No. 2019-1124

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GENERAL MILLS, INC. AND SUBSIDIARIES,

Plaintiff - Appellant,

v.

UNITED STATES,

Defendant - Appellee.

Appeal from the United States Court of Federal Claims
No. 14-cv-00089-PEC, Honorable Patricia E. Campbell-Smith

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF INTEREST

Counsel for Appellants General Mills, Inc., and Subsidiaries certify the following:

1. Full Name of Party Represented by me:	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party:
General Mills, Inc., and Subsidiaries	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

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Dated: May 30, 2019

Respectfully submitted,

By: */s/ Sheri A. Dillon*

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INTRODUCTION

GMI's opening brief identified three, independent legal errors in the trial court's decision. First, the court erred in holding that section 6230(c)(2)(A) of the Internal Revenue Code[1] provides the applicable limitations period instead of section 6511(a). Second, it erred in holding that section 6230(c)(2)(A) applies by its terms. Third, it erred in holding that a section 6230(c)(2)(A) period ever commenced in this case.

In response, the government beats a hasty retreat from the trial court's opinion. "Regardless what the Court of Federal Claims may have said regarding the matters alluded to by GMI," the government maintains, "its judgment is correct." Gov't Br. 33. But the government cannot save the trial court's flawed decision. Nor can it sweep the trial court's legal errors under the rug—for instance, by burying its response to GMI's lead appellate argument in the closing pages of its brief.

The government refuses to address arguments raised in GMI's opening brief. The government also misrepresents the trial court's holdings and GMI's arguments.

[1] Unless otherwise indicated, (1) all section references are to the Internal Revenue Code of 1986 (the "Code"), as amended and in effect during the years at issue, and (2) all references to Treas. Reg. are to the income tax regulations in effect for the years at issue.

ARGUMENT

I. SECTION 6511(a) PROVIDES THE APPLICABLE LIMITATIONS PERIOD, NOT SECTION 6230(c)(2)(A)

The government does not dispute that GMI filed suit within the 2-year period set by section 6511(a). In fact, it agrees that it did. Gov't Br. 11. The parties' dispute, rather, is over whether section 6511(a) applies. According to the government, another purportedly more "specific" Code provision, section 6230(c)(2)(A), overrides section 6511(a)'s application in this case.

But to make out such an argument, the government must cast aside the most specific provisions that bear on this question: the three separate provisions that harmonize the two limitations periods—sections 6230(d)(6), 6511(g), and 7422(h). These statutes select the shorter period (from section 6230(c)(2)(A)) when the claim or tax is "attributable to a partnership item." 26 U.S.C. §§ 6230(d)(6), 6511(g), 7422(h). But in the government's view, these three statutory provisions do no real work. While they "establish that *all* refund claims that are attributable to partnership items are governed by § 6230(c)," the government also insists that refund claims that are *not* attributable to partnership items are also governed by section 6230(c). Gov't Br. 40. Thus, by the end of its brief, the government claims that "[w]hether GMI's claims are 'attributable to partnership items' is *irrelevant* to the applicability of former § 6230(c)." Gov't Br. 44 (emphasis added). In the government's view, then, the characteristic singled out for consideration by the three applicable statutes—

whether the taxes or claims are attributable to partnership items—is in fact completely irrelevant to the analysis. But if that is so, then these three statutes are meaningless.

This is not how statutory interpretation works. Congress does not enact statutory language that serves no purpose, and courts attempt to avoid reading unnecessary conflicts into statutes that can be harmonized rather than resorting to preemption doctrines. GMI Br. 36-37. Nor is there any merit to the government's fallback argument that the claims here *are* attributable to partnership items. Gov't Br. 45-48. Because section 6511(a) applies, this Court should reverse the judgment below and need not reach any other issue.

A. Sections 6230(d)(6), 6511(g), and 7422(h) Are Not Meaningless

Section 6511(a) provides the general 2- or 3-year limitations period within which a taxpayer may bring a claim for refund. In the absence of an applicable exception, section 6511(a) must apply. However, it is subject to certain exceptions, including the exception identified in sections 6230(d)(6), 6511(g), and 7422(h). Each of those three provisions states that section 6230(c)'s shorter period applies if the claim or tax is attributable to a partnership item. These provisions were all enacted at the same time, as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, § 402(a), (c)(7), (c)(11), 96 Stat. 324, 662, 667-68. The unmistakable message from Congress is that the shorter period in

section 6230(c) governs when the claim or tax is attributable to a partnership item, but not otherwise.

