No. 06-759

In the Supreme Court of the United States

COMPUTERVISION CORPORATION, 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

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QUESTIONS PRESENTED

1. Whether a purported waiver of the requirements of 26 C.F.R. 301.6402-2(b)(1) regarding the form and specificity of a tax refund claim is ineffective after the statutory period for filing a refund claim has expired.

2. Whether an administrative refund claim is no longer pending with the Internal Revenue Service, and therefore cannot be amended, once the taxpayer files a suit for refund.

3. Whether petitioner's untimely amendment of its refund claim was not germane to, and thus did not relate back to, its original refund claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 445 F.3d 1355. The supplemental opinion of the court of appeals on petition for rehearing (Pet. App. 34-38) is reported at 467 F.3d 1322. The decision of the United States Court of Federal Claims (Pet. App. 39-118) is reported at 62 Fed. Cl. 299.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2006. A petition for rehearing was denied on August 30, 2006 (Pet. App. 119-120). The petition for a writ of certiorari was filed on November 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Code authorizes the Internal Revenue Service (IRS) to refund an overpayment of tax or interest "within the applicable period of limitations." 26 U.S.C. 6402(a). An administrative claim for refund of an overpayment of tax or interest must be filed within three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. 26 U.S.C. 6511(a). The IRS cannot allow a refund after the limitation period in Section 6511(a) has expired "unless a claim for credit or refund is filed by the taxpayer within such period." 26 U.S.C. 6511(b)(1).

"No suit * * * shall be maintained in any court" for a tax refund until an administrative refund claim has been "duly filed" with the IRS. 26 U.S.C. 7422(a). That requirement is a jurisdictional prerequisite. *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990). The administrative refund request must comply with "the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. 7422(a).

The Treasury regulations further provide:

> No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

26 C.F.R. 301.6402-2(b)(1). "[C]ourts have long interpreted § 7422(a) and Treasury Reg. § 301.6402-2(b)(1) as stating a 'substantial variance' rule which bars a taxpayer from presenting claims in a tax refund suit that 'substantially vary' the legal theories and factual bases set forth in the tax refund claim presented to the IRS." *Lockheed Martin Corp.* v. *United States*, 210 F.3d 1366, 1371 (Fed. Cir. 2000). Prohibiting the taxpayer from substantially varying from its administrative claim "(1) gives the IRS notice as to the nature of the claim and the specific facts upon which it is predicated; (2) gives the IRS an opportunity to correct errors; and (3) limits any subsequent litigation to those grounds that the IRS had an opportunity to consider and is willing to defend." *Ibid.*

The IRS may waive the requirement of 26 C.F.R. 301.6402-2(b)(1) that a claim set forth the specific grounds for a refund, but it may not waive the provisions of Section 6511(a) or Section 7422(a) requiring the timely filing of a claim for refund. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533 (1938); see *Angelus Milling Co.* v. *Commissioner*, 325 U.S. 293, 296 (1945). This Court has explained: "while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits." *Garbutt Oil*, 302 U.S. at 533; see *Angelus Milling*, 325 U.S. at 294-295; *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 71 (1933). But "no officer of the government has power to waive the statute of limitations." *Garbutt Oil*, 302 U.S. at 534.

A claim for refund may be amended at any time while the limitation period on filing a claim is still open. Once the limitation period expires, however, an amendment to a claim cannot be considered unless it is germane to a timely filed claim. *United States* v. *Andrews*, 302 U.S. 517, 524 (1938). An amendment is germane if it "merely makes more definite the matters already within [the IRS's] knowledge, or which, in the course of [its] investigation, [it] would naturally have ascertained." *Ibid*. An amendment filed after the limitation period has expired that does not relate back to a timely filed claim, and, thus, constitutes a new claim, cannot be considered by the IRS. See 26 U.S.C. 6511(b)(1); *Garbutt Oil*, 302 U.S. at 535. In addition, a claim may not be amended after expiration of the limitation period unless the original claim is still pending before the IRS. See *Memphis Cotton Oil*, 288 U.S. at 72.

