 U.S. at 530. Indeed, § 1346(a)(1) was initially adopted as an amendment to the Tucker Act. *See Flora v. United States*, 362 U.S. 145, 151-52 & n.8 (1960). And just as the Court recognized for the Tucker Act itself, "by giving the Court of Claims" and the district courts "jurisdiction over specified types of claims against the United States," § 1346(a)(1) "constitutes a waiver of sovereign immunity with respect to those claims." *Mitchell*, 463 U.S. at 212.

Overpayment interest claims under § 6611 clearly fall within § 1346(a)(1)'s waiver of sovereign immunity. Section 1346(a)(1) allows for claims for the recovery of "any sum alleged to have been excessive . . . under the internal-revenue laws." 28 U.S.C. § 1346(a)(1). This Court explained in *Flora* that "[o]ne obvious example of such a 'sum'" fitting within § 1346(a)(1)'s "'any sum'" provision "is interest." 362 U.S. at 149; *see also Scripps*, 420 F.3d at 597-98 ("through the 'any sum' provision of § 1346(a)(1), the federal government has waived its sovereign immunity with respect to suits for interest on overpayments of tax that are brought in federal district court"). The government acknowledged from the outset of this case that the district court had jurisdiction over Ford's § 6611 claim under § 1346(a)(1). *Supra* at 7. And the Sixth Circuit decided this case on

the basis of that premise, which was embedded in the court's own case law. *Scripps*, 420 F.3d at 596-97.[1]

Section 6611, in turn, creates the substantive right underlying Ford's claims. Unlike § 1346(a)(1), § 6611 does not speak of opening the courts to claims or jurisdiction. Instead, it creates a substantive right to overpayment interest, providing that "[i]nterest shall be allowed and paid" on tax overpayments. 26 U.S.C. § 6611(a). In that regard, § 6611 is directly analogous to the substantive provision in *Gomez-Perez*, which provided that federal personnel decisions "'shall be made free from any discrimination based on age.'" 553 U.S. at 479 (quoting 29 U.S.C. § 633a(a)). Section 6611 also specifies the rate at which interest shall be paid, § 6611(a), and the period of time for which it will be paid, § 6611(b)(2). In other words, it governs the *merits* of Ford's interest claim. Indeed, the district court rejected Ford's claim on the merits when it granted the government's motion for judgment on the pleadings, which presented only merits arguments. And the Sixth Circuit affirmed that merits ruling,

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[1] As the Sixth Circuit recognized in *Scripps*, the "any sum" provision's waiver of sovereign immunity for claims brought under § 6611 is in addition to § 1346(a)(1)'s general waiver of immunity for refund suits—"the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 420 F.3d at 596, 598. The "any sum" provision therefore readily satisfies the "separate waiver" requirement in *Library of Congress v. Shaw*—that a plaintiff, at least when seeking interest as a separate element on damages on a substantive claim (*see infra* at 25-27), must point to an "express congressional consent to the award of interest separate from a general waiver of immunity to suit." 478 U.S. 310, 314 (1986).

rather than dismissing for lack of jurisdiction on the ground that the United States was immune from suit.

This case thus presents the same situation presented by the *Mitchell* line of cases: one statute is a "jurisdictional provision[] that operate[s] to waive sovereign immunity for claims premised on other sources of law" and another statute creates the "substantive rights" to be enforced thereunder. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009). As explained, in that situation, the Court has repeatedly held that the strict construction canon applies only to the waiver of sovereign immunity, not the separate substantive provision. The Sixth Circuit's decision directly contravenes this Court's decisions—both in failing to appreciate the distinction between the waiver of sovereign immunity (§ 1346(a)(1)) and the separate, substantive provision creating the rights underlying Ford's claims (§ 6611), and in holding that the latter provision must meet the "same high hurdle" as the former. *Gomez-Perez*, 553 U.S. at 491.

II. THE DECISION BELOW IS EMBLEMATIC OF THE BROADER CONFLICT AND CONFUSION IN THE COURTS OF APPEALS OVER WHEN TO APPLY THE STRICT CONSTRUCTION CANON FOR WAIVERS OF SOVEREIGN IMMUNITY

As members of this Court have recognized, the strict construction canon for waivers of sovereign immunity has been a lingering source of confusion. *See, e.g.*, *FAA v. Cooper*, 132 S. Ct. 1441, 1456-57 (2012) (Sotomayor, J., joined by Ginsburg, & Breyer, JJ., dissenting) (arguing that the strict construction canon "has been used . . . haphazardly in the Court's history"); *Nordic Vill.*, 503 U.S. at 42 (Stevens, J., joined by

Blackmum, J., dissenting) (arguing that the canon is "nothing but a judge-made rule that is sometimes favored and sometimes disfavored") (collecting cases). That checkered history no doubt helps explain the frequency with which the Court has been called upon to address the applicability of the canon. It also helps explain the broader conflict and confusion in the courts of appeals over the application of the strict construction canon for waivers of sovereign immunity. This confusion—which is exacerbated by the Sixth Circuit's flawed decision in this case—underscores the need for further guidance from this Court.

1. One of the central errors committed by the Sixth Circuit below was failing to recognize what constitutes a waiver of sovereign immunity and what constitutes a substantive provision—which is the on/off switch for applying the canon. There is a broader conflict and confusion on this issue. For example, in *Federal National Mortgage Ass'n v. United States*, 379 F.3d 1303, 1305 (Fed. Cir. 2004), the taxpayer brought a claim for interest under the so-called "Special Rule" (26 U.S.C. § 6621(d)), arguing that a zero net interest rate applied to overlapping periods in which the taxpayer owed underpayment interest and the IRS owed overpayment interest. The Federal Circuit applied the strict construction canon to the Special Rule, stating that it "authorizes claims against the government to recover interest paid, if the taxpayer satisfies certain specified conditions." 379 F.3d at 1310. But that was clearly wrong. The Special Rule is a substantive provision, not a waiver of sovereign immunity from suit. The court failed even to discuss the actual waiver of sovereign immunity—the statutory provision that

gave the Court of Federal Claims jurisdiction over the claim at issue, 28 U.S.C. § 1491(a) (the Tucker Act).

In direct conflict with the Federal Circuit's holding, the Second Circuit (correctly) declined to apply the strict construction canon to the Special Rule on the ground that it is not a waiver of sovereign immunity. *Exxon Mobil Corp. v. Commissioner*, 689 F.3d 191, 201 (2d Cir. 2012). The court explained that the Special Rule "does not create jurisdiction or authorize claims against the United States," but instead "merely allows for the interest-netting provision of section 6621(d) to be applied retrospectively to claims raised under section 6611(a)." *Id.* at 201-02. Relying on *Gomez-Perez*, *White Mountain*, and *Mitchell*, the court recognized that the strict construction canon applies only to the waiver of sovereign immunity, not to the separate provision that governs the merits of the dispute. *Id.* at 202. Yet the court still erred by treating § 6611 as a waiver of sovereign immunity (when, for the reasons discussed above, it plainly is not), and the court failed to recognize that the actual waiver of sovereign immunity was the statutory provision that granted the lower tribunal (the Tax Court) jurisdiction over the claims at issue. *See id.*[2]

Not only do the Federal Circuit's and the Second Circuit's holdings directly conflict, but the courts both committed the same error that the Sixth Circuit committed here—all three courts treated a substantive

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[2] By contrast, in *Northern States Power Co. v. United States*, the Eighth Circuit construed 26 U.S.C. § 6601(f), which—like the Special Rule—provides for interest netting, without mentioning sovereign immunity or the strict construction canon. 73 F.3d 764, 766 (8th Cir.), *cert. denied*, 519 U.S. 862 (1996).

provision as a waiver of sovereign immunity. In *Federal National Mortgage,* the Federal Circuit treated the Special Rule as a waiver of immunity, and in this case and *Exxon Mobil,* the Sixth Circuit and Second Circuit treated § 6611 as a waiver of sovereign immunity. In order to properly apply the *Mitchell* rule, the lower courts need further guidance from this Court on what constitutes a waiver of sovereign immunity and what constitutes a substantive provision.

2. Lower courts are also confused and divided on what can be characterized as an issue of the "scope" of a waiver of sovereign immunity, which also affects when to apply the strict construction canon. This Court has stated that the strict construction canon applies to issues of the "scope" of the waiver of sovereign immunity, *see, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996), but the application of that rule has caused confusion in the lower courts and tension in this Court's cases on whether the canon applies to an issue.

For example, the Ninth Circuit and the Federal Circuit have held that the strict construction canon does not apply when determining the *rate* at which the government pays overpayment interest. The Federal Circuit explained that the sovereign immunity canon was "irrelevant" because "the dispute concerns not *whether* interest runs against the United States but *how* the interest is to be calculated." *J.F. Shea Co. v. United States*, 754 F.2d 338, 340 (Fed. Cir. 1985). The Ninth Circuit similarly explained that § 6621(a)(1) "is not a waiver of immunity from an award of interest," but instead "governs the *manner* in which the interest available on . . . a wrongful levy judgment is calculated." *Steven N.S. Cheung, Inc. v. United States*, 545 F.3d 695, 699 n.9 (9th Cir. 2008) (emphasis added).

But the issue in these cases also could have been characterized as an issue of the scope of the waiver—*e.g.*, whether the government waived sovereign immunity for interest above a certain amount.

Moreover, other courts *have* characterized issues relating to the calculation of interest as questions of "scope" and applied the strict construction canon to those issues. Here, for example, the Sixth Circuit stated that the date from which interest runs is a question of "scope" to which the canon applies (after erroneously concluding that the canon applied to § 6611 at all). App. 8a & n.2. Similarly, the Federal Circuit held that the canon applies in determining the applicability of the Special Rule because the issue is "*whether*" interest runs against the United States. *Federal National Mortgage*, 379 F.3d at 1310. But the issues in these cases could just as easily have been phrased in terms of calculating the amount of interest due, which the *J.F. Shea* and *Steven N.S. Cheung* courts held does *not* trigger the canon.

It is hard to blame these courts for the confusion, given the tension in this Court's own case law about what qualifies as an issue of the scope of a waiver of sovereign immunity. Finding that the issues were not "scope" issues, the Court has often held that the canon does not apply when construing exceptions to the Federal Tort Claims Act waiver of sovereign immunity, *see, e.g.*, *Dolan v. United States Postal Serv.*, 546 U.S. 481, 484-85 (2006), or when construing time limits in a waiver of sovereign immunity. *See Scarborough v. Principi*, 541 U.S. 401, 419-23 (2004).

But in other cases, the Court has held that the strict construction canon applies to the issue of what *remedy* is authorized because that is an issue of the "scope" of

the waiver. *See FAA v. Cooper*, 132 S. Ct. at 1448 (whether the Privacy Act's authorization of suits for "'actual damages'" includes emotional distress damages "concerns the *scope* of the waiver"); *Lane*, 518 U.S. at 192-93 (whether § 504 of the Rehabilitation Act waives immunity from monetary claims is an issue of scope); *Nordic Vill.*, 503 U.S. at 34-36 (1992) (applying strict construction canon to question whether 11 U.S.C. § 106(c) of the Bankruptcy Code's waiver of immunity from suit includes suits for money damages); *cf. Sossamon v. Texas*, 131 S. Ct. 1651, 1660 (2011) (whether the Religious Land Use and Institutionalized Persons Act of 2000's waiver of sovereign immunity for "appropriate relief" is an issue of scope).

One scholar recently criticized this line of cases as improperly imposing "double immunity," noting that before *Nordic Village* the Court applied the strict construction canon only "to determine whether a particular lawsuit was intended to be within the scope of a waiver of immunity, but not to define the remedial scope of the waiver." Tang, *Double Immunity*, 65 Stan. L. Rev. at 317. As he explained, if the "scope" of the waiver "extends beyond the question of whether a particular suit is authorized and reaches to questions of remedies," there is no logical stopping-point. *Id.*

Indeed, this Court's treatment of the question of remedy as an issue of "scope" that is subject to the strict construction canon is in tension with the *Mitchell* line of cases. In *Mitchell*, the Court explained that the Tucker Act waives sovereign immunity "for claims founded upon statutes or regulations that create substantive rights to money damages," but the issue of whether a statute falls within that category—*i.e.*, whether a statute creates a substantive right to money

damages—is "analytically distinct" and the canon does not apply to that issue. 463 U.S. at 218. The question whether a substantive claim fits within the waiver could easily have been framed as an issue of the "scope" of the waiver to which the canon applies.