The government resists that reading, but it offers no plausible alternative. In the government's view, the trio of provisions merely serve to confirm that section 6230(c) applies to claims that are attributable to partnership items, but does not preclude it from applying to claims that are *not* attributable to partnership items. Gov't Br. 40. The government also contends that attributability to partnership items is "irrelevant" to section 6230(c)'s applicability. Gov't Br. 44. That contention necessarily renders these three provisions superfluous, because it would go without saying that section 6230(c) applies to claims that are attributable to partnership items. Nothing in the provision suggests otherwise. There was thus no reason for Congress to specify that claims attributable to partnership items are governed by section 6230(c)—much less a reason to say so in three different places in the Code. The government does not dispute the principle that statutes should not be given interpretations that render them superfluous. Gov't Br. 39; *see also* GMI Br. 37. But the government is unable to identify any meaningful purpose for these three provisions if they do not establish that section 6230(c) applies only to claims that are attributable to partnership items.

GMI's reading, on the other hand, is consistent with a sensible legislative purpose. Having created a new, shorter limitations period that could potentially

overlap with the existing, longer limitations period, Congress also provided a principle for determining when to apply which. Then it stated the principle in the statute that authorizes a new class of refund claims governed by the shorter period (section 6230), in the statute that sets the longer period that governs most refund claims (section 6511), and in the statute that authorizes most refund suits (section 7422). In this unified statutory scheme, there is no doubt that Congress wanted to apply section 6230(c) instead of section 6511 when, but only when, a claim is attributable to partnership items.

The government asks this Court to make Congress's chosen principle "irrelevant" on the ground that none of the three provisions expressly states that section 6230(c) applies *only* where tax is attributable to a partnership item. Gov't Br. 38-39. But under the *expressio unius* canon, Congress does not need to insert the word "only" in statutes when that is obviously the meaning Congress intended for them. *See, e.g.*, *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003) ("Despite the plain meaning of the statute, the [government] contends that it is somehow ambiguous because it does not expressly state that agreement of the parties is the *only* means to obtain an extension. No such express provision is necessary."). As in *Beverly Health*, "[t]his is a case where 'the [canons] of avoiding surplusage and *expressio unius* are at their zenith' because 'they apply in tandem.'" *Id.* (citation omitted).

In resisting *expressio unius*, the government relies on *United States Capitol Police v. Office of Compliance*, 908 F.3d 748, 758 (Fed. Cir. 2018). But the government's reliance is misplaced. As the Court there recognized, the *expressio unius* canon is *appropriate* when "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Id.* (citation omitted). Here, it is incontrovertible that Congress considered whether section 6230(c) should apply to claims that are not attributable to partnership items. In fact, for fifteen years, section 6230(d)(6) required application of section 6230(c) not just for taxes attributable to a partnership item but also for taxes attributable to "an affected item." Pub. L. No. 97-248, § 402(a), 96 Stat. 662. Congress changed course in 1997, however, deleting the "affected item" possibility. GMI Br. 33. The government downplays this change on the theory that it was intended only to clarify the Tax Court's jurisdiction. Gov't Br. 41 n.14. But that misses the point: Congress was clearly aware of the possibility that 6230(c) might apply as the exclusive judicial mechanism for claims other than those that are "attributable to partnership items" and clearly rejected that possibility. In other words, Congress "considered the unnamed possibility and meant to say no to it." *U.S. Capitol Police*, 908 F.3d at 758 (citation omitted). Rather than guess what "Congress *probably* meant to signal," Gov't Br. 40-41 (emphasis added), GMI offers the only reading of these provisions that makes sense of them as an integrated statutory scheme.