2. This case arises from petitioner's claim for refund of deficiency interest for its 1982 tax year. The IRS determined that petitioner's 1982 income tax return understated its tax liability and proposed a deficiency. A portion of the deficiency related to the IRS's determination that petitioner's subsidiary did not qualify as a domestic international sales corporation (DISC) under 26 U.S.C. 992. Pet. App. 3, 145. Another portion of the deficiency related to other, non-DISC issues. The parties settled the amount of the non-DISC tax liability. *Ibid.*

The carryback of a net operating loss from petitioner's 1985 tax year to 1982 offset virtually all of the deficiency, but did not eliminate interest owed on the deficiency. Pet. App. 4, 145-146. The IRS assessed interest in the amount of $2,808,888 attributable to the still-disputed DISC qualification issue, and interest in the amount of $1,254,186 attributable to the resolved

non-DISC issues. *Id.* at 4. In 1989, petitioner paid the assessed interest, with the final payment occurring on April 28, 1989. *Ibid.* Within two years of the final payment, on August 4, 1989, petitioner filed a claim for refund, in which it claimed "'that portion of the interest relating to the [DISC] disqualification issue' for the 1982 tax year," and specifically requested $2,808,888. *Id.* at 4-5, 132, 134-142. Although the claim contained a "boilerplate provision" seeking "such other grounds as are shown to be appropriate," *id.* at 5, the claim did not request a refund of any interest paid on the portion of the deficiency attributable to the non-DISC issues that had been settled. *Id.* at 15. After six months passed without the IRS acting on the claim for refund, petitioner filed this suit in the Court of Federal Claims on April 4, 1990. *Id.* at 5, 147.

Petitioner also was issued a notice of deficiency for other tax years as a result of the DISC disqualification, and it petitioned the United States Tax Court to redetermine the deficiencies. Pet. App. 5, 147. The Court of Federal Claims stayed proceedings in this case pending resolution of the DISC issue in the Tax Court. *Id.* at 5, 148. The Tax Court decided the DISC issue in petitioner's favor, and petitioner and the Department of Justice (DOJ) began negotiating a settlement of the present case. *Id.* at 5-6, 148-150. In May and September 2000, petitioner requested in letters to DOJ and the IRS that the principles of "interest netting" and "interest suspension" be applied in computing its refund. *Id.* at 6, 150, 157.[1] Although the IRS responded to one let-

[1] Interest suspension refers to the following rule: "When a taxpayer reports an overpayment on its income tax return, interest will be assessed on that portion of a subsequently determined deficiency for the overpayment return year that is less than or equal to the overpay-

ter with statements suggesting that interest suspension could be applied, DOJ responded that petitioner had not timely filed a claim for refund on the basis of interest suspension. Pet. App. 6-7, 150.

On April 4, 2002, petitioner filed an amended claim for refund with the IRS to include interest-netting and interest-suspension claims with respect to the interest on the non-DISC deficiencies. Pet. App. 7, 151. On July 9, 2003, petitioner filed an amended complaint in the Court of Federal Claims asserting those claims and requesting an additional $820,946 in deficiency interest. *Id.* at 7, 51. The government moved to dismiss the claims. *Id.* at 51-52.

3. The Court of Federal Claims granted the government's motion to dismiss petitioner's claim for a refund of deficiency interest on the non-DISC deficiencies based on interest suspension because petitioner failed to file a timely administrative refund claim for that interest. Pet. App. 39-118. The court entered judgment for petitioner in the amount of the deficiency interest attributable to the DISC issue, to which the government conceded petitioner was entitled. *Id.* at 118.

