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STATE OF WASHINGTON
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NO. 40923-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

WELLS FARGO BANK, N.A.,

Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Respondent.

WELLS FARGO'S REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

Michele Radosevich
Dirk Giseburt
Davis Wright Tremaine LLP
Attorneys for Wells Fargo Bank, N.A.

1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
(206) 622-3150 Phone
(206) 757-7700 Fax

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTS RELEVANT TO CROSS-APPEAL 2

III. ARGUMENT IN RESPONSE TO CROSS-APPEAL 4

A. Wells Fargo Asserts a Breach of Contract Claim 5

B. The APA Does Not Provide an Exclusive Cause of Action Here. 6

1. A Contract Case Invokes the Original Jurisdiction of the Superior Court. 6

2. The APA Itself Provides that It Is Not the Exclusive Means of Review. 8

C. Wells Fargo Successfully Invoked APA Jurisdiction. 11

IV. ARGUMENT IN REPLY 16

A. The Department Ignores the Plain Language and Statutory History of RCW 82.32.060 and the Closing-Agreement Statutes 17

1. RCW 82.32.060(4) Expressly Calls for Interest on All Refunds Without Limitation. 17

2. The Closing Agreement Cannot Displace the Interest Statute When It Is Silent as to Interest. 24

3. The Department's Reliance on Vague "Policy" Claims Is Misplaced. 27

4. Federal Law Supports Wells Fargo's Position 28

B. Wells Fargo Did Not Waive Its Right to Interest. 35

C. Rules Governing the Construction of Contracts Establish That Interest Is a Term of the Contract. 38

V. CONCLUSION..... 42

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Anthony v. United States,
987 F.2d 670 (10th Cir. 1993) 31, 33

Columbia Steel & Shafting Co. v. United States,
70 Ct. Cl. 730, 44 F.2d 998 (1930) 31

Evergreen School Dist. v. N.F.,
393 F. Supp. 2d 1070 (W.D. Wash. 2005).....9

Ewing v. United States,
914 F.2d 499 (4th Cir. 1990).....31

E.W. Scripps Co. v. United States,
2002 WL 31477137 (S.D. Ohio 2002).....35

Heckler v. Community Health Serv.,
467 U.S. 51 (1984).....33

Hurt v. United States,
70 F.3d 1261, 1995 WL 703540 (4th Cir. unpub. 1995) 31, 32

In re Spendthrift Farm,
931 F.2d 405 (6th Cir. 1991) 29, 32, 37

LaRosa's Int'l Fuel Co., Inc. v. United States,
73 Fed. Cl. 625 (2006) 31, 32

Lloyd-Smith v. United States,
44 F.2d 990 (Ct. Cl. 1930) 31

Nelson-Wiggen Piano Co. v. United States,
84 F.2d 47 (7th Cir. 1936) 34

Parish & Bingham Corp. v. United States,
44 F.2d 993 (Ct. Cl. 1930) 31

Schneider v. United States,
119 F.2d 215 (6th Cir. 1941) 34

Smith v. United States,
850 F.2d 242 (5th Cir. 1988) 29, 32

United States v. Steinberg,
100 F.2d 124 (2d Cir. 1938).....28, 29

United States v. William Cramp & Sons Ship & Engine Bldg. Co.,
206 U.S. 118 (1907).....26

Western Maryland Ry. Co. v. United States,
23 F. Supp. 554 (D.C. Md. 1938) 34

STATE CASES

Anderson v. Port of Seattle,
49 Wn.2d 528, 304 P.2d 705 (1956).....26

Architectural Woods, Inc. v. State,
92 Wn.2d 521, 598 P.2d 1372 (1979).....6

Bowman v. Webster,
44 Wn.2d 667, 269 P.2d 960 (1954).....36

City of Seattle v. Public Employment Relations Comm'n,
116 Wn.2d 923, 809 P.2d 1377 (1991).....6

Dombrowsky v. Farmers Ins. Co.,
84 Wn. App. 245, 928 P. 1127 (1996).....35, 36

Dot Foods, Inc. v. *Department of Revenue*,
166 Wn.2d 912, 215 P.3d 185 (2009).....18

Dougherty v. Department of Labor & Indus.,
150 Wn.2d 310, 76 P.3d 1183 (2003).....16

Graff v. Allstate Ins. Co.,
113 Wn. App. 799, 54 P.3d 1266 (2002).....16

Harrington v. Spokane County,
128 Wn. App. 202, 114 P.3d 1233 (2005).....13

Holden v. Farmers Ins. Co. of Washington,
___ Wn.2d ___, 239 P.3d 344 (2010).....8

IBM Corp. v. Levin,
928 N.E.2d 440 (2010).....27

In re Estate of Phillips,
46 Wn.2d 1, 278 P.2d 627 (1955).....26, 35

In re Garrity,
22 Wn.2d 391, 156 P.2d 217 (1945).....39

Jenkins v. Morgan,
112 S.E.2d 23 (Ga. 1959).....25

Kim v. Moffett,
156 Wn. App. 689, 234 P.3d 279 (2010).....8

Nishikawa v. U.S. Eagle High, LLC,
138 Wn. App. 841, 158 P.3d 1265 (2007).....9

Peterson v. Groves,
111 Wn. App. 306, 44 P.3d 894 (2002).....15

Poole & Kent Corp. v. C.E. Thurston & Sons, Inc.,
209 S.E.2d 450 (N.C. 1974).....25

Rasmussen v. Allstate Ins. Co.,
45 Wn. App. 635, 726 P.2d 1251 (1986).....26

Reynolds Metals Co. v. *Electric Smith Constr. & Equip. Co.*,
4 Wn. App. 695, 483 P.2d 880 (1971).....36

Riley Pleas, Inc. v. State,
88 Wn.2d 933, 568 P.2d 780 (1977).....5, 11

Vehicle/Vessel LLC v. Whitman County,
122 Wn. App. 770, 95 P.3d 394 (2004).....36, 37

Voelker v. Joseph,
62 Wn.2d 429, 383 P.2d 301 (1963).....36, 37

Wagner v. Wagner,
95 Wn.2d 94, 621 P.2d 1279 (1980).....25, 26, 38, 39

WCHS, Inc. v. City of Lynnwood,
120 Wn. App. 668, 86 P.3d 1169 (2004) 13

Wright v. *Colville Tribal Enterprise Corp.*,
159 Wn.2d 108, 147 P.3d 1275 (2006) 15

FEDERAL STATUTES

26 U.S.C. § 1313(a) 23

26 U.S.C. § 3760(a), (b) (1940) 20

26 U.S.C. § 6611 29

26 U.S.C. § 7121 ..... 20, 21, 23

Internal Revenue Code of 1939, § 3760(a) 20

Revenue Act of 1926, § 1106(b), 44 Stat. 9, 113 ..... 21, 22, 31

Revenue Act of 1928, § 606, 45 Stat. 791, 874 ..... 20, 21, 22

Revenue Act of 1938, § 820(a)(1), 52 Stat. 447, 581 23

STATE STATUTES

Chapter 34.05 RCW 4

RCW 4.16.040 7

RCW 4.92.010 ..... passim

RCW 34.05.010(3) 7, 8

RCW 34.05.510(3) 8, 9, 10

RCW 34.05.530 10

RCW 34.05.542(3) 10, 12, 14

RCW 34.05.570(4) 4, 7

RCW 82.04.460 30

RCW 82.32.060 ..... 16, 17, 29, 41

RCW 82.32.060(3) 28

RCW 82.32.060(4) ..... passim

RCW 82.32.060(4)(a) 1, 17, 39

RCW 82.32.350 ..... 11, 19, 21

RCW 82.32.360 ..... 11, 19, 20, 25

1935 Laws ch. 180, § 189 24

1945 Laws ch. 251, §§ 1-2 19

1949 Laws ch. 228, § 21 23

1961 ch. 15, §§ 82.32.350, .360 19

1971 Laws ex. sess. ch. 229, § 23. 19

1975 Laws 1st ex. sess. ch. 278, § 93. 19

2003 Laws ch. 73, § 2 27

RULES

CR 12(b)(1) 16

CR 12(b)(6) 16

OTHER AUTHORITIES

15A CJS 120-21, *Compromise & Settlement* §§ 37, 38 (2002) 24, 25

Comm'r International Revenue, IT-Mimeograph Coll. No. 3652, R.A. No. 463 (July 5, 1928) 22

Int. Rev. Manual 8.17.6.1(2) 29

J. Klein, Federal Income Taxation (1929) 22

I. INTRODUCTION

To recapitulate the dispute in simplest terms, in 2008, Wells Fargo Bank and the Department of Revenue settled certain B&O tax refund claims concerning two technical points on how Wells Fargo's income from interstate operations should have been divided between Washington and all other states. On one issue, the Department agreed to refund 100% of the related tax paid by Wells Fargo in 1996 and 1997—in other words, after the State had had the use of the funds for as much as 12 years. On the other issue, the Department agreed to refund 40% of the related tax paid in 1996 through 1999.

Despite the fact that Washington law requires payment of interest on "any refund, credit, or other recovery allowed to a taxpayer" for taxes paid under Title 82 RCW, RCW 82.32.060(4)(a), which Wells Fargo believed was an underlying principle applicable to every closing agreement, the Department did not pay interest when it paid the agreed tax refund. Wells Fargo brought suit to enforce the closing agreement. The Department argues, without any statutory basis, that the interest statute does not apply to refunds made under closing agreements.

The Department also argues that Wells Fargo is not entitled to bring a breach-of-contract claim. Instead, the Department claims Wells Fargo is foreclosed from seeking any relief at all because it did not file suit

under the Administrative Procedure Act within 30 days of the Department's letter stating why it did not pay interest, despite the Department's invitation in that letter to discuss the issue further and the Department's openness to negotiating the interest claim in the months that followed. Even if the Administrative Procedure Act applies to Wells Fargo's contract claim, however, it does not preclude the courts' jurisdiction in this action.

II. FACTS RELEVANT TO CROSS-APPEAL

Following payment of Wells Fargo's tax refund, Andrew Gardner of Wells Fargo wrote to the administrative law judge with whom he had conducted the settlement negotiations, pointing out that interest was required under RCW 82.32.060 and that Wells Fargo had not waived its right to interest in the closing agreement. CP 239-40. Mary Barrett of the Department replied in a letter dated April 15, 2008, in which Ms. Barrett stated that the parties' closing agreement foreclosed any further Department liability for interest. CP 494-95. Wells Fargo then engaged outside counsel to evaluate and assist on its claim for refund interest. CP 994. Although Ms. Barrett had invited further discussion of the interest issue in her letter, Wells Fargo directed its attorneys to seek an additional audience for the issue by writing to the Department's lawyers at the Attorney General's Office. CP 994-95.

On behalf of Wells Fargo, its attorneys then wrote to Cameron Comfort, Senior Assistant Attorney General, explaining the background of the issue, stating the legal grounds for disagreeing with Ms. Barrett's letter, and stating that Wells Fargo was ready to bring an action to recover the interest in 60 days if a satisfactory resolution was not in process. *Id.* Mr. Comfort called Dirk Giseburt in response and said that he would forward the letter and discuss the issue with the Department. He also requested that Mr. Giseburt contact him again before filing suit so that he could prompt the Department if its failure to respond earlier was inadvertent. *Id.* at 995.

Following the end of the 60-day period, Mr. Giseburt emailed Mr. Comfort on November 26, 2008, to ask whether the Department would be responding to the letter to Mr. Comfort. *Id.* A few days later, Ms. Barrett called Mr. Giseburt and said that the Department would like to resolve the matter short of litigation. Ms. Barrett made an offer of settlement. *Id.* A few days later, Mr. Giseburt left a voice message with Ms. Barrett conveying a counteroffer. Then on December 12, 2008, Ms. Barrett sent Mr. Giseburt an email conveying another counteroffer, which purported to be a final offer in concept although it invited discussion on the method of calculating the interest to be paid. *Id.*

Mr. Giseburt received no revocations of this offer by the time Wells Fargo filed this action on January 22, 2009. *Id.*

III. ARGUMENT IN RESPONSE TO CROSS-APPEAL

In its cross-appeal, the Department of Revenue ("Department") claims that the trial court erred in denying the Department's Motion to Dismiss based on an alleged lack of compliance with the Administrative Procedure Act ("APA"), ch. 34.05 RCW, which deprived the court of subject matter jurisdiction.

Wells Fargo does not rely on the APA for subject matter jurisdiction, however. Wells Fargo presented the superior court with a common law breach of contract claim under RCW 4.92.010, not an appeal of a previously adjudicated agency decision. If the APA applies at all, the Department's failure to pay interest is reviewable only as "other agency action" under RCW 34.05.570(4).[1] And even if the APA applies to the present case, Wells Fargo may still bring its contract claim because the APA expressly exempts certain causes of action, including the present claim, from the exclusive APA process.

