

M e m o r a n d u m**465.0100**

To: Mr. E. H. Stetson

Sacramento
September 11, 1959

From: George A. Trigueros

Subject: H--- and N---, Inc.
XXX South --- Street
--- ---, California

Account -- - XXXXXX

In accordance with your memorandum of August 20, I have looked into the question of whether the Board has jurisdiction to approve a refund of tax based on sales to the United States, which ground was not set forth in any refund claim filed within the limitation period.

Specifically, taxpayer has filed a timely claim for refund of sales taxes paid during the period September 16, 1948 to April 12, 1955, on the ground that certain sales by which the tax was measured were exempt sales in foreign commerce. Subsequent examination of taxpayer's records revealed that taxpayer made certain other sales during that period to the United States for which exemption was not claimed.

In my opinion, since no timely claim for refund has been filed, stating as grounds for refund that certain sales were exempt sales to the United States, taxpayer has waived its demand against the Board on account of such overpayment.

In his memorandum of September 16, 1948, Mr. R. G. Hamlin referred to United States v. Andrews, 302 U.S. 517 (1937) as a leading case on the question of whether a claim for refund, limited to a specific item, might be amended after expiration of the statutory period for filing a claim, so as to seek a refund on account of other and unrelated items.

In the Andrews case taxpayer filed a claim for refund of federal income tax in a specific amount, based on loss due to worthlessness of certain stocks. After expiration of the statutory period for filing refund claim, taxpayer amended its claim for refund to include a new and entirely unrelated claim based upon an error in reporting certain amounts as dividends rather than capital gains. The court said, "We hold that the so-called amendment was in fact a new claim and its allowance was barred by the statutory provision limiting the time for presentation of claims for refund."

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In United States v. Garbutt Oil, 302 U. S. 528, taxpayer filed a claim for refund of income tax on the ground that it should have been allowed a deduction for amortization. Subsequently, after the statutory period for filing claims for refund had expired, taxpayer attempted to amend the original claim so as to adopt the contention that because its product was not sold, but distributed in kind to its shareholders, no tax should have been paid. The court said, "The statement filed after the period for filing claims had expired was not a permissible amendment of the original claim presented. It was a new claim untimely filed and the Commissioner was without power, under the statute, to consider it." To the same effect are cases cited in 113 A.L.R. 1291, Annotation, Right to Amend Claim for Refund of Taxes after Time for Filing has Expired.

Scharef v. United States, 157 Fed. Supp. 434 (1956) is a fairly recent case in which, after the statute of limitations had run, an attempt was made to file a new claim under the guise of an amendment to a prior claim. The court said, "Under these circumstances the new claim is barred by the statute of limitations."

In Ryan v. Harrison, 146 F. Supp. 671 (1956), the court stated:

As in many instances, the rule of law is plain – The only problem is to apply it to the facts. A later claim is considered an amendment of an earlier one, and therefore to relate back to it as to the time of filing, if it states no new cause of action... In determining what is to be considered in this category, it must be remembered that the purpose of the statute requiring claims for refund to be filed within a stated time limit is to give the government notice of the pending claim and thus protect it from stale demands,... The first claim must therefore give notice of the subject matter of the second, ... It is considered that such notice has been given when the examination necessary to acceptance or rejection of the first claim would necessarily reveal the factual situation to which the second claim relates, or the grounds on which it relies..."

In view of the foregoing, it is my opinion that, since no timely claim for refund was filed with respect to the sales to the United States, and the subject matter of the timely claim for refund gave no notice of such grounds, the Board is barred from approving a claim for refund on such grounds under Section 6902, and the taxpayer has waived his right to a refund on such grounds under Section 6904.

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