

No. 06-1250

In the Supreme Court of the United States

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner is barred from seeking a refund under the “special rule” for retroactive application of 26 U.S.C. 6621(d)—which provides for a net interest rate of zero during periods of overlapping underpayments and overpayments of tax—because the limitations periods for the relevant underpayment years had expired.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 469 F.3d 968. A prior opinion of the court of appeals (Pet. App. 19a-31a) is reported at 379 F.3d 1303. An errata order of the court of appeals with respect to the prior opinion (Pet. App. 32a-33a) is unreported. The opinion of the Court of Federal Claims (CFC) (Pet. App. 36a-48a) is reported at 69 Fed. Cl. 89. A prior opinion of the CFC (Pet. App. 49a-73a) is reported at 56 Fed. Cl. 228.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2006. On February 5, 2007, the Chief Justice extended the time within which to file a petition for

a writ of certiorari to and including March 13, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Code generally requires corporate taxpayers to pay an interest rate on tax underpayments that is higher than the interest they receive from the Internal Revenue Service (IRS) on tax overpayments. See Pet. App. 37a. Until 1998, the Code contained no provision for interest netting during periods when overpayments and underpayments overlapped. See *ibid.* In 1998, however, Congress enacted the Internal Revenue Service Restructuring and Reform Act of 1998 (1998 Act), Pub. L. No. 105-206, 112 Stat. 685. Section 3301(a) of the 1998 Act, 112 Stat. 741, added a new 26 U.S.C. 6621(d), which requires the IRS to apply a net interest rate of zero during such overlapping periods of mutual indebtedness.

The 1998 Act also established a “special rule” providing for retroactive application of Section 6621(d)’s interest-netting provision under certain conditions. See Pet. App. 37a. In its current form, the “special rule” provides as follows:

Special rule.—*Subject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment,* the amendments made by this section shall apply to interest for periods beginning before the date of the enactment of this Act [July 22, 1998] if the taxpayer—

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

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

Id. at 51a (emphasis added).¹

2. For certain periods preceding the enactment of the 1998 Act, petitioner had outstanding underpayments of tax for its 1983 and 1986 tax years, as well as outstanding overpayments for its 1974 and 1975 tax years that overlapped with the 1983 and 1986 underpayments. See Pet. App. 19a-20a. In December 1999, invoking the interest-netting provision of the “special rule,” petitioner filed an administrative claim with the IRS seeking to recover additional overpayment interest. See *id.* at 21a-22a. The IRS disallowed petitioner’s refund claim. See *id.* at 22a. The IRS relied on Revenue Procedure 99-43, 1999-2 C.B. 579, 580, which interprets the “special rule” to require that “both periods of limitation applicable to the tax underpayment and to the tax overpayment . . . must have been open on July 22, 1998.” Pet. App. 22a. “The IRS concluded that the limitations periods for the 1983 and 1986 (underpayment) years had expired,” and that petitioner’s claim therefore “did not satisfy the requirements of the special rule.” *Ibid.*

3. Petitioner filed suit in the CFC seeking a refund of overpayment interest under 26 U.S.C. 6621(d) and the “special rule.” The dispute between the parties centered

¹ The enrolled version of the 1998 Act omitted the italicized language. See 1998 Act, § 3301(c)(2), 112 Stat. 741. That language was restored, however, by a technical correction contained in the Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277, Div. J, § 4002(d), 112 Stat. 2681-906, which was enacted in October of the same year.

on whether petitioner had satisfied the requirement of the “special rule” that “any applicable statute of limitation not hav[e] expired with regard to either a tax underpayment or a tax overpayment.” The government conceded that the limitations periods for recovery of overpayment interest for 1974 and 1975 had remained open as of July 22, 1998. Pet. App. 52a. The government argued, however, that the limitations periods for the 1983 and 1986 underpayment years had been closed as of that date. *Ibid.* Consistent with Revenue Procedure 99-43, the government contended that petitioner was not entitled to invoke the “special rule” because petitioner could not show that both “legs” of the overlapping liabilities had been open at the time of the 1998 Act’s enactment. See Pet. App. 52a.