Moreover, if the APA applies, Wells Fargo filed its claim within the 30-day filing requirement. The superior court thus had subject matter

[1] Wells Fargo pleaded both APA and common law contract as alternative causes of action. CP 9. Wells Fargo thus did not concede that the Department's refusal to pay interest was "agency action" as the Department asserts. *See* Br. Respondent at 10.

jurisdiction to hear Wells Fargo's common law contract claim via RCW 4.92.010 and the APA. The superior court properly denied the Department's motion to dismiss for lack of subject matter jurisdiction, and this court should affirm that ruling.

A. Wells Fargo Asserts a Breach of Contract Claim.

This is a breach of contract case. Wells Fargo and the Department entered into a settlement agreement to resolve a tax controversy. In that agreement, Wells Fargo offered to waive its right to seek a full return of tax overpayments in exchange for a partial return, and the Department accepted. The settlement agreement was thus a contract. *See Riley Pleas, Inc. v. State*, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977) (settlement agreement with Department was a contract; plaintiff's claim treated as contract claim).

The Department does not disagree:

> Once a settlement is entered into, any subsequent remedy of the parties must be based on the agreement, which operates as a merger and a bar of all prior claims, unless they are reserved.

Br. Respondent at 22 (citing cases). Having made this claim in the portion of its brief dealing with the substantive issue, the Department fails to recognize the implications for its cross-appeal. If Wells Fargo could only

bring a contract action, then the APA does not apply, let alone serve as the exclusive means of access to the courts.

B. The APA Does Not Provide an Exclusive Cause of Action Here.

1. A Contract Case Invokes the Original Jurisdiction of the Superior Court.

RCW 4.92.010 authorizes suits against the State on contracts. *See Architectural Woods, Inc. v. State,* 92 Wn.2d 521, 527, 598 P.2d 1372 (1979). The Department asserts RCW 4.92.010 is irrelevant here because the APA is the exclusive avenue for Wells Fargo to seek judicial review of the Department's contract breach. This is allegedly so because the offending party is an agency of the state, and agency actions are only reviewable in accordance with the APA. The Department argues Wells Fargo did not satisfy the APA's requirements. As a result, Wells Fargo (and any other private party similarly situated) allegedly has no recourse against the Department's breach of contract, even though, presumably, the Department could sue a breaching taxpayer under the court's original jurisdiction. The Department is incorrect.

The APA provides a mechanism for courts to engage in appellate review of agency decisions. *City of Seattle v. Public Employment Relations Comm'n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991). However, Wells Fargo seeks *to present a claim* under the superior court's

original jurisdiction, not to obtain appellate review of a decision regarding that claim. Wells Fargo's claim is a classic case of contract interpretation: whether an implied promise is part of its contract with the Department and, if so, whether the Department's conduct constitutes a breach of contract.

The Legislature allows those harmed by a breach of contract six years to file a claim for relief. RCW 4.16.040. Wells Fargo was harmed by the Department's breach of contract, and by statute it has a right to have its claim decided on the merits.

The Department seeks to elevate any type of action or conduct by an agency to the level of adjudication, rule-making, licensing, and other substantive agency decisions envisioned by the APA. Here, however, an APA claim would have to brought under RCW 34.05.570(4) dealing with other agency action. Under that subsection, the only way the agency action can be set aside is if it is: "(i) Unconstitutional; (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law; (iii) Arbitrary or capricious; or (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action." These standards are ill-suited to a contract action.

Such an expansion of the scope of the APA is unwarranted. Wells Fargo seeks to present a claim to the trial court in the first instance, not

invoke appellate review under the APA. The Superior Court correctly determined that it had subject matter jurisdiction to hear a claim that sounds in contract, not review a decision under its appellate jurisdiction.

2. The APA Itself Provides that It Is Not the Exclusive Means of Review.

Wells Fargo's claim may proceed even if the APA applies to claims of breach of contract in the first instance. The APA states that it is not the "exclusive means of judicial review of agency action" when "de novo review . . . of agency action is expressly authorized by provision of law." RCW 34.05.510(3). Thus, the APA will not bar a claim if an additional source of law permits the claim and the claim is required by law to be reviewed de novo.

Wells Fargo's contract claim satisfies these requirements. As stated above, the claim is independently authorized under RCW 4.92.010. The claim is also required by law to be reviewed de novo. Numerous cases have established the well known legal rule that, in the absence of a dispute of material fact, questions of contract interpretation are legal questions subject to de novo review. *See, e.g.*, *Holden v. Farmers Ins. Co. of Washington*, ___ Wn.2d ___, 239 P.3d 344, 347 (2010); *Kim v. Moffett*, 156 Wn. App. 689, 697, 234 P.3d 279 (2010) ("To the extent we are required to interpret contract provisions, we apply the noted de novo

review standard."). The Department's brief cites case law affirming this point. Br. Respondent at 10 (citing *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 848-49, 158 P.3d 1265 (2007) ("[W]here the facts are undisputed, the legal effect of a contract is a question of law that we review de novo."). Thus, Wells Fargo's contract claim is authorized by a source of law other than the APA, and it must be reviewed de novo. By terms of the APA itself, Wells Fargo's contract claim may proceed under RCW 4.92.010.[2]

The Department attempts to confuse this issue by citing RCW 34.05.010(3), which exempts a variety of agency decisions from the term "agency action" within the meaning of the APA. The Department argues that the "de novo review" exception does not apply to Wells Fargo's claim because tax settlement contracts are not included in the agency action list and tax settlement agreements are "uniquely governmental." Br. Respondent at 14. These arguments are incorrect and irrelevant.

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[2] There is no requirement that the statutory alternative to APA jurisdiction use the words "de novo review" themselves to provide the de novo review that is required for the exception to exclusive APA procedures. *See Evergreen School Dist. v. N.F.*, 393 F. Supp. 2d 1070, 1075 (W.D. Wash. 2005) (holding that Washington's appeal provisions regarding disabilities in education, which adopt by cross-reference federal procedures in the parallel federal statute, neither of which call for "de novo review" in so many words, do qualify for the "de novo review" exception to exclusive APA procedures under RCW 34.05.510(3)).

First, the Department misunderstands the effect of RCW 34.05.010(3).[3] The sole purpose of this statute is to define the term "agency action;" it in no way modifies or even references the de novo exception to exclusivity. The APA treats conduct classified as agency action differently from conduct not so classified. For example, if a party is injured by conduct classified as agency action, that party has standing to sue under the APA. RCW 34.05.530 (granting standing when aggrieved by agency action). If a party is injured by agency conduct that is not statutorily classified as agency action, that party must rely on some other source of subject matter jurisdiction to bring a claim. Like the 30-day filing requirement, the APA "de novo review" exception applies to agency actions only. RCW 34.05.510(3); 34.05.542(3). If the breach of a tax settlement agreement is "agency action," then the present claim satisfies the de novo review exception. If such a breach is not "agency action," then the 30-day filing requirement does not apply. The Department's argument that tax closing agreements are not included in the RCW 34.05.010(3) list has no practical impact on the question of subject matter jurisdiction.

[3] Contrary to the Department's assertions, RCW 34.05.010(3) is not a list of contract types only, but rather a broader list of governmental actions. In addition to certain types of contracts, it includes conduct related to the exercise of eminent domain, leasing, mediation, arbitration, and the granting of licenses and franchises.

Second, while the government's ability to impose taxes is uniquely governmental, the ability to impose taxes is not at issue here. Instead, having exercised its authority under RCW 82.32.350 and .360 to enter into a closing agreement determining Wells Fargo's "tax liability or tax immunity" on the issues in question, the Department's rights and obligations (like Wells Fargo's) are determined by the contract and contract law. Just as the Department argues, "Once a settlement agreement is entered into, any subsequent remedy of the parties must be based on the agreement." Br. Respondent at 22 (citing authorities). There is nothing uniquely governmental about the rules of contract interpretation or the enforcement of contractual obligations. *See Riley Pleas, Inc. v. State,* 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977).

The present claim is reviewable independent of the APA because the APA exempts claims subject to de novo review from exclusive judicial review under the APA. The present claim is reviewable under RCW 4.92.010 and is subject to de novo review, and thus the Superior Court has subject matter jurisdiction.

C. Wells Fargo Successfully Invoked APA Jurisdiction.

If the Court agrees that the APA applies to the present dispute, then the APA serves as an additional, independent source of subject matter jurisdiction. Under the APA, an agency action is judicially reviewable if a

claim is properly initiated within 30 days of the disputed action. RCW 34.05.542(3). Wells Fargo commenced the present action in a timely manner, so the APA provides subject matter jurisdiction.

The Department asserts "agency action" regarding the breach of contract occurred on April 15, 2008. On that day, Wells Fargo received a letter from the Department indicating it would not pay interest on the tax refund. The Department asserts this letter was unequivocally final and concluded all negotiation on the issue, despite an offer by the Department for Wells Fargo to contact it to discuss the situation further. In contrast, when the Department issues an assessment, letter ruling, or determination, it advises the taxpayer of its right to appeal—it does not suggest further discussions.

Moreover, given the Department's subsequent conduct, it is abundantly clear that the April 15 letter represented no such final decision, either to the Department or Wells Fargo. After receiving the April 15 letter, Wells Fargo retained outside counsel. CP 994. Dirk Giseburt, outside counsel for Wells Fargo, wrote to Cameron Comfort, Senior Assistant Attorney General, described the situation, and informed Mr. Comfort that Wells Fargo would bring an action in 60 days for damages absent a satisfactory resolution. CP 994-95. Mr. Comfort called Mr. Giseburt in response and said that he would forward the letter and

discuss the issue with the Department. CP 995. He also requested that Mr. Giseburt contact him again before filing suit so that he could prompt the Department if its failure to respond earlier was inadvertent. *Id.*

Following the end of the 60-day period, Mr. Giseburt emailed Mr. Comfort on November 26, 2008, to ask whether the Department would respond to Mr. Giseburt's letter. *Id.* A few days later, Mary Barrett on behalf of the Department called Mr. Giseburt and said the Department would like to resolve the matter short of litigation. *Id.* Ms. Barrett made an offer of settlement. *Id.* A few days later, Mr. Giseburt left a voice message with Ms. Barrett conveying a counteroffer. On December 12, 2008, Ms. Barrett sent Mr. Giseburt an email conveying another counteroffer, which purported to be a final offer in concept, although it invited discussion on the method of calculating the interest to be paid. *Id.* Mr. Giseburt received no revocations of this offer by the time Wells Fargo filed this action on January 22, 2009. *Id.*

The Department's position that the April 15 letter represented a final decision is untenable legally and factually. Negative letters lack finality unless they clearly assert a legal relationship and make clear that the letter is the final point in the administrative process. *Harrington v. Spokane County*, 128 Wn. App. 202, 212, 114 P.3d 1233 (2005); *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169 (2004).

The letter here did no such thing. Nor did the Department's conduct show that it had made a final decision. The subsequent negotiations over how much interest was owed by the Department make clear the Department's April 15 position on the issue was neither firm nor final. The Department's attempt to recast these negotiations as merely an attempt to avoid litigation is irrelevant. Regardless of the label, the issue open for discussion was how much interest the Department would pay. As such, the Department's prior indication on April 15 that it would not pay any interest was not a final decision and did not initiate the 30-day APA filing requirement provided by RCW 34.05.542(3).

The Department's conduct enshrined in the April 15 letter was not a final decision. The Department's final action in regards to the tax interest was an offer that was neither accepted nor rescinded. Because the Department made no firm, final decision on the issue prior to Wells Fargo filing its claim, if the continuing failure to pay interest under the closing agreement was an "agency action" at all, Wells Fargo's claim was filed within the APA 30-day requirement. The APA itself thus provides an independent, alternative source of subject matter jurisdiction.

Moreover, even if the 30-day period had been triggered at some point, the Department's continued negotiations over the interest issue equitably estop it from asserting a statute of limitations defense. The

gravamen of equitable estoppel with regard to the statute of limitations is that the defendant made representations that lulled the plaintiff into delaying timely action. *Peterson v. Groves,* 111 Wn. App. 306, 311, 44 P.3d 894 (2002). The three elements to be proved are (1) an admission, statement, or act inconsistent with the later assertion of the statute of limitations, (2) reasonable reliance by the plaintiff on that admission, statement, or act, and (3) resultant running of the limitations period. *Id.* at 310-11. Here the Department's invitation to discuss the issue further in April 2008 and willingness to negotiate with Wells Fargo over interest in December 2008 are certainly inconsistent with the Department's assertion in this action that the statute of limitations began to run no later April 15, 2008. This continued willingness to negotiate reasonably had the effect of discouraging Wells Fargo from filing an action, and it would be inequitable to allow the Department to escape defending the claims on the merits because the statute of limitations has run.