B. The Preemption Canon Does Not Apply

The government's continued reliance on preemption principles ignores much of GMI's argument on this subject. As GMI explained, resort to such principles is appropriate only when the statutory provisions in question genuinely conflict with each other, and the conflict is irreconcilable. GMI Br. 36. That is because the default presumption must always be in favor of harmonizing reconcilable statutes rather than picking one to override the other. GMI Br. 36-37 (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)). As just described, GMI's harmonization of the statutes avoids any conflict at all, using Congress's own principle for determining when each of the two limitations periods applies. The government, on the other hand, acts as though courts should favor interpretations that produce avoidable statutory conflicts. The government's approach is backwards.

And *EC Term of Years Trust v. United States*, 550 U.S. 429 (2007), is not to the contrary. There the Court "simply [could not] reconcile" the two provisions on the taxpayer's reading of them, and it noted the usual rule that tries to avoid conflict that is not "irreconcilable." *Id.* at 435 (citation omitted). In that case, unlike here, there were no provisions like sections 6230(d)(6), 6511(g), or 7422(h) showing that Congress had already established the line between the two limitations periods. *See* GMI Br. 36. The same is true in *Hinck v. United States*, 550 U.S. 501 (2007), on which the government additionally relies. In fact, in that case Congress had

"enact[ed] a specific remedy when no remedy [had] previously [been] recognized," which bolstered the conclusion that the newly provided remedy was "exclusive." *Id.* at 506. Here, however, the general remedy afforded through sections 6511 and 7422 would normally be available to GMI, and the only question is whether section 6230 eliminates the preexisting remedy other than in the circumstance that Congress specified—*i.e.*, even where the tax is *not* attributable to a partnership item. That is exactly the sort of "implied repeal" that the Supreme Court disfavors. *Epic Sys.*, 138 S. Ct. at 1624; GMI Br. 37.

The remainder of the government's argument for preemption simply begs the question here: whether Congress meant for section 6230(c) to apply even when the taxes are not attributable to partnership items. The government repeatedly claims that GMI's interpretation would "effectively extend" section 6230(c)'s period, allow taxpayers to "evade" section 6230(c), or thwart Congress's purposes in creating section 6230(c)'s time restriction. Gov't Br. 42-44. But if, as sections 6230(d)(6), 6511(g), and 7422(h) attest, section 6230(c) does not apply outside the context of taxes attributable to partnership items, GMI's reading does not threaten Congress's design; it furthers it. The purpose of the shorter limitations period was to prevent delay in raising challenges that could have implications for the other partners and thereby furthered TEFRA's purpose of treating partners uniformly. GMI Br. 40-41. But a tax that is not attributable to a partnership item, by definition, is "entirely

dependent on [the partner's] own unique factual circumstances, and has no effect on and is not affected by the tax liability of any of the other . . . partners." *Prochorenko v. United States*, 243 F.3d 1359, 1363 (Fed. Cir. 2001). There is no need for such challenges to be raised within the short period specified in section 6230(c), which is why Congress drew the line that it drew.

C. GMI's Claims for Refund Are Not Attributable to Partnership Items

GMI's claims for refund, which are premised on the IRS's legal error in selecting the wrong applicable date provision for large corporate underpayment ("LCU") interest under section 6621(c), are not claims that are attributable to partnership items. Neither the applicability of LCU interest nor the applicable date are partnership items. Nor are they attributable to partnership items. In fact, as it must, the government concedes that LCU interest is "determined at the partner (and not the partnership) level." Gov't Br. 46; Appx693 at 18:8-15 (conceding at oral argument that numerous partner-level fact determinations were required to determine the applicable date for the application of LCU interest). This is because under section 6621(c), LCU interest may be imposed only if certain partner-level facts obtain, such as whether the taxpayer is a C corporation and whether a large corporate underpayment exists after the applicable date. The determinations of the existence of a large corporate underpayment or the applicable date for one partner

has no impact on the partnership or any other partner. Such facts are unique to each partner.