The court observed that petitioner timely filed its original refund claim in August 1989 for deficiency interest. Pet. App. 65. The court determined, however, that

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ment as of: (1) the date on which the Service refunds the overpayment without interest; or (2) the date on which the overpayment is applied to the succeeding year's estimated taxes." Rev. Rul. 99-40, 1999-2 C.B. 441, 443. Interest netting refers to the relief available under 26 U.S.C. 6621(d), which provides for a net interest rate of zero during overlapping periods when underpayment interest is payable and overpayment interest is allowable on equivalent underpayments and overpayments of tax. In this case, interest suspension and interest netting would have provided petitioner the same relief. Petitioner does not press its interest-netting claim in this Court.

petitioner's original claim sought a refund only with respect to the interest related to the DISC issue and that the claim was based primarily on the contention that the IRS had erred in disqualifying its subsidiary as a DISC. *Id.* at 65-66. The court held that the doctrine of "substantial variance," which precludes a taxpayer "from substantially varying the legal or factual basis of an administrative claim when before a court," barred petitioner's interest-suspension claim. *Id.* at 66.

The court rejected petitioner's contention that its original refund claim included an interest-suspension claim. The court concluded that petitioner's "original refund claim did not include, explicitly or implicitly, a claim that interest suspension be applied to interest assessed on a deficiency corresponding to issues that were settled prior to the filing of the claim." Pet. App. 92. That claim, the court observed, "simply does not suggest to the IRS that [petitioner] is seeking deficiency interest for the 1982 tax year unrelated to the DISC issue, based on the principle of interest suspension." *Id.* at 98.

The court rejected petitioner's argument that the IRS had waived the variance defense by addressing interest suspension in an August 2000 letter to petitioner. Pet. App. 100-105. The August 2000 IRS letter to petitioner included draft, revised interest computations applying the principle of interest suspension to tax year 1982, and stated that "Revenue Ruling 99-40 (Sequa) is applied regarding the credit elect to 1983. No claim is necessary." *Id.* at 101; see note 1, *supra* (describing Rev. Rul. 99-40, *supra.*). The court observed that, on October 25, 2000, DOJ sent petitioner a letter specifically disputing the application of interest suspension to tax year 1982 "*absent the filing of a timely claim for refund raising the issue*." Pet. App. 101 (quoting DOJ

letter). The court concluded, *inter alia*, that there could be no waiver by IRS conduct that "occurred in 2000, nine years after the statute of limitations for filing a refund claim expired in 1991," because any waiver "must occur within the applicable statutory time period." *Id.* at 103.

The court also rejected petitioner's contention that its amended claim for refund, filed in 2002, related back to the original 1989 claim. Pet. App. 105-110. The court found that petitioner's amended claim was not germane to the original claim, which raised only the DISC issue. *Id.* at 106-107. The court further held that, in any event, the amendment could not relate back because "[a]n amendment to a refund claim submitted after the expiration of the applicable statute of limitations may only be made if the original claim is still pending" with the IRS, and, in this case, the claim ceased to be pending with the IRS when petitioner filed suit. *Id.* at 108-110.

4. The court of appeals affirmed. Pet. App. 1-33. In describing the substantial-variance doctrine, the court identified four limited situations in which a claim for a refund may be considered "despite failure to timely file detailed formal claims with the IRS," *id.* at 12: (1) the "informal claim doctrine," which allows consideration of a timely claim with formal defects if it "fairly apprises the IRS of the basis for the claim" (*id.* at 13-15); (2) the "waiver doctrine," which allows consideration of a specific claim for relief not raised in the original claim if it is nevertheless considered by the IRS before the limitation period expires (*id.* at 15-21); (3) the "general claim doctrine," which allows consideration of an untimely amendment to a timely, general claim under certain circumstances (*id.* at 21-24); and (4) the "germaneness doctrine," which allows consideration of an untimely amend-

ment to a timely, specific claim where the amendment is germane to the original claim and is filed while the original claim remains pending with the IRS (*id.* at 24-30).