The questions of when the APA's statute of limitations was triggered and whether the Department may assert a statute of limitations defense involve disputed issues of fact that are evaluated using the summary judgment standard. *See Wright* v. *Colville Tribal Enterprise Corp.*, 159 Wn.2d 108, 117-120, 147 P.3d 1275 (2006) (Madsen, J.,

concurring).[4] Therefore, the facts and inferences drawn from the pleadings and other evidence must be viewed in the light most favorable to Wells Fargo. *See Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002). Here the Department's ongoing negotiations clearly raise factual questions that preclude a finding that the statute of limitations was triggered in April 2008, or that even if it was, whether the Department is entitled to dismissal when it led Wells Fargo to think that the issue was still open to negotiation.

IV. ARGUMENT IN REPLY

In its opening brief, Wells Fargo argued that (1) RCW 82.04.060 requires the payment of interest on all tax refunds, including those documented by closing agreements between the taxpayer and the Department, (2) because there was a statutory right underlying the closing agreement, Wells Fargo was entitled to interest unless it had waived it in the agreement, and (3) under contract interpretation principles, in the absence of an interest term, the statute would supply it. In its responsive brief, the Department argues that the interest statute applies to all tax refunds ***except*** closing agreements because closing agreements are

[4] The Department's Motion to Dismiss was ostensibly brought pursuant to CR 12(b)(1), to which the summary judgment standard applies. However, the Washington Supreme Court has held that the superior court has original jurisdiction over issues of compliance with the APA and the APA itself does not provide such jurisdiction. *Dougherty v. Department of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003). In that case, the Department's motion should be deemed brought pursuant to CR 12(b)(6), with its more deferential standard.

settlements, waiver does not apply because the claims were resolved by a settlement, and normal contract principles do not apply either—apparently because the claims were resolved by a settlement. The Department's real argument here is that a settlement is so inherently different—from other administrative processes and even from other contracts—that the normal methods of statutory and contract interpretation do not apply. Nowhere, however, does the Department cite a single authority for why a settlement is so different.

A. The Department Ignores the Plain Language and Statutory History of RCW 82.32.060 and the Closing-Agreement Statutes.

1. RCW 82.32.060(4) Expressly Calls for Interest on All Refunds Without Limitation.

Wells Fargo's position is that the interest provision in RCW 82.32.060(4)(a) expresses in ***plain language*** the Legislature's intent that the State pay interest whenever the State returns tax to a taxpayer, and that this statute forms the basis for every closing agreement unless waived by the taxpayer. The statute provides:

> Interest at the rate of three percent per annum ***must be allowed*** by the department and by any court on the amount ***of any refund, credit, or other recovery allowed to a taxpayer*** for taxes, penalties, or interest paid by the taxpayer . . . .

(Emphasis added.) If a statute is unambiguous, the courts do not look beyond the statutory language for interpretive guidance.

> In reviewing a statute, we give effect to the legislature's intent, primarily derived from statutory language. Where statutory language is plain and unambiguous, we ascertain the meaning of the statute solely from its language. We read an unambiguous statute as a whole and must give effect to all its language.

Dot Foods, Inc. v. Department of Revenue, 166 Wn.2d 912, 919 (¶ 8), 215 P.2d 185 (2009).

Nowhere in the Brief of Respondent does the Department expressly deny that this statute has plain meaning. Nor does the Department claim that its plain meaning is something else. The Department has even abandoned the express statutory argument it made in the trial court that, in "the context of the entire statute," it is "clear that the word 'refund' in RCW 82.32.060(4) refers to the amount that either the Department or a Court 'determined' was paid 'in excess of that properly due'." CP 796-97.

Indeed, the Department now offers no statutory-interpretation argument at all. It merely asserts that the interest statute "does not require the Department to pay interest on the amount of a negotiated settlement," Br. Respondent at 18, because "[a] closing agreement is not equivalent to a determination on the merits of the taxpayer's claims." *Id.* at 20. *See also id.* at 24 (repeating this logic). The Department also places no reliance on the erroneous statutory analysis of the trial court in its oral

opinion. The Department's only response to Wells Fargo's plain-meaning argument is, Settlements are different, and the "policies" are different. *See id.* at 20-21, 23-26.

The Department offers no ***statutory*** rationale why the policies are different. In fact, the statutory language itself and the statutory history show that the Department's position is false.

The Washington statutes on closing agreements were enacted in 1945. 1945 Laws ch. 251, §§ 1-2. They established that the Department

> may enter into an agreement in writing with any person relating to ***the liability of such person in respect of any tax*** imposed by any of the preceding chapters of this title for any taxable period or periods.

RCW 82.32.350 (emphasis added). And, upon mutual execution of the agreement,

> the agreement shall be final and conclusive as to ***the tax liability or tax immunity covered thereby*** . . . .

RCW 82.32.360 (emphasis added). These statutes have not been amended substantially at all since 1945.[5] They speak of agreeing to the taxpayer's "tax liability or tax immunity," not of merely compromising monetary claims.

[5] The statutes were amended to alter cross-references when the statutes were codified, 1961 Laws ch. 15, §§ 82.32.350, .360, and to substitute the Department for the old State Tax Commission. 1971 Laws ex. sess. ch. 229, § 23 (RCW 82.32.350); 1975 Laws 1st ex. sess. ch. 278, § 93 (RCW 82.32.360).

The Department argues that closing agreements do not entail admission of liability, Br. Respondent at 27, but as a statutory matter this too is false. Terms in a closing agreement reciting "no admission" of liability or non-liability are instead reservations of claims for other periods and other issues not covered by the closing agreement and are thus consistent with the statute. *See* RCW 82.32.360 (the agreement is "final and conclusive as to the tax liability or tax immunity *covered thereby*"). A closing agreement necessarily involves fixing liability for the issue and period covered thereby.

The Washington closing agreement statutes enacted in 1945 were substantively identical to the parallel provisions of federal law at the time, Internal Revenue Code of 1939 § 3760(a), (b), 26 U.S.C. § 3760(a), (b) (1940) (Appendix A). (The federal provisions, now 26 U.S.C. § 7121(a) and (b), remain substantively identical to Washington's statutes, as discussed in Wells Fargo's Opening Brief at 17-18.) The 1939 federal provisions themselves derived from the federal Revenue Act of 1928, Section 606, 45 Stat. 791, 874 (Appendix B), which had the express purpose and effect of changing prior law to make a closing agreement itself a "determination" of tax liability. This history shows the Department's error in distinguishing between closing agreements and other "determinations" of tax liability.

Before the 1928 federal act, Section 1106(b) of the federal Revenue Act of 1926 had required a prior "determination" of tax liability and even a prior payment of the agreed assessment or refund before a closing agreement could be effective:

> (b) If ***after*** *a determination and assessment* in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund *based on such determination and assessment*, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that *such determination and assessment shall be final and conclusive*, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made)
>
> > (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and
> >
> > (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

Revenue Act of 1926 § 1106(b), 44 Stat. 9, 113 (emphasis added) (Appendix C). The Revenue Act of 1928 repealed this provision and adopted the language, now common to both federal and Washington law, authorizing "an agreement in writing with any person . . . in respect of any . . . tax [imposed by the respective jurisdiction] for any taxable period." Revenue Act of 1928, § 606(a), 45 Stat. 791, 874 (Appendix B); *cf.* RCW 82.32.350; 26 U.S.C. § 7121(a). The Office of the Commissioner of

Internal Revenue issued a "mimeograph" – IT-Mimeograph Coll. No. 3652, R. A. No. 463 – as of July 5, 1928, to explain the purpose and effect of the repeal of Section 1106(b) of the 1926 Act and the passage of Section 606 of the 1928 Act, showing that closing agreements under the new statute would have the legal effect of a determination.

> 2. The purpose of this section is to provide a method whereby a taxpayer and the Commissioner (or any officer or employee authorized in writing by him) subject to approval of the Secretary or the Undersecretary, ***may reach a final and conclusive determination*** and closing of the tax liability so that the case may not be reopened as to the matters or liability agreed upon . . . .
>
> 3. Section 606 removes the restrictions on agreements provided in prior acts and it is no longer required as a condition precedent to a valid agreement that the liability determined be assessed and paid or that the taxpayer accept any abatement, credit or refund which may be disclosed in the audit of the return. ***It is essential only that there be a determination of the tax liability for the period to be covered by the agreement***. The removal of the restrictions referred to will permit agreements stating "no tax liability" in cases where nontaxable returns have been filed and accepted by the Bureau.

Id., reprinted in J. Klein, Federal Income Taxation 1363, 1364 (1929) (emphasis added) (Appendix D). This explanation by the Commissioner of Internal Revenue shows that a closing agreement ***was*** a determination of tax liability by agreement.

Still other provisions of federal law in effect when Washington adopted its closing agreement statutes in 1945 were also consistent with this understanding that closing agreements are "determinations." Section 1313(a) of today's Internal Revenue Code, 26 U.S.C. § 1313(a), defines "determination" (for purposes of mitigating the effect of limitations periods on actions by the IRS) to include, on an equal footing, both "a closing agreement made under Section 7121" and "a final disposition by the Secretary of a claim of refund." 26 U.S.C. § 1313(a)(2), (3) (Appendix E). This statute derives from Section 820(a)(1) of the Revenue Act of 1938, 52 Stat. 447, 581 (Appendix F). For federal purposes, the equivalence of a statutory IRS closing agreement and an IRS unilateral decision to allow a refund was therefore firmly in place when Washington enacted its closing agreement statutes using the federal precedent in 1945. There was no "policy" distinguishing closing agreements from decisions on the merits inherent in the federal statutes that underlie Washington's statutes. To the contrary, federal "policy" was to treat them the same. There was no hint in the Washington enactment of an intent to adopt any different "policy."

In 1949, when the Legislature adopted Washington's first interest provision, it ***required*** interest to be paid on "any refund, credit, or other recovery allowed to a taxpayer." 1949 Laws ch. 228, § 21 (amending

1935 Laws ch. 180, § 189). The Legislature did not exclude refunds paid pursuant to closing agreements, though it certainly could have done so. Such an exclusion would not have made sense. The Legislature knew that refunds paid under closing agreements reflected an agreed *determination* of the taxpayer's "tax liability or tax immunity." RCW 82.32.360. The Legislature also knew that, as the Department concedes, there is no constitutional basis for an administrative agreement to make a refund unless, at the very least, "the validity of the tax is in doubt." Br. Respondent at 24. The plain language of the interest statute is broad, without exceptions as to types of refunds, because it reflects the Legislature's clear ***policy*** that paying interest on tax refunds is a matter of simple justice.

2. The Closing Agreement Cannot Displace the Interest Statute When It Is Silent as to Interest.

The Department appears to argue that the statute awarding interest is irrelevant because it has been superseded by the closing agreement. *E.g.,* Br. Respondent at 22. It is certainly true that the parties were free to contract for something other than statutory interest—a different rate, perhaps, or none at all. The fallacy in the Department's argument is that the closing agreement says nothing at all about interest. A settlement is only conclusive "as to the matters included." 15A CJS 121,

Compromise & Settlement § 38 (2002). And "any matter not in fact intended to be settled by the compromise is not barred by the settlement from recovery." *Id.* at 120, § 37. *Cf.* RCW 82.32.360 (closing agreements are "final and conclusive as to tax liability and tax immunity *covered thereby*").

The interest statute is relevant precisely because the settlement is silent. The Department cannot dismiss the statute on the grounds that the settlement contract displaces it and then refuse to use ordinary contract principles to interpret the agreement.

Wagner v. Wagner, 95 Wn.2d 94, 621 P.2d 1279 (1980), shows the correct interplay of statutory and contract law. In that case, the parties entered into a separation agreement, settling the issues in their dissolution matter. *Id.* at 96. The agreement provided for alimony, but was silent as to the circumstances under which the alimony could be modified. *Id.* at 99. The court held that, in the absence of such a provision, the statute dealing with the subject would control. *Id.* at 98-99. The absence of a modification provision did not mean that alimony could not be modified; it meant that it could only be modified as provided by statute. Absent a clear intent to the contrary disclosed by the contract, the general law will govern. *See Jenkins v. Morgan*, 112 S.E.2d 23 (Ga. 1959); *Poole & Kent*

Corp. v. C.E. Thurston & Sons, Inc., 209 S.E.2d 450 (N.C. 1974), *cited in Wagner,* 95 Wn.2d at 99.

The Department's cases are not to the contrary. In fact, in arguing that a settlement agreement overrides the statute, the Department relies on cases that simply state the rule that a settlement agreement is res judicata as to the matters contained therein. *See Rasmussen v. Allstate Ins. Co.*, 45 Wn. App. 635, 637, 726 P.2d 1251 (1986); *In re Estate of Phillips*, 46 Wn.2d 1, 13-14, 278 P.2d 627 (1955); *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118 (1907). Not one of these cases addresses the question of whether a settlement can override a statute, let alone whether a settlement that is silent on a question controlled by statute can nonetheless negate the statute.