Under this Court's well-settled precedents, partnership items are those that affect the partnership as a whole, while items that do not affect the partnership as a whole are not partnership items. *See, e.g.*, *Keener v. United States*, 551 F.3d 1358, 1364 (Fed. Cir. 2009); *Prochorenko*, 243 F.3d at 1363. This Court has explained that an item that is not a partnership item does not become "attributable to a partnership item" merely because a partner seeks a refund related to underpayments of partnership taxes. *See Keener*, 551 F.3d at 1366; *Prochorenko*, 243 F.3d at 1363. And this Court has specifically rejected interpreting the phrase "attributable to partnership items" to cover claims that depend on the unique circumstances of an individual partner and that affect only that partner. *See Prochorenko*, 243 F.3d at 1363. But rather than confronting this precedent, the government simply asserts that "[t]he refund of LCU interest that GMI seeks is self-evidently due to, caused by, or generated by partnership items." Gov't Br. 46. The government offers no answer to its own concessions that the imposition of LCU interest is dependent on facts unique to GMI.

II. SECTION 6230(c)(2)(A) DOES NOT APPLY BY ITS TERMS

Even if section 6230(c)(2)(A) could apply to refund claims that are not attributable to partnership items, by its terms, it does not apply to the refund claims at issue in this case.

A. The Applicable Date Is Not a Computational Adjustment

The grounds for GMI's claims for refund are that the IRS committed legal error in determining the applicable date.[2] The underlying dispute in these refund claims turns on a legal disagreement about which statutory provision prescribes the applicable date.

The government's brief refuses to acknowledge or analyze this point. Instead, it contends that a challenge to any input necessary to determine interest "necessarily entails an allegation that the IRS 'erroneously computed' the interest, . . . regardless of the basis for challenging the inputs." Gov't Br. 27-28. In effect, the government argues that any legal issue affecting the amount of interest is a computational adjustment. That position cannot stand. While an erroneous legal determination of which statutory provision applies to establish an applicable date may cause the ultimate interest computation to be wrong, the legal error is not computational. The

[2] The government strains to use GMI's use of the word "miscalculated" in the complaint as an admission that its refund claims did not involve a legal dispute. Gov't Br. 27. However, in its complaint, GMI also described the legal issue it sought to challenge, stating that "the IRS erroneously applied Code § 6621(c)(2)(A)." *See, e.g.*, Appx53-54.

grounds for GMI's claim are legal grounds, not computational grounds, and the claim for refund is not that the IRS erroneously computed a computational adjustment.

Further, the government perpetuates the trial court's error in concluding that because interest is not subject to deficiency procedures[3] and is directly assessed, it can *only* be challenged under section 6230(c). The government fails to address the fact that interest is always directly assessed, whether in a partnership or nonpartnership proceeding, and the fact that nothing precludes a claim for refund of interest under section 6511(a), even though deficiency procedures do not apply. *See* 26 U.S.C. § 6601(e). The fact that deficiency procedures are not available to challenge interest simply means that taxpayers cannot avail themselves of a prepayment forum to challenge an interest assessment. Rather, in either a partnership or nonpartnership proceeding, taxpayers must pay the interest and sue for refund.[4] Because LCU interest requires partner-level determinations that cannot

[3] The trial court and the government were distracted by the implications of whether deficiency proceedings are required. It is unclear why they became so fixated on deficiencies proceedings because the issue is not dispositive in this case. The fact that the assessment of interest does not require a notice of deficiency or allow a taxpayer to contest interest in a prepayment forum does not mean that every claim of error determining interest is subject to section 6230(c).

[4] A narrow exception to this general principle, not applicable here, applies where certain taxpayers seek review of a denial of a request for abatement of interest. 26 U.S.C. § 6404(h).

and do not affect any other partner or the partnership as a whole, those partner-level determinations are made after the partnership proceeding is complete. Only then can the IRS directly assess LCU interest, which is simply the act of the IRS recording the liability of a taxpayer. 26 U.S.C. § 6203.

The mechanics of assessment, whether through deficiency or nondeficiency procedures, have nothing to do with whether section 6511(a) or section 6230(c) provides the limitations period for filing a claim for refund of interest. Stated another way, while interest may not give rise to a deficiency, that does not mean that interest can only be challenged under section 6230; interest is always directly assessed and is routinely challenged under section 6511(a). The government's argument to the contrary—based on interest being directly assessed—is a red herring and simply beside the point.

B. Determining the Applicable Date Was Not "necessary to apply to [GMI] a settlement"

The partnership settlements did not cover interest and, therefore, were not necessary to apply to GMI a settlement. Rather, the parties specifically agreed in the December 1, 2011 global settlement agreement that interest issues remained unsettled. Appx604. This is a fact that the government never mentions, much less confronts.