The court of appeals concluded that none of the exceptions applied to petitioner's untimely claim for interest suspension. The informal claim doctrine did not apply because petitioner's original refund claim was formal and specific with respect to the DISC issue. Pet. App. 15. The doctrine of waiver did not apply because the purported waiver occurred after the limitation period had expired. *Id.* at 20-21. The general claim doctrine did not assist petitioner because the original refund claim was not general but was specific. *Id.* at 23-24. And the germaneness doctrine did not apply because the interest-suspension claim was not germane to the DISC claim (*id.* at 27-28), and, in the alternative, because the interest-suspension claim had been filed after the IRS had already lost jurisdiction over the DISC claim by virtue of petitioner's decision to file suit rather than await an IRS decision on the claim (*id.* at 28-30). Accordingly, the court of appeals affirmed the dismissal of petitioner's interest-suspension claim.[2]

ARGUMENT

Petitioner contends that the court of appeals erred in its articulation of the waiver and germaneness exceptions to the rule that a taxpayer cannot substantially vary in court the legal or factual basis of its administrative refund claim. The decision of the court of appeals is correct and does not conflict with any decision of this

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[2] In response to a letter from the government, the court of appeals issued a supplemental opinion (Pet. App. 34-38) regarding the interest-netting claim, which is not at issue here.

Court or of any other court of appeals. Further review is not warranted.

1. a. The court of appeals correctly rejected (Pet. App. 15-21) petitioner's contention that the IRS waived petitioner's failure to file a timely administrative claim seeking interest suspension on the interest attributable to the non-DISC deficiencies. Petitioner made its final payment of deficiency interest for the 1982 tax year on April 28, 1989, and the period for filing a refund claim for such interest thus expired on April 28, 1991. See 26 U.S.C. 6511(a). Although petitioner filed a timely, formal administrative claim for a refund within that period, that claim contained "a specific request for DISC-related interest" attributable to the IRS's disqualification of its subsidiary as a DISC. Pet. App. 23. That administrative claim contained no specific request for refund of the interest related to the non-DISC deficiencies, *id.* at 15, and raised no claim based on the theory of interest suspension, *id.* at 66. The interest-suspension theory was not raised until nine years after the expiration of the applicable limitation period, when the IRS applied it in draft computations in a 2000 letter to petitioner. *Id.* at 21. Petitioner did not file a formal administrative claim seeking a refund of the interest on the non-DISC deficiencies based on the interest-suspension theory until more than 10 years after the statutory deadline. *Id.* at 10-11.

The IRS's 2000 letter suggesting the applicability of interest suspension could not make petitioner's claim here timely. This Court rejected an assertion of waiver in similar circumstances in *United States* v. *Garbutt Oil Co.*, 302 U.S. 528 (1938). There, as here, "the original claim was specific and the so-called amendment completely shifted to a totally different ground for refund."

Id. at 531. There, as here, the amendment was untimely. *Id.* at 530. In such circumstances, the Court held that the IRS cannot waive the failure of the original claim to raise the new claim, because that would be equivalent to waiving the limitation period, and "no officer of the government has power to waive the statute of limitations." *Id.* at 534.

b. Petitioner asserts a conflict (Pet. 13-14) with decisions of the Second and Fifth Circuits. But neither of the cases cited by petitioner squarely addressed whether the IRS can waive compliance with the Treasury regulation after expiration of the limitation period. Rather, those cases turned on whether the IRS's conduct in fact amounted to a waiver. See *United States* v. *Henderson Clay Prods.*, 324 F.2d 7, 18 (5th Cir. 1963) (concluding that "[o]n this record there is ample support for the District Judge's finding that the Commissioner did in fact waive the provisions of [the regulation] requiring the facts * * * to be set forth" and that the new count "asserts no other ground for recovery than its original claims"), cert. denied, 377 U.S. 917 (1964); *Dale Distrib. Co.* v. *Commissioner*, 269 F.2d 444, 448 (2d Cir. 1959) (concluding that "the undisputed facts are a perfect demonstration of waiver"). Because those cases did not expressly decide the question answered by the court of appeals here, there is no conflict warranting review by this Court.[3]

Petitioner also contends (Pet. 15) that the court of appeals' ruling is inconsistent with this Court's decisions in *United States* v. *Kales*, 314 U.S. 186 (1941), and

[3] Petitioner also argues (Pet. 13-14) that the court of appeals' decision conflicts with several decisions of the Tax Court. Any such conflict, however, would not warrant this Court's review. See generally Sup. Ct. R. 10.