This case directly implicates the confusion in the lower courts and this Court's cases over which issues qualify as issues of the "scope" of a waiver of sovereign immunity. Here, the Sixth Circuit improperly treated the "date of the overpayment" that triggers interest in § 6611(b)(2) as governing the "scope" of the waiver, when it should have recognized that § 6611 is a substantive provision—separate from the waiver of immunity altogether. App. 8a & n.2. If the court of appeals had properly appreciated that § 6611 is not a waiver of sovereign immunity from suit at all, or that issues concerning the "scope" of waivers of immunity do not extend beyond the consent to suit itself, it might have properly concluded that the strict construction canon does not apply to the "date of the overpayment" in § 6611(b)(2). Further guidance is needed from this Court to preserve the distinction stressed in the *Mitchell* line of cases between waivers of sovereign immunity and separate substantive provisions.

3. As this case underscores, the courts of appeals are also confused and in conflict about when the strict construction canon applies to interest provisions, and whether the rule that the canon does not apply to separate, substantive provisions is any different when the separate provision creates a right to interest. This confusion has been exacerbated by the government's aggressive reading of this Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986).

In *Shaw*, a Title VII case, this Court held that the United States is immune from claims for prejudgment interest on damages, absent a waiver "separate from a general waiver of immunity to suit." *Id.* at 314. The Court explained that this requirement "reflects the historical view that interest is an element of damages separate from damages on the substantive claim." *Id.* (citing Charles T. McCormick, *Handbook on the Law of Damages* § 50 (1935)). But in this case—which involves a claim for overpayment interest on taxes, not prejudgment interest on damages—the Sixth Circuit effectively transformed *Shaw* into a rule requiring *double immunity* for interest claims. Here, § 1346(a)(1) clearly provides a waiver of immunity from suit for interest claims—separate from the general waiver of immunity from suit for refund claims. *See supra* n.1. Yet the Sixth Circuit still applied the strict construction canon in construing the substantive provision creating a right to overpayment interest.

As the Solicitor General has recently recognized, the courts of appeals are divided on the related issue of whether a party may recover interest on seized property in forfeiture actions, when the relevant statute does not unambiguously provide for such interest. *See* U.S. Br. in Opp., *Craig v. United States*, No. 12-1046 at 7 (filed July 5, 2013) ("disagreement exists among the circuits on whether sovereign immunity bars recovery of interest on seized money"); *id.* at 11 (same); Petition for Writ of Certiorari, *Craig v. United States*, No. 12-1046 (filed Feb. 25, 2013) (presenting issue); *United States v. Craig*, 694 F.3d 509, 513 (3d Cir. 2012) (discussing conflict). Some circuits have held that interest is part of the *res* that the government must return and have distinguished *Shaw*

as governing only pre-judgment interest on damages awards.[3] Other circuits have held that interest on seized property is barred by *Shaw* because there is no clear waiver of sovereign immunity for interest.[4]

In this case, *Shaw* presents no obstacle because the "any sum" provision of § 1346(a)(1) provides any necessary waiver of immunity on interest claims in particular—and the case was litigated below on the undisputed premise that § 1346(a)(1) supplied the United States' consent to be sued for overpayment interest. *See supra* n.1. Holding that *Shaw* obligates a separate, substantive interest provision (like § 6611) to surmount the strict construction canon in these circumstances would contravene this Court's later cases, such as *Gomez-Perez*, which teach that the strict construction canon does not extend beyond the waiver of sovereign immunity to such substantive provisions.

But in any event, even if the "any sum" provision of § 1346(a)(1) did not apply here, *Shaw* should not govern under the rationale of the circuits that have distinguished *Shaw* in the seized property cases. Overpayment interest is directly analogous to interest that the government accrues during its possession of seized property because both forms of interest

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[3] *See Carvajal v. United States*, 521 F.3d 1242, 1245, 1248-49 (9th Cir. 2008); *United States v. 1461 W. 42nd St.*, 251 F.3d 1329, 1338 (11th Cir. 2001); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998).

[4] *See Craig*, 694 F.3d at 512; *Larson v. United States*, 274 F.3d 643, 647-48 (1st Cir. 2001); *United States v. $30,006.25 in U.S. Currency*, 236 F.3d 610, 613-14 (10th Cir. 2000); *United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843, 845 (8th Cir. 1999); *Ikelionwu v. United States*, 150 F.3d 233, 239 (2d Cir. 1998).

effectuate the use-of-money principle rather than compensating the plaintiff for an injury (like prejudgment interest). Moreover, just like interest on seized property, overpayment interest does not implicate the unique history underlying the *Shaw* rule concerning the treatment of prejudgment interest on damages. Accordingly, even without the separate waiver for interest in § 1346(a)(1), *Shaw* would not compel the result reached by the Sixth Circuit here. This Court's review is also warranted to clarify whether *Shaw* applies to interest claims—like those for overpayment interest on taxes, or interest on seized property—that do not involve pre-judgment interest as a component of damages for a substantive injury.

In short, the application of the strict construction canon has continued to confound the lower courts. That confusion is in full display in the decision below. This Court's guidance is sorely needed.

III. THE PROPER APPLICATION OF THE STRICT CONSTRUCTION CANON FOR WAIVERS OF SOVEREIGN IMMUNITY IS UNQUESTIONABLY IMPORTANT AND SQUARELY PRESENTED HERE

The proper application of the strict construction canon is undeniably important. It is a threshold issue that has been used to determine whether plaintiffs can bring suit against the government, what remedies they can seek from the government, and the resolution of disputes on the merits. The issue of sovereign immunity cuts across all suits against the federal and state governments. It applies in substantive areas as varied as tax law, employment discrimination, torts, civil and criminal forfeiture, and government management of Indian property. And this Court

accordingly has frequently granted certiorari in cases involving application of the strict construction canon.

The issue is not going away. The government reflexively asserts—and over asserts—the canon of strict construction when it is sued. The Court has had to rein in the government's use of the canon in recent years. *See, e.g.*, *Scarborough*, 541 U.S. at 419-21; *Dolan*, 546 U.S. at 485; *Gomez-Perez*, 553 U.S. at 491. Twice this year, Justices questioned the government's reliance on the canon during oral arguments. *See* Transcript of Oral Argument at 26-29, *Levin v. United States*, 133 S. Ct. 1224 (2013) (No. 11-1351) (Chief Justice questioning counsel for the government on why the government should get the benefit of the canon beyond the "waiver of sovereign immunity in the first instance"); Transcript of Oral Argument at 14-15, *Sebilus v. Cloer*, 133 S. Ct. 1886 (2013) (No. 12-236) (Justice Scalia stating that once the Court finds a clear waiver of sovereign immunity "I don't think we nitpick the following language to unrealistically narrow it as much as possible"; "[o]nce it's clear that [Congress] has agreed to be sued, I think we just interpret the language reasonabl[y]."). Despite this Court's decisions, the government still asserts the strict construction canon in construing separate, substantive provisions. And in the lower courts at least, the government frequently gets away with it, giving the government an unintended advantage on the merits.

This case presents an ideal vehicle for the Court to review the proper application of the canon. The Sixth Circuit's decision holding that Ford is not entitled to the overpayment interest from the date that Ford remitted funds to the U.S. treasury is grounded on the court's belief that the strict construction canon applies.

The court had the canon "foremost in mind" (App. 7a), and, after finding that § 6611 was ambiguous, decided the case on the ground that "Congress has 'unequivocally expressed' its waiver of sovereign immunity for claims to overpayment interest accruing between the date a deposit in the nature of a cash bond was remitted and the date that deposit was converted to an advance tax payment" (*id.* at 12a-13a). At every key step—in framing the issue, in interpreting the statute, in interpreting the Revenue Procedure, and in announcing its holding—the Sixth Circuit made clear that its decision was controlled by the canon.

On a level playing field, it is clear that Ford is entitled to judgment on its overpayment-interest claim. The Sixth Circuit itself recognized that Ford made a "strong case" for interpreting the provisions governing overpayment interest (§ 6611) and underpayment interest (§ 6601) symmetrically—explaining that the provisions are "functionally parallel," effectuate the use-of-money principle, and use "very similar language." App. 4a, 11a, 14a. The government maintains that the "date of the overpayment" in § 6611(b)(1) should be interpreted differently than "the date paid" in § 6601, so that the *same* remittance has a *different* date of payment depending on whether the payment eventually triggers underpayment or overpayment interest.[5] That position is illogical and

[5] In fact, when the IRS eventually assessed the taxes, it treated Ford's deposit remittances as payments as of their remittance dates to calculate underpayment interest. Later, after Ford succeeded on refund claims, the IRS treated the very same remittances as payments only as of the later conversion date to calculate overpayment interest.

flouts the rule that the same or similar language in a statute is presumed to have the same meaning.[6]

The government's position is also contradicted by the IRS's own revenue procedure. As explained, the operative provisions of Revenue Procedure 84-58—like the statutory provisions it implements—create a symmetrical scheme in which remittances operate in the same fashion for both underpayment interest and overpayment interest, except in one narrow situation carved out in subsection 5.05. *Supra* at 4-5. As the Sixth Circuit recognized, the fact that overpayment interest accrues from the date that a remittance is designated an advance payment under the *exception*, leads to the common-sense conclusion that the general rule is that overpayment interest accrues from the date of the remittance. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) (explaining that "converting the exception into the rule" would "distort" a statute's text); *see* App. 17a-18a; *id.* at 31a-32a & n.3. The government's contrary interpretation is, as the Sixth Circuit itself gingerly put it, "strained." *Id.* at 17a. In

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[6] Relying on *Busser v. United States*, 130 F.2d 537, 539 (3d Cir. 1942), the Sixth Circuit stated that the ordinary meaning of "payment" supported the government's position, reasoning that there can be no overpayment until there is a payment of a tax obligation. App. 10a-11a. But as the Solicitor General has twice recognized, Congress overruled *Busser* by enacting 26 U.S.C. § 6401(c), which provides that "[a]n amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid." *See* U.S. Br. 21-22, *Baral v. United States*, 528 U.S. 431 (1999), *available at* 1999 WL 1146867; U.S. Br. 31-34, *Rosenman v. United States*, 323 U.S. 658 (1944), *available at* 1944 WL 42253.

short, the government has yet to come up with a plausible response to its own revenue procedure.[7]

The IRS invited taxpayers to remit funds under the terms of Revenue Procedure 84-58. Here, Ford remitted more than $800 million to the IRS with specific reference to, and reliance on, the Revenue Procedure, not to mention the statutory provisions discussed above. Under the bedrock time-value-of-money principle interest should accrue from the date that the IRS had the use of Ford's money—indisputably, the date the remittances were made. And as discussed, ordinary principles of statutory interpretation compel the same conclusion under § 6611. If there were any doubt, the tiebreaker would be the longstanding canon that—in construing the tax laws—"the doubt must be resolved against the Government and in favor of the taxpayer." *United States v. Merriam*, 263 U.S. 179, 188 (1923). Only by subjecting § 6611 to the exacting strict construction canon reserved for waivers of immunity—in direct conflict with this Court's precedent—did the Sixth Circuit reach the opposite conclusion, depriving Ford of over $470 million in overpayment interest.

Unfortunately, that decision is not an outlier. As discussed, lower courts frequently misconceive, and misapply, the strict construction canon for waivers of sovereign immunity. This Court's intervention is needed to address this important threshold issue.

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[7] As the Sixth Circuit recognized, the government's interpretation is also "contradicted" by prior IRS statements on the meaning of § 6611. *See* App. 18a n.6; *see also* Ford Pet. for Reh'g 14-15.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 24, 2013

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APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FORD MOTOR COMPANY, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 10-1934

December 17, 2012, Filed

2012 U.S. App. LEXIS 25725

BEFORE: BATCHELDER, Chief Judge; GIBBONS and ROGERS, Circuit Judges.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellant Ford Motor Company ("Ford") seeks approximately $445 million in interest that it believes has accrued on overpayments of its corporate income taxes. Ford contends that the Internal Revenue Service ("IRS"), under 26 U.S.C. § 6611, was required to calculate overpayment interest from the earlier dates on which Ford submitted deposits to the IRS, rather than from the later dates on which Ford requested that those deposits be converted into advance payments of tax. The district court granted the government's motion for judgment on the pleadings and denied Ford's motion for summary judgment, finding reasonable the government's interpretation of § 6611—that overpayment interest be calculated only from the later dates of conversion. For the reasons that follow, we affirm.

I.

The facts giving rise to Ford's legal claims are not in dispute. On September 9 and 27, 1991, July 6, 1992,

and June 23, 1994, Ford submitted remittances to the IRS. In submitting these remittances, Ford specifically requested that they be treated as deposits in the nature of a cash bond. Ford made these remittances, amounting to several hundred millions of dollars, after it had been audited by and received 30-day letters from the IRS which notified Ford of proposed tax deficiencies incurred during 1983-1989, 1992, and 1994.

