No. 00-482

In the Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
JEFFREY A. BELKIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a statute that allows interest to be paid on overpayments of an "internal-revenue tax" (28 U.S.C. 2411) authorizes interest on refunds of a customs assessment that Congress has specified "shall not be treated as a tax for purposes of * * * any * * * provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. 4462(f)(3)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

No. 00-482

INTERNATIONAL BUSINESS MACHINES CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 201 F.3d 1367. The opinion of the Court of International Trade (Pet. App. 15a-21a) is reported at 20 Ct. Int'l Trade 206.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on January 19, 2000. A petition for rehearing and suggestion for rehearing en banc was denied on May 31, 2000. (Pet. App. 33a). The Chief Justice extended the time in which to file a petition for writ of certiorari to September 28, 2000, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

STATEMENT

1. In 1986, Congress enacted the Harbor Maintenance Tax, 26 U.S.C. 4461, to help fund various harbor improvement programs. That statute imposes a fee on port use by importers, exporters, domestic shippers and passenger liners. In 1995, however, the Court of International Trade held that application of the Harbor Maintenance Tax to exported goods violates the Export Clause of the Constitution, which specifies that "[n]o Tax or Duty shall be laid on Articles exported from any State" (U.S. Const. Art. 1, § 9, Cl. 5). *United States Shoe Corp.* v. *United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The judgment entered in that case required a refund of the Harbor Maintenance Tax payments on exports "together with interest and costs as provided by law." *United States Shoe Corp.* v. *United States*, 924 F. Supp. 1191 (Ct. Int'l Trade 1995); Pet. App. 39a-40a. The court stayed enforcement of that judgment—and stayed proceedings in other similar cases—until the conclusion of appellate proceedings. *Id.* at 38a.

On January 5, 1996, the exporter in *United States Shoe* filed a motion in the Court of International Trade for an award of prejudgment and post-judgment interest. On February 7, 1996, the court, while noting that it lacked jurisdiction to alter the judgment from which an appeal had already been taken in that case, stated that, "[b]ecause the issue [of entitlement to interest] has been fully briefed under the captioned case by the attorneys involved in the numerous cases stayed hereunder * * * the court will address this matter under this caption." Pet. App. 17a-18a. The court then concluded that interest should be awarded on refunds of the Harbor Maintenance Tax under 28 U.S.C. 2411,

which authorizes interest on "any overpayment in respect of any internal-revenue tax" (*ibid.*). Pet. App. 19a-21a. The court did not calculate any award of interest at that time; instead, the court stayed further proceedings pending a final decision on appeal in that case. *Id.* at 38a.

2. In 1998, in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, this Court upheld the determination of the Court of International Trade that the Harbor Maintenance Tax may not constitutionally be applied to exported goods. After that ruling was entered, the Court of International Trade devised a "test case" procedure to determine the appropriate method "for the entry of judgment with interest * * * ." Pet. App. 36a. The parties thereafter designated the present case as the test case for determining the propriety of an award of interest.

On June 17, 1998, after receiving briefs from interested parties, the court (i) entered judgment for petitioner in the principal amount of $330,689, (ii) specified "that interest pursuant to 28 U.S.C. § 2411 is owing on the aforesaid principal amount," and (iii) ordered "that all briefs on the issue of interest * * * filed in *U.S. v. United States Shoe Co.*, Court No. 94-11-00668 be deemed filed herein." Pet. App. 35a.[1]

3. In the court of appeals, the government argued that neither 28 U.S.C. 2411 nor any other statutory or constitutional provision authorizes an award of interest on refunds of the Harbor Maintenance Tax. Petitioner

---

[1] The Court of International Trade entered a similar judgment in *United States Shoe* on June 26, 1998. Pet. App. 35a. The government filed its notice of appeal in this case and in *United States Shoe* on August 7, 1998. The appeal in *United States Shoe* is stayed pending final resolution of the appeal in this case.

elected to rely solely on statutory grounds and did not rely upon any constitutional theory for an award of interest.

