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Subject: RE: Statute of Limitations on Refunds

If the taxpayer is not located in the 11th Circuit, Mobil Corp controls. If the taxpayer did not specifically set forth an alternative tax net operating loss deduction calculation as contemplated by section 56(d), then I would argue that the grounds for the \$ refund were not set forth in the refund claim and the claim was not valid, as stated in Richardson, excerpted below (330 F.Supp. 102). There is no authority for the notion that the Service would be required to notify a taxpayer when it does not give the taxpayer the benefit of an available refund that was never requested, because an associated claim for refund does not exist and therefore is afforded no consideration by the Service.

Plaintiffs urge that the isolated words "no taxable distribution of property" in paragraph one was certainly notification to the Commissioner that the shareholders claim the distribution to be non-taxable. The Court cannot agree. Those few words, taken out of context, might conceivably support plaintiffs' *106 present contention. However, this Court can only view such a contention in its full context. Thus, the entirety of paragraph one of the claim cannot in any sense be taken to mean that a non-taxable dividend distribution was intended. Such construction is actually precluded in the last sentence of that paragraph. Moreover, in order to presume that the Commissioner was put on notice of the plaintiff's claim that the excess in value of the property was a dividend from previously taxed income, it must also be presumed that the Commissioner was aware the plaintiffs further contended that Treasury Regulation 1.1375-4(b) is invalid. Such an argument can only be categorized as specious.

In *United States v. Garbutt Oil Co.*, 302 U.S. 528, 58 S.Ct. 320, 82 L.Ed. 405 (1938), the stated ground for recovery-that the Company was entitled to reduce its taxable income-was held insufficient to raise the issue that the Company had, in fact, received no income. Similarly, in *Alabama By-Products Corp. v. Patterson*, 258 F.2d 892 (5th Cir. 1958), it was held that where taxpayer's claim for refund was based on the ground that there was no representative market price, taxpayer could not assert in court that the existing representative price was incorrect. The Court of Appeals for the Fifth Circuit found a fatal variance, in *Carmack v. Scofield*, 201 F.2d 360 (5th Cir. 1963), between the grounds urged in the claim for refund-alleging that plaintiffs had paid taxes in a previous year on poker winnings and that allowance for such winnings had not been made in determination of a tax deficiency for the year following-and the grounds urged upon trial of the case, alleging no poker earnings for the previous year. See *a/so United States v. Hancock Bank*, 400 F.2d 975 (5th Cir. 1968).

These cases clearly point out that the regulation requires that the grounds for refund claims and facts pertinent thereto be set out with specificity.^{FN8} The requirement is a practical one enabling the Commissioner to determine at the outset the answers to important inquiries:

How is the refund claim to be handled administratively, to what issues and points is the Commissioner's attention directed, what facts must the Commissioner ascertain, is the investigation necessitated by the claim one of fraud or limited scope, does the claim indicate that the Commissioner must take affirmative action to protect the government against the running of statutory periods on assessments?

United States v. Hancock Bank, 400 F.2d 975, 981 (5th Cir. 1968); Samara v. United States, 129 F.2d 594, 597-98 (2nd Cir. 1942), cert. denied, 317 U.S. 686, 63 S.Ct. 258, 87 L.Ed. 549 (1942).

Since the uncontroverted evidence clearly shows that the plaintiffs failed **107* to set forth *in any manner*, much less in detail, the allegation relating to treating the difference between fair market value and sales price as a distribution of the Company's undistributed taxable income previously taxed, the claim did not, nor could it, generate any factual investigation by the Commissioner.

The plaintiffs had until February 19, 1970, and March 8, 1970, to file additional or supplemental claims for refund for the years in question. Their failure to do so prevents them from asserting grounds not encompassed in the original claim.

Thus, as recognized in the foregoing cases, a refund suit seeking recovery upon a ground not set forth in the refund claim is as jurisdictionally defective as a suit which is instituted without any refund claim having previously been filed. See *Nemours Corp. v. United States*, 188 F.2d 745 (3d Cir. 1951), cert. denied, 342 U.S. 834, 72 S.Ct. 50, 96 L.Ed. 631 (1951).