Subsequently, Ford requested that the IRS treat these remittances as advance payments—*i.e.*, payments towards proposed (not yet assessed) tax deficiencies—rather than as deposits in the nature of a cash bond. On December 19, 1994, Ford requested that part of the September 9, 1991 deposit be treated as an advance payment. One year later, on December 15, 1995, Ford requested that another portion of its September 9, 1991 deposit; portions of its deposits made on September 27, 1991 and July 6, 1992; and the entire June 23, 1994 deposit also be treated as advance payments. The IRS obliged, and thus Ford effectively converted its deposits that were held in the nature of cash bonds into advance payments towards proposed past-due taxes.

At some point after the deposits were converted, the IRS determined that Ford had in fact *overpaid* its taxes for the years in question and issued refunds to Ford. These refunds included the amount that Ford overpaid and the interest that had accrued on its overpayment. Importantly—and at the heart of this dispute—the IRS calculated the amount of overpayment interest from the dates on which Ford requested that its deposits be converted to advance payments (*i.e.*, the "conversion dates" of December 19,

1994 and December 15, 1995), not from the earlier dates on which Ford remitted the deposits (*i.e.*, the "remittance dates" of September 9 and 27, 1991, July 6, 1992, and June 23, 1994).

On July 10, 2008, Ford filed a complaint seeking approximately $445 million in interest that had allegedly accrued on overpayments of its corporate income taxes for 1983-1989, 1992, and 1994. The United States moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Ford responded and also moved for summary judgment. On June 3, 2010, after conducting a hearing, the district court granted the government's motion for judgment on the pleadings and denied Ford's motion for summary judgment. Although the district court conceded that Ford's argument "may have some merit," it found reasonable the government's position that there could be no overpayment of tax—and therefore no overpayment interest accrual—until Ford actually converted its deposits to advance payments. Thus, the court held that the government had correctly calculated Ford's overpayment interest.

We review *de novo* the district court's grant of judgment on the pleadings and its denial of summary judgment. *Fortney & Weygandt, Inc. v. Am. Mfrs. Mut. Ins. Co.*, 595 F.3d 308, 310 (6th Cir. 2010).

II.

Corporate tax returns, like individual tax returns, are subject to audit by the IRS. *See generally* 34 Am. Jur. 2d Federal Taxation ¶ 70000 (updated 2012). An audit may reveal that the corporate taxpayer has underpaid or overpaid its taxes for the year in question. If the audit reveals that a taxpayer has overpaid its taxes, then the taxpayer is entitled to the

amount of the overpayment, plus interest on that overpayment. 26 U.S.C. § 6611(a); *see generally* 34 Am. Jur. 2d Federal Taxation ¶ 70901 (updated 2012). The "overpayment interest" statute, 26 U.S.C. § 6611, reads as follows:

> **(a) Rate.**—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.
>
> **(b) Period.**—*Such interest shall be allowed and paid* as follows ...
>
> > **(2) Refunds.**—In the case of a refund, *from the date of the overpayment* to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer . ...

26 U.S.C. § 6611(a)–(b)(2) (emphases added). Conversely, if a taxpayer has underpaid taxes, he is liable for the amount of underpayment plus interest on that underpayment. The "underpayment interest" statute, 26 U.S.C. § 6601, reads as follows:

> **(a) General rule.**—*If any amount of tax imposed by this title ... is not paid on or before the last date prescribed for payment, interest* on such amount at the underpayment rate established under section 6621 *shall be paid for the period from such last date to the date paid.*

Id. § 6601(a) (emphases added). Thus, § 6611 (taxpayer entitlement to overpayment interest) and § 6601 (taxpayer liability for underpayment interest) are functionally parallel in that they describe when interest starts and stops accruing.

Because it can take years for the IRS to complete an audit and resolve any administrative appeals related to a return, significant underpayment interest can accrue in the interim if a taxpayer has indeed underpaid. To avoid this possibility, a taxpayer may remit money to the IRS pursuant to Revenue Procedure 84-58—before any tax liability is assessed—which will stop the accrual of underpayment interest in the event that the taxpayer is later found to have underpaid. *See* Rev. Proc. 84-58, 1984-2 C.B. 501, *superseded by* Rev. Proc. 2005-18, 2005-1 C.B. 798. To gain this benefit and stop potential underpayment interest from accruing, a taxpayer must designate the remittance as "a deposit in the nature of a cash bond." *Id.* §§ 4.02; 5.01. A taxpayer who submits a deposit in the nature of a cash bond may request the return of the deposit at any time—but if he does so, he will not be paid interest for the time the IRS had the deposit *and* he will be liable for interest incurred on any underpayment from the date of the remittance. In other words, in addition to not earning interest on his deposit, the taxpayer who requests his deposit's return will lose whatever interest-stopping benefits he gained by submitting a deposit in the first place. *See id.* §§ 5.01, 5.04. Alternatively, after submitting a deposit in the nature of a cash bond, the taxpayer may request that this deposit be converted and applied towards an advance payment of a tax—*i.e.*, a tax that has been proposed but not assessed.[1]

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[1] It appears that there is no provision of the Revenue Procedures that specifically allows a taxpayer to request the "conversion" of its deposit to a payment of tax. But the fact that a taxpayer can request initially that its remittance be treated as a

There is no dispute Ford designated that its remittances be treated as deposits in the nature of a cash bond pursuant to Revenue Procedure 84-58, and thus stopped the accrual of any underpayment interest. Instead, the dispute here involves overpayment interest. Years after Ford submitted remittances pursuant to Revenue Procedure 84-58, Ford requested that the IRS treat these deposits as advance payments on its proposed tax liabilities. But then, years after converting Ford's deposits to tax payments, the IRS recognized that Ford had in fact overpaid its taxes. The IRS therefore refunded Ford the amount of overpayment plus interest on that overpayment, calculating the interest due from the date that Ford requested that its remittances be treated as tax payments. Ford contends that interest should be calculated from earlier dates—the dates on which it initially submitted its remittances. Accordingly, we face the following question: does overpayment interest accrue from the date of the initial remittance or the date when the taxpayer requests the remittance be treated as an advance tax payment?

III.

We begin any statutory-interpretation analysis "by examining the language of the statute itself to determine if its meaning is plain." *Nat'l Air Traffic Controllers Ass'n v. Dep't of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (internal quotation marks omitted). "Plain meaning is examined by looking at the language

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deposit, *see* Rev. Proc. 84-58 § 4.02, or otherwise it will be treated as a tax payment, *id.* § 4.03, supports the logical inference that a taxpayer may request conversion from deposit to tax payment. And it is undisputed that Ford's request to convert its deposits was granted.

and design of the statute as a whole." *Id.* (internal quotation marks omitted). "[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Menuskin v. Williams*, 145 F.3d 755, 768 (6th Cir. 1998) (internal quotation marks omitted). Moreover, "[i]n interpreting the meaning of the words in a revenue Act, we look to the ordinary, everyday senses of the words." *C.I.R. v. Soliman*, 506 U.S. 168, 174, 113 S. Ct. 701, 121 L. Ed. 2d 634 (1993) (internal quotation marks omitted).

In addition, when interpreting § 6611, we bear foremost in mind that Ford's challenge involves construing a waiver of sovereign immunity in a suit for interest against the government. It is well established that the "no-interest rule" shields the government from liability in suits for interest unless there is a express statutory waiver of sovereign immunity. *Library of Cong. v. Shaw*, 478 U.S. 310, 317-18, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986), *abrogated by statute on other grounds as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); *Van Winkle v. McLucas*, 537 F.2d 246, 247-48 (6th Cir. 1976); *United States ex rel. Angarica de la Rua v. Bayard*, 127 U.S. 251, 260, 8 S. Ct. 1156, 32 L. Ed. 159 (1888). Where the government has waived sovereign immunity, we are bound to "strictly construe[]" the waiver, "in terms of its scope, in favor of the sovereign," *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996); to limit such waivers to their plain language, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693-94, 103 S. Ct. 3274, 77 L. Ed. 2d

938 (1983); and to construe any "ambiguities in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995). Although this strict construction principle does not displace other rules of statutory construction, *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589, 128 S. Ct. 2007, 170 L. Ed. 2d 960 (2008), it is not to be taken lightly: the "no-interest rule provides an added gloss of strictness upon the[] usual rules" governing waivers of sovereign immunity. *Shaw*, 478 U.S. at 318.

Here, the question is not whether Congress has consented to be sued for interest on tax overpayments; it clearly has. Both § 6611(a) and (b) specifically state that overpayment interest "shall be allowed and paid." 26 U.S.C. § 6611(a) ("Interest shall be allowed and paid upon any overpayment ...."); *id.* § 6611(b) ("Such interest shall be allowed and paid as follows ...."). Rather, the proper question is the scope of that waiver.[2] And as the Supreme Court has recently reiterated, "[f]or the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign." *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448, 182 L. Ed. 2d 497 (2012). Thus, for Ford to prevail here, "the scope of Congress' waiver [must] be clearly discernable from the statutory

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[2] This dispute does not involve the mere calculation of interest, where principles of sovereign immunity arguably might not apply. *See J.F. Shea Co. v. United States*, 754 F.2d 338, 340 (Fed. Cir. 1985). Rather, it involves whether the government can be sued *at all* for overpayment interest accruing from the date of deposit—and therefore necessitates an inquiry into how broadly the government has waived its sovereign immunity, which is fundamentally a question of scope.

text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government." *Id.*[3]

A.

Section 6611 does not define "the date of overpayment" and the tax code generally does not define the term "overpayment." *Gen. Elec. Co. & Subsidiaries v. United States*, 384 F.3d 1307, 1312 (Fed. Cir. 2004). However, the Supreme Court has "read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due." *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531, 68 S. Ct. 229, 92 L. Ed. 142, 1948-1 C.B. 102 (1947); *see United*

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[3] Although the Supreme Court has arguably softened its use of the strict construction principle since the 1990s, *see generally Burch v. Sec'y of Health & Human Servs.*, No. 99-946V, 2010 U.S. Claims LEXIS 154, 2010 WL 1676767, at *5-6 (Fed. Cl. Apr. 9, 2010), the Court has done so only when a party sought to apply the strict construction principle to a statute or section of a statute entirely separate from the one that supplied the waiver of sovereign immunity itself. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491, 128 S. Ct. 1931, 170 L. Ed. 2d 887 (2008) (refusing to apply strict construction principle to substantive provision of subsection where the waiver of sovereign immunity was contained in another subsection); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472–473, 123 S. Ct. 1126, 155 L. Ed. 2d 40 (2003) (holding that where one statute provides for a waiver of sovereign immunity to enforce a separate statute, the latter statute is not subject to the strict construction principle). Here, § 6611 itself waives sovereign immunity for interest on tax overpayments, and both § 6611(a) and (b) specifically state that overpayment interest "shall be allowed and paid" and contain the key word "overpayment." Thus, the strict construction principle applies. *See Schortmann v. United States*, 82 Fed. Cl. 1, 6 (2008) (finding that the language of § 6611 *as a whole* constituted a waiver of sovereign immunity "too explicit to be misunderstood").

States v. Dalm, 494 U.S. 596, 609 n. 6, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990) ("The commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all."). But to define "overpayment" with any precision also requires defining "payment." And the ordinary, commonsense meaning of "payment" is "the act of paying or giving compensation: the discharge of a debt or an obligation." Webster's Third New International Dictionary 1659 (1981); Black's Law Dictionary (9th ed. 2009) (defining payment as "[p]erformance of an obligation by the delivery of money ... accepted in partial or full discharge of the obligation"); *see Katkin v. C.I.R.*, 570 F.2d 139, 142 (6th Cir. 1978) (referring to Webster's and Black's dictionaries in interpreting meaning of "payment" in an unrelated provision of the tax code). Indeed, when interpreting the statutory predecessor to § 6611, one of our sister circuits adopted exactly this definition of "payment." *Busser v. United States*, 130 F.2d 537, 539 (3d Cir. 1942).

The government seizes upon the plain meaning of the word "payment," arguing that there can be no overpayment until there has actually been a payment—and there was no payment until Ford requested that its deposits be converted into tax payments. Prior to that point, Ford's remittances were, at its own request, treated as deposits in the nature of a cash bond and Ford could have requested their return at any time. As Revenue Procedure 84-58 § 2.03 clearly states, "[a] deposit in the nature of a cash bond is not a payment of tax." Accordingly, the government argues that it does not owe Ford interest from the date of the original

remittances because they were indisputably made only as deposits, not as payments of any tax obligation.