The Federal Circuit reversed the judgment insofar as it awarded interest in this case. Pet. App. 1a-14a, 31a. The court concluded that 28 U.S.C. 2411—which authorizes interest on "any overpayment * * * of any internal-revenue tax"—has no application to this case because Congress specified in 26 U.S.C. 4462(f)(3) that the Harbor Maintenance Tax "shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." Pet. App. 6a (quoting 26 U.S.C. 4462(f)(3)). Congress thus specified that the Harbor Maintenance Tax is to be administered and enforced as "a customs duty, and not a tax." *Id.* at 6a. The court concluded that 28 U.S.C. 2411, which authorizes interest only on overpayments of internal revenue taxes, provides no basis for an award of interest on this customs exaction. Pet. App. 12a-13a.[2] Since petitioner had not raised any constitutional basis for an award of interest, the court of appeals did not address any such contention.

4. In a petition for rehearing and rehearing *en banc*, however, petitioner sought to raise constitutional arguments on appeal for the first time. The government's brief in response to the petition for rehearing noted that petitioner had waived any constitutional arguments by not presenting them in its opening brief. The

---

[2] Petitioner does not now contend that the court of appeals and the Court of International Trade erred in rejecting alternative statutory grounds for awarding interest on Harbor Maintenance Tax payments.

court of appeals denied the petition for rehearing and rehearing *en banc* without opinion. Pet. App. 33a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the asserted constitutional issues that petitioner now seeks to raise were not raised in the court of appeals and are thus not properly presented in this case. Further review is therefore not warranted.

1. a. The only question properly presented to the court of appeals was correctly resolved by that court. The court of appeals correctly concluded that 28 U.S.C. 2411, which authorizes interest on "any overpayment * * * of any internal-revenue tax," does not apply to this case because 26 U.S.C. 4462(f)(3) specifies that the Harbor Maintenance Tax "shall *not* be treated as a tax for purposes of * * * any * * * provision of law relating to the administration and enforcement of internal revenue taxes." *Ibid.* (emphasis added). Congress elected to treat the Harbor Maintenance Tax as a customs duty, rather than as an internal revenue tax. *United States* v. *United States Shoe Corp.*, 523 U.S. at 365-366. In this context, interest cannot be recovered against the United States under 28 U.S.C. 2411 because that statute does not directly and unambiguously provide for an award of interest for customs assessments. See *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986).

Petitioner argued in the court of appeals that the requirement that the Harbor Maintenance Tax be "treated as if such tax were a customs duty" (*United States* v. *United States Shoe Corp.*, 523 U.S. at 365 (quoting 26 U.S.C. 4462(f)(2)) should not preclude "judi-

cial" awards of interest on "internal-revenue taxes" under 28 U.S.C. 2411. Pet. App. 19a-21a. The court of appeals correctly concluded, however, that the requirement that Harbor Maintenance Tax payments be treated as customs duties in their "administration and enforcement" (26 U.S.C. 4462(f)(3)) precludes their treatment as an "internal-revenue tax" under 28 U.S.C. 2411. The court noted that the Internal Revenue Code provides an entire body of provisions for enforcement of internal revenue taxes, which includes a chapter on "Judicial proceedings." "That chapter includes provisions regarding civil actions by the United States (subchapter A), proceedings by taxpayers and third parties (subchapter B), the Tax Court (subchapter C), and court review of Tax Court decisions (subchapter D)." Pet. App. 10a. The court properly concluded (*ibid.*) that, in removing the Harbor Maintenance Tax from the judicial and administrative enforcement mechanisms that have been adopted for internal revenue taxes, Congress necessarily precluded any application to this customs assessment of a statute that awards interest only for an "overpayment" of an "internal-revenue tax." 28 U.S.C. 2411.

b. Petitioner errs in asserting (Pet. 14-15) that this Court implicitly resolved the question presented in this case simply by stating in *United States Shoe* that this customs assessment "bears the indicia of a tax." 523 U.S. at 367. The question presented in *United States Shoe* was whether the Harbor Maintenance Tax was an unconstitutional "Tax or Duty" imposed on exports (U.S. Const. Art. 1, § 9, Cl. 5) or was, instead, a permissible user fee designed merely to reimburse the government for services that it provides to commerce.