The only case involving a statute that was cited by the Department is *Anderson v. Port of Seattle*, 49 Wn.2d 528, 304 P.2d 705 (1956). *Anderson*, however, is an inverse condemnation case, where interest is an integral element of damages rather than being awarded on top of damages. The last sentence of the quote used by the Department makes this clear:

> The rule is well settled, that where interest is recoverable only as damages, once the principal debt has been paid, interest cannot be recovered in a separate action.

Id. at 532, *quoted in* Br. Respondent at 31. *Anderson* is not a case about prejudgment interest, let alone about interest on tax refunds.

3. The Department's Reliance on Vague "Policy" Claims Is Misplaced.

Without offering any argument why the closing-agreement statutes should, as a matter of statutory interpretation, be divorced from the Legislature's requirement that interest be paid on "any refund," and without so much as a mention of "legislative intent,"[6] the Department casts wide for sources for sources of its alleged "policy" that agreed refunds do not presumptively entail a payment of interest.

The Department cites *IBM Corp. v. Levin*, 928 N.E.2d 440 (Ohio 2010), for the proposition that legislative policy supports the distinction that the Department makes between settlement agreements and other methods of fixing tax liability. However, *IBM Corp.* did not turn on this distinction, but instead on the distinction between tax exemptions and tax overpayments. The taxpayer in *IBM Corp.* was seeking interest, not on an overpayment of taxes, but on a 25 percent rebate of sales and use tax available to providers of electronic information services. *Id.* at 441. The court held that the rebate was in the nature of a tax exemption, not a refund of "illegal or erroneous payments." *Id.* at 444. As to the latter, the court stated that "interest was allowed on all overpayments." *Id.* at 443.[7]

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[6] There is at least a nod to "legislative intent" in the Department's APA argument. Br. Respondent at 14.

[7] Ohio is not unique in using refund or rebate statutes to provide tax benefits to certain industries. Washington has done the same with government contractors. *See* 2003 Laws

The Department does not explain why its refund of $1,997,685 to Wells Fargo was not an "overpayment." As to one of the issues, the Department refunded 100 percent of the amount claimed. Presumably, the Department did so because it believed that a court would find that amount to be an "overpayment."[8] The Department even admits that "[i]t makes sense that the Appeals Division would use a closing agreement to efficiently resolve a tax refund claim of undisputed merit." Br. Respondent at 29, n.12. The Department's attempt to characterize the refund to Wells Fargo as something other than an overpayment is nonsensical.

4. Federal Law Supports Wells Fargo's Position.

The Department mistakes the meaning of *United States v. Steinberg*, 100 F.2d 124 (2d Cir. 1938). There a taxpayer entered into a monthly installment plan and gave a bond to secure it. The taxpayer made late payments and the government sought to get interest on the late payments. The court held that the government could have accepted the principal and sued for interest because the "statute itself awards interest"

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ch. 73, § 2. This act repealed former RCW 82.32.060(3), which provided for refunding tax amounts paid on income that the taxpayers later had to refund to the U.S. government, but which specifically provided that no interest would be paid on such refunds. The Legislature has not similarly excluded closing-agreement refunds from the interest requirement.

[8] Beth Anne Kreger, the administrative law judge who negotiated the settlement, repeatedly stated to her superiors that Wells Fargo was likely to prevail on the merits. *See* CP 780-94.

on taxes, but that it had substituted the bond, which carried no statutory duty to pay interest. *Id.* at 126. The key to understanding the result in *Steinberg* is that the government agreed to get specific sums of money over time, thus evidencing an agreement to forego interest. Where an agreement does not involve an installment plan, no inference can be drawn about interest.

The Department's attempt to distinguish *Smith v. United States,* 850 F.2d 242 (5th Cir. 1988), and *In re Spendthrift Farm*, 931 F.2d 405 (6th Cir. 1991), is misguided. First, it tries to impose a distinction between a settlement of a discrete set of issues versus a settlement of all issues for a particular tax period. This distinction, however, has nothing to do with whether interest is paid. *See* Int. Rev. Manual 8.17.6.1(2), *available at* http://www.irs.gov/irm/part8/irm_08-017-006.html#d0e10. ("In general, interest is paid on an overpayment as provided by the Internal Revenue Code or, if not provided by the Internal Revenue Code, for the period the Government has use of the taxpayer's money.") Then the Department argues that the case outcomes are determined by this general policy to pay interest, without recognizing that the "policy" is dictated by 26 U.S.C. § 6611, which is parallel to RCW 82.32.060. The

Department's insistence that its "policy" is different from the federal one begs the question of whether its policy is legal.[9]

The Department's asserted distinction, Br. Respondent at 36-40, between the Wells Fargo settlement and the cited federal settlements on "narrow issues" is exaggerated on the facts as well. Wells Fargo's refund claims for one issue for 1996 and 1997 related to whether just one cost of doing business, its income-tax costs, should be allocated to the location of its home office or ratably to all company locations for purposes of the apportionment formula of RCW 82.04.460, and whether Wells Fargo had the benefit of a prior Department determination on that question. CP 99-100, 172, 229. The other issue also related to allocating business costs among the states for purposes of apportioning income. *Id.* 228-29. These are not broader issues than those involved in the cases cited by the Department, Br. Respondent at 36 n.17, where the courts held that closing agreements did not preclude statutory interest claims.

Moreover, in the recent published federal cases cited by the Department as purportedly more broadly covering "the entire tax controversy," *id.* at 36-37, the denial of interest claims related not to the substantive tax issues in dispute but primarily to the manner in which the

[9] It also assumes that it is the Department's policy not to be explicit about interest in a closing agreement, but there is no evidence of that, apart from the facts of this case. The Department cites to no regulations or other published guidance as evidence of its "policy" or interpretation of the statutes in question.

parties expressed their sense of "finality" in settling Tax Court litigation, not in statutory closing agreements. [10]

The Department cites three relatively recent decisions, *LaRosa's Int'l Fuel Co., Inc. v. United States,* 73 Fed. Cl. 625 (2006), *Hurt v. United States,* 70 F.3d 1261, 1995 WL 703540 (4th Cir. unpub. 1995), and *Anthony v. United States,* 987 F.2d 670 (10th Cir. 1993). All three settlements at issue were made as Stipulated Decisions in the U.S. Tax Court rather than as statutory closing agreements[11] and all three decisions favored the taxpayers, with a marked flavor of disapproval of IRS overreaching.

In *LaRosa's*, the court relied on extrinsic evidence of the taxpayers' anguish over their "nightmare" experience to infer intent to completely settle the Tax Court litigation and the family's federal tax

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[10] The older cases cited in the Br. of Respondent at 37, *Parish & Bingham Corp. v. United States*, 44 F.2d 993 (Ct. Cl. 1930), *Lloyd-Smith v. United States*, 44 F.2d 990 (Ct. Cl. 1930), and *Columbia Steel & Shafting Co. v. United States*, 70 Ct. Cl. 730, 44 F.2d 998 (1930), are not germane because they all dealt with settlement agreements pursuant to sections of the Revenue Acts of 1921 or 1926 that provided for a final determination and payment of all liabilities of the taxpayer or the government for the period covered by the agreement before execution of the agreement. *See* Revenue Act of 1926 § 1106(b) (Appendix C), *discussed supra* at 20-22; *see also Parish & Bingham,* 44 F.2d at 997; *Lloyd-Smith,* 44 F.2d at 991-92; *Columbia Steel,* 44 F.2d at 999-1000. These cases do not provide an analogy either to Washington's closing-agreement statute or for the Wells Fargo agreement, which was limited to the refund claims under appeal rather than all liabilities for a specified period. Under the modern federal closing-agreement statute equivalent to Washington's, by contrast, courts such as in *Ewing v. United States,* 914 F.2d 499, 505 (4th Cir. 1990), hold that closing agreements determine only what they determine, and that statutes give effect to those agreed determinations. The agreement to a refund means interest is owing.

[11] *LaRosa's* involved a Stipulated Decision in the Tax Court for the year in question, plus a closing agreement for certain subsequent years.

disputes in general. 73 Fed. Cl. at 630. The inference of finality was supported by the government's admission that the settlement had included a calculation of interest and payment of interest by the taxpayers. The government's new interest claim – that it had calculated the interest incorrectly the first time – was made eight years after the taxpayers had paid their liabilities under the Stipulated Decision. The court also expressed sympathy for the taxpayers' alternative estoppel theory, though it was unnecessary to resolution of the case. *Id.* at 630-31.

Hurt v. United States is a bizarre, unpublished 2-1 decision of a Fourth Circuit panel that analyzes a Tax Court Stipulated Decision with virtually no reference to federal case law on the settlement of tax controversies and with no reference to federal statutes on settlement. The court interpreted the Stipulated Decision as unambiguous on its face (and as precluding the IRS interest claims) in light of only one lower-court decision from Georgia, plus reference to general principles of settlement from opinions in Virginia, Hawaii, Kansas, Oklahoma, and North Carolina – ***none*** of them tax disputes. 1995 WL 703540 at *3-*4. The dissent, applying federal case law on tax controversies (including the *Anthony*, *Spendthrift Farm*, and *Smith* cases cited above), perceived ambiguity in

the stipulation's text and the extrinsic evidence. *Id.* at *5-*6. The majority opinion has very dubious standing.[12]

In *Anthony,* as the dissent in *Hurt* noted, the Tenth Circuit held that the Stipulated Decision was ambiguous and could be interpreted in light of extrinsic evidence. The IRS had argued that it could assess interest on the deficiencies that flowed from the agreement's terms because the Stipulated Decision should be interpreted like a closing agreement, "which would not include interest," but the court held that it was not a statutory agreement and was open to interpretation. 987 F.2d at 673. The IRS attorney had assured the taxpayers during negotiation that the agreement covered all "civil liability" other than fraud. *Id.* This evidence was sufficient to validate the taxpayers' claimed intent to settle the tax issues fully and finally. The court implied that, if the IRS intended to reserve privately its deficiency interest claim in this context, it would be a breach the government's "duty to act with at least a 'minimum standard of decency, honor, and reliability' . . ." when contracting with its citizens. *Id.* at 674 (quoting *Heckler v. Community Health Serv.,* 467 U.S. 51, 61 (1984)).

Of these three recent cases, then, the two published decisions stand for the unassailable proposition that, when an agreement that terminates litigation is ambiguous as to whether interest is due on a resulting tax

[12] The taxpayer and the IRS attorney gave conflicting testimony on whether interest had been discussed during their negotiations. 1995 WL 703540 at *3.

deficiency, the agreement may and must be interpreted in light of extrinsic evidence of the parties' intentions concerning the scope of the "finality" of the agreement. The Department's argument that these cases are equivalent to the context and content of the Wells Fargo agreement is baseless. To the contrary, the disputes arose outside the context of statutory closing agreements, where the presumption is clear and settled that interest will be paid by the party with the tax payment or refund obligation.

The Department tries to bolster its argument by citing a number of cases that would suggest, based on the parentheticals, that a taxpayer may not bring a separate claim for interest after settling the tax liability. *See* Br. Respondent at 38-39. This claim is, of course, inconsistent with all the cases cited by the Department and Wells Fargo that involved actions for interest following a settlement. But the holdings of the cited cases do not support the Department's argument. Two of these cases hold that a taxpayer who has entered into an agreement compromising interest and penalties cannot then contest the tax itself because payment of interest and penalties concedes the tax. *See Nelson-Wiggen Piano Co. v. United States,* 84 F.2d 47 (7th Cir. 1936); *Schneider v. United States*, 119 F.2d 215 (6th Cir. 1941). The implication that can be drawn from paying interest and penalties is not the same as an implied waiver of a statutory right. *Western Maryland Ry. Co. v. United States,* 23 F. Supp. 554 (D.C. Md. 1938),

involved two separate lawsuits for taxes and for interest, which certainly raises res judicata issues. The lone Washington case, *In re Estate of Phillips*, 46 Wn.2d 1, 278 P.2d 627 (1955), was not a tax case. And *E.W. Scripps Co. v. United States*, 2002 WL 31477137 (S.D. Ohio 2002), the unpublished federal decision, concerned jurisdiction and waiver of sovereign immunity, holding that the same provisions of federal law authorized suits for both tax refunds and interest. It did not say that the claims must be brought together. *Scripps* supports Wells Fargo's position. It approved a suit for interest alone after payment of the refund, because the taxpayer was not required to ask for the interest separately. The court said, "[T]he government may not return the cow, but keep the calf." *Id.* at *4.