Ford counters that the "most appropriate starting point" is not § 6611, but rather § 6601, the provision that governs *underpayment* interest. First, Ford contends that these two sections should be interpreted symmetrically because they both use very similar language, *compare* § 6601 ("date paid"), *with* § 6611 ("date of the overpayment"), and both deal with the accrual of interest on tax payments. Second, Ford notes that under § 6601(a), only a "payment" stops the accrual of underpayment interest against a taxpayer, and since a deposit in the form of a cash bond stops the accrual of interest from the date it is remitted, Rev. Proc. 84-58 § 5.01, that deposit must be considered a payment under § 6601(a). And because a deposit is treated as a payment for underpayment interest purposes under § 6601, it should also be considered a payment for overpayment interest purposes under § 6611. In other words, if a mere deposit *stops* the accrual of underpayment interest, then a mere deposit must also *start* the accrual of overpayment interest.

Both parties' readings are plausible. The government's interpretation is grounded in the ordinary meaning of the terms "date of the overpayment" and "payment." However, this interpretation ignores that the date of remittance is treated as the date of "payment" under § 6601—a section that uses similar language to § 6611—at least insofar as it stops the accrual of underpayment interest pursuant to Revenue Procedure 84-58. Conversely, Ford makes a strong case for interpreting interest accrual under § 6601 and § 6611 symmetrically. Yet Ford ignores a natural reading of "date of

overpayment," and does not account for the fact that the language the two statutes employ, though similar, is not identical.[4]

In light of the parties' conflicting, plausible readings of § 6611, we find that the text of the statute is ambiguous as to when the accrual of overpayment interest begins.

B.

Because each of the parties' interpretations of § 6611 is plausible, it cannot be said that Congress has

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[4] Additionally, Ford observes that if the government is correct that a payment only occurs when a deposit is converted to discharge a debt, then the government has unlawfully neglected to collect underpayment interest from remitting taxpayers (who later convert their remittances into payments) for the period from remittance to conversion. This is so, Ford argues, because the IRS must collect interest owed by taxpayers. *See* 26 U.S.C. § 6404(e) (establishing circumstances, not applicable here, under which the IRS can abate interest collection). Ford thus insists that we must either adopt its definition of "payment," or find that the IRS has long been violating the interest statutes.

We do not view the issue in such stark terms. Congress has explained that prior to amending the tax code in 2004, the law of the land was that "[a] deposit in the nature of a cash bond is not a payment of tax ...." Staff of the J. Comm. on Taxation, 108th Cong., General Explanation of Tax Legislation Enacted in the 108th Congress, Part Seventeen: American Jobs Creation Act of 2004, at 60 (Comm. Print 2005). That the IRS has long *treated* deposits as payments for underpayment interest purposes under § 6601—a practice which benefits taxpayers, which Congress has long tolerated, and which is neither expressly prescribed nor proscribed by the statutes—does not necessarily mean that these deposits are "payments" under the interest statutes. Thus, even if we assume that the two interest statutes should be interpreted symmetrically, Ford's interpretation of § 6611 does not necessarily prevail.

"unequivocally expressed" its waiver of sovereign immunity for claims to overpayment interest accruing between the date a deposit in the nature of a cash bond was remitted and the date that deposit was converted to an advance tax payment. *See United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L. Ed. 2d 52 (1969); *see also United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992) (finding government's "plausible" statutory interpretation was "enough to establish that a reading imposing monetary liability on the Government [was] not 'unambiguous' and therefore should not be adopted"); *Siddiqui v. United States*, 359 F.3d 1200, 1204 (9th Cir. 2004) (declining to find that Congress had waived sovereign immunity for punitive damages where statute was subject to two "plausible" interpretations); *Fed. Nat'l Mortg. Ass'n v. United States*, 379 F.3d 1303, 1311 (Fed. Cir. 2004) (declining to find that Congress had waived sovereign immunity for overpayment interest where "the language at issue [was] ambiguous, subject to two conflicting interpretations").

Indeed, when we have found a waiver of sovereign immunity in the tax context, Supreme Court precedent interpreting the specific provision at issue has guided our interpretation. In *E.W. Scripps Co. & Subsidiaries v. United States*, 420 F.3d 589, 596–98 (6th Cir. 2005), we concluded that Congress had waived the government's sovereign immunity and was subject to district court jurisdiction with respect to suits for overpayment interest under 28 U.S.C. § 1346(a)(1), a different provision than the one at issue here. We found that language in § 1346(a)(1), which allowed taxpayers to recover "*any sum* alleged to have been excessive or in any manner wrongfully collected,"

represented a waiver of sovereign immunity. *Id.* at 596 (emphasis added). In finding that the scope of "any sum" under § 1346(a)(1) extended to interest on tax overpayments, we relied in no small part upon *Flora v. United States*, 362 U.S. 145, 149, 80 S. Ct. 630, 4 L. Ed. 2d 623 1960-1 C.B. 660 (1960), a Supreme Court case that had interpreted the phrase "any sum" in § 1346(a)(1) quite broadly, suggesting that it would include interest on tax overpayments. *E.W. Scripps Co.*, 420 F.3d at 596-97. Although we noted the general principle that "taxpayers should be compensated for the lost time-value of their money when they make overpayments of tax," 420 F.3d at 597, a principle that provides some support to Ford, we only did so *after* grounding our interpretation of "any sum" in Supreme Court jurisprudence. No such strong foothold exists here. In fact, the most relevant Supreme Court case supports, albeit weakly, the government.[5]

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[5] In *Rosenman v. United States*, 323 U.S. 658, 662-63, 65 S. Ct. 536, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945), the Court found that the taxpayer remittances in question were deposits rather than payments, thus providing some support for the government's view. However, *Rosenman's* import is sharply limited because that case involved a statute-of-limitations issue rather than an interest-overpayment issue, and construed a long-defunct tax statute. Thus, as the government conceded at oral argument, *Rosenman's* statements about taxpayer remittances are dicta. In addition, *Rosenman* held that the remittances in question could not be payments at least partly because no tax had yet been assessed, *see id.* at 662, yet the tax code now explicitly rejects the notion that there can be no payment or accrual of overpayment interest until a tax is actually assessed, 26 U.S.C. § 6401(c)—further limiting *Rosenman's* relevance here.

Instead, Ford relies heavily on Revenue Procedure 84-58, the only published guidance bearing on the meaning of "date of the overpayment" in § 6611(b)(1). Needless to say, relying upon a Revenue Procedure is quite different from relying upon a Supreme Court decision. A revenue procedure is at most an interpretive aid: it is "well-established that, as a general rule, 'the I.R.S.'s Revenue Procedures are directory not mandatory.' " *Estate of Shapiro v. C.I.R.*, 111 F.3d 1010, 1017 (2d Cir. 1997) (quoting *Estate of Jones v. C.I.R.*, 795 F.2d 566, 571 (6th Cir. 1986)). A revenue procedure does not enjoy the status of a law or regulation and does not bind courts. *Xerox Corp. v. United States*, 41 F.3d 647, 657-58 (Fed. Cir. 1994). Rather, it is a "mere internal procedural guide" that typically does not even bind the IRS itself. *See Shapiro*, 111 F.3d at 1017-18; *see also Riley v. United States*, 118 F.3d 1220, 1222 (8th Cir. 1997). Accordingly, "the 'failure to comply with [a] Revenue [Procedure] ... is not dispositive....' " *Shapiro*, 111 F.3d at 1017 (quoting *Virginia Educ. Fund v. Comm'r*, 799 F.2d 903, 904 (4th Cir. 1986)).

Two provisions of Revenue Procedure 84-58 are relevant here. The parties agree that under Revenue Procedure 84-58 § 5.01, underpayment interest *stops* accruing on the date that a remittance is submitted to the IRS, regardless of whether the remittance is treated as a payment of tax or a deposit. However, the parties debate the meaning of Revenue Procedure 84-58 § 5.05, which deals with when interest *starts* accruing for the purpose of overpayments. That provision reads:

> Remittances treated as payments of tax will be treated as any other assessed amount and

> compound interest will be paid on any overpayment under *section 6611* of the Code. In the event that [a] deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

Rev. Proc. 84-58 § 5.05.

In Ford's view, the first sentence of § 5.05 establishes the general rule that overpayment interest will be paid on "[r]emittances treated as payments of tax," whether treated as tax payments when initially remitted or when later converted from deposits to tax payments. The second sentence is an exception to this general rule that states that when a deposit is converted to a tax payment pursuant to § 4.02, a section not applicable here, overpayment interest is determined "only from the date the amount was posted as a payment of tax,"—*i.e.*, the conversion date. Ford explains that because "there would be no need for such an 'exception' if interest can never begin accruing under § 6611 before the conversion date, it follows that the *general rule* must be that interest does accrue from the remittance date on a converted deposit."

In response, the government argues that because Revenue Procedure 84–58 "does not even contemplate" a taxpayer's request to convert a deposit to a tax payment, the only way to understand the conversion itself is as a "constructive return" of the deposit to the taxpayer followed by his immediate re-submission of the deposit as a tax payment. Accordingly, when a taxpayer requests a conversion from deposit to payment, he works an effective return of his deposit,

which does not bear interest, Rev. Proc. 84–58 §§ 2.03, 4.02, followed by an immediate resubmission in the form of a tax payment, which bears interest from the date it is submitted. In the government's view, the first sentence of § 5.05 only applies to remittances that are treated as tax payments *when they are sent to the IRS*. Because Ford rendered its remittances as deposits, not as payments of tax, it is not entitled to interest from the remittance date.

The government's interpretation is strained. Under its reading, whenever a taxpayer requests conversion of a deposit to a tax payment and there is a "constructive return" of this deposit, the taxpayer should lose any interest-stopping protections gained by remitting the deposit in the first place. *See* Rev. Proc. 84–58 § 5.01. But this did not occur here: the government did not claim that Ford, in requesting that its deposits be converted to tax payments, lost any interest-stopping benefits or owed any underpayment interest as a result of losing these benefits. Indeed, this approach would seem to undercut the entire purpose behind Revenue Procedure 84–58, which is to "provide[] procedures for taxpayers to make remittances in order to stop the running of interest on deficiencies." Rev. Proc. 84–58 § 1. If a taxpayer loses the interest-stopping benefits of making a deposit by requesting that the deposit be converted to a tax payment, then there is little incentive to make a deposit in the first place. In this sense, the government's interpretation strips away from the

Revenue Procedure the very protection it was designed to furnish.[6]

Nonetheless, although Ford's interpretation of Revenue Procedure 84–58 § 5.05 is superior to the government's, it is insufficient to render the phrase "date of the overpayment" in 26 U.S.C. § 6611(b)(1) unambiguous. After all, the Revenue Procedure states and the parties agree that Ford's remittances were not payments when they were submitted. Rev. Proc. 84–58 § 2.03 ("A deposit in the nature of a cash bond is not a payment of tax ...."). Thus, the most Ford can say is that its remittances were *treated* as payments by the IRS pursuant to Revenue Procedure 84–58 § 5.01 for purposes of 26 U.S.C. § 6601, and thus these remittances should be *treated* as payments pursuant to Revenue Procedure 84–58 § 5.05 for purposes of shedding light on the language used in 26 U.S.C. § 6611. In other words, Ford relies heavily upon the Revenue Procedure to support its argument that § 6601 and § 6611 should be read symmetrically. But we are unwilling to place so much weight upon an interpretive aid that binds neither the IRS nor this court. *See Shapiro*, 111 F.3d at 1017–18; *Xerox Corp.*, 41 F.3d at 657–58; *Jones*, 795 F.2d at 571. Revenue Procedure 84–58 is just that—a statement of procedure

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6 Furthermore, it appears that the IRS, in a private letter ruling, has contradicted the interpretation of Revenue Procedure 84–58 it now advances. *See* I.R.S. P.L.R. 8738041 (June 23, 1987). Specifically, the IRS stated that "[b]ecause the Government will have uninterrupted use of [a] remittance, the remittance will not be deemed to be returned upon redesignation as a payment of tax ...." *Id.* This statement appears to cut against the government's contention that converted deposits are constructively returned to the taxpayer.

or guidance issued by the *executive* branch. It is far from an expression of congressional intent as to the scope of a waiver of sovereign-immunity; indeed, it does not even enjoy the status of an agency regulation. *Xerox Corp.*, 41 F.3d at 657. Thus, however helpful to Ford, Revenue Procedure 84-58 is too weak an indicator of statutory meaning to overcome the strict statutory construction principle to which the language of § 6611 is subject. *See Premo v. United States*, 599 F.3d 540, 547 (6th Cir. 2010) ("[I]n analyzing whether Congress has waived the immunity of the United States, we must ... not enlarge the waiver beyond what the language requires" (internal quotation marks omitted)).