Petitioner conceded that the limitations period for the 1986 underpayment year had closed before July 22, 1998. See Pet. App. 4a. Petitioner construed the “special rule,” however, to be applicable if the limitations period for either the overpayment or the underpayment year remained open as of that date. *Id.* at 3a. Petitioner also contended that the limitations period for the 1983 underpayment year had been open as of July 22, 1998. *Id.* at 52a n.5.

The CFC ruled in petitioner’s favor. Pet. App. 49a-73a. The court found the text of the “special rule” to be ambiguous with respect to the question whether the limitations periods for both the underpayment and the overpayment years are required to have been open on July 22, 1998, or whether it is sufficient if one of those periods was open as of that date. See *id.* at 62a. The court adopted the latter reading of the “special rule,” see *id.* at 70a-73a, relying in part on what it described as the rule that, “where the plain meaning of a tax statute

cannot be ascertained, ‘the doubt must be resolved against the government and in favor of the taxpayer,’” *id.* at 71a (quoting *United States v. Merriam*, 263 U.S. 179, 188 (1923)). Because the CFC found it sufficient that the limitations periods for petitioner’s overpayment years had been open as of July 22, 1998, it did not resolve the parties’ dispute as to whether the limitations period for the 1983 underpayment year had also been open on that date. See *id.* at 52a n.5.

4. The government appealed, and the court of appeals reversed and remanded for further proceedings. Pet. App. 19a-31a. The court of appeals found the language of the “special rule” to be “equally subject to both proffered interpretations.” *Id.* at 24a. The court concluded that “the most significant construction principle applicable to the present dispute” was “the requirement that a sovereign immunity waiver be strictly construed.” *Id.* at 28a-29a (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 315 (1986)).

The court of appeals found that canon of construction to be applicable here because “the disputed language in the special rule does not * * * merely relate to the rate of interest the government must pay,” but instead “discriminates between those claims for overpaid interest Congress has authorized and those it has not.” Pet. App. 30a. The court remanded the case to the CFC “for a factual determination regarding whether the statute of limitations for the 1983 underpayment year was closed on July 22, 1998.” *Id.* at 31a. The court of appeals stated that, if the limitations period for that underpayment year had been closed on the date of the 1998 Act’s enactment, the CFC “lacked jurisdiction to enter-

tain [petitioner’s] claims or at least its ‘jurisdiction to grant relief.’” *Ibid.*²

5. On remand, the CFC held that the limitations period for petitioner’s 1983 underpayment year had closed before July 22, 1998, and it accordingly dismissed petitioner’s suit. Pet. App. 36a-48a. The court’s decision on remand turned on a fact-intensive inquiry into whether a settlement between petitioner and the IRS, pursuant to which the IRS had issued a refund check on or about May 1, 1995, had resulted in a “final determination of tax” that terminated the parties’ prior agreement to extend the 1983 statute of limitations indefinitely. See *id.* at 43a, 45a-46a. The CFC acknowledged that, as a general matter, “the issuance of a refund check to a taxpayer does not foreclose the IRS from subsequently seeking its recovery on the ground that the refund was erroneously paid.” *Id.* at 47a. Based on the totality of the interactions between the parties in this case, however, the CFC held that the May 1995 refund was “logically construed as an administrative action that ‘reflects the final determination of tax and the final administrative appeals consideration,’” and that the refund there-

² In the concluding paragraph of its original opinion, the court of appeals mistakenly framed the question to be resolved by the CFC on remand as whether “both limitations periods—*i.e.*, for the underpayments and the overpayments—were closed on July 22, 1998.” Pet. App. 31a. In fact, it was undisputed that, on the date of enactment of the 1998 Act, the limitations periods for both overpayment years were open and the limitations period for the 1986 underpayment period was closed. The court of appeals subsequently issued a correction to its original opinion, *id.* at 32a-33a, which clarified the contours of the dispute between the parties, see *id.* at 32a, and directed the CFC on remand to render “a factual determination whether the limitation period for the 1983 underpayment year was closed on July 22, 1998,” *id.* at 33a.

fore terminated the parties' prior agreement to extend the limitations period. *Ibid.*; see *id.* at 43a-44a.

6. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1a-18a.

a. The court of appeals rejected petitioner's contention that the court should reconsider its ruling on the prior appeal. See Pet. App. 6a-9a. Petitioner relied on intervening decisions of this Court and the Federal Circuit that, in petitioner's view, "set[] forth new standards for determining when a statutory provision is jurisdictional." *Id.* at 8a. The court of appeals found that the precedents on which petitioner relied were "not pertinent because they do not address whether, in cases against the government, limitations periods are jurisdictional or whether they must be strictly construed." *Ibid.* The court further explained that its analysis in the first appeal was consistent with a number of this Court's decisions holding that conditions on the United States' waiver of sovereign immunity, including statutory provisions limiting the time for filing suit against the government, should be strictly construed in the sovereign's favor. *Id.* at 8a-9a. The court concluded that "[t]he special rule is a statute of limitations and must be strictly construed." *Id.* at 9a.

b. The court of appeals agreed with the CFC that the limitations period for the 1983 underpayment year had closed before July 22, 1998. Pet. App. 9a-18a. The court explained that, although the parties had agreed to extend the limitations period for 1983, the extension agreement would terminate by its own terms no later than 90 days after "the final determination of tax and the final administrative appeals consideration." *Id.* at 11a. The court concluded that, under the circumstances of this case, petitioner's tax liability for 1983 had been

finally determined when the IRS paid petitioner's refund claim. *Id.* at 16a-17a.

ARGUMENT

1. Petitioner contends (Pet. 11-25) that the court of appeals erred in its application of sovereign-immunity principles to the interpretive question presented in this case. The court of appeals held that the "special rule" enacted as part of the 1998 Act does not encompass petitioner's claim for an additional refund of overpayment interest. That holding is correct and does not warrant this Court's review.

a. The disputed statutory language makes petitioner's entitlement to a refund of additional interest "[s]ubject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment." See Pet. App. 51a. The interpretive question presented in this case is whether petitioner must demonstrate that the limitations periods for both the overpayment and underpayment years remained open as of July 22, 1998, or whether it is sufficient that the limitations periods for the overpayment years remained open on that date. The choice between the competing interpretations of the "special rule" will make a practical difference only in cases where (a) a period of overlapping indebtedness between the taxpayer and the government existed before July 22, 1998, and (b) the limitations period for one but not both of the relevant tax years remained open at that time. Review by this Court is not warranted to determine the proper disposition of that limited and diminishing set of cases.

In urging that certiorari be granted, petitioner does not contend that the proper construction of the "special rule" is itself a matter of substantial and continuing im-

portance. Rather, petitioner argues (*e.g.*, Pet. 10, 16) that the *mode of interpretation* utilized by the court of appeals in this case may have disruptive consequences if it is used to resolve disputes as to the meaning of other federal statutes. But absent a circuit conflict regarding the proper construction of the “special rule” itself, or some overriding need for this Court to announce a definitive interpretation of the particular statutory provision at issue here, this case would be an unsuitable vehicle for clarification of the canons of construction that apply to *other* federal laws.

b. Petitioner contends (Pet. 16-17) that, under the decision below, any statutory language bearing on a plaintiff’s entitlement to money damages from the government—including language defining the substantive obligations that the government is alleged to have breached—must be construed in the government’s favor if any ambiguity exists. Petitioner substantially overstates the logical implications of the court of appeals’ decision for the construction of other federal laws.