B. Wells Fargo Did Not Waive Its Right to Interest.

"The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled." *Dombrowsky v. Farmers Ins. Co.*, 84 Wn. App. 245, 255, 928 P. 1127 (1996). The Department contends that the doctrine of waiver does not apply to the interest at issue in this appeal because Wells Fargo has no right to that interest under RCW 82.32.060(4). However, as discussed extensively above, RCW 82.32.060(4) does apply to refunds granted pursuant to a closing agreement. Thus, the doctrine of waiver is applicable to this case.

The Department then argues that Wells Fargo's silence waived the right to interest, citing *Dombrowsky*. Br. Respondent at 41. However, *Dombrowsky* unequivocally held that silence was not enough. "A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." *Id.* (citing *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)). Thus, a waiver does not result from "[n]egligence, oversight or thoughtlessness." *Id.* (citing *Reynolds Metals Co. v. Electric Smith Constr. & Equip. Co.*, 4 Wn. App. 695, 700, 483 P.2d 880 (1971)). The fact that there was an express reservation of rights in *Dombrowsky* does not mean that one was necessary. Longstanding case law makes this clear. *See, e.g., Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 778, 95 P.3d 394 (2004) ("Implied waiver will not be inferred; the party claiming waiver must present unequivocal acts or conduct that show an intent to waive."). "Mere silence does not constitute a waiver unless there is an obligation to speak." *Voelker v. Joseph*, 62 Wn.2d 429, 434-35, 383 P.2d 301 (1963). The Department has pointed to no rule or statute that obligated Wells Fargo to reserve its right to interest under RCW 82.32.060(4), and Wells Fargo knows of none.

The Department cannot meet its burden to demonstrate Wells Fargo's intent to waive its right to interest on its tax refund. Andrew

Gardner's testimony makes clear that Wells Fargo did not intend to waive interest. CP 161, 179-81, 239-40. Both Mr. Gardner and Ms. Kreger stated interest was never discussed during the settlement process. CP 108, 112, 122. Thus, the Department can point to no "unequivocal acts or conduct that show an intent to waive." *Vehicle/Vessel LLC*, 122 Wn. App. at 778, 95 P.3d 394.

The Department contends that Wells Fargo's "unconditional waiver . . . of any right to further challenge the assessments . . . in any administrative or judicial proceeding," CP 246, served as a waiver of its right to statutory interest. This argument fails because Wells Fargo is not challenging the amount of the assessment; it agrees with the agreed determination of its "tax immunity" and the tax refund amount stated in the closing agreement. Rather, Wells Fargo believes statutory interest should be applied *to the agreed upon assessment*, as is the case under federal closing agreements made under the identical federal statute. "When [waiver] is in derogation of a statutory right, it is not favored . . . and will not be inferred from doubtful acts." *Voelker*, 62 Wn.2d at 436 (internal citations omitted); *see also In re Spendthrift Farm, Inc.*, 931 F.2d 405, 407 (6th Cir. 1991) ("there must be a specific waiver in the closing agreement" to cut off the payee's right to interest). The waiver language in the closing agreement is not the unequivocal and specific language

required to waive Wells Fargo's statutory right to interest on its tax refund. The right to that statutory interest is not waived in the closing agreement, and Wells Fargo is entitled to interest in accordance with RCW 82.32.060(4).

C. Rules Governing the Construction of Contracts Establish That Interest Is a Term of the Contract.

The Department agrees that a closing agreement between a taxpayer and the Department is a contract, but then declines to apply normal contract principles to the closing agreement. Its arguments are disjointed but can be summarized as (1) there is no gap in the contract because interest must be specifically addressed or none is available, (2) extrinsic evidence should not be considered, and (3) it would be inequitable to award interest.

The first of these arguments is really just an amalgam of the Department's earlier arguments that the statute does not apply, coupled with bare assertions that closing agreements are somehow different from other agreements. The Department ignores the principle that parties are presumed to contract with reference to existing statutes that affect the subject matter of the contract. *Wagner*, 95 Wn.2d at 98. "If the parties to a contract wish to provide for other legal principles to govern their contractual relationship, they must be expressly set forth in the contract.

Absent a clear intent to the contrary disclosed by the contract, the general law will govern." *Id.* at 98-99.

Here, the contract is completely silent as to the provision of interest. CP 246. Although interest was not discussed during negotiations, both parties understood that Washington law provides for interest "on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes . . . paid by the taxpayer." RCW 82.32.060(4)(a). The Department did not specify in the contract that interest was not to be paid on the $1,997,685 the Department agreed to refund to Wells Fargo. CP 246. Absent a clear intent to deviate from the standard operation of Washington law, the terms of RCW 82.32.060(4)(a) must govern. *See Wagner*, 95 Wn.2d at 98-99. Thus, Wells Fargo is entitled to interest on its tax refund.

The Department's second argument is that Wells Fargo has improperly relied on extrinsic evidence of what occurred within the Department after the closing agreement was finalized because Wells Fargo could not have relied upon this evidence when entering into the contract. The Department misunderstands the importance of this evidence. The evidence is not presented to demonstrate reliance, rather it is evidence of the parties' original intent when entering into the contract. *See In re Garrity*, 22 Wn.2d 391, 398, 156 P.2d 217 (1945) ("In ascertaining the

intention of parties to a written agreement we must look to the wording of the instrument itself as made by the parties, view it as a whole, and consider all of the circumstances surrounding the transaction, including the subject matter *together with the subsequent acts of the parties* to the instrument.") (emphasis added).

Wells Fargo had previously dealt with the Audit Division of the Department of Revenue regarding the same tax refund requests at issue in this appeal. When the Audit Division agreed to refund taxes previously paid by Wells Fargo, it issued the refund plus statutory interest. CP 288-95. Wells Fargo did not make specific requests for interest at that time. Without any request by Wells Fargo, the Audit Division's documents included a notice indicating that "Interest . . . is included," annual credit tax assessments for 1996, 1997, and 1998 noting the amount of interest being credited, and supporting schedules containing a summary line stating, "Total Tax Adjustment (Excluding Penalties and Interest)." CP 288-95. Thus, when the Appeals Division agreed to refund 100 percent of the amount requested by Wells Fargo on one issue for two tax years and 40 percent on another issue, Wells Fargo believed interest would be paid on those amounts.

The Department gave Wells Fargo no indication during settlement negotiations or in the draft closing agreement that the Appeals Division

and the Audit Division treated the question of interest differently. Considering the prior course of dealing with the Audit Division, which aligned with Wells Fargo's understanding of RCW 82.32.060, Wells Fargo reasonably understood that interest would be added to the agreed amount of its refund. In fact, the refund agreed to by the Appeals Division was accompanied by an Audit Division schedule identical to those previously obtained during the parties' course of dealing, stating "Total Tax Adjustment (Excluding Penalties and Interest)." CP 254. In the absence of language in the contract demonstrating that the course of dealing between the parties was being modified, this Court should find that the parties intended to provide for interest on the tax refund.

The Department's third argument is that it would be inequitable to award interest in this case because Wells Fargo was negligent. The Department does not explain why it was not also negligent in failing to raise the issue. The Department customarily supplies the working draft for closing agreements, maintaining templates for this purpose. CP 122-23, 275-76, 283. The taxpayer may then suggest changes to the Department's template. CP 122-23. Because the Department supplies the templates and is the only party involved in all closing agreements, it is in the best

position to avoid ambiguities by adopting clear language for the template.[13]

V. CONCLUSION

For the above reasons, this Court should reverse the trial court and grant summary judgment to Wells Fargo.

RESPECTFULLY SUBMITTED this 26th day of January, 2011.

Davis Wright Tremaine LLP
Attorneys for Wells Fargo Bank, N.A.

By _____
Michele Radosevich, WSBA # 24282
Dirk Giseburt, WSBA #13949

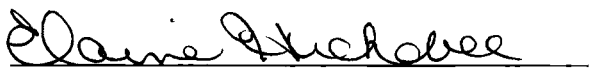
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Telephone: (206)-622-3150
E-mail: micheleradosevich@dwt.com
dirkgiseburt@dwt.com

[13] This is not, as the Department suggests at page 29 of its responsive brief, an assertion that the Department would act in bad faith toward taxpayers—merely that the law should encourage the Department to make it clear to taxpayers whether interest will or will not be paid on refunds allowed in closing agreements, given that there is a statute expressly stating that interest is required on "any refund."

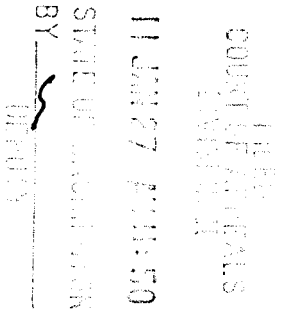
The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 26, 2011, I caused to be served in the manner noted below a copy of Wells Fargo's Reply Brief on counsel of record:

Rosann Fitzpatrick Assistant Attorney General Revenue Division 7141 Cleanwater Drive S.W. P.O. Box 40123 Olympia, WA 98504-0123 RosannF@ATG.WA.GOV	Via U.S. Mail and Electronic Mail

DATED this 26th day of January, 2011.



Elaine Huckabee



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APPENDIX A

brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund.

(c) Refunds based on fraud or misrepresentation.

Despite the provisions of subsections (a) and (b) such suit may be brought at any time within five years from the making of the refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact.

(d) Interest.

Erroneous refunds recoverable by suit under this section shall bear interest at the rate of 6 per centum per annum from the date of the payment of the refund. (53 Stat. 461.)

DERIVATION

Act May 29, 1928, ch. 852, § 610, 45 Stat. 875, as amended by acts May 10, 1934, ch. 277, § 502 (a), 48 Stat. 756; June 22, 1936, ch. 690, § 803, 49 Stat. 1744.

§ 3747. Disposition of judgments and moneys recovered.

All judgments and moneys recovered or received for taxes, costs, forfeitures, and penalties, shall be paid to collectors as internal revenue taxes are required to be paid. (53 Stat. 461.)

DERIVATION

R. S. § 3216, which was in nature of a revision of act July 13, 1866, ch. 184, § 9, 14 Stat. 111.

§ 3748. Periods of limitation—(a) Criminal prosecutions.

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U. S. C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

(b) Scope of limitations.

Subsection (a) of this section shall apply to offenses whenever committed; except that it shall not apply to offenses the prosecution of which was barred before June 6, 1932.

(c) Civil suits.

For period of limitation in respect of—

Suits for fines, penalties, and forfeitures, see section 1047 of the Revised Statutes (U. S. C., Title 28, § 791).

Suits for erroneous refunds, see section 3746.

(53 Stat. 461.)

DERIVATION

Act July 5, 1884, ch. 225, 23 Stat. 122, as amended by acts Nov. 23, 1921, ch. 136, § 1321 (a), 42 Stat. 315; June 2, 1924, ch. 234, § 1010 (a), 43 Stat. 341; Feb. 26, 1926, ch. 27, § 1110, 44 Stat. 114; June 6, 1932, ch. 209, § 1106, 47 Stat. 268.

SUBCHAPTER F.—CLOSING AGREEMENTS AND COMPROMISES

§ 3760. Closing agreements—(a) Authorization.

The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any taxable period.

(b) Finality.

If such agreement is approved by the Secretary, the Under Secretary, or an Assistant Secretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) The case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) In any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded. (53 Stat. 462.)

DERIVATION

Act May 29, 1928, ch. 852, § 606, 45 Stat. 874, as amended by act May 28, 1936, ch. 280, §§ 801, 802, 52 Stat. 573.

§ 3761. Compromises—(a) Authorization.

The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense.

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(b) Record.

Whenever a compromise is made by the Commissioner in any case there shall be placed on file in the office of the Commissioner the opinion of the General Counsel for the Department of the Treasury, or of the officer acting as such, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

(c) Cross reference.

For compromises after judgment, see R. S. § 3469 (U. S. C., Title 31, § 194).

(53 Stat. 462.)

DERIVATION

R. S. § 3229 which was in nature of a revision of act July 20, 1868, ch. 186, § 102, 15 Stat. 166; act Mar. 3, 1933, ch 212, § 16, 47 Stat. 1518; act May 10, 1934, ch. 277, § 512 (b), 48 Stat. 759; Ex. Ord. No. 6166, § 5; act May 28, 1938, ch. 289, § 815, 52 Stat. 576.

§ 3762. Penalties.

Any person who, in connection with any compromise under section 3761, or offer of such compromise, or in connection with any closing agreement under section 3760, or offer to enter into any such agreement, willfully—

(a) Concealment of property.

Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(b) Withholding, falsifying, and destroying records.

Receives, destroys, mutilates, or falsifies any book, document, or record, or makes under oath any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax—

Shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both. (53 Stat. 463.)

DERIVATION

Act May 29, 1928, ch. 852, § 616, 45 Stat. 877.