Nor do we find any support for Ford's position in subsequent legislative history. In 2004, Congress enacted 26 U.S.C. § 6603, which provides that, contrary to previous practice, taxpayers who deposit funds with the IRS and then request the return of those funds are entitled to interest in certain circumstances. *Compare United States v. Domino Sugar Corp.*, 349 F.3d 84, 87 n.2 (2d Cir. 2003), *with* § 6603(d). Section 6603 provides for a different—and lower—interest rate for returned deposits, when compared to the general overpayment interest rate applicable to overpayments under § 6611. *Compare* § 6603(d)(4), *and* § 6621(b), *with* § 6611(a), *and* § 6621(a)(1).

Ford contends that since § 6603 allows a taxpayer who requests the return of his deposit to recover interest from the remittance date, it makes little sense to interpret § 6611 to allow a taxpayer who converts a deposit—rather than asking for its return—to recover interest only from the conversion date. According to Ford, a taxpayer who requests the return of a deposit

would then be entitled to interest from an earlier date than the taxpayer who requests that a deposit be converted, thus illogically rewarding the taxpayer who seeks the return of his deposit over the taxpayer who actually converts his deposit into an advance payment of tax. The government responds that a converted deposit is actually two sequential transactions—a constructive return of the deposit followed by immediate re-submission of that deposit as a tax payment. Under this reasoning, § 6603 requires that the taxpayer be paid interest from the date of deposit to the date of return under the lower § 6603(d)(4) interest rate, and be paid interest from the date of return (which is also the date of resubmission) to the date of refund under the higher § 6621(a)(1) interest rate. In other words, § 6603 allows for the payment of interest at two different rates for a converted deposit, while prior to the enactment of § 6603, interest would only be paid from the date of conversion forward.

Although the government's "constructive return" theory may be a flawed interpretation of Revenue Procedure 84-58, it does make some sense when read in the context of § 6603, which only deals with the accrual of interest on returned deposits. In any event, the passage of § 6603 does not render the government's interpretation of § 6611 illogical. Thus, subsequent legislative history, which "generally deserves only limited weight," does not alter our analysis here. *See Buck v. Sec'y of Health & Human Serv.*, 923 F.2d 1200, 1207 (6th Cir. 1991).

IV.

Because the scope of Congress's waiver of sovereign immunity in § 6611 is not "clearly discernable from the statutory text in light of

traditional interpretive tools" so as to allow Ford to recover the overpayment interest it seeks here, *see Cooper*, 132 S. Ct. at 1448, we affirm the judgment of the district court.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

FORD MOTOR COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

Case No. 08-12960

June 3, 2010, Filed

2010 U.S. Dist. LEXIS 54987

OPINION AND ORDER

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Ford Motor Company ("Ford") filed this lawsuit against the United States ("Government") under the internal revenue laws, seeking to recover additional interest Ford claims it is due for calendar years 1983-1989, 1992, and 1994. Presently before the Court are the Government's motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and Ford's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). The motions have been fully briefed and the Court held a motion hearing on April 15, 2010.

I. Standard of Review

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(c) is reviewed under the same standard as a motion to dismiss under Rule 12(b)(6). *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295-96 (6th Cir. 2008). Reviewing a motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and "determine whether the complaint

contains 'enough facts to state a claim to relief that is plausible on its face.' " *Bledsoe v. Community Health Sys.*, 501 F.3d 493, 502 (6th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1974, 167 L.Ed. 2d 929 (2007)).

Summary judgment pursuant to Rule 56(c) is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L.Ed. 2d 202 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed. 2d 265 (1986).

II. Background

A. Ford's Theories of Liability

Ford is seeking relief pursuant to three different theories of liability. The first theory (and Ford's "primary" theory) is set forth in what Ford refers to as its "deposit remittance" counts (Counts I–IX of the Complaint). The second theory is contained in what Ford calls its "carryback recapture" counts (Counts X–XIII); and the third theory is set forth in what Ford refers to as its "carryback allowance" count (Count

XIV). The following describes the tax concepts and procedures relevant to these three theories of liability.

B. Taxes and Interest

Tax returns filed by corporate taxpayers are subject to Internal Revenue Service ("IRS" or "Service") review and audit. These audits can lead the IRS to find additional tax owed by the taxpayer or that the taxpayer has overpaid its taxes for a specific year.

Pursuant to the internal revenue laws, if a taxpayer overpays its tax for a specific year, the Government may owe interest to the taxpayer on the overpayment (in addition to a refund or credit for the amount overpaid). 26 U.S.C. § 6611. This is referred to as "overpayment interest." According to the statute, "[s]uch interest shall be allowed and paid" from the "date of the overpayment" to the date of the refund or credit. *Id.* at § 6611(b).

Conversely, where a taxpayer has underpaid its taxes, the taxpayer may owe interest to the Government on the amount of the underpayment—i.e. "underpayment interest." 26 U.S.C. § 6601. Underpayment interest accrues from "the last date prescribed for payment ... to the date paid." *Id.* at § 6601(a). Because an audit and related administrative appeals of a return can take years to complete, it is possible for considerable underpayment interest to accrue in the interim.

To address this situation, the IRS has promulgated a mechanism by which taxpayers can remit money to the Service and stop the accrual of underpayment interest. Such a remittance—referred to as a "deposit in the nature of a cash bond"—is set forth in IRS Revenue Procedure 84-58, 1984-33 I.R.B. 9. Section 5 of Revenue Procedure 84-58 provides that "[t]he

running of interest on an assessed tax liability ... will stop on the date the remittance [i.e. the deposit in the nature of a cash bond] is received by the Service." While a deposit in the nature of a cash bond stops the accrual of underpayment interest from the date the deposit is remitted, the Revenue Procedure states that interest does *not* accrue from that date forward if the deposit subsequently is returned to the taxpayer as a result of an overpayment. In fact, several sections of Revenue Procedure 84-58 specifically provide that a deposit returned to the taxpayer "does not bear interest." *See* Rev. Proc. 84-58 §§ 2.03, 4.02, 5.01.

A taxpayer alternatively can make an advance payment of tax, which the IRS treats as accruing interest from the date it is received by the Service if the payment or a portion thereof is subsequently refunded to the taxpayer. *See id.* § 5.05. However, to obtain a refund or a credit of an advance tax payment, the taxpayer must follow certain refund procedures. Additionally, the taxpayer's request for a refund is subject to the limitations period set forth in 26 U.S.C. § 6511. In comparison, a deposit in the nature of a cash bond will be returned with limited exceptions upon a taxpayer's simple letter request "at any time before the Service is entitled to assess the tax" without the taxpayer having to resort to refund procedures. Rev. Proc. 84-58 § 5.01-5.02; *see also United States v. Domino Sugar Corp.*, 349 F.3d 84, 87 n.2 (2d Cir. 2003). As well, the statute of limitations applicable for filing a refund claim does not apply to a claim for the return of a cash bond. *See Domino Sugar Corp.*, 349 F.3d at 87 (citing cases).

C. Facts Relevant to Ford's "Remittance Deposit" Counts

The facts related to Ford's claims are not in dispute. Ford submitted remittances to the IRS on September 9 and 27, 1991, July 6, 1992, and June 23, 1994, specifically requesting in writing that the remittances be treated as deposits in the nature of a cash bond. These remittances were made after the IRS sent a 30-day letter for tax years 1983-1986 and 1988. A portion of the deposits also applied to tax years 1987, 1989, 1992, and 1994, before 30 day letters were sent for those tax years. A 30-day letter accompanies a Revenue Agent Report proposing additional tax liabilities, and allows the taxpayer 30 days to file a protest with the IRS Appeals Office challenging the proposed liabilities.

Ford subsequently requested that the IRS treat its remittances as advance payments rather than deposits in the nature of a cash bond. Those requests were made on the following dates for the following remittances: (1) December 19, 1994 for the September 9, 1991 deposit; and (2) December 15, 1995 for the September 27, 1991, July 6, 1992, and June 23, 1994 deposits. Sometime after these dates, the IRS determined that Ford had overpaid its tax liabilities for the years at issue. The IRS therefore refunded to Ford the overpayment plus overpayment interest; however, the IRS did not pay interest for the time the remittances were designated by Ford as deposits in the nature of a cash bond. The IRS only paid overpayment interest from the dates when Ford requested that the deposits be converted to advance payments. In its "deposit remittance" theory of liability, Ford argues that overpayment interest should have accrued from

the dates that it made the deposits in the nature of a cash bond.

D. "Carryback Recapture"

A taxpayer experiencing a net operating loss ("NOL") in a given year can "carryback" the NOL to offset the taxpayer's taxable income in an earlier year and achieve a refund for that earlier year. The IRS pays the refund tentatively ("tentative Carryback allowance") but may, after an audit of the year in which the NOL arose, determine that the NOL carryback should be reduced. This reduction is referred to as a "carryback recapture." Because the taxpayer already received a refund for the earlier year based on the carryback, the carryback recapture will result in a tax liability for that earlier year. Underpayment interest related to the amount of the carryback recapture will be owed from the filing date for the year in which the NOL arose until the date on which the taxpayer repays the excessive amount. IRS Notice 88-119, 1988-2 CB 453.

In tax years 1985, 1987, 1988, and 1989, Ford had carryback recaptures. Therefore, Ford was obligated to pay underpayment interest on the amount of the recaptures from the filing date for the year in which the NOL carryback arose until the excessive amount was repaid. Before these liabilities were assessed, however, Ford had made deposits in the nature of a cash bond to stop the accrual of underpayment interest on any tax liabilities. Ford alleges in Counts X-XIII of its Complaint—setting forth its "carryback recapture" theory of liability—that the Government should have applied the necessary portion of its deposits to pay those excessive amounts.

The Government did not do so. Instead, to collect the carryback recapture amount, the Government applied a portion of an overpayment that Ford made for the 1985 tax year which was accruing overpayment interest. As a result, the Government avoided paying continued overpayment interest on that portion of the 1985 refund.

E. "Carryback Allowance"

Ford's "carryback allowance" theory of liability—set forth in Count XIV of its Complaint—relates to a $20.04 million underpayment for the 1984 tax year and the money the Government used to satisfy that underpayment. Specifically, the Government applied a $19.48 million carryback allowance that hit Ford's account on March 15, 1992, rather than deposit remittances Ford had made effective September 9, 1991. Ford contends that by using the carryback allowance instead of the deposit remittances, the Government improperly avoided paying overpayment interest on the amount of the carryback allowance.[1] In other words, if the Government had applied a portion of the deposit remittances to the 1984 underpayment, Ford would have been entitled to overpayment interest on the full amount of the March 15, 1992 carryback allowance.

III. Analysis

A. Deposit Remittance Counts

Ford asserts several arguments to support its claim that deposits in the nature of a cash bond accrue

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[1] Ford acknowledges that the Government did stop the accrual of interest on the $20.04 million underpayment as of the date of the deposit remittances.

interest from the date remitted to the IRS. First, Ford argues that statutory rules of construction require that the payment date in 26 U.S.C. §§ 6601 and 6611 be read symmetrically. Section 6601 provides that interest on an *underpayment* accrues from the last date prescribed for payment "to the date paid." 26 U.S.C. § 6601. Section 6611 provides that interest on an *overpayment* accrues "from the date of the overpayment" to the date a credit or refund is given. Because a deposit in the nature of a cash bond stops the running of underpayment interest for purposes of § 6601 from the date of the deposit's remittance, Ford argues that interest should begin to run for purposes of overpayment interest under § 6611 also on the remittance date. Stated differently, Ford argues that "when interpreting these two statutes, one must ensure that the 'payment' status of a remittance is treated consistently for purposes of **stopping** the accrual of underpayment interest under § 6601 and for **starting** the accumulation of overpayment interest under § 6611." (Doc. 43 at 14 (emphasis in original).)

Ford next argues that Revenue Procedure 84–58 confirms its interpretation of § 6611. Specifically, Ford points to the first sentence of Section 5.01 which states that the running of interest on an assessed tax liability stops on the date a deposit in the nature of a cash bond is remitted. Ford also points to Section 5.05 which states:

> Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code. In the event that [a] deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax, pursuant

> to subparagraph 3 of section 4 .02,[2] interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

Rev. Proc. 84-58 § 5.05.

Ford interprets the above-quoted section as stating, as a general rule, that overpayment interest will be paid on any remittance treated as a tax payment regardless of whether the remittance was initially made as a tax payment or made as a deposit and subsequently converted to a payment of tax. Ford interprets the second sentence as stating one exception to this general rule. In other words, Ford reads Section 5.05 as meaning that overpayment interest accrues from when a remittance is made, regardless of whether it is classified as a payment of tax or a deposit in the nature of a cash bond, unless it is a deposit pursuant to subparagraph 3 of Section 4.02.