Partnership settlements convert a partner's partnership items to nonpartnership items upon settlement.[5] As this Court has explained, section 6230(c) has no further application to unsettled items. *See Schell v. United States*, 589 F.3d 1378, 1383 (Fed. Cir. 2009). Accordingly, unsettled items can be resolved either by invoking deficiency proceedings or by direct assessment following partner-level determinations. Here, the determination of the applicable date and whether LCU interest might be imposed were not settled, and they required partner-level determinations. Thus, the assessment of LCU interest was not (nor could it be) "necessary . . . . to apply to [GMI] a settlement." 26 U.S.C. § 6230(c)(1)(A). Section 6230(c) is inapplicable by its terms.

III. EVEN IF SECTION 6230(c)(2)(A) PROVIDED THE APPLICABLE LIMITATIONS PERIOD, NO SUCH PERIOD EVER COMMENCED

Even if section 6230(c)(2)(A) provided the exclusive limitations period for this dispute, GMI's claims were timely because the IRS failed to comply with the statute's strict notice requirement. Under the statute, a taxpayer must bring a refund claim "within 6 months after the day on which the Secretary mails *the notice of computational adjustment* to the partner." 26 U.S.C. § 6230(c)(2)(A) (emphasis added). If the Secretary fails to mail the notice of computational adjustment, the limitations period never begins and cannot expire. *See* 26 U.S.C. § 6230(c)(2)(A).

[5] Settled items remain subject to section 6230(c), but unsettled items are not subject to section 6230(c).

The notice of computational adjustment thus serves not only to inform a partner of the IRS's computations of underpayments resulting from partnership item adjustments, but also to set the time limit on the partner's right to file a claim for refund on the ground that such computations are erroneous. Here, however, the Secretary failed to provide the requisite notice to GMI, and excusing the Secretary's failure to provide such notice would violate GMI's constitutionally protected due process rights.

A. The Government Misrepresents the Trial Court's Opinion and GMI's Opening Brief

Contrary to the government's claims, the trial court did not identify any specific document as the notice of computational adjustment for either of the two sets of tax years. *See* Gov't Br. 18. Recognizing that section 6230(c)(2)(A) specifically requires that the IRS in fact mail a notice, the government tries to rewrite the trial court's opinion as holding "that GMI 'had effective notice—in writing—of its calculated LCU interest' by reason of the interest computations that the IRS mailed to GMI in April and June of 2011." Gov't Br. 31 (citing Appx23, Appx24); *see also* Gov't Br. 18. But the trial court did not hold that any specific document started the six-month limitations period for the 2002-2003 tax years or 2004-2006 tax years. In fact, it carefully avoided identifying a specific triggering document, which is why the government could not provide any citation to such a holding.

Recognizing that it cannot defend the trial court's inability to identify the triggering documents that would satisfy the statutory requirements of section 6230(c)(2)(A), the government now offers a single document for the 2002-2003 tax years and a single document for the 2004-2006 tax years that it alleges constitute the written notices of computational adjustment: two Letters 3535, and attachments, sent in April and June 2011. Gov't Br. 18. The government may prefer that this Court ignore "what the Court of Federal Claims may have said," but the government cannot deny the flaws in the trial court's reasoning. Gov't Br. 33.

The government also mischaracterizes GMI's opening brief. It incorrectly asserts that "GMI concedes on brief that the 2011 interest computations imparted information sufficient to provide it with fair notice of those computational adjustments." Gov't Br. 19. Again, it provides no citation for that purported concession, because, again, none exists. The government similarly misattributes to GMI the view that "[t]he 2011 interest computations 'imparted information sufficient to provide [GMI] with fair notice of th[ose] computational adjustments.'" Gov't Br. 36 (citing GMI Br. 49). What GMI's brief actually says, however, was about what the law requires, not whether the 2011 mailings satisfied that requirement: "The overarching principle in determining whether a notice of computational adjustment is sufficient is whether the mailed notice imparted information sufficient to provide the taxpayer with fair notice of the computational

adjustment." GMI Br. 49. The government's mischaracterizations cannot be squared with GMI's actual arguments, including GMI's specific assertion that "The IRS's Failure to Mail to GMI a Notice of Computational Adjustment with Respect to LCU Interest Harmed GMI and Should Not Be Excused." GMI Br. 61.