Chapter 37.—ABATEMENTS, CREDITS, AND REFUNDS

Sec.
3770. Authority to make abatements, credits, and refunds.
3771. Interest on overpayments.
3772. Suits for refund.
3773. Interest on judgments.
3774. Refunds after periods of limitation.
3775. Credits after periods of limitation.
3776. Reports to Congress of refunds in excess of $500.
3777. Reports of refunds and credits in excess of $75,000.
3778. Cross reference.

§ 3770. Authority to make abatements, credits, and refunds—(a) To taxpayers—(1) Assessments and collections generally.

Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, the Commissioner, subject to regulations prescribed by the Secretary, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.

(2) Assessments and collections after limitation period.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

(3) Date of allowance.

Where the Commissioner has signed a schedule of overassessments in respect of any internal revenue tax imposed by this title, the Revenue Act of 1932, or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax.

(4) Cross references.

For limitations on refunds and credits in case of—
Estate tax, see sections 910, 911, and 912.
Gift tax, see section 1027.
Income tax, see section 322.
Miscellaneous taxes, see section 3313.

(b) To collectors and officers.

The Commissioner, subject to regulations prescribed by the Secretary, is authorized to repay—

(1) Collections recovered.

To any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him, with the cost and expense of suit; also

(2) Damages and costs.

All damages and costs recovered against any collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty. (53 Stat. 464; Oct. 8, 1940, 11 p. m., E. S. T., ch. 757, title V, § 508 (b), 54 Stat. 1008.)

DERIVATION

Subsection (a) (1) from R. S. § 3220, which was in nature of a revision of acts July 13, 1866, ch. 184, § 9, 14 Stat. 111; Dec. 24, 1872, ch. 13, § 1, 17 Stat. 401; as amended by acts May 29, 1928, ch. 852, § 619 (b), 45 Stat. 878; May 29, 1928, ch. 901, § 3, 45 Stat. 996.

Subsection (a) (2) from act May 29, 1928, ch. 852, § 607, 45 Stat. 874.

Subsection (a) (3) from act June 6, 1932, ch. 209, § 1104, 47 Stat. 297.

Subsection (b) from R. S. § 3220, as amended by act May 29, 1928, ch. 901, § 3, 45 Stat. 996.

R. S. § 3220 was also amended by act Feb. 24, 1919, ch. 18, § 1316 (a), 40 Stat. 1145; reenacted without change by acts Nov. 23, 1921, ch. 136, § 1315, 42 Stat. 314; June 2, 1924, ch. 234, § 1011, 43 Stat. 342; and amended by act Feb. 26, 1926, ch. 27, § 1111, 44 Stat. 115.

1940 AMENDMENT

Subsection (a) (1) was amended by act October 8, 1940, cited to text, by inserting words "war-profits, excess-profits," therein.

APPENDIX A

APPENDIX B

CHAP. 852.—An Act To reduce and equalize taxation, provide revenue, and for other purposes.

May 29, 1928.
[H. R. 1.]
[Public, No. 562.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into titles and sections according to the following Table of Contents, may be cited as the "Revenue Act of 1928":

Revenue Act of 1928.

TABLE OF CONTENTS

Table of contents.

TITLE I—INCOME TAX

Income Tax, p. 795.

SUBTITLE A—INTRODUCTORY PROVISIONS

Introductory provisions, p. 795.

Sec. 1. Application of title.
Sec. 2. Cross references.
Sec. 3. Classification of provisions.
Sec. 4. Special classes of taxpayers.

SUBTITLE B—GENERAL PROVISIONS

General provisions, p. 795.

PART I—RATES OF TAX

Rates of tax, p. 795.

Sec. 11. Normal tax on individuals.
Sec. 12. Surtax on individuals.
Sec. 13. Tax on corporations.
Sec. 14. Taxable period embracing years with different laws.

PART II—COMPUTATION OF NET INCOME

Net income computed, p. 797.

Sec. 21. Net income.
Sec. 22. Gross income.
Sec. 23. Deductions from gross income.
Sec. 24. Items not deductible.
Sec. 25. Credits of individual against net income.
Sec. 26. Credits of corporation against net income.

PART III—CREDITS AGAINST TAX

Credits against tax, p. 804.

Sec. 31. Earned income credit.
Sec. 32. Taxes of foreign countries and possessions of United States.
Sec. 33. Taxes withheld at source.
Sec. 34. Erroneous payments.

PART IV—ACCOUNTING PERIODS AND METHODS OF ACCOUNTING

Accounting, p. 805.

Sec. 41. General rule.
Sec. 42. Period in which items of gross income included.
Sec. 43. Period for which deductions and credits taken.
Sec. 44. Installment basis.
Sec. 45. Allocation of income and deductions.
Sec. 46. Change of accounting period.
Sec. 47. Returns for a period of less than twelve months.
Sec. 48. Definitions.

PART V—RETURNS AND PAYMENT OF TAX

Returns and payment, p. 807.

Sec. 51. Individual returns.
Sec. 52. Corporation returns.
Sec. 53. Time and place for filing returns.
Sec. 54. Records and special returns.
Sec. 55. Publicity of returns.
Sec. 56. Payment of tax.
Sec. 57. Examination of return and determination of tax.
Sec. 58. Additions to tax and penalties.
Sec. 59. Administrative proceedings.

PART VI—MISCELLANEOUS PROVISIONS

Miscellaneous provisions, p. 810.

Sec. 61. Laws made applicable.
Sec. 62. Rules and regulations.
Sec. 63. Taxes in lieu of taxes under 1926 Act.
Sec. 64. Short title.
Sec. 65. Effective date of title.

Effective date, p. 811.

HeinOnline -- 45 Stat. 791 1927-1929

APPENDIX B

REVENUE ACT OF 1928

Retroactive regulations.

Vol. 44, p. 114, amended.

Amended Treasury decision may be without retroactive effect.

SEC. 605. RETROACTIVE REGULATIONS.

Section 1108(a) of the Revenue Act of 1926 is amended to read as follows:

"Sec. 1108. (a) In case a regulation or Treasury decision relating to the internal-revenue laws is amended by a subsequent regulation or Treasury decision, made by the Secretary or by the Commissioner with the approval of the Secretary, such subsequent regulation or Treasury decision may, with the approval of the Secretary, be applied without retroactive effect."

Closing agreements.

SEC. 606. CLOSING AGREEMENTS.

Authorization for, relating to tax liability.

(a) **Authorization.**—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

Finality of agreements, except for fraud.

(b) **Finality of agreements.**—If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

Reopening not allowed.

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

No annulment, etc., in any suit.

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Former provision for settlement repealed.

Vol. 44, p. 113, repealed.

(c) Section 1106(b) of the Revenue Act of 1926 is repealed, effective on the expiration of 30 days after the enactment of this Act, but such repeal shall not affect any agreement made before such repeal takes effect.

Period of limitation against United States.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Tax paid after limitation expired, deemed overpayment, and to be refunded.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Limitation against taxpayer.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

Erroneous refunds of tax.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

Exceptions.

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the

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APPENDIX C

CHAP. 26.—An Act To provide for the inspection of the battle fields and surrender grounds in and around old Appomattox Court House, Virginia.

February 25, 1926.
[S. 1493.]
[Public, No. 19.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created, to be composed of the following members, who shall be appointed by the Secretary of War:

Appomattox Court House, Va., battlefields.
Commission created.

(1) A commissioned officer of the Corps of Engineers, United States Army;

Army Engineer officer.

(2) A veteran of the Civil War who served honorably in the military forces of the United States; and

United States Civil War veteran.

(3) A veteran of the Civil War who served honorably in the military forces of the Confederate States of America.

Confederate States Civil War veteran.

Sec. 2. In appointing the members of the commission created by section 1 of this Act the Secretary of War shall, as far as practicable, select persons familiar with the terrain of the battle fields and surrender grounds of old Appomattox Court House, Virginia, and the historical events associated therewith.

Qualifications of commission.

Sec. 3. It shall be the duty of the commission, acting under the direction of the Secretary of War, to inspect the battle fields and surrender grounds in and around old Appomattox Court House, Virginia, in order to ascertain the feasibility of preserving and marking for historical and professional military study such fields. The commission shall submit a report of its findings to the Secretary of War not later than December 1, 1926.

Inspection and report on feasibility of preserving, for historical study, etc.

Sec. 4. There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,000 in order to carry out the provision of this Act.

Amount authorized for expenses.
Post, p. 878.

Approved, February 25, 1926.

CHAP. 27.—An Act To reduce and equalize taxation, to provide revenue, and for other purposes.

February 26, 1926.
[H. R. 1.]
[Public, No. 20.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Revenue Act of 1926.

TITLE I.—GENERAL DEFINITIONS

Definitions.

Section 1. This Act may be cited as the "Revenue Act of 1926."

Title of Act.

Sec. 2. (a) When used in this Act—

Terms construed.

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

"Person."

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

"Corporation."

(3) The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

"Domestic."

(4) The term "foreign" when applied to a corporation or partnership means a corporation or partnership which is not domestic.

"Foreign."

(5) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

"United States."

(6) The term "Secretary" means the Secretary of the Treasury.

"Secretary."

(7) The term "Commissioner" means the Commissioner of Internal Revenue.

"Commissioner."

(8) The term "collector" means collector of internal revenue.

"Collector."

(9) The term "taxpayer" means any person subject to a tax imposed by this Act.

"Taxpayer."

HeinOnline -- 44 Stat. 9 1925-1927

REVENUE ACT OF 1926.

EXAMINATION OF BOOKS AND WITNESSES

Examination of books and witnesses.

Powers conferred on revenue officers to secure information.

Vol. 43, p. 340.

SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

UNNECESSARY EXAMINATIONS

Unnecessary examinations.

Restriction on making.

SEC. 1105. No taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

FINAL DETERMINATIONS AND ASSESSMENTS

Final determinations and assessments.

Effect of statute of limitations against United States.

Against taxpayer.

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

Cases settled without protest not to be reopened.

Fraud, etc., excepted.

No suit to be entertained by any United States court.

(b) If after a determination and assessment in any case the taxpayer has paid in whole any tax or penalty, or accepted any abatement, credit, or refund based on such determination and assessment, and an agreement is made in writing between the taxpayer and the Commissioner, with the approval of the Secretary, that such determination and assessment shall be final and conclusive, then (except upon a showing of fraud or malfeasance or misrepresentation of fact materially affecting the determination or assessment thus made) (1) the case shall not be reopened or the determination and assessment modified by any officer, employee, or agent of the United States, and (2) no suit, action, or proceeding to annul, modify, or set aside such determination or assessment shall be entertained by any court of the United States.

ADMINISTRATIVE REVIEW

Administrative review.

Findings of facts and decisions of Commissioner not subject to review by any other officer.

By Board of Tax Appeals excepted.

Ante, p. 105.

SEC. 1107. In the absence of fraud or mistake in mathematical calculation, the findings of facts in and the decision of the Commissioner upon (or in case the Secretary is authorized to approve the same, then after such approval) the merits of any claim presented under or authorized by the internal-revenue laws shall not, except as provided in Title IX of the Revenue Act of 1924, as amended, be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

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HeinOnline -- 44 Stat. 113 1925-1927

APPENDIX C

APPENDIX D

FEDERAL INCOME TAXATION

BY

JOSEPH J. KLEIN, Ph.D., C.P.A., LL.B.
of the Firm of Klein, Hinds & Finke, Certified Public Accountants
Member of the New York Bar; Former President of the New York State Society of Certified Public Accountants; Associated Professor of Taxation, College of the City of New York

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1929

should, under ordinary conditions, be reported on the tax return of the taxpayer to whom or to which specific data apply. Thus, an employer may report a 1928 payment of salary to John Doe amounting to $10,000.00. The Sorting Section furnishes Form 1099 to those charged with responsibility for the auditing of John Doe's return. Similarly, the auditing of all income tax returns is aided by the operations of this Division. Claims for refund of tax erroneously withheld at source are also handled in the Sorting Division.

Par. 39 : 30 (a)—Routing of Information Returns. The chart on page 1362 illustrates the route of information and withholding returns. The procedure within the Sorting Section is clearly shown.

TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

IT-Mimeograph July 5, 1928.
Coll. No. 3652
R. A. No. 463

Agreement as to Final Determination of Tax Liability Under Section 606 of the Revenue Act of 1928.

COLLECTORS OF INTERNAL REVENUE,
INTERNAL REVENUE AGENTS IN CHARGE,
AND OTHER OFFICERS AND EMPLOYEES CONCERNED:

1. Attention is invited to Section 606 of the Revenue Act of 1928, which provides as follows:

(a) The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfea-

sance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

(c) Section 1106 (b) of the Revenue Act of 1926 is repealed, effective on the expiration of 30 days after the enactment of this Act, but such repeal shall not affect any agreement made before such repeal.