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[2] Subparagraph 3 of Section 4.02 of Revenue Procedure 84-58 provides, in part:

> Upon completion of an examination, if the taxpayer who has made a deposit does not execute a waiver of restrictions on assessment and collection [of the deficiency] or otherwise agree to the full amount of the deficiency, the Service will mail a notice of deficiency and the taxpayer will have the right to petition the Tax Court. That part of the deposit that is not greater than the deficiency proposed plus any interest that has accrued on the deficiency will be posted to the taxpayer's account as a payment of tax ... Any amount of the remittance that exceeds the proposed liability will be continued to be considered a deposit and will be returned to the taxpayer without interest subject to the provisions in subparagraph 1 of this section.

Ford argues that its interpretation "makes perfect sense" because it penalizes the taxpayer (i.e. by not paying overpayment interest) "[w]here [the] taxpayer makes a deposit and then refuses to execute a waiver of assessment (thereby creating a deficiency and permitting the taxpayer to challenge the assessment in the U.S. Tax Court),...." (Doc. 43 at 19.) Ford further points out that the exception in the second sentence would be mere surplusage if, as a general rule, overpayment interest only began to accrue from the date a deposit in the nature of a cash bond is converted to a tax payment (rather than on the date the deposit is remitted).

As noted earlier, several provisions of Revenue Procedure 84-58 specifically state that deposits in the nature of a cash bond do not bear interest if returned to a taxpayer. Ford maintains, however, that these provisions are referring to deposits that are never converted to tax payments. Deposits returned to the taxpayer before being converted to tax payments are returned without the taxpayer resorting to refund procedures and are not subject to the limitations period for seeking refunds or credits. Thus Ford maintains that the distinction of whether a deposit in the nature of a cash bond accrues interest from the date remitted should depend on whether the deposit subsequently is returned to the taxpayer or converted to a tax payment.

Even if the Court found merit in Ford's arguments—particularly its interpretation of subsection 5.05 of Revenue Procedure 84–58 which the Court does not believe the Government addresses

sufficiently[3]—the Court must be mindful of the deference it is required to give the IRS' interpretation of the Internal Revenue laws. As the United States Supreme Court has stated:

> "[W]e do not sit as a committee of revision to perfect the administration of the tax laws." *United States v. Correll,* 389 U.S. 299, 306-07, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967). Instead, we defer to the Commissioner's regulations as long as they "implement the congressional mandate in some reasonable manner." *Id.*, at 308, 389 U.S. 299, 88 S. Ct. 445. "We do this because Congress has delegated to the [Commissioner], not to the courts, the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code." *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 477, 99 S. Ct. 1304, 59 L. Ed. 2d 519 (1979) (citing *Correll*, 389

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[3] In response to Ford's argument based on Section 5.05 of Revenue Procedure 84-58, the Government explains that there are three types of remittances provided for in the revenue procedure: (1) deposits in the nature of a cash bond that are later returned to the taxpayer without the taxpayer resorting to refund procedures; (2) advance tax payments applied to the taxpayer's proposed liabilities at the time of remittance that cannot be refunded without resort to refund procedures; and (3) and deposits in the nature of a cash bond that are converted to payments. The Government contends that, as a general rule, remittances in the third category resulting in an overpayment will earn interest "only from the date the amount was posted as a payment of tax." The second sentence of subsection 5.05, however, refers to a remittance that falls within the third category (i.e. a "*deposit in the nature of a cash bond [that] is posted to a taxpayer's account as a payment of tax* pursuant to subparagraph 3 of section 4.02 ..." where "an overpayment is later determined to be due"). Revenue Proc. 84-58 (emphasis added).

> U.S. at 307, 88 S. Ct. 445) (citing 26 U.S.C. § 7805(a))). This delegation "helps guarantee that the rules will be written by 'masters of the subject' who will be responsible for putting the rules into effect." 440 U.S., at 477, 99 S. Ct. 1304 (quoting *United States v. Moore*, 95 U.S. 760, 763, 24 L.Ed. 588, 13 Ct. Cl. 542 (1877)).

United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 218-19, 121 S. Ct. 1433, 1444, 149 L. Ed. 2d 401 (2001); *see also Cottage Sav. Ass'n v. Comm'rs of Internal Revenue*, 499 U.S. 554, 111 S. Ct. 1503, 113 L. Ed. 2d 589 (1991). Therefore, provided it is reasonable, this Court must accept the Government's interpretation of § 6611.

When assessing the reasonableness of the Government's interpretation, the Court must further bear in mind that "[e]xaction of interest from the Government requires statutory authority." *Rosenman v. United States*, 323 U.S. 658, 663, 65 S. Ct. 536, 538, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945). Such authority must be strictly construed in favor of the sovereign and "not enlarge[d] beyond what the [statutory] language requires." *See Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S. Ct. 2957, 2963, 92 L. Ed. 2d 250 (1986) (superseded by statute on other grounds).

As set forth previously, § 6611 requires the Government to pay overpayment interest "from the date of overpayment ..." Similarly, § 6601 requires a taxpayer to pay underpayment interest from the date prescribed for payment "to the date [the underpayment is] paid." The Internal Revenue Code does not define when an underpayment or overpayment is "paid." The effect of the IRS'

promulgation of a procedure by which taxpayers can remit a deposit to stop the accrual of underpayment interest is that the date of payment for purposes of § 6601 is the date a deposit in the nature of a cash bond is remitted. Nevertheless, this does not mean that § 6611 must be similarly interpreted to define "the date of overpayment" as the date the deposit was made. Although courts generally must presume that "'identical words used in different parts of the same act are intended to have the same meaning,' .. the presumption 'is not rigid,' and 'the meaning of the same words well may vary to meet the purposes of the law." *Cleveland Indians Baseball*, 532 U.S. at 213, 121 S. Ct. at 1441 (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S. Ct. 607, 76 L. Ed. 1204 (1932)).

Additionally, as the Government points out, other sections of the Internal Revenue Code (specifically §§ 6213 and 6511) depend upon the date of payment and are not interpreted symmetrically with § 6601. In discussing the Tax Court's jurisdiction under § 6213, Revenue Procedure 84-58 instructs that, when designated as such, "[a] deposit in the nature of a cash bond is not a payment of tax" which as the Supreme Court has noted would wipe out a deficiency and therefore the Tax Court's jurisdiction which depends on the existence of a deficiency. *Baral v. United States*, 528 U.S. 431, 439 n.2, 120 S. Ct. 1006, 1011 n.2, 145 L. Ed. 2d 949 (2000). With respect to § 6511, the Supreme Court explicitly has held that deposits in the nature of a cash bond are *not* payments of tax for purposes of when the statute of limitations for filing a claim for credit or refund begins to run. *Rosenman v.*

United States, 323 U.S. 658, 65 S. Ct. 536, 89 L. Ed. 535, 102 Ct. Cl. 851, 1945 C.B. 410, 1945-1 C.B. 410 (1945).

The issue presented in *Rosenman* was whether the three-year limitations period for filing a claim for refund began to run when a deposit in the nature of a cash bond was remitted or when the deposit or a portion thereof was applied to satisfy an assessed tax. The statute of limitations in *Rosenman*, like current § 6511, provided that a claim for a tax refund must be made "within three years next after *the payment of such tax.*" 323 U.S. at 659, 65 S. Ct. at 537 (emphasis added). The Government argued that because the taxpayer's deposit stopped the running of penalties and interest it therefore should to be treated as a payment of tax, rendering the refund claim untimely. *Id.* at 662, 65 S. Ct. at 538. The Supreme Court rejected this argument and held that the statute of limitations did not begin to run until the deposit was applied to a defined tax obligation. In reaching this holding, the Supreme Court specifically noted that the Government had taken the position that such a deposit was "not a 'payment' interest on which is due from the Government if there is an excess beyond the amount of the tax eventually assessed." *Id.*

Consistent with this holding, the Sixth Circuit has concluded that a remittance *made to satisfy a proposed deficiency* and discharge any further tax liability is a "payment" of tax. *Ameel v. United States*, 426 F.2d 1270 (6th Cir. 1970). As the *Ameel* court explained in reaching this holding:

> In general, a tax is considered "paid" for purposes of the running of the period of limitations when a taxpayer files his return, accompanied by his payment.... On the other hand, where there is

> no tax liability computed and proposed, a remittance is to be treated as a cash bond to stop the running of interest on the amount 'dumped,' ... or deposited until a more definite determination of tax liability is asserted by the Government.... In such cases, "payment" occurs when the indefinite tax liability is further defined; such as by a formal assessment of a definite amount.

426 F.2d at 1272 (internal citations omitted). The court also identified specific "factors" that determine what constitutes a "payment":

> "This much is clear: (1) a remittance is not per se 'payment' of the tax; (2) a remittance that does not satisfy an asserted tax liability should not be treated as the 'payment' of a tax; and (3) an essential factor in "payment" before assessment is the satisfaction or discharge of what the taxpayer deems a liability."

Id. (quoting Mertens, Law of Federal Income Taxation, Vol. 10, § 58.27 at 79 (1964 ed.)). Applying those "factors," the Sixth Circuit concluded that the remittance involved in the case before it was "the advance payment of a computed and proposed tax liability, not the remittance of an estimated or approximated tax liability." *Id.* at 1274.

In this Court's view, the Supreme Court's and Sixth Circuit's decisions alone compel the conclusion that Ford's remittances at issue in this case were not "tax payments" and that, therefore, the Government's interpretation of § 6611 is reasonable. Further supporting this conclusion is the fact that the statute only provides for interest from the Government from the "date of the overpayment." § 6611(b). It is reasonable to conclude, as the IRS has, that there can

be no overpayment of tax until the entire tax liability has been paid. *See* 26 C.F.R. § 301.6611-1(b) (providing that, subject to one exception, "there can be no overpayment of tax until the entire tax liability has been satisfied. Therefore, the dates of overpayment of any tax are the date of payment of the first amount which (when added to previous payments) is in excess of the tax liability.") While Ford's arguments in favor of its interpretation of the statute may have some merit, the Government's interpretation, as set forth before, must be upheld as long as it is reasonable. *Cleveland Indians Baseball*, *supra*.

For the above reasons, the Court concludes that Ford is not entitled to additional overpayment interest from the dates that it remitted deposits in the nature of a cash bond to the dates those remittances were converted to tax payments. For the reasons that follow, the Court also rejects Ford's other theories of liability.

As a reminder, in its "carryback recapture" counts, Ford complains that the Government wrongfully used an overpayment from the 1985 tax year to collect carryback recaptures for the 1985, 1987, 1988, and 1989 tax years instead of Ford's deposits in the nature of a cash bond that had been remitted before the liabilities were assessed. In its "carryback allowance" count, Ford complains that the Government wrongfully used a carryback allowance to satisfy an underpayment for the 1984 tax year rather than its deposit remittances. Ford, however, cites no legal basis for its claim that the Government was required to apply its deposits to collect these amounts.

As Ford explains in its pleadings, and this Court explained above, the IRS promulgated the procedure

for making a deposit in the nature of a cash bond to address the situation in which underpayment interest may accrue before a final tax assessment can be made. Pursuant to this procedure, taxpayers are able to stop the running of interest on potential deficiencies by remitting a deposit. However this Court finds nothing in those procedures—Ford cites no other authority—that would require the Government to apply those remittances to pay an assessed deficiency rather than other monies in the taxpayer's account. Absent any authority requiring the IRS to apply the deposit to satisfy a subsequently assessed liability, the Court finds no reason why the Service cannot choose which monies to use.

IV. Conclusion

For the reasons set forth above, the Court concludes that Ford's challenges to the Government's treatment of its deposits fail as a matter of law.

Accordingly,

IT IS ORDERED, that the Government's motion for judgment on the pleadings is **GRANTED;**

IT IS FURTHER ORDERED, that Ford's motion for summary judgment is **DENIED.**

/s/ PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE

JUDGMENT

Ford Motor Company ("Ford") filed this lawsuit against the United States ("Government") under the internal revenue laws, seeking to recover additional interest Ford claims it is due for calendar years 1983-1989, 1992, and 1994. Subsequently, the Government filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(c) and Ford filed a motion for

summary judgment pursuant to Federal Rule of Civil Procedure 56. In an Opinion and Order entered on this date, the Court granted the Government's motion and denied Ford's motion.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED, that Ford's Complaint is **DISMISSED WITH PREJUDICE** and **JUDGMENT** is entered in favor of the Government and against Ford.

DATE: June 3, 2010

No. 10-1934

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 25, 2013
DEBORAH S. HUNT, Clerk

FORD MOTOR COMPANY,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellee.	)	

BEFORE: BATCHELDER, Chief Judge, GIBBONS and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges* of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

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* Judge Kethledge recused himself from participation in this ruling.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT
s/ Deborah S. Hunt, Clerk
Deborah S. Hunt, Clerk

26 U.S.C. § 6601

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

(a) General rule

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

(b) Last date prescribed for payment

For purposes of this section, the last date prescribed for payment of the tax shall be determined under chapter 62 with the application of the following rules:

(1) Extensions of time disregarded

The last date prescribed for payment shall be determined without regard to any extension of time for payment or any installment agreement entered into under section 6159.