Petitioner’s core contention (Pet. 13) is that the limiting language at the beginning of the “special rule” is a substantive element of the taxpayer’s claim on the merits, not a limitations period or a restriction on the jurisdiction of the CFC. In fact, that limiting language cannot unambiguously be categorized as either a merits provision or as a condition on the government’s waiver of sovereign immunity, since it has attributes of both. On the one hand, as petitioner asserts (Pet. 13-14), it is possible to describe the “special rule” in substantive terms, as a provision that has the ultimate effect of determining which statutory rule for calculating the overpayment interest rate will govern petitioner’s refund claim. On the other hand, however, because the limiting

language at the beginning of the “special rule” is explicitly framed in terms of limitations periods, and thus directly implicates the government’s interest in avoiding stale claims, it is easily viewed as establishing an additional two-pronged statute of limitations for this particular category of claims. And neither the “special rule” in general nor its limiting introductory language in particular explicitly speaks to the substantive question whether interest-netting was required by the law in effect at the time the periods of mutual indebtedness actually occurred.

As we explain below (see pp. 11-13, *infra*), the “special rule” is best understood as a limitation on the government’s waiver of sovereign immunity rather than as an element of petitioner’s claim on the merits. The court of appeals was therefore correct to hold that any ambiguity in the statutory text should be resolved in the government’s favor. But in any event, the idiosyncratic nature of the statutory provision at issue here makes this case an especially poor vehicle for resolution of any broader questions concerning the distinction between jurisdictional and merits-based questions.

c. This Court has frequently reaffirmed that “a waiver of the Government’s sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.” *Lane v. Pena*, 518 U.S. 187, 192 (1996); see, e.g., *United States v. Williams*, 514 U.S. 527, 531 (1995); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992). The 1998 Act created a new 26 U.S.C. 6621(d), which mandates that a net rate of interest of zero will be used for any future period in which “interest is payable under subchapter A and allowable under subchapter B on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title.” On a going-

forward basis, Section 6621(d) establishes a substantive rule of law that governs the computation of interest for periods of overlapping mutual indebtedness between taxpayers and the government.

The “special rule,” however, serves a different purpose. The “special rule” does not itself establish the applicable rate of interest for periods of mutual indebtedness between the government and taxpayers generally. Rather, it is used to determine *which* taxpayers may assert a timely claim under Section 6621(d) as a ground for retroactive adjustment of their rights and obligations vis-a-vis the government for periods that predate the rule’s enactment. See Pet. App. 30a (court of appeals explains that “the disputed language in the special rule does not * * * merely relate to the rate of interest the government must pay,” but instead “discriminates between those claims for overpaid interest Congress has authorized and those it has not”). The class of taxpayers who may invoke the “special rule,” moreover, is defined by reference to the continued existence of live claims concerning the underpayments and overpayments in question.³ The “special rule” thus im-

³ As petitioner points out (Pet. 18-19), statutes of limitations are generally regarded as affirmative defenses rather than as restrictions on the jurisdiction of the trial court. The rule is different, however, with respect to statutes of limitations applicable to suits against the federal government. Thus, in *Finn v. United States*, 123 U.S. 227 (1887), the Court explained:

The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its

plicates the interest in avoiding stale claims that underlies statutes of limitations, and the rule's application to a particular taxpayer turns in part on the taxpayer's potential rights and liabilities *as a litigant*. In light of the purpose that it serves and the criteria that govern its application, the "special rule" is properly regarded as a condition on the government's waiver of sovereign immunity rather than as an element of petitioner's claim on the merits.

The fact that the "special rule" addresses awards of interest against the United States provides an additional reason to resolve any textual ambiguity in the government's favor. See *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986). The Court in *Shaw*, after reaffirming the general principles that any waiver of the United States' immunity must be construed "strictly in favor of the sovereign" and must not be expanded beyond its plain terms, observed that "[t]he no-interest rule provides an added gloss of strictness upon these usual rules." *Ibid.* The clear import of *Shaw* is that a court

officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.