B. The Letters 3535 and Attachments Are Not Written Notices of Computational Adjustment

GMI's opening brief preemptively rebutted the government's current reliance on the two Letters 3535 and attachments. *See* GMI Br. 56-60. But the government disregards or downplays the background of those two documents and the pervasive defects contained therein, which GMI previously explained in detail. GMI Br. 15-16, 20-21, 55-60. All relevant Letters 3535 stated:

> As required by Internal Revenue Code Section 6631, we are providing a copy of the schedule we used to calculate interest on the tax adjustment for the return identified above. This computation is for your information. The enclosed Interest Computation Schedule is not a bill for tax due. We will either send you a bill within the next few weeks or send you a statement of any refund.

See, e.g., Appx334.

These Letters 3535 and attachments cannot possibly satisfy the requirements of section 6230(c)(2). Viewed from the perspective of section 6230(c)(2), each contains numerous defects, which the government attempts to dismiss as "irrelevant," does not attempt to justify, and concedes that GMI's assertions are true. Gov't Br. 33-36. Further, the government makes the remarkable assertion that any

prejudice or violation of due process "ring[s] hollow in light of [GMI's] status as a sophisticated and well-advised taxpayer." Gov't Br. 36.

As an initial matter, the IRS issued the Letters 3535 and attachments as section 6631 notices, and not as 6230(c)(2) notices. Gov't Br. 34. Section 6631 provides a separate, special notice requirement that has nothing to do with TEFRA or section 6230(c). GMI Br. 56-57. It requires the IRS to provide "notice to an individual taxpayer which includes . . . information with respect to the section of this title under which the interest is imposed and a computation of the interest." 26 U.S.C. § 6631. GMI is not an individual, and section 6631 is inapplicable to GMI—a fact the government agrees "is true." Gov't Br. 34. Second, the Letters 3535 state that the purpose of the attached computations is to provide information to the taxpayer. *See, e.g.*, Appx334. The letters advise the taxpayer that the ball remains in the IRS's court to either "send you a bill . . . or send you a statement of any refund." *Id.* The government agrees with this statement as well. Gov't Br. 34. Third, the Letters 3535 and attachments conflate items from the partnership proceedings and the corporate proceedings, making it impossible for GMI to determine whether interest related to the partnership proceedings or corporate proceedings. GMI Br. 15-16, 20-21, 55-57. In summary, the IRS specifically advised GMI that it was sending these letters under section 6631, that they were for GMI's information only, and that GMI

did not need to take any further action because next steps, if any, would be taken by the IRS.

Thus, not only do the Letters 3535 not purport to be notices of computational adjustment under section 6230(c)(2), they affirmatively state that they are notices required by another, unrelated statute. Nor does the government claim that the IRS *intended* the Letters 3535 and attachments to be treated as notices of computational adjustment under section 6230(c)(2). Nothing in the Letters 3535 gave GMI any reason to think that they were section 6230(c)(2) notices. And GMI had no reason to be on the lookout for section 6230(c)(2) notices because neither GMI nor the government believed it applied. In the December 1, 2011 global settlement, the government and GMI expressly agreed that the imposition of LCU interest was reserved as an open issue. Appx604. This agreement demonstrated that the IRS knew it had not sent a section 6230(c)(2) notice and that GMI knew it had not received one. *Id.*

The government acknowledges, as it must, that the Letters 3535 and attachments were provided under section 6631 for informational purposes and do not refer to section 6230(c). Gov't Br. 34. The government is not concerned that the Letters 3535 affirmatively state that the IRS, not GMI, will decide whether a refund is appropriate and notify GMI of that determination. And, incredibly, it dismisses GMI's complaints as being associated "largely with the *cover letter*." *Id.*

(emphasis in original). A Letter 3535 is clearly part of the notice that is required by section 6631. The attachments that accompany a letter would be meaningless to an individual without the letter and could not possibly satisfy the requirements of due process were they to start the running of a six-month limitations period.