United States v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 71 (1933). That contention, which merely takes issue with the court of appeals' application of settled law to the facts of this case, does not warrant this Court's review. In any event, the decision below is consistent with both *Kales* and *Memphis Cotton Oil*.

In *Kales*, the Court held that a timely claim, presented in an informal letter and not rejected by the IRS as defective in form, could be amended by an untimely formal claim that "only made more specific the allegations of [the taxpayer's] earlier informal claim." 314 U.S. at 193-197. That situation, as the court of appeals recognized (Pet. App. 15), is distinguishable from the situation here, where petitioner's original claim was a formal one, and the untimely amendment raised an entirely new claim. Although (as petitioner points out, Pet. 15) the *Kales* Court noted the IRS's "consistent administrative treatment" of the informal letter and the later amendment as a claim for a refund, the Court did not consider or decide whether the IRS could have treated the untimely amendment as a refund claim if that amendment had, as here, attempted to assert a new and different claim.

The situation in *Memphis Cotton Oil* is likewise distinguishable. As the court of appeals observed, "[i]n *Memphis Cotton*, the Supreme Court found a waiver where (during investigation of the taxpayer's original claim and within the limitations period) the Commissioner discovered that the taxpayer was entitled to a refund on a specific ground, and notified the taxpayer that a refund would be made." Pet. App. 16. As this Court later observed, "[t]his was far from holding that after the period set forth by the statute for the filing of claims [the Commissioner] had power to accept and act

upon claims that complied with or violated his regulations." *Garbutt Oil*, 302 U.S. at 533-334 (discussing *Memphis Cotton Oil*). That is the situation here. The letter from the IRS upon which petitioner relies for waiver "occurred long after the expiration of the limitations period." Pet. App. 21.

Petitioner further contends (Pet. 16-18) that the court of appeals' ruling is inconsistent with the case law allowing refund claims to be amended after the limitation period has expired. Petitioner improperly conflates the rules applicable to waiver and amendment. An untimely amendment is permitted only when it is germane to the original, timely claim. See *United States* v. *Andrews*, 302 U.S. 517, 521 (1938). The doctrine of waiver, by contrast, can be invoked even when the taxpayer asserts new grounds for a refund wholly unrelated to its original claim. But allowance of such a new claim when, as here, the limitation period already has expired, would be tantamount to a waiver of the limitation period on new claims, which is beyond the authority of the IRS. See *Garbutt*, 302 U.S. at 534 ("[N]o officer of the government has power to waive the statute of limitations."). Contrary to petitioner's assertion (Pet. 20-21), the court of appeals' conclusion in that regard is not only faithful to, but required by, this Court's decisions distinguishing between the nonwaivability of statutory limitations and the waivability of regulatory requirements.[4]

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[4] Petitioner also incorrectly suggests (Pet. 16-17) that the court of appeals' decision regarding waiver is in conflict with *Pink* v. *United States*, 105 F.2d 183 (2d Cir. 1939). That case involved the different question whether a refund claim continued to be pending with the IRS, such that it was susceptible to amendment, when the IRS had rejected the claim but later reopened the claim for consideration of an intervening Supreme Court decision affecting the substance of the claim. *Id.* at

2. a. The court of appeals correctly rejected (Pet. App. 27-30) petitioner's argument that its untimely amended refund claim could relate back to its original refund claim. The court rejected that argument "for two separate reasons." *Id.* at 27. First, it concluded that petitioner's amended refund claim, which raised the interest-suspension issue with respect to the interest on the non-DISC deficiencies, was not germane to its original claim, which raised only the DISC qualification issue. *Id.* at 27-28. That conclusion is correct, because petitioner's amended claim did not "merely make[] more definite the matters already within [the IRS's] knowledge, or which, in the course of [its] investigation, [it] would naturally have ascertained," but "invoke[d] action requiring examination of other matters not germane to the first claim." *Andrews*, 302 U.S. at 524.