Id. at 232-233; see, e.g., *Soriano v. United States*, 352 U.S. 270, 271 (1957) (holding that "the Court of Claims lack[ed] jurisdiction because the claim was not filed within the period provided by the statute"); *Munro v. United States*, 303 U.S. 36 (1938); *United States v. Wardwell*, 172 U.S. 48, 52 (1898); *de Arnaud v. United States*, 151 U.S. 483, 495-496 (1894) (quoting *Finn*, 123 U.S. at 232-233); *Kendall v. United States*, 107 U.S. 123 (1883).

The question whether the six-year statute of limitations in 28 U.S.C. 2501 establishes a jurisdictional rule is presented in *John R. Sand & Gravel Co. v. United States*, petition for cert. pending, No. 06-1164 (filed Feb. 26, 2007). We have provided petitioner's counsel with a copy of the government's response to the petition for a writ of certiorari in that case.

should take *particular* care not to award interest against the government in circumstances where Congress has not authorized such an award.

d. Petitioner’s reliance (Pet. 14-15) on *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), and *United States v. Mitchell*, 463 U.S. 206 (1983), is misplaced. Those cases hold that, in circumstances where the Tucker Act’s authorization for damages actions against the United States (see 28 U.S.C. 1491(a)(1)) applies, the clear-statement rule governing waivers of sovereign immunity does not apply to the determination whether a statute that imposes substantive obligations on the government also creates a right to money damages in the event that those obligations are breached. See *White Mountain Apache Tribe*, 537 U.S. at 472-473; *Mitchell*, 463 U.S. at 216-219.

The instant case, by contrast, does not present the question whether a statute imposing a substantive obligation on the government establishes a right to damages for a breach of that duty. The suits in *White Mountain Apache Tribe* and *Mitchell* did not implicate the government’s interest in avoiding stale claims, and neither case involved the settled rule that interest against the United States is presumptively unavailable. The statutes at issue in those cases, moreover, were not used to determine *which* plaintiffs could obtain the benefit of a newly-enacted rule of law, nor could they plausibly be viewed as statutes of limitations or the equivalent thereof. Those cases therefore have little bearing on the interpretive methodology that should govern construction of the “special rule.”

Petitioner’s reliance (Pet. 19) on *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), is also misplaced. The Court in *Arbaugh* announced a general rule that “when Con-

gress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *Id.* at 516. *Arbaugh* did not involve a suit against the United States, however, and with respect to that category of suits this Court has long recognized that “the terms of [the government’s] consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *United States v. Dalm*, 494 U.S. 596, 608 (1990) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976), in turn quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Tests for distinguishing jurisdictional from nonjurisdictional prerequisites to recovery in private litigation therefore cannot readily be transplanted to suits against the government. In addition, the coverage requirement in *Arbaugh* (whether the defendant had 15 or more employees and therefore was an “employer” subject to Title VII, see 546 U.S. at 503-504) turned on the nature of the defendant’s primary conduct, not on the application of a statutory limitations period.

e. Petitioner also contends (Pet. 21) that “the principle of strict construction of waivers of sovereign immunity is simply a guide to congressional intent that must be considered along with other indicia that could demonstrate that Congress intended a broader construction.” Petitioner argues (Pet. 21-25) that the court of appeals exaggerated the significance of the relevant canon of construction and erroneously refused to consider other evidence of congressional intent. That argument lacks merit. Because “[a] statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text,” *Lane*, 518 U.S. at 192, the absence from the “special rule” of clear language entitling petitioner to the rule’s benefits would be dispositive even if other in-

dicta of congressional intent supported petitioner's claim.

In any event, the court of appeals found not simply that the "special rule" could *plausibly* be construed in either of two ways, but that the statutory text was "*equally* subject to both proffered interpretations." Pet. App. 24a (emphasis added). The court also examined the legislative history of the 1998 Act, *id.* at 27a-28a, and found that it provided "limited guidance" with respect to the interpretive question presented here, *id.* at 27a. Contrary to petitioner's suggestion, therefore, the court did not use the applicable canon of construction to override compelling evidence of a contrary congressional intent.