C. The IRS's Failure to Provide Adequate Written Notice Denied GMI Due Process and Should Not Be Excused

In light of the indisputable errors and misleading content of the Letters 3535 and attachments, they cannot lawfully be construed as adequate notice to trigger the six-month limitations period.[6] The trial court mistakenly analyzed whether GMI was misled about the IRS's *substantive position* on LCU interest. Appx24. But that is not the relevant jurisdictional question. The relevant question is whether the Letters 3535 and attachments were so misleading and defective that they could not be treated as notices of computational adjustment in order to trigger section 6230(c)(2)'s limitations period. And that question must be addressed in light of relevant case law, and most importantly, the Constitution's due process guarantee.

This case is most similar to *McGann v. United States*, 76 Fed. Cl. 745, 761 (2007), a case in which the Court of Federal Claims found documents sent by the

[6] The Court of Federal Claims recently considered the criteria for determining whether the IRS provided adequate notice to trigger a jurisdictional limitations period. In *Hale v. United States*, 123 A.F.T.R.2d 2019-1813 (Fed. Cl. 2019), the court found purported notices of disallowance to be defective because they did not inform the taxpayer of her right to sue or of the applicable limitations period. *Id.*

Secretary had inconsistencies that were so misleading that they were defective. The trial court and government attempt to distinguish *McGann* on the theory that GMI was not misled. Gov't Br. 31-32; Appx24. But the Letters 3535 were misleading for the reasons discussed above, and certainly did not purport to be notices of computational adjustments.

Accordingly, the government prefers to place its reliance on *Acute Care Specialists II, v. United States*, 727 F.3d 802, 813 (7th Cir. 2013), for the proposition that "the six-month statute of limitations in § 6230(c)(2)(A) began to run upon the IRS's mailing of Form 4549A to the partners, even though the form did not state that it was a notice of computational adjustment." Gov't Br. 31. But, in fact, the court in *Acute Care* did not base its holding upon whether the document at issue (Form 4549A) stated that it was a notice of computational adjustment. *Acute Care*, 727 F.3d at 813. Instead, it found that Form 4549A satisfied the court's standard for notice because it listed the existence and amount of the taxpayers' tax deficiency and included the phrase and amount of underpayment attributable to tax motivated transactions. *Id.* at 813. In any event, that case is also distinguishable from the facts here because the Letters 3535 and attachments do not provide the partnership proceeding underpayment amount necessary to determine LCU interest and also contain numerous other defects as described above (*e.g.*, they were sent specifically as section 6631 notices for which no taxpayer response was required).

The government insists that "it is difficult to fathom how GMI could have been misled by the 2011 interest computations." Gov't Br. 31-32. But GMI was in fact misled, and courts have previously rejected the government's efforts to make similar arguments. *See, e.g.*, *McGann*, 76 Fed. Cl. at 761 (rejecting the government's argument that a taxpayer "suffered no prejudice due to the ability of their advisors in due course to decipher the position that the IRS might in fact be taking respecting interest."). Here, GMI received a Letter 3535 and attachment in 2011 providing that "LCU interest is OFF." Appx339-341. It also received numerous other documents making no mention of LCU interest, section 6621(c), or section 6230(c)(2)(A). Any reasonable taxpayer, sophisticated or unsophisticated, could be misled by the haphazard documents that GMI received.

The government also errs in attempting to impose on GMI a duty to follow-up. In the government's view, GMI must explain how the government's failure to discriminate between LCU interest resulting from corporate proceedings and LCU interest resulting from partnership proceedings "would have prevented it from following up with the IRS in that regard . . . ." Gov't Br. 35-36. In making this argument, however, the government fails to recognize that the Secretary, *not the taxpayer*, must provide a valid written notice of computational adjustment. *See* 26 U.S.C. § 6230(c)(2)(A). The argument is further undercut by the fact that the parties agreed that interest remained unsettled. Appx604. As the later settlement confirms,

even if GMI attempted to follow-up, the government would only have confirmed GMI and the government agreed that GMI had reserved the right to challenge LCU interest in the December 2011 global settlement, which occurred after the six-month limitations period that the government now argues applies had expired.