2. The purpose of this section is to provide a method whereby a taxpayer and the Commissioner (or any officer or employee authorized in writing by him) subject to the approval of the Secretary or the Undersecretary, may reach a final and conclusive determination and closing of the tax liability so that the case may not be reopened as to the matters or liability agreed upon, nor may any adjustment made in accordance therewith be modified, annulled or set aside except upon a showing of fraud of malfeasance or misrepresentation of a material fact.

3. Section 606 removes the restrictions on agreements provided in prior acts and it is no longer required as a condition precedent to a valid agreement that the liability determined be assessed and paid or that the taxpayer accept any abatement, credit or refund which may be disclosed in the audit of the return. It is essential only that there be a determination of the tax liability for the period to be covered by the agreement. The removal of the restrictions referred to will permit agreements stating "no tax liability" in cases where nontaxable returns have been filed and accepted by the Bureau.

4. Form 866, revised to conform to the provisions of the Revenue Act of 1928, has been so worded as to include a waiver of the restrictions on assessment and collection of any proposed deficiency. It will accordingly replace and be used in the same manner as Forms 870, 874, Collectors' form, "Waiver of Restrictions upon the Assessment and Collection of a Deficiency" and Form 7858, in all cases where a final determination discloses a deficiency.

5. Regular procedure will be observed in advising the taxpayer of the amount of any proposed deficiency.

The notice will be accompanied by Form 866 properly filled out as to the Section and year of the Revenue Act and the name and address of the taxpayer, and stating as the tax liability the amount shown on the return, increased or decreased by any prior deficiencies or overassessments as indicated by stamps on the return, plus the amount of the proposed deficiency.

EXAMPLE

Tax reported on return	$10,000.00
Additional tax previously assessed	2,000.00
	$12,000.00
Overassessment allowed	4,0000.00
	$ 8,000.00
Proposed deficiency	1,500.00
Liability stated on Form 866	$ 9,500.00

6. In any case where a field audit discloses an overassessment only Form 866 should replace and be used in the same manner as Form 873. In the case of overassessments without acceptable agreements, new Forms 866 shall be prepared and accompany certificate to Claims Control Section where the total tax for any year amounts to $5,000.00 or more.

7. In the event that a change in liability results upon the review in the Bureau of a case in which Form 866 has been signed by the taxpayer, the taxpayer will be so advised in accordance with regular procedure and a new form, stating the liability as corrected, will be forwarded for signature. This action will constitute notice to the taxpayer of the rejection of the original proposed agreement.

8. Where returns for any year or years have been audited and closed and are on file in the Bureau, and the taxpayer requests an agreement relating to his liability for such year or years, Form 866 will be prepared in Proving Section of the Clearing Division and forwarded to the taxpayer for signature.

9. Where an agreement is requested in any case where the returns have been audited and closed and retained in the Collector's file, Form 866 will be prepared in the Collector's office and submitted for the signature of the taxpayer. The signed agreement with the entire file including original and amended returns for the years covered, will be forwarded to the Income Tax Unit of the Bureau, marked for the attention of the Clearing Division.

10. Agreements executed by taxpayers in cases involving deficiencies to be assessed in the Bureau

will be detached from the return in Proving Section at the time such tax is assessed. The agreements will be listed on a schedule for the approval of the Secretary or Undersecretary and will be routed for signature of the Commissioner or the officer or employee authorized to sign.

11. Agreements received in connection with cases involving deficiencies assessed by Collectors will be withdrawn at the time the case is approved after review in the Preliminary Audit Section and forwarded to Proving Section for completion in the manner above outlined.

12. Agreements on overassessments only accepted after review will be withdrawn by Claims Control Section at the time the overassessment is scheduled and forwarded to Proving Section.

13. When an agreement has been approved by the Secretary, the original copy will be forwarded to the taxpayer and the duplicate copy will be attached to the return.

14. Inasmuch as any tax included in the liability determined may be assessed and collected, and any abatement, credit or refund may be allowed under Section 606 after the agreement has been entered into, transcripts of taxpayers' accounts will no longer be required and the use of Form 899 is accordingly abolished in agreement cases.

15. In the event the final agreement is executed by a person other than the taxpayer, there must be submitted, with the agreement and accompanying papers documentary evidence showing specific authority of the agent to execute an agreement as to the final determination under Section 606 of the Revenue Act of 1928. Where the agreement is to be executed by an administrator, executor, trustee or other fiduciary, documentary evidence, showing the authority of the fiduciary to act on behalf of the taxpayer, must be submitted with the agreement and it must appear from such evidence that the authority remains in full force and effect as of the date of the agreement.

16. If the taxpayer is a corporation, the agreement shall be signed by an officer having authority to bind the corporation and his signature shall be attested by the secretary of the corporation over the corporate seal. In the absence of a seal, a certified copy of the resolution of the board of directors, specifically authorizing an officer or officers to enter into the agreement, shall be filed with the agreement. If the corporation is in process of liquidation or dissolution, the person or persons authorized so to do shall sign the agreement. A true

copy of the instrument under which the trustees derive their authority, or if to secure a notary public, shall accompany the signed agreement or if their authority arises under a State statute, such statute shall be cited and quoted and an affidavit by a third party showing the facts required by the statute as a precedent to the vesting of the authority in said trustee shall be furnished. If the corporation has been legally dissolved, the agreement shall be signed before a notary public by former stockholders representing a majority of the voting stock of the corporation at the date of dissolution, and shall be supported by an affidavit showing the total number of standing shares of voting stock at the date of dissolution and the number held by each signatory to the agreement. The affidavit must contain positive averments as to the non-existence of any trustee and the date of dissolution must be stated therein.

17. An initial supply of Form 866, revised, will be furnished to Collectors and Revenue Agents in Charge as soon as the forms are available for distribution.

18. Cases may arise where taxpayers, willing to waiver the restrictions on assessment and collection, may not desire to execute the final agreement. In such cases, the taxpayer's agreement should be obtained on Form 870, Form 874, Collectors' form, "Waiver of Restrictions upon the Assessment and Collection of a Deficiency" or Form 7858.

19. The provisions of this mimeograph are effective as of June 29, 1928, and Commissioner's Mimeographs Collectors' No. 3543 and 3596 are hereby superseded and revoked.

20. Correspondence concerning the provisions of this mimeograph should refer to the number thereof and to the symbols IT:E:CBA.

H. F. MIRES,

Acting Commissioner.

APPENDIX E

puting the taxable income of estates or trusts, or requires or denies any of the inclusions in the computation of taxable income of beneficiaries, heirs, or legatees, specified in subparts A to E, inclusive (secs. 641 and following, relating to estates, trusts, and beneficiaries) of part I of subchapter J of this chapter, or corresponding provisions of prior internal revenue laws, and the correlative inclusion or deduction, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer.

(6) Correlative deductions and credits for certain related corporations

The determination allows or disallows a deduction (including a credit) in computing the taxable income (or, as the case may be, net income, normal tax net income, or surtax net income) of a corporation, and a correlative deduction or credit has been erroneously allowed, omitted, or disallowed, as the case may be, in respect of a related taxpayer described in section 1313(c)(7).

(7) Basis of property after erroneous treatment of a prior transaction

(A) General rule

The determination determines the basis of property, and in respect of any transaction on which such basis depends, or in respect of any transaction which was erroneously treated as affecting such basis, there occurred, with respect to a taxpayer described in subparagraph (B) of this paragraph, any of the errors described in subparagraph (C) of this paragraph.

(B) Taxpayers with respect to whom the erroneous treatment occurred

The taxpayer with respect to whom the erroneous treatment occurred must be—

(i) the taxpayer with respect to whom the determination is made,

(ii) a taxpayer who acquired title to the property in the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, or

(iii) a taxpayer who had title to the property at the time of the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, if the basis of the property in the hands of the taxpayer with respect to whom the determination is made is determined under section 1015(a) (relating to the basis of property acquired by gift).

(C) Prior erroneous treatment

With respect to a taxpayer described in subparagraph (B) of this paragraph—

(i) there was an erroneous inclusion in, or omission from, gross income,

(ii) there was an erroneous recognition, or nonrecognition, of gain or loss, or

(iii) there was an erroneous deduction of an item properly chargeable to capital account or an erroneous charge to capital account of an item properly deductible.

(Aug. 16, 1954, ch. 736, 68A Stat. 338; Pub. L. 85-866, title I, § 59(a), Sept. 2, 1958, 72 Stat. 1647.)

AMENDMENTS

1958—Pars. (6), (7). Pub. L. 85-866 added par. (6) and redesignated former par. (6) as (7).

EFFECTIVE DATE OF 1958 AMENDMENT

Section 59(c) of Pub. L. 85-866 provided that: "The amendments made by subsections (a) and (b) [amending this section and section 1314 of this title] shall apply to determinations (as defined in section 1313(a)) made after November 14, 1954."

§ 1313. Definitions

(a) Determination

For purposes of this part, the term "determination" means—

(1) a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final;

(2) a closing agreement made under section 7121;

(3) a final disposition by the Secretary of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary—

(A) as to items with respect to which the claim was allowed, on the date of allowance of refund or credit or on the date of mailing notice of disallowance (by reason of offsetting items) of the claim for refund, and

(B) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Secretary in reduction of the refund or credit, on expiration of the time for instituting suit with respect thereto (unless suit is instituted before the expiration of such time); or

(4) under regulations prescribed by the Secretary, an agreement for purposes of this part, signed by the Secretary and by any person, relating to the liability of such person (or the person for whom he acts) in respect of a tax under this subtitle for any taxable period.

(b) Taxpayer

Notwithstanding section 7701(a)(14), the term "taxpayer" means any person subject to a tax under the applicable revenue law.

(c) Related taxpayer

For purposes of this part, the term "related taxpayer" means a taxpayer who, with the taxpayer with respect to whom a determination is made, stood, in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance, or disallowance was made, in one of the following relationships:

(1) husband and wife,

(2) grantor and fiduciary,

(3) grantor and beneficiary,

(4) fiduciary and beneficiary, legatee, or heir,

(5) decedent and decedent's estate,

(6) partner, or

(7) member of an affiliated group of corporations (as defined in section 1504).

(Aug. 16, 1954, ch. 736, 68A Stat. 339; Pub. L. 94-455, title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834.)

APPENDIX E

AMENDMENTS

1976—Subsec. (a)(3), (4). Pub. L. 94-455 struck out "or his delegate" after "Secretary" wherever appearing.

§ 1314. Amount and method of adjustment

(a) Ascertainment of amount of adjustment

In computing the amount of an adjustment under this part there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of the tax previously determined shall be the excess of—

(1) the sum of—

(A) the amount shown as the tax by the taxpayer on his return (determined as provided in section 6211(b)(1), (3), and (4), relating to the definition of deficiency), if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in section 6211(b)(2), made.

There shall then be ascertained the increase or decrease in tax previously determined which results solely from the correct treatment of the item which was the subject of the error (with due regard given to the effect of the item in the computation of gross income, taxable income, and other matters under this subtitle). A similar computation shall be made for any other taxable year affected, or treated as affected, by a net operating loss deduction (as defined in section 172) or by a capital loss carryback or carryover (as defined in section 1212), determined with reference to the taxable year with respect to which the error was made. The amount so ascertained (together with any amounts wrongfully collected as additions to the tax or interest, as a result of such error) for each taxable year shall be the amount of the adjustment for that taxable year.

(b) Method of adjustment

The adjustment authorized in section 1311(a) shall be made by assessing and collecting, or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years. If, as a result of a determination described in section 1313(a)(4), an adjustment has been made by the assessment and collection of a deficiency or the refund or credit of an overpayment, and subsequently such determination is altered or revoked, the amount of the adjustment ascertained under subsection (a) of this section shall be redetermined on the basis of such alteration or revocation and any overpayment or deficiency resulting from such redetermination shall be refunded or credited, or assessed and collected, as the case may be, as an adjustment under this part. In the case of an adjustment resulting from an increase or decrease in a net operating loss or net capital loss which is carried back to the year of adjustment, interest shall not be collected or paid for any period prior to the close of the taxable year in which the net operating loss or net capital loss arises.

(c) Adjustment unaffected by other items

The amount to be assessed and collected in the same manner as a deficiency, or to be refunded or credited in the same manner as an overpayment, under this part, shall not be diminished by any credit or set-off based upon any item other than the one which was the subject of the adjustment. The amount of the adjustment under this part, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item other than the one which was the subject of the adjustment.

(d) Periods for which adjustments may be made

No adjustment shall be made under this part in respect of any taxable year beginning prior to January 1, 1932.

(e) Taxes imposed by subtitle C

This part shall not apply to any tax imposed by subtitle C (sec. 3101 and following relating to employment taxes).