As we explain below (see pp. 16-17, *infra*), the text of the "special rule" actually supports the government's construction of the statute even if clear-statement principles are put to one side. But even under the court of appeals' view that the statutory text was equally susceptible of either reading, the principle that waivers of sovereign immunity should be narrowly construed was used in this case as a tiebreaker, not as a basis for rejecting a construction of the "special rule" that the court would otherwise have found preferable. Given the court of appeals' conclusion that the parties' textual arguments were in equipoise, the court might properly have deferred to the IRS's contemporaneous interpretation of the "special rule" as reflected in Revenue Procedure 99-43. Although Revenue Procedure 99-43 was not issued pursuant to notice and comment procedures, judicial deference is nevertheless appropriate when, as here, Congress granted the agency the power to make rules with the "force of law" and "the agency interpretation claiming deference was promulgated in the exercise of

that authority.” *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 230-231 (2001); see *Barnhart v. Walton*, 535 U.S. 212, 221-222 (2002).

f. Even without regard to the principle that waivers of sovereign immunity will be narrowly construed, the text of the “special rule” supports the court of appeals’ conclusion that a taxpayer may invoke the rule only if the limitations periods for both the overpayment and the underpayment years remained open as of July 22, 1998. The applicability of the “special rule” is “[s]ubject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment.” See Tax and Trade Relief Extension Act of 1998, Pub. L. No. 105-277, Div. J, § 4002(d), 112 Stat. 2681-906 to 2681-907. Thus, the effect of the “special rule” is that 26 U.S.C. 6621(d) “applies to interest for periods beginning before the date of enactment if,” *inter alia*, “the statute of limitations has not expired with respect to either the underpayment or overpayment.” H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 257 (1998).

The statement “I have not visited either England or France” would naturally be understood as an assertion that the speaker had visited neither country. A person who uttered that sentence and was later shown to have visited England could not persuasively defend his statement as accurate by explaining that he had used the words “either * * * or” and that France was the country he had not visited. The statement “I have not endorsed a candidate with regard to either the presidential election or the gubernatorial election” would likewise naturally be construed as an assertion that the speaker has endorsed neither a presidential nor a gubernatorial candidate. Similarly here, the “special rule” is most naturally read to be inapplicable if the limitations periods

for either the underpayment or the overpayment year had expired before July 22, 1998.

2. Petitioner contends (Pet. 25-30) that the court of appeals erred in holding that the statute of limitations with regard to petitioner's 1983 underpayment year had expired before July 22, 1998. That claim lacks merit and does not warrant this Court's review.

In November 1988, petitioner entered into an agreement, reflected in standard Form 872-A, to extend the applicable statute of limitations for the 1983 tax year. Pet. App. 10a, 39a. The second paragraph of Form 872-A provided that the extension would terminate if the parties' course of dealing culminated in an action constituting a "final determination of tax." *Id.* at 11a, 43a-44a. The courts below correctly concluded that, under the circumstances presented here, the IRS's issuance of a refund check in May 1995 reflected such a "final determination." *Id.* at 16a-17a, 45a-46a.

As a general matter, the IRS's provision of a refund does not represent a final determination of a taxpayer's tax liability because the IRS retains the power to audit the return and redetermine the amount of tax owed. Under the particular facts of this case, however, where the refund came after completion of an audit and appeals process and flowed from a settlement in which finality was acknowledged and which strictly limited the scope of the refund, the court of appeals correctly affirmed the CFC's finding that payment of the refund served as a final determination of tax. See Pet. App. 17a. Petitioner's factbound challenge to the court of appeals' holding presents no legal issue of recurring significance that would warrant this Court's review. Indeed, petitioner acknowledges (Pet. 25) that review on this

issue is not warranted unless the Court grants certiorari to decide the proper interpretation of the “special rule.”

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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