Second, the court concluded that petitioner's original claim was not susceptible of amendment because it ceased to be pending with the IRS when petitioner filed this refund suit. Pet. App. 28-30. As this Court has observed, when the administrative proceeding has come to an end, "there is no longer anything to amend." *Memphis Cotton Oil*, 288 U.S. at 72; see *Union Pac. R.R.* v. *United States*, 389 F.2d 437, 447 (Ct. Cl. 1968). The court of appeals concluded that "[t]he same rule necessarily applies where the taxpayer elects to terminate the IRS's jurisdiction by filing a suit for refund." Pet. App. 29. The court reasoned that, once a suit is filed, "[t]he IRS no longer has the authority to resolve the claim, and therefore is without power to 'allow' or 'disallow' it."

185, 187. Moreover, the court in *Pink* held that the amendment was germane to the original claim; indeed, the court concluded that "it may well be argued that the original claim was enough" to assert the new claim. *Id.* at 187.

Ibid. That conclusion is correct. See 28 U.S.C. 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); 26 U.S.C. 7122(a); Exec. Order No. 6166, § 5, 5 U.S.C. 901 note.[5]

b. On the second point, the court of appeals believed that the Second and Eleventh Circuits had adopted "a different rule, holding that an amendment is effective for purposes of the germaneness doctrine after the IRS has lost jurisdiction over the claim." Pet. App. 29 (citing *Mutual Assurance, Inc.* v. *United States*, 56 F.3d 1353 (11th Cir. 1995); *St. Joseph Lead Co.* v. *United States*, 299 F.2d 348 (2d Cir. 1962)). Contrary to petitioner's contention (Pet. 23-26), however, those cases are distinguishable from the present case and do not create a conflict warranting this Court's review.

In *St. Joseph Lead*, the taxpayer filed a refund suit and, one year later, the IRS decided to consider the merits of the claim. *St. Joseph Lead Co.* v. *United States*, 190 F. Supp. 637, 638 (S.D.N.Y. 1960), aff'd, 299 F.2d 348 (2d Cir. 1962). At DOJ's request, the IRS assigned a revenue agent to the case. *Id.* at 641 (on reconsideration); *id.* at 638. He discovered that the taxpayer had made computational errors, and the taxpayer filed

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[5] That Executive Order provides, in pertinent part, as follows:

> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Exec. Order No. 6166, § 5, 5 U.S.C. 901 note.

an amended claim to correct the errors. *Id.* at 639. The Second Circuit held that the amendment related back to the original claim because "'in determining the merits of the original claim' [the IRS] would necessarily have ascertained 'the facts on which the amendment is based.'" *St. Joseph Lead*, 299 F.2d at 351.

Unlike *St. Joseph Lead*, the IRS here did not act upon petitioner's original refund claim at any time. Six months passed without the IRS acting upon the original claim, and petitioner then filed suit. See 26 U.S.C. 6532(a)(1). At no time during this litigation did the IRS undertake to resolve the merits of petitioner's original DISC claim. While negotiating a settlement of this case, DOJ solicited the IRS's non-binding recommendations, but DOJ never referred the case back to the IRS to evaluate the original refund claim or to recalculate the 1982 deficiency interest. Unlike in *St. Joseph Lead*, petitioner's case was not "being treated as if it were still in the administrative stage." *St. Joseph Lead*, 190 F. Supp. at 641 (on reconsideration).