(Aug. 16, 1954, ch. 736, 68A Stat. 340; Pub. L. 85-866, title I, § 59(b), Sept. 2, 1958, 72 Stat. 1647; Pub. L. 89-44, title VIII, § 809(d)(5)(B), June 21, 1965, 79 Stat. 168; Pub. L. 91-172, title V, § 512(f)(7), (8), Dec. 30, 1969, 83 Stat. 641, 642; Pub. L. 94-455, title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834.)

AMENDMENTS

1976—Subsec. (b). Pub. L. 94-455 struck out "or his delegate" after "Secretary".

1969—Subsec. (a). Pub. L. 91-172, § 512(f)(7), substituted "capital loss carryback or carryover" for "capital loss carryover".

Subsec. (b). Pub. L. 91-172, § 512(f)(8), inserted reference to net capital loss.

1965—Subsec. (a)(1)(A). Pub. L. 89-44 struck out "(b)(1) and (3)" and inserted in lieu thereof "(b)(1), (3), and (4)".

1958—Subsec. (c). Pub. L. 85-866 substituted in second sentence "The" for "Other than in the case of an adjustment resulting from a determination under section 1313(a)(4), the".

EFFECTIVE DATE OF 1969 AMENDMENT

Amendment by Pub. L. 91-172 applicable with respect to net capital losses sustained in taxable years beginning after Dec. 31, 1969, see section 512(g) of Pub. L. 91-172, set out as a note under section 1212 of this title.

EFFECTIVE DATE OF 1965 AMENDMENT

Amendment by Pub. L. 89-44 applicable to taxable years beginning on or after July 1, 1965, see section 809(f) of Pub. L. 89-44, set out as a note under section 6420 of this title.

EFFECTIVE DATE OF 1958 AMENDMENT

Amendment by Pub. L. 85-866 effective with respect to determinations made after Nov. 14, 1954, see section 59(c) of Pub. L. 85-866, set out as a note under section 1312 of this title.

[§ 1315. Repealed. Pub. L. 94-455, title XIX, § 1901(a)(143), Oct. 4, 1976, 90 Stat. 1788]

Section, act Aug. 16, 1954, ch. 736, 68A Stat. 341, related to effective date of this part.

APPENDIX E

APPENDIX F

[CHAPTER 285]

AN ACT

To amend the Second Liberty Bond Act, as amended.

May 26, 1938
[H. R. 10535]
[Public, No. 552]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 1 of the Second Liberty Bond Act, as amended (U. S. C., title 31, sec. 752), is amended by striking out the following: ": *Provided*, That the face amount of bonds issued under this section and section 22 of this Act shall not exceed in the aggregate $25,000,000,000 outstanding at any one time".

Second Liberty Bond Act, amendments.
40 Stat. 288; 49 Stat. 20.
31 U. S. C. § 752; Supp. III, § 752.
Limitation on face amount of bonds removed.
49 Stat. 21.

SEC. 2. Section 21 of the Second Liberty Bond Act, as amended (U. S. C., title 31, sec. 757b), is amended to read as follows:

"SEC. 21. The face amount of bonds, certificates of indebtedness, Treasury bills, and notes issued under the authority of this Act, and certificates of indebtedness issued under the authority of section 6 of the First Liberty Bond Act, shall not exceed in the aggregate $45,000,000,000 outstanding at any one time: *Provided*, That the face amount of bonds issued under the authority of this Act shall not exceed in the aggregate $30,000,000,000 outstanding at any one time."

31 U. S. C., Supp. III, § 757b.
Bonds, certificates of indebtedness, etc.
40 Stat. 36.
31 U. S. C. § 755.
Aggregate outstanding amount.
Proviso.
Face amount of bonds issued under this Act.

Approved, May 26, 1938.

[CHAPTER 288]

AN ACT

To equalize certain allowances for quarters and subsistence of enlisted men of the Coast Guard with those of the Army, Navy, and Marine Corps.

May 26, 1938
[H. R. 10190]
[Public, No. 553]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved June 20, 1936 (49 Stat. 1545; U. S. C., Supp. III, title 34, sec. 914), is hereby amended, effective as of June 20, 1936, by inserting in line 15 thereof, after the word "Navy", the words "Coast Guard", and by inserting in line 17 thereof, after the words "Marine Corps Band", the words "Coast Guard Academy Band".

Coast Guard, enlisted men.
49 Stat. 1545.
34 U. S. C., Supp. III, § 914.
Allowances for quarters and subsistence.

Approved, May 26, 1938.

[CHAPTER 289]

AN ACT

To provide revenue, equalize taxation, and for other purposes.

May 28, 1938
[H. R. 9682]
[Public, No. 554]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, divided into titles and sections according to the following Table of Contents, may be cited as the "Revenue Act of 1938":

Revenue Act of 1938.

TABLE OF CONTENTS

Table of Contents.

TITLE I—INCOME TAX

Title I—Income Tax, p. 452.

SUBTITLE A—INTRODUCTORY PROVISIONS

Introductory provisions, p. 452.

Sec. 1. Application of title.
Sec. 2. Cross references.
Sec. 3. Classification of provisions.
Sec. 4. Special classes of taxpayers.

HeinOnline -- 52 Stat. 447 1937-1938

(f) The amendments made by this section shall be effective only with respect to jeopardy assessments made after the date of the enactment of this Act.

Application.

SEC. 820. MITIGATION OF EFFECT OF LIMITATION AND OTHER PROVISIONS IN INCOME TAX CASES.

Mitigation of effect of limitation and other provisions in income tax cases.

(a) DEFINITIONS.—For the purpose of this section—

Definitions.

(1) DETERMINATION.—The term "determination under the income tax laws" means—

"Determination under the income tax laws."

45 Stat. 874.

(A) A closing agreement made under section 606 of the Revenue Act of 1928, as amended;

(B) A decision by the Board of Tax Appeals or a judgment, decree, or other order by any court of competent jurisdiction, which has become final; or

(C) A final disposition by the Commissioner of a claim for refund. For the purposes of this section a claim for refund shall be deemed finally disposed of by the Commissioner—

(i) as to items with respect to which the claim was allowed, upon the date of allowance of refund or credit or upon the date of mailing notice of disallowance (by reason of offsetting items) of the claim for refund, and

(ii) as to items with respect to which the claim was disallowed, in whole or in part, or as to items applied by the Commissioner in reduction of the refund or credit, upon expiration of the time for instituting suit with respect thereto (unless suit is instituted prior to the expiration of such time).

Such term shall not include any such agreement made, or decision, judgment, decree, or order which has become final, or claim for refund finally disposed of, prior to ninety days after the date of the enactment of this Act.

(2) TAXPAYER.—Notwithstanding the provisions of section 901, the term "taxpayer" means any person subject to a tax under the applicable Revenue Act.

"Taxpayer."

Post, p. 583.

(3) RELATED TAXPAYER.—The term "related taxpayer" means a taxpayer who, with the taxpayer with respect to whom a determination specified in subsection (b) (1), (2), (3), or (4) is made, stood, in the taxable year with respect to which the erroneous inclusion, exclusion, omission, allowance, or disallowance therein referred to was made, in one of the following relationships: (A) husband and wife; (B) grantor and fiduciary; (C) grantor and beneficiary; (D) fiduciary and beneficiary, legatee, or heir; (E) decedent and decedent's estate; or (F) partner.

"Related taxpayer."

(b) CIRCUMSTANCES OF ADJUSTMENT.—When a determination under the income tax laws—

Circumstances of adjustment.

(1) Requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer; or

(2) Allows a deduction or credit which was erroneously allowed to the taxpayer for another taxable year or to a related taxpayer; or

(3) Requires the exclusion from gross income of an item with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year or from the gross income of a related taxpayer; or

(4) Allows or disallows any of the additional deductions allowable in computing the net income of estates or trusts, or requires

HeinOnline -- 52 Stat. 581 1937-1938

Ante, p. 517.

or denies any of the inclusions in the computation of net income of beneficiaries, heirs, or legatees, specified in section 162 (b) and (c) of this Act, and corresponding sections of prior revenue Acts, and the correlative inclusion or deduction, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer; or

(5) Determines the basis of property for depletion, exhaustion, wear and tear, or obsolescence, or for gain or loss on a sale or exchange, and in respect of any transaction upon which such basis depends there was an erroneous inclusion in or omission from the gross income of, or an erroneous recognition or nonrecognition of gain or loss to, the taxpayer or any person who acquired title to such property in such transaction and from whom mediately or immediately the taxpayer derived title subsequent to such transaction—

and, on the date the determination becomes final, correction of the effect of the error is prevented by the operation (whether before, on, or after the date of enactment of this Act) of any provision of the internal-revenue laws other than this section and other than section 3229 of the Revised Statutes, as amended (relating to compromises), then the effect of the error shall be corrected by an adjustment made under this section. Such adjustment shall be made only if there is adopted in the determination a position maintained by the Commissioner (in case the amount of the adjustment would be refunded or credited in the same manner as an overpayment under subsection (c)) or by the taxpayer with respect to whom the determination is made (in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under subsection (c)), which position is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be. In case the amount of the adjustment would be assessed and collected in the same manner as a deficiency, the adjustment shall not be made with respect to a related taxpayer unless he stands in such relationship to the taxpayer at the time the latter first maintains the inconsistent position in a return, claim for refund, or petition (or amended petition) to the Board of Tax Appeals for the taxable year with respect to which the determination is made, or if such position is not so maintained, then at the time of the determination.

R. S. § 3229.
26 U. S. C. § 1661.
Ante, p. 578.

Method of adjustment.

(c) METHOD OF ADJUSTMENT.—The adjustment authorized in subsection (b) shall be made by assessing and collecting, or refunding or crediting, the amount thereof, to be ascertained as provided in subsection (d), in the same manner as if it were a deficiency determined by the Commissioner with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year with respect to which the error was made, and as if on the date of the determination specified in subsection (b) one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year.

Ascertainment of amount of adjustment.

(d) ASCERTAINMENT OF AMOUNT OF ADJUSTMENT.—In computing the amount of an adjustment under this section there shall first be ascertained the tax previously determined for the taxable year with respect to which the error was made. The amount of the tax previously determined shall be (1) the tax shown by the taxpayer, with respect to whom the error was made, upon his return for such taxable year, increased by the amounts previously assessed (or collected without assessment) as deficiencies, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of

HeinOnline -- 52 Stat. 582 1937-1938

such tax; or (2) if no amount was shown as the tax by such taxpayer upon his return, or if no return was made by such taxpayer, then the amounts previously assessed (or collected without assessment) as deficiencies, but such amounts previously assessed, or collected without assessment, shall be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax. There shall then be ascertained the increase or decrease in the tax previously determined which results solely from the correct exclusion, inclusion, allowance, disallowance, recognition, or nonrecognition, of the item, inclusion, deduction, credit, gain, or loss, which was the subject of the error. The amount so ascertained (together with any amounts wrongfully collected, as additions to the tax or interest, as a result of such error) shall be the amount of the adjustment under this section.

Adjustment unaffected by other items, etc.

(e) ADJUSTMENT UNAFFECTED BY OTHER ITEMS, ETC.—The amount to be assessed and collected in the same manner as a deficiency, or to be refunded or credited in the same manner as an overpayment, under this section, shall not be diminished by any credit or set-off based upon any item, inclusion, deduction, credit, exemption, gain, or loss other than the one which was the subject of the error. Such amount, if paid, shall not be recovered by a claim or suit for refund or suit for erroneous refund based upon any item, inclusion, deduction, credit, exemption, gain, or loss other than the one which was the subject of the error.

No adjustment for years prior to 1932.

(f) NO ADJUSTMENT FOR YEARS PRIOR TO 1932.—No adjustment shall be made under this section in respect of any taxable year beginning prior to January 1, 1932.

Delinquent income, estate, and gift taxes.

SEC. 821. INTEREST ACCRUING AFTER OCTOBER 24, 1933, AND BEFORE AUGUST 30, 1935, ON DELINQUENT INCOME, ESTATE, AND GIFT TAXES.

Interest accruing after October 24, 1933, and prior to August 30, 1935.

Interest accruing after October 24, 1933, and prior to August 30, 1935, on delinquent income, estate, and gift taxes shall be computed at the rate of 6 per centum per annum. Any such interest accruing during such period which has been collected prior to the date of the enactment of this Act in excess of such rate shall be credited or refunded to the taxpayer, if claim therefor is filed within six months after the date of the enactment of this Act. No interest shall be allowed or paid on any such credit or refund.

TITLE VI—GENERAL PROVISIONS

Title VI—General Provisions.

Definitions.

SEC. 901. DEFINITIONS.

(a) When used in this Act—

"Person."

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

"Corporation."

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

"Partnership."

(3) The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this Act, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

"Domestic."

(4) The term "domestic" when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State or Territory.

HeinOnline -- 52 Stat. 583 1937-1938