(2) Installment payments

In the case of an election under section 6156(a)[1] to pay the tax in installments—

(A) The date prescribed for payment of each installment of the tax shown on the return shall be determined under section 6156(b), and

(B) The last date prescribed for payment of the first installment shall be deemed the last

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1 Footnote omitted.

date prescribed for payment of any portion of the tax not shown on the return.

(3) Jeopardy

The last date prescribed for payment shall be determined without regard to any notice and demand for payment issued, by reason of jeopardy (as provided in chapter 70), prior to the last date otherwise prescribed for such payment.

(4) Accumulated earnings tax

In the case of the tax imposed by section 531 for any taxable year, the last date prescribed for payment shall be deemed to be the due date (without regard to extensions) for the return of tax imposed by subtitle A for such taxable year.

(5) Last date for payment not otherwise prescribed

In the case of taxes payable by stamp and in all other cases in which the last date for payment is not otherwise prescribed, the last date for payment shall be deemed to be the date the liability for tax arises (and in no event shall be later than the date notice and demand for the tax is made by the Secretary).

(c) Suspension of interest in certain income, estate, gift, and certain excise tax cases

In the case of a deficiency as defined in section 6211 (relating to income, estate, gift, and certain excise taxes), if a waiver of restrictions under section 6213(d) on the assessment of such deficiency has been filed, and if notice and demand by the Secretary for payment of such deficiency is not made within 30 days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such 30th day and ending with the date of notice

and demand and interest shall not be imposed during such period on any interest with respect to such deficiency for any prior period. In the case of a settlement under section 6224(c) which results in the conversion of partnership items to nonpartnership items pursuant to section 6231(b)(1)(C), the preceding sentence shall apply to a computational adjustment resulting from such settlement in the same manner as if such adjustment were a deficiency and such settlement were a waiver referred to in the preceding sentence.

(d) Income tax reduced by carryback or adjustment for certain unused deductions

(1) Net operating loss or capital loss carryback

If the amount of any tax imposed by subtitle A is reduced by reason of a carryback of a net operating loss or net capital loss, such reduction in tax shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the net operating loss or net capital loss arises.

(2) Foreign tax credit carrybacks

If any credit allowed for any taxable year is increased by reason of a carryback of tax paid or accrued to foreign countries or possessions of the United States, such increase shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such increase shall not affect the computation of interest

under this section for the period ending with the filing date for such subsequent taxable year.

(3) Certain credit carrybacks

(A) In general

If any credit allowed for any taxable year is increased by reason of a credit carryback, such increase shall not affect the computation of interest under this section for the period ending with the filing date for the taxable year in which the credit carryback arises, or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, such increase shall not affect the computation of interest under this section for the period ending with the filing date for such subsequent taxable year.

(B) Credit carryback defined

For purposes of this paragraph, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(4) Filing date

For purposes of this subsection, the term "filing date" has the meaning given to such term by section 6611(f)(4)(A).

(e) Applicable rules

Except as otherwise provided in this title—

(1) Interest treated as tax

Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except

subchapter B of chapter 63, relating to deficiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

(2) Interest on penalties, additional amounts, or additions to the tax

(A) In general

Interest shall be imposed under subsection (a) in respect of any assessable penalty, additional amount, or addition to the tax (other than an addition to tax imposed under section 6651(a)(1) or 6653 or under part II of subchapter A of chapter 68) only if such assessable penalty, additional amount, or addition to the tax is not paid within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000), and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment.

(B) Interest on certain additions to tax

Interest shall be imposed under this section with respect to any addition to tax imposed by section 6651(a)(1) or 6653 or under part II of subchapter A of chapter 68 for the period which—

(i) begins on the date on which the return of the tax with respect to which such addition to tax is imposed is required to be filed (including any extensions), and

(ii) ends on the date of payment of such addition to tax.

(3) Payments made within specified period after notice and demand

If notice and demand is made for payment of any amount and if such amount is paid within 21 calendar days (10 business days if the amount for which such notice and demand is made equals or exceeds $100,000) after the date of such notice and demand, interest under this section on the amount so paid shall not be imposed for the period after the date of such notice and demand.

(f) Satisfaction by credits

If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment. The preceding sentence shall not apply to the extent that section 6621(d) applies.

(g) Limitation on assessment and collection

Interest prescribed under this section on any tax may be assessed and collected at any time during the period within which the tax to which such interest relates may be collected.

(h) Exception as to estimated tax

This section shall not apply to any failure to pay any estimated tax required to be paid by section 6654 or 6655.

(i) Exception as to Federal unemployment tax

This section shall not apply to any failure to make a payment of tax imposed by section 3301 for a calendar quarter or other period within a taxable year required under authority of section 6157.

(j) 2-percent rate on certain portion of estate tax extended under section 6166

(1) In general

If the time for payment of an amount of tax imposed by chapter 11 is extended as provided in section 6166, then in lieu of the annual rate provided by subsection (a)—

(A) interest on the 2-percent portion of such amount shall be paid at the rate of 2 percent, and

(B) interest on so much of such amount as exceeds the 2-percent portion shall be paid at a rate equal to 45 percent of the annual rate provided by subsection (a).

For purposes of this subsection, the amount of any deficiency which is prorated to installments payable under section 6166 shall be treated as an amount of tax payable in installments under such section.

(2) 2-percent portion

For purposes of this subsection, the term "2-percent portion" means the lesser of—

(A)(i) the amount of the tentative tax which would be determined under the rate schedule set forth in section 2001(c) if the amount with respect to which such tentative tax is to be computed were the sum of $1,000,000 and the applicable exclusion amount in effect under section 2010(c), reduced by

(ii) the applicable credit amount in effect under section 2010(c), or

(B) the amount of the tax imposed by chapter 11 which is extended as provided in section 6166.

(3) Inflation adjustment

In the case of estates of decedents dying in a calendar year after 1998, the $1,000,000 amount contained in paragraph (2)(A) shall be increased by an amount equal to—

(A) $1,000,000, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year by substituting "calendar year 1997" for "calendar year 1992" in subparagraph (B) thereof.

If any amount as adjusted under the preceding sentence is not a multiple of $10,000, such amount shall be rounded to the next lowest multiple of $10,000.

(4) Treatment of payments

If the amount of tax imposed by chapter 11 which is extended as provided in section 6166 exceeds the 2-percent portion, any payment of a portion of such amount shall, for purposes of computing interest for periods after such payment, be treated as reducing the 2-percent portion by an amount which bears the same ratio to the amount of such payment as the amount of the 2-percent portion (determined without regard to this paragraph) bears to the amount of the tax which is extended as provided in section 6166.

(k) No interest on certain adjustments.

For provisions prohibiting interest on certain adjustments in tax, see section 6205(a).

26 U.S.C. § 6611

§ 6611. Interest on overpayments

(a) Rate

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

(b) Period

Such interest shall be allowed and paid as follows:

(1) Credits

In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken.

(2) Refunds

In the case of a refund, from the date of the overpayment to a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(3) Late returns

Notwithstanding paragraph (1) or (2) in the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed.

[**(c) Repealed.** Pub.L. 85-866, Title I, § 83(c), Sept. 2, 1958, 72 Stat. 1664]

(d) Advance payment of tax, payment of estimated tax, and credit for income tax withholding

The provisions of section 6513 (except the provisions of subsection (c) thereof), applicable in determining the date of payment of tax for purposes of determining the period of limitation on credit or refund, shall be applicable in determining the date of payment for purposes of subsection (a).

(e) Disallowance of interest on certain overpayments

(1) Refunds within 45 days after return is filed

If any overpayment of tax imposed by this title is refunded within 45 days after the last day prescribed for filing the return of such tax (determined without regard to any extension of time for filing the return) or, in the case of a return filed after such last date, is refunded within 45 days after the date the return is filed, no interest shall be allowed under subsection (a) on such overpayment.

(2) Refunds after claim for credit or refund

If—

(A) the taxpayer files a claim for a credit or refund for any overpayment of tax imposed by this title, and

(B) such overpayment is refunded within 45 days after such claim is filed,

no interest shall be allowed on such overpayment from the date the claim is filed until the day the refund is made.

(3) IRS initiated adjustments

If an adjustment initiated by the Secretary, results in a refund or credit of an overpayment, interest on such overpayment shall be computed

by subtracting 45 days from the number of days interest would otherwise be allowed with respect to such overpayment.

(4) Certain withholding taxes

In the case of any overpayment resulting from tax deducted and withheld under chapter 3 or 4, paragraphs (1), (2), and (3) shall be applied by substituting "180 days" for "45 days" each place it appears.

(f) Refund of income tax caused by carryback or adjustment for certain unused deductions

(1) Net operating loss or capital loss carryback

For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of a net operating loss or net capital loss, such overpayment shall be deemed not to have been made prior to the filing date for the taxable year in which such net operating loss or net capital loss arises.

(2) Foreign tax credit carrybacks

For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a carryback of tax paid or accrued to foreign countries or possessions of the United States, such overpayment shall be deemed not to have been made before the filing date for the taxable year in which such taxes were in fact paid or accrued, or, with respect to any portion of such credit carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such overpayment shall be deemed not to have been made before the filing date for such subsequent taxable year.

(3) Certain credit carrybacks

(A) In general

For purposes of subsection (a), if any overpayment of tax imposed by subtitle A results from a credit carryback, such overpayment shall be deemed not to have been made before the filing date for the taxable year in which such credit carryback arises, or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, capital loss carryback, or other credit carryback from a subsequent taxable year, such overpayment shall be deemed not to have been made before the filing date for such subsequent taxable year.

(B) Credit carryback defined

For purposes of this paragraph, the term "credit carryback" has the meaning given such term by section 6511(d)(4)(C).

(4) Special rules for paragraphs (1), (2), and (3)

(A) Filing date

For purposes of this subsection, the term "filing date" means the last date prescribed for filing the return of tax imposed by subtitle A for the taxable year (determined without regard to extensions).

(B) Coordination with subsection (e)

(i) In general

For purposes of subsection (e)—

(I) any overpayment described in paragraph (1), (2), or (3) shall be treated as an overpayment for the loss year, and

(II) such subsection shall be applied with respect to such overpayment by treating the return for the loss year as not filed before claim for such overpayment is filed.

(ii) Loss year

For purposes of this subparagraph, the term "loss year" means—

(I) in the case of a carryback of a net operating loss or net capital loss, the taxable year in which such loss arises,

(II) in the case of a carryback of taxes paid or accrued to foreign countries or possessions of the United States, the taxable year in which such taxes were in fact paid or accrued (or, with respect to any portion of such carryback from a taxable year attributable to a net operating loss carryback or a capital loss carryback from a subsequent taxable year, such subsequent taxable year), and

(III) in the case of a credit carryback (as defined in paragraph (3)(B)), the taxable year in which such credit carryback arises (or, with respect to any portion of a credit carryback from a taxable year attributable to a net operating loss carryback, a capital loss carryback, or other credit carryback from a subsequent taxable year, such subsequent taxable year).

(C) Application of subparagraph (B) where section 6411(a) claim filed

For purposes of subparagraph (B)(i)(II), if a taxpayer—

(i) files a claim for refund of any overpayment described in paragraph (1), (2), or (3) with respect to the taxable year to which a loss or credit is carried back, and

(ii) subsequently files an application under section 6411(a) with respect to such overpayment,

then the claim for overpayment shall be treated as having been filed on the date the application under section 6411(a) was filed.

(g) No interest until return in processible form

(1) For purposes of subsections (b)(3) and (e), a return shall not be treated as filed until it is filed in processible form.

(2) For purposes of paragraph (1), a return is in a processible form if--

(A) such return is filed on a permitted form, and

(B) such return contains—

(i) the taxpayer's name, address, and identifying number and the required signature, and

(ii) sufficient required information (whether on the return or on required attachments) to permit the mathematical verification of tax liability shown on the return.

(h) Prohibition of administrative review

For prohibition of administrative review, see section 6406.

28 U.S.C. § 1346

§ 1346. United States as defendant

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

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

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

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

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

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

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

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the

District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

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

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

Internal Revenue Service (I.R.S.)

Revenue Procedure 84-58
1984-2 C.B. 501
July 1984

SECTION 1. PURPOSE

The purpose of this revenue procedure is to update Rev. Proc. 82-51, 1982-2 C.B. 839, which provides procedures for taxpayers to make remittances in order to stop the running of interest on deficiencies.

SEC. 2. BACKGROUND

.01 Section 6213(a) of the Internal Revenue Code provides the general rule that a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days after the notice of deficiency is mailed (150 days if the notice is addressed to persons outside the United States). No assessment of a deficiency may be made until after the expiration of the 90-day or 150-day period, or, if petition is filed, until the decision of the Tax Court is final.

