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TAXATION-EXCESS PROFITS-GENERAL RELIEF UNDER SECTION 722 I. R. C

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TAXATION—EXCESS PROFITS—GENERAL RELIEF UNDER SECTION 722 I. R. C.—On August 19, 1946 the Tax Court handed down its decision in the case of *East Texas Motor Freight Lines v. Commis-*

sioner of Internal Revenue,[1] involving the review of the commissioner's disallowance of the taxpayer's application for excess profits tax relief under section 722 I. R. C., as amended. The taxpayer's claim was based essentially on section 722(b)(4), having to do with a change in character of the business. The taxpayer was incorporated in May, 1935 and carried on a trucking business between Dallas, Texas and several cities on the borders of Texas until October, 1938, at which time it acquired a certificate of convenience and necessity to operate between Dallas and Fort Worth. In the same month the taxpayer obtained a certificate to operate between Dallas and Memphis, Tennessee, and in December, 1939 another, for operations between Memphis and St. Louis, Missouri. These acquisitions in addition to enlarging the company's territory caused a significant change in operations. The operations from 1935 through October, 1938 involved the hauling of freight to intermediate points, with trucks generally arriving at their destination empty: the cartage between Dallas and Fort Worth, Memphis, and St. Louis involved hauling full loads on through trips to destination. It was the taxpayer's contention that it takes two to three years to develop such a system to the point of normal operation and consequently that the company's average base period net income did not properly reflect its net income. In a series of mathematical calculations, aided by testimony of expert witnesses and the two year "push-back" rule, the taxpayer demonstrated that its average base period net income was too low and sought to prove that it should be increased by 125 per cent, on the basis of its changed operations. The court thought that the taxpayer had proved that the tax levied was excessive and discriminatory and that it had established what would be a fair and just amount representing normal earnings. The opinion of the judge who heard the case was reviewed by the Special Division and relief was granted, though not in the amount requested.[2] At this writing the taxpayer's motion for reconsideration on the amount of relief granted is pending before the court.

This decision, already famous as the first case in which a taxpayer has succeeded in obtaining relief under section 722 in the Tax Court, presents an excellent opportunity to review the much discussed and often maligned general relief provisions of the excess profits tax program in order to see what has developed since its inception in 1940.

[1] 7 T.C. 579 (1946).

[2] As stated the taxpayer sought an increase of 125 per cent. This was on the basis of testimony of three expert witnesses. One of them, the president of the taxpayer corporation, estimated that in a period of two to three years the net earnings would be 225 per cent of the earnings for the calendar year 1939, and this was the figure used as a basis for all computations. In granting the relief the court discarded the 225 per cent and settled on 150 per cent, a 50 per cent increase.

From the outset it was apparent that some form of relief had to be made available to taxpayers who would suffer from the lack of flexibility found in any taxing statute of this type. This realization led to the enactment of the first relief provisions as a part of the Second Revenue Act of 1940.[3] Since we shall here deal with general relief rather than with provisions related to specific hardship problems our attention will be centered in the development of section 722.[4]

The content of section 722 of the 1940 act and the regulations applicable thereto proved to be practically worthless because they set up no standards to guide the commissioner.[5] As a result the section was rewritten by a 1941 amendment,[6] which provided the commissioner with guiding principles to aid in administration. It was recognized, however, that the content of the amendment left much to be desired, and further study, analysis and revision were suggested.[7] As a result the section was subjected to two more amendments[8] before it reached its final form in December, 1943. On November 2, 1944 the Treasury Department issued the now familiar bulletin on section 722 which was to serve as a handbook for department personnel and as an indication of the government's interpretation of that section for taxpayers. Thus the law as amended through December, 1943 together with the bulletin and the current regulations[9] brings the general relief provisions up to date; but the amendments, the bulletin, and the regulations have not satisfied all of the interested taxpayers or their counsel, and numerous objections and suggestions for improvement have been made.[10] In the light of the pattern formed by the decisions handed down by the Tax Court one may wonder whether some of the objections may not have been unfounded, particularly if relief is obtainable with the expenditure

[3] Title II, Pub. L. 801, 54 Stat. L. 974 at 975 (1940).

[4] The present title of § 722 is, "General Relief-Constructive Average Base Period Net Income."

[5] Sec. 722 (1940 act)—Adjustment of Abnormalities in Income and Capital by the Commissioner, which reads as follows: "For the purpose of this subchapter, the Commissioner shall also have authority to make such adjustments as may be necessary to adjust abnormalities affecting income or capital, and his decisions shall be subject to review by the United States Board of Tax Appeals." U. S. TREAS. REG. 109, § 30.722-1, 1943 INT. REV. BULL. 761.

[6] Pub. L. 10, § 6, 55 Stat. L. 17 at 23 (1941).

[7] See for example, Magill, "Relief from Excess Profits Tax," 89 UNIV. PA. L. REV. 843 (1941).

[8] Pub. L. 753, § 222, 56 Stat. L. 798 at 914 (1942); Pub. L. 201, 57 Stat. L. 601 (1943).

[9] TREAS. REG. 112, Excess Profits Tax, §§ 35.722-1-5.

[10] 2 MONTGOMERY, FEDERAL TAXES ON CORPORATIONS 1945-46, p. 530; Groseclose, "Expanding Business and the Excess Profits Tax," 18 TEMPLE L. Q. 504 (1944), digested in 23 TAXES 448 (1945); Eppston, "Excess Profits Tax Relief—Frustration or Promise?" 69 N.J. L. J. 3 (1946).

of no more than a reasonable effort. What then must a taxpayer do to obtain relief under section 722 as it stands today?