523 U.S. at 367-370.[3] In addressing and resolving that issue, the Court obviously did not address or consider whether this assessment is an "internal-revenue tax" for the purposes of 28 U.S.C. 2411. The Court's holding in that case was nonetheless directly inconsistent with petitioner's claim here—for in *United States Shoe* the Court expressly stated that, "for administrative, enforcement, and jurisdictional purposes, the [Harbor Maintenance Tax] should be treated 'as if [it] were a customs duty'" and *not* as an internal revenue tax. 523 U.S. at 367 (quoting 26 U.S.C. 4462(f)(1), (2)).[4]

2. Petitioner incorrectly asserts (Pet. 16) that the judgment entered by the Court of International Trade in the *United States Shoe* case—which states that the exporter in that case may recover "interest and costs as provided by law" (Pet. App. 40a)—bars the United States from challenging the award of interest in this case. In the first place, petitioner did not make this claim in the court of appeals and is therefore barred from raising it here. Secondly, the fact that the recited order of the Court of International Trade generally provided for an award of interest as "provided by law" simply begs the question presented in the subsequent proceedings in that court and in the court of appeals—which is whether interest *is* "provided by law." Indeed,

---

[3] That question turned on whether the Harbor Maintenance Tax possessed "the attributes of a generally applicable tax or duty" or was "instead, a charge designed as compensation for Government-supplied services, facilities, or benefits." 523 U.S. at 363.

[4] Petitioner errs in asserting that the United States utilizes funds placed in the Harbor Maintenance Trust Fund to "fund activities without seeking congressional appropriations" (Pet. 13). The money placed in the Fund, and the interest earned on those monies, may be withdrawn only by appropriation for specified purposes. 26 U.S.C. 9505(b), (c).

the Court of International Trade expressly acknowledged the fact that its prior orders had not conclusively resolved this issue by setting the present case as a test case to address the interest issue in proceedings following the affirmance of the judgment on the merits in *United States Shoe*. See page 3, *supra*.

Petitioner's newly minted claim is, in fact, entirely divorced from the record of this case. All of the parties to these combined proceedings have recognized that the government is not precluded from contesting whether interest may be awarded on refunds of the Harbor Maintenance Tax. All parties, including petitioner, briefed the question of interest in this case. Pet. App. 15a. The Court of International Trade and the Federal Circuit both addressed the interest question on the merits in their decisions in this case. Indeed, this case was expressly designated as the "test case" for addressing the interest issue by the Court of International Trade. *Id.* at 36a-37a; see page 3, *supra*. And, following the entry of the judgment in this case, petitioner (along with other parties challenging the Harbor Maintenance Tax in the Court of International Trade) agreed to "*consent* to entry of judgment with interest in this case *for the purpose of permitting the Government an opportunity to appeal the award of interest* * * * ." Pet. App. 35a (emphasis added).

Petitioner did not, at any point in the court of appeals, assert that the government is precluded from challenging the award of interest in this case. As a result, the Federal Circuit had no occasion to—and did not—address petitioner's novel contention. The suggestion that this Court should address this new claim *sua sponte* (Pet. 16-17) is thus both unwarranted and

inconsistent with the clear record of this case. See, *e.g.*, Pet. App. 35a.[5]

3. Petitioner seeks to raise several other issues that it failed to raise below. In particular, petitioner asks this Court to determine whether any provision of the Constitution would require interest to be paid on refunds of the Harbor Maintenance Tax. That question, however, was not raised by petitioner in its briefs in the courts below. As a result, the court of appeals neither considered nor addressed that question. Petitioner first raised its constitutional arguments in a petition for rehearing that was filed after the decision of the court of appeals was entered in the government's favor. The court of appeals thereafter declined, without comment, to consider petitioner's new and belated contentions at that late stage of this case. Especially in view of the fact that neither of the courts below has addressed the issues that petitioner now belatedly seeks to raise, there are no "exceptional circumstances" that would warrant review by this Court. See, *e.g.*, *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38-39 (1989) ("[w]e decline to address this argument because respondent failed to raise it below"); *Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). See also *American National Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 608 (1985); *Mazer* v. *Stein*,

---

[5] Subsequent to the decision of this Court in *United States Shoe*, the Court of International Trade amended the judgment in that case to provide for interest pursuant to 28 U.S.C. 2411. That order is itself currently stayed and is pending on appeal to the Federal Circuit pending final resolution of this case. See note 1, *supra*. Because that judgment remains pending on appeal, it obviously does not preclude litigation of that same issue by the United States in the court of appeals.

347 U.S. 201, 206 n.5 (1954) ("[w]e do not reach for constitutional questions not raised by the parties").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
TODD M. HUGHES
JEFFREY A. BELKIN
Attorneys

DECEMBER 2000