.02 Section 6213(b)(4) of the Code provides an exception to the rule in section 6213(a). If an amount is paid as tax, or in respect of a tax, the amount may be assessed as a payment of tax upon receipt of payment. Additionally, if an amount is paid after the mailing of a notice of deficiency, the payment will not deprive the Tax Court of jurisdiction over the matter.

.03 Rev. Proc. 82-51 updated procedures found in Rev. Proc. 64-13, 1964-1 (Part I) C.B. 674, concerning the making of remittances before assessment. Rev. Proc. 82-51 distinguished between payments made in satisfaction of a tax liability and "deposits in the nature of a cash bond" made merely to stop the running of

interest. A deposit in the nature of a cash bond is not a payment of tax, is not subject to a claim for credit or refund, and, if returned to the taxpayer, does not bear interest. Rev. Proc. 82-51 assured taxpayers of their right to petition the Tax Court in cases in which they had made a deposit in the nature of a cash bond before the mailing of the notice of deficiency. It also provided various rules for computing interest, returning deposits, and allocating payments to tax, penalty, and interest.

.04 Section 344 of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 579, (TEFRA) made several changes affecting computation of interest, effective January 1, 1983.

1 Section 6622 of the Code was enacted to require the daily compounding of all interest required to be paid under the Code.

2 The "no interest on interest" rule formerly found in former section 6601(e)(2) of the Code was repealed.

.05 Under section 4.04 of Rev. Proc. 83-7, 1983-2 C.B. 583, interest continues to run on accrued interest if a deposit in the nature of a cash bond satisfies all or part of the tax but does not satisfy the interest that has accrued up until the date the deposit was made.

SEC. 3. CHANGES/CLARIFICATIONS

.01 Section 4.01 of this revenue procedure permits the making of a deposit in the nature of a cash bond after mailing of the notice of deficiency.

.02 Paragraph 3 of section 4.02 and section 5.01 provide that a deposit in the nature of a cash bond stops the running of interest at the time the remittance is received.

.03 Paragraph 3 of section 4.02 provides that a deposit in the nature of a cash bond will be posted to the taxpayer's account as a payment of tax after the mailing of a notice of deficiency unless the taxpayer specifically asks that it continue to be treated as a deposit. See section 3.01.

.04 Paragraph 4 of section 4.02 allows taxpayers to apply a deposit in the nature of a cash bond against other specific liabilities.

.05 Paragraph 1 of section 4.03 and paragraph 3 of section 4.02 provide that payments will normally be "posted" rather than "assessed". Assessments of payments as tax are made discretionary to the Internal Revenue Service by the Code. Posting payments against tax liabilities ultimately determined to be due assures proper credit and has no adverse effect upon taxpayers with respect to the running of interest.

.06 Paragraph 1 of section 4.03 requires that taxpayers specify what portion of the proposed liability they intend to satisfy if a partial payment is made.

.07 Section 5 revises rules on interest to take account of changes imposed by the TEFRA.

.08 Section 6.02 clarifies the rules for allocating payments to tax, penalty, and interest. Taxpayers will not be allowed to designate payments toward interest unless the underlying tax to which the interest relates is paid or the taxpayer agrees to the assessment.

SEC. 4. PROCEDURE

.01 *Post statutory notice remittances*

1 Subject to the provisions of subparagraph 3, a remittance made after the mailing of a notice of deficiency in complete or partial satisfaction of the deficiency will, absent any instructions from the

taxpayer, be considered a payment of tax and will be posted to the taxpayer's account as such as soon as possible. Such a remittance will not deprive the Tax Court of jurisdiction over the deficiency.

2 A remittance made after the mailing of a notice of deficiency but before the expiration of the 90-day or 150-day period, or, if a petition is filed, before the decision of the Tax Court is final, and is specifically designated by the taxpayer in writing as a "deposit in the nature of a cash bond", will be treated as such by the Service. Such a deposit in the nature of a cash bond is not a substitute for a bond to stay assessment and collection described in section 7485 of the Code. Although the amount will be posted to the taxpayer's account, it may be returned to the taxpayer under the conditions in section 4.02 up until the time the Service is entitled to assess the tax.

3 Any remittance made by the taxpayer after the date that the Tax Court files its opinion in an amount greater than the amount of the deficiency determined by the Tax Court, plus any interest that as accrued on that amount at the remittance date, will be treated as a deposit in the nature of a cash bond.

.02 *Deposits in the nature of a cash bond*

1 A remittance made before the mailing of a notice of deficiency that is designated by the taxpayer in writing as a deposit in the nature of a cash bond will be treated as such by the Service. Such a deposit is not subject to a claim for credit or refund as an overpayment. The taxpayer may request the return of all or part of the deposit at any time before the Service is entitled to assess the tax. That amount will be returned to the taxpayer, without interest, unless the Service determines that assessment or collection of the

tax determined to be due would be in jeopardy, or that the amount should be applied against any other liability. In such a case, the deposit will not be returned, but will be applied against a jeopardy or termination assessment or against the other liability.

2 Upon completion of an examination, if taxpayer who has made a deposit executes a waiver of restrictions on assessment and collection of the deficiency or otherwise agrees to the full amount of the deficiency, an assessment will be made and any deposit will be applied against the assessed liability as a payment of tax as of the date the assessment was made. In such a case, no notice of deficiency will be mailed and the taxpayer will not have the right to petition the Tax Court for redetermination of the deficiency.

3 Upon completion of an examination, if a taxpayer who has made a deposit does not execute a waiver of restrictions on assessment and collection or otherwise agree to the full amount of the deficiency, the Service will mail a notice of deficiency and the taxpayer will have the right to petition the Tax Court. That part of the deposit that is not greater than the deficiency proposed plus any interest that has accrued on the deficiency will be posted to the taxpayer's account as a payment of tax at the expiration of the 90 or 150-day period unless the taxpayer rerequests in writing before the date that the deposit continue to be treated as a deposit after the mailing of the notice of deficiency. Any amount of the remittance that exceeds the proposed liability will continue to be considered a deposit and will be returned to the taxpayer without interest subject to the provisions in subparagraph 1 of this section.

4 A taxpayer may elect to have a deposit in the nature of a cash bond that exceeds the amount of tax ultimately determined to be due applied against another assessed or unassessed liability, subject to the provisions of subparagraph 1 of this section. Thus, a taxpayer under examination for several different years may request that a deposit made for one year be applied to another year. Such requests must be in writing and must be directed to the same office with which the original deposit was made.

5 For deposits in the nature of a cash bond made after the mailing of a notice of deficiency, see subparagraph 2 of section 4.01.

.03 *Payments of tax*

1 A remittance not specifically designated as a deposit in the nature of a cash bond will be treated as a payment of tax if it is made in response to a proposed liability, for example, as proposed in a revenue agent's or examiner's report, and remittance in full of the proposed liability is made. A partial remittance will not be treated as a partial payment of tax unless the taxpayer specifically designates what portion of the proposed liability the taxpayer intends to satisfy. If the remittance is treated as a partial payment of tax, it will be posted to the taxpayer's account as a payment as of the date it is received. That amount may be taken into account by the Service in determining the amount for which a notice of deficiency must be mailed. If the Service is unable to determine whether a partial remittance is intended to be a payment of tax or a deposit in the nature of a cash bond, the Service will treat the remittance as a deposit in the nature of a cash bond and will follow the procedures described in section 4.04 .

2 If the remittance equals or exceeds the proposed liability, no notice of deficiency will be mailed. The taxpayer will not have the right to petition the Tax Court for a redetermination of the deficiency .

3 Remittances treated as payments of tax will be posted against the taxpayer's account upon receipt, or as soon as possible thereafter, and may be assessed provided that assessment will not imperil a criminal investigation or prosecution. In any case, the remittance will be applied against the taxpayer's account as of the date received by the Service.

4 If the remittance exceeds the assessed liability including any interest and penalty, the balance will be returned to the taxpayer, without interest, provided the taxpayer has no other outstanding liabilities.

.04 *Undesignated remittances*

1 Any undesignated remittance not described in section 4.03 made before the liability is proposed to the taxpayer in writing (e.g., before the issuance of a revenue agent's or examiner's report), will be treated by the Service as a deposit in the nature of a cash bond. Such a deposit is not subject to a claim for credit or refund and the excess of the deposit over the liability ultimately determined to be due will not bear interest under section 6611 of the Code. The taxpayer will be notified concerning the status of the remittance, and may elect to have the deposit returned, without interest, at any time before the issuance of a revenue agent's or examiner's report, subject to the provisions of subparagraph 1 of section 4.02.

2 If the taxpayer leaves an undesignated remittance on deposit until completion of the examination, the Service will follow the procedure described in section 4.02.

SEC. 5. INTEREST

.01 The running of interest on an assessed tax liability satisfied by application of a remittance (whether it was treated as a "payment of tax" or a "deposit in the nature of a cash bond") will stop on the date the remittance is received by the Service, regardless of when the liability is assessed or the remittance actually applied against the taxpayer's account. If the remittance is held as a deposit in the nature of a cash bond, but is returned at the taxpayer's request, and a deficiency is later assessed for that period and type of tax, the taxpayer will not receive credit for the period in which the funds were held as a deposit. If a waiver of restrictions on assessment and collection is executed for the amount covered by the remittance, the running of interest will stop on the date of receipt of the remittance, or 30 days after the waiver is filed with the Service, whichever is earlier.

.02 Taxpayers should be cautioned that the making of either a payment of tax or a deposit in the nature of a cash bond will stop the running of interest on only that amount that is actually remitted. Because of the compounding rules in section 6622 of the Code, interest will continue to accrue on accrued interest even though the underlying tax has been paid. Taxpayers wishing to stop the running of interest on both tax and interest should have a remittance for both the tax and the interest that has accrued as of the date of remittance.

.03 If a remittance is treated as a payment of tax and no notice of deficiency is mailed under sections 4.03 or 4.04, any interest due will be assessed with the tax. If a remittance is made after the mailing of a notice of deficiency under section 4.01, or if the Service mails a notice of deficiency under sections 4.02, 4.03, or 4.04,

any interest due will be assessed after the expiration of the period of time for filing a petition with the Tax Court, or, if a petition is filed, after the Tax Court decision becomes final. Compound interest will continue to accrue on any interest not covered by the remittance under section 4.02. A taxpayer wishing to stop the running of all interest must make a payment or deposit sufficient to cover all accrued interest as of the date of remittance as well as the entire amount of the underlying tax.

.04 No interest will be allowed or paid on a deposit, or any portion of a deposit, returned to a taxpayer before or after assessment.

.05 Remittances treated as payments of tax will be treated as any other assessed amount and compound interest will be paid on any overpayment under section 6611 of the Code. In the event that deposit in the nature of a cash bond is posted to a taxpayer's account as a payment of tax pursuant to subparagraph 3 of section 4.02, interest will run on an overpayment later determined to be due only from the date the amount was posted as a payment of tax.

SEC. 6. ALLOCATION OF REMITTANCES

.01 The Service will allocate any remittance treated as a payment of tax to penalty or interest as designated by the taxpayer if the remittance exceeds the full amount of the underlying tax due. If no designation is made, the remittance will be applied first to tax, then to penalty, and then to interest. If more than one period of tax is involved, the Service will allocate an undesignated remittance so as to satisfy all tax, penalty, and interest for the earliest period before applying any excess to other periods.

.02 If a taxpayer makes a remittance that is treated as a partial payment of tax under section 4.03, the Service will honor the taxpayer's request to allocate all or part of the payment to interest if one of the following conditions is met:

1 The taxpayer agrees to assessment and collection of the liability by executing a waiver of restrictions; or

2 The taxpayer pays the underlying tax with respect to the amount to be designated as interest and the amount designated as interest does not exceed the amount of interest that has accrued on the tax being paid.

.03 Any remittance purporting to be a partial payment of tax that does not meet one of the conditions in section 6.02 will be treated in its entirety as a deposit in the nature of a cash bond and the procedures in section 4.02 will be followed. In such a case, the taxpayer may cure any defects in the designation by redesignating the amount to be allocated as interest.

.04 Taxpayers may not make designations of remittances treated as deposits in the nature of a cash bond. If a liability is ultimately assessed and the deposit applied as a payment of tax, the Service will allocate the payments in accordance with any designation then made by the taxpayer. If no allocation is designated by the taxpayer, the remittance will be applied first to tax, then to penalties, and then to interest.

SEC. 7. EFFECTIVE DATE

This Revenue Procedure is effective for all remittances made on or after October 1, 1984.

SEC. 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 82-51 is superseded, effective with respect to remittances made on or after October 1, 1984.