It was entirely reasonable that GMI did not even entertain the possibility that the Letters 3535 and attachments might be notices of computational adjustment under section 6230(c)(2)(A). As explained in GMI's opening brief, a notice of computational adjustment must (1) contain the amount of adjustments, (2) contain a statement of the increased rate of interest that will apply, and (3) provide the partner with some indication that the document is intended to be a notice of computational adjustment that triggers a six-month period of limitations under section 6230(c)(2)(A). GMI Br. 49. While it may be that a notice does not have to refer expressly to section 6230(c)(2) to be a valid notice of computational adjustment, here the notices, by their terms, were issued under another statute and negated GMI's need to do anything to preserve its rights. Even before one views the Letters 3535 through the lens of due process, their misleading statements rebut any argument that they are section 6230(c)(2) notices.

And due process considerations confirm that conclusion. There is no dispute that GMI's legal claim is a constitutionally protected property interest. *See* GMI Br. 61; Gov't Br. 36. Nor can the government deny that where, as here, a government

action triggers the possible loss of the right to pursue the legal claim, due process requires that the government provide meaningful notice of the triggering act.[7] *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1316 (10th Cir. 2018) (citing *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487 (1988)). Moreover, "when notice is a person's due[,] the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (citation and brackets omitted). No reasonable official who wanted to notify GMI of its filing deadline under section 6230(c)(2) would send the notice disguised as a notice that is required by another statute, and that expressly advises the taxpayer not to take actions that the taxpayer must take to preserve its right to seek a refund.[8] Even assuming that the Letters 3535 and attachments were intended to be notices of computational

[7] For example, "the published rule regarding how long one has to answer a complaint is not sufficient to notify a person who does not know he or she has been sued. The rule is not self-executing because an action must be taken before the clock starts to tick. Sure, a person can be aware in general that if he is sued, he has a certain amount of time to respond. But that person is not required to check court records to make sure he has not been sued. Due process requires the defendant be notified of a pending action." *M.A.K.*, 897 F.3d at 1316-17.

[8] As explained in GMI's opening brief, after the years at issue in this case, the IRS amended the Internal Revenue Manual to make clear when the IRS was sending a notice of computational adjustment within the meaning of section 6230(c)(2)(A). GMI Br. 51 n.15. The revised procedures included sending a letter to the partner notifying the partner that a refund claim must be filed within six months from the date of the letter. *Id.*

adjustment under section 6230(c)(2)—an assumption the government does not even defend—they violate GMI's constitutional right to due process because they were so misleading that no reasonable person sending or receiving them would construe them as notice under section 6230(c)(2).

The government ignores these principles and cases, apparently on the premise that it can ignore GMI's due-process argument because of GMI's "status as a sophisticated and well-advised taxpayer." Gov't Br. 36. The government's dismissiveness contradicts decades of Supreme Court precedent. Officials do not get a free pass on due process just because the party entitled to meaningful notice is "sophisticated" in the government's eyes. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983). On the contrary, "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799; *accord M.A.K.*, 897 F.3d at 1312; *McGann*, 76 Fed. Cl. at 761. Not even "common knowledge" will "excuse the government from complying with its constitutional obligation of notice." *Jones*, 547 U.S. at 232.

Here, of course, neither common knowledge nor sophistication alerted GMI that the Letters 3535 or any other writings constituted the notices of computational adjustment sufficient to start the short six-month countdown. Having failed to follow the letter of section 6230(c)(2)(A) and requirements of due process, the

government cannot claim victory by proclaiming its conduct close enough to what the law demands.

CONCLUSION

For these reasons and the reasons in GMI's opening brief, the Court should reverse the trial court's judgment and remand for further proceedings.

Dated: May 30, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 30, 2019, I electronically transmitted this Reply Brief for Appellant with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users. A paper copy was mailed to Richard E. Zuckerman, Deputy Assistant Attorney General, at each of the following addresses: 1) Department of Justice, Tax Division, Appellate Section, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530, by FedEx overnight delivery, and 2) Department of Justice, Tax Division, Post Office Box 502, Washington, D.C. 20044, by USPS Priority Mail.

Dated: May 30, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(a). This brief contains 6,125 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 MSO in 14 point Times New Roman font as provided by Fed. R. App. P. 32(a)(5)-(6). As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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