The Eleventh Circuit's decision in *Mutual Assurance* is also inapposite because it did not present any question concerning the IRS's authority to consider a refund claim after the taxpayer files a refund suit. In *Mutual Assurance*, the taxpayer filed a claim for refund that was allowed in full. 56 F.3d at 1354. The IRS later conducted an examination of the taxpayer's claim and discovered a miscalculation of the taxpayer's loss reserves that caused the taxpayer to understate its refund claim. *Ibid*. The court found that the taxpayer's amended claim merely sought a larger amount while asserting the same grounds as the original claim, and that if the IRS had properly computed the taxpayer's refund in the first

instance, it would have arrived at the correct amount. *Id.* at 1356-1357.[6]

In any event, the question whether a refund claim ceases to be pending with the IRS when a taxpayer files suit is not one of exceptional importance warranting further review. First, it appears that the question has arisen, at most, only twice in over forty years: in the present case, and arguably in *St. Joseph Lead*, which was decided in 1962 (on fundamentally different facts). Second, the issue is not dispositive of this case: even if petitioner's claim were still pending before the IRS, petitioner would have to establish that the amendment was germane to the original claim. See *Andrews*, 302 U.S. at 524; *Mutual Assurance*, 56 F.3d at 1356-1357; *St. Joseph Lead*, 299 F.2d at 350-351. As discussed below, the court of appeals correctly held (Pet. App. 27) that the interest-suspension claim was not germane to the DISC claim.

c. Petitioner contends (Pet. 26) that the court of appeals "both misstated what the germaneness doctrine requires and misapplied that doctrine to the facts in this case." Specifically, petitioner argues (Pet. 27) that the court of appeals' articulation of the doctrine is inconsistent with the Second Circuit's "leading" decision in *Pink*

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[6] In this case, unlike in *Mutual Assurance*, the IRS did not undertake any examination of petitioner's original refund claim such that it could be characterized as pending with the IRS. Moreover, when petitioner filed its refund claim in 1989, the principle of interest suspension was not clearly established or routinely applied by the IRS. See Rev. Rul. 99-40, *supra*. Petitioner cites Internal Revenue Manual § 20.2.8.9.1(1)(A) for the proposition that interest suspension is "one of the 'normal . . . considerations' involved in the computation of interest" (Pet. 22), but that section of the Internal Revenue Manual was added on July 31, 2001, twelve years after petitioner filed its claim for refund.

v. *United States*, 105 F.2d 183 (1939), which petitioner did not cite or discuss until its rehearing petition in the court below.

In attempting to show that the court of appeals applied the wrong test, petitioner selectively quotes from the court's opinion (Pet. 27-28), but the court correctly stated and applied the rule urged by petitioner and set forth in *Pink*. Petitioner states that, according to *Pink*, "the application of the germaneness requirement * * * involves looking to the facts upon which the amendment is based." Pet. 27 (quotation marks omitted) (quoting Pet. App. 26 n.16). That is precisely the rule followed by the court of appeals here, which stated that an amendment is "'germane' to the original claim" if it "depends upon facts that the IRS examined or should have examined within the statutory period while determining the merits of the original claim." Pet. App. 24; see *id.* at 24-25. The court of appeals properly concluded that "[t]he determination of the interest attributable to the DISC deficiency did not require the IRS to compute non-DISC interest under the interest suspension theory," noting that petitioner "admitted that even as of late 1999, it was unaware that an interest suspension claim was available." *Id.* at 27.[7]

Petitioner's remaining arguments in this regard (Pet. 28-29) merely renew its arguments, rejected by the court of appeals (Pet. App. 27-28), that its interest-suspension claim was in fact germane to the DISC claim. The court's application of the law to the facts of this case does not warrant review by this Court.

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[7] Indeed, petitioner would have had a claim for interest suspension regardless of the outcome of the DISC issue. Pet. App. 77-81.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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