

CC:PUB-119943-97
MWilliams

ACTION ON DECISION

SUBJECT: Mutual Assurance, Inc. v. United States
56 F.3d 1353 (11th Cir. 1995)

Issues:

Whether a timely filed claim for refund that was allowed in full may be amended after the expiration of the statute of limitations for filing a claim for refund.

Discussion:

On April 5, 1991, the taxpayer filed a timely claim for refund in the amount of \$495,728 with respect to its 1987 tax year. The claim was based on its retroactive election under Rev. Proc. 91-21, 1991-1 C.B. 525, to compute the present value of its unpaid loss reserves using a special schedule of discount factors. Without audit, the Service allowed the taxpayer's claim for refund in full on May 14, 1991, and paid the amount of \$485,728 plus interest to the taxpayer. After the expiration of the three year refund period for 1987, the Service, pursuant to a field examination, discovered a miscalculation of the taxpayer's present value of its unpaid loss reserves for the 1987 tax year. This miscalculation had caused the taxpayer to understate the amount of its overpayment in the original claim for refund.

Thereafter, the taxpayer filed an additional claim for refund for 1987. The Service disallowed the additional claim because it had not been filed timely. The taxpayer filed suit on May 12, 1993. The district court concluded that the September 26, 1991, claim for refund amended the claim filed on April 5, 1991, which was timely. Thus, the district court held that the taxpayer was entitled to a refund of the additional amount. The Court of Appeals for the Eleventh Circuit affirmed the district court's decision. The appellate court rejected the government's assertion that the April 5, 1991, claim for refund could not be amended because it was paid in full on May 14, 1991. The appellate court concluded that, once a taxpayer files a claim for refund, the Service is required to compute the correct tax based on that claim. Inasmuch as the Service had all the information necessary to arrive at the correct amount of the overpayment in the original claim for refund, the taxpayer was entitled to the relief appropriate to the facts that it pleaded in the April 5, 1991, claim for refund. Accordingly, the appellate court

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held, citing *Bemis Brothers Bag Co. v. United States*, 289 U.S. 28 (1933), that the taxpayer was entitled to amend its claim and recover the additional amount of its overpayment.

The appellate court inappropriately relied on *Bemis Brothers*. *Bemis Brothers* dealt with whether the original claim and the amended claim perfected after the limitations period had sufficient similarity for the amendment to relate back to an existing claim filed within the limitations period. It is not clear that the original claim in *Bemis Brothers* had been finally denied by the Service at the time of the amendment. The Supreme Court did not discuss whether a post-limitations amendment could be made to a claim that had been finally denied or whether the post-limitations amendment could increase the amount of the refund requested within the limitations period.

In general, a timely filed claim for refund may be amended after the period of limitations for filing a claim has expired when the amendment is based on the same facts stated in the original claim and requires no additional investigation. *United States v. Ideal Basic Industries Inc.*, 404 F.2d 122, 124 (10th Cir. 1968); *Pink v. United States*, 105 F.2d 183 (2d Cir. 1939). No amendment of a claim for refund is allowed, however, after final action is taken by the Service. *Cf. United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1932)(amendment is too late after the Service has disallowed the claim); see also *New York Trust Co. v. United States*, 87 F.2d 889, 891 (2d Cir. 1937) ("[a]llowance of a specific claim and payment of the full sum claimed must be deemed final action thereon, leaving nothing pending for subsequent amendment"), *cert. denied*, 301 U.S. 704 (1937); *Reynolds v. United States*, 92-2 USTC ¶ 50,347 (E.D. Wis. 1992)(same); *Union Pacific Railroad Co. v. United States*, 389 F.2d 437 (Ct. Cl. 1968)(same); *Mondshein v. United States*, 338 F. Supp. 786 (E.D.N.Y. 1971)(same), *aff'd*, 469 F.2d 1394 (2d Cir. 1972).

In the instant case, the Service allowed the taxpayer's claim for refund in full on May 14, 1991, which was before the taxpayer filed the "amended" claim for refund. Thus, the April 5, 1991, claim for refund ceased to exist on May 14, 1991, and the later claim for refund was a new claim for refund. Inasmuch as the additional claim was filed more than three years after the taxpayer filed its 1987 return, the claim was not timely under I.R.C. § 6511(a).

Based on the foregoing, we disagree with the decision of the appellate court in *Mutual Assurance*, although we recognize the precedential effect of the decision to cases appealable to the Eleventh Circuit, and, therefore, will follow it with respect to cases

within that circuit, if the opinion cannot be meaningfully distinguished. The Mutual Assurance original claim contained all the information which would have justified the amount of refund contained in the amended claim, see fn. 2 to the opinion; thus, the case may be limited to that situation in the Eleventh Circuit. We do not, however, acquiesce to the opinion and will continue to litigate our position in cases in other circuits.

Recommendation:

Nonacquiescence

/s/
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Reviewers:

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