The problem presented may be divided into three parts: What must be proved; what materials can and should be used in proving it; and what procedure must be followed. The answer to the first question is found in section 722(a) and can best be explained by quoting excerpts therefrom. The taxpayer must establish "that the tax computed under this subchapter (without benefit of this section) results in an excessive and discriminatory tax and [he must establish] what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income." To establish that the tax is excessive and discriminatory a domestic corporation organized before January 1, 1940[11] will seek to prove that the actual average base period net income or the invested capital credit is not an adequate standard because of the existence of one of the conditions set out in section 722 (b)(1-5),[12] whereas domestic corporations organized subsequent to December 31, 1939 must make their case under section 722(c)(1-3).[13] That proof of the first element does not automatically establish the second, i.e., what would be a fair and just average base period net income, is obvious. This second element is considered in a subsequent paragraph. There is, however, an additional problem regarding what must be proved. Acting on GCM 24013[14] the commissioner contended that a third factor must be proved, namely the inadequacy of the actual average base period net income as a standard of normal earnings. This construction of the statute has been severely criticized,[15] and it appears from the wording of the opinion in the *East Texas* case[16] that the Tax Court has rejected the commissioner's view.[17] Therefore it may be as-

[11] Whether a foreign corporation must use § 722(c) or may use § 722(b) is determined by I.R.C., § 712(b).

[12] It has been argued with considerable force that § 722(c) relief should be available to domestic corporations organized before January 1, 1940. See Crampton, "Excess Profits Tax Relief for Pre-1940 Corporations," 24 TAXES 231 (1946).

[13] See note 11, supra.

[14] G.C.M. 24013, 1943 INT. REV. BULL. 794.

[15] 2 MONTGOMERY, FEDERAL TAXES ON CORPORATIONS 1945-46, p. 532; Cf. Landman, "The General Counsel's Section 722 Memorandum," 23 TAXES 63 (1945).

[16] The court in the second paragraph of the opinion stated: "Under the statute petitioner must establish (1) that the tax computed without the benefit of section 722 results in an excessive and discriminatory tax and (2) a fair and just amount representing normal earnings to be used as a constructive average base period net income." 7 T.C. 579 at 587 (1946).

[17] In the Homer Laughlin China Co. v. Commissioner of Internal Revenue, 7 T.C. 1325 at 1331 (1946), the court appears to state the conclusion conversely. It said, "If an inadequate standard for the base period is so proved, thereupon the excess profits tax . . . shall be considered excessive and discriminatory," citing East Texas Motor Freight Lines. Hence it is clear that proof of either factor is proof of the other.

sumed that only the two elements set out above need be proved to obtain relief.

Counsel in gathering material to prove a case under section 722 must keep two matters in mind. The first is whether or not relief will actually be obtained by resort to section 722, even if a case is proved thereunder. This is to say that any factual situation should be tested against a check list to see if all other avenues of relief have been explored. Thus the actual excess profit credit used should be tested to see, in the case of a corporation using the average income basis, whether by use of the invested capital basis a greater increase in the credit might not be obtained than could be hoped for by applying for relief under section 722; and vice versa in the case of an invested capital basis corporation, if it is in the position to use the average income basis.[18] The same point applies regarding the possible application of the 80 per cent ceiling provision of section 710(a)(1)(B), the "deficit rule" provisions of section 713(e)(1), and the "normal growth" provisions of section 713(f). It should also be noted that the commissioner has claimed the power to eliminate abnormal income in the base period under section 722(a). This means that a taxpayer seeking to construct an average base period net income may not be able to use such items of income in the construction because they were abnormal, with the result that the constructed base may be less than the actual base which included the abnormal items.[19]

A second consideration is that various sections of the statute cannot be combined in building a constructive average base period net income. This was pointed out by the court in the recent case of *Stimson Mill Co. v. Commissioner of Internal Revenue*[20] in which the petitioner attempted under section 722(b)(1) to increase its net income for 1937 (the condition being a strike which curtailed its operations) and then attempted to use the average of the actual 1936, the newly constructed 1937, and the actual 1939 incomes as a basis for applying the 75 per cent provision of section 713(e)(1) to 1938, the lowest income year of the base period. The court interpreted the statute to mean that

[18] I.R.C., § 712(a).

[19] For a detailed listing of all possible methods of reducing excess profits taxation see: Simons and Seghers, "Relief from Excess Profits Tax Burdens with Special Reference to Section 722," 21 TAXES 67 at 68 (1943).

[20] 7 T.C. 1065 (1946). The REGULATIONS, § 35.722-2(b) and the BULLETIN, Part VIII, ¶ (E) (1) have maintained this position in regard to § 713(e) (1) from the outset contrary to the views of several writers: See Tarleau, "Currently Controversial Aspects of Section 722," 1 TAX L. REV. 197 at 208 (1946); and Maloney, "Special Relief Under the Excess Profits Tax—Section 722," CURRENT PROBLEMS IN FEDERAL TAXATION, (American Bar Assn. Section of Taxation, Practicing Law Institute) p. 41 (1946). It appears that the case has modified even the Bulletin's position in regard to sec. 713(f), see TREAS. BULL., Part VIII, ¶ (E) (2).

the petitioner could use either of the methods to construct a base but could not combine them.[21] The court has affirmed this position in the case of *The Homer Laughlin China Co. v. Commissioner of Internal Revenue*[22] where the taxpayer attempted to combine section 722 and section 713(f) to obtain a constructive average base period net income.

With the above considerations in mind the taxpayer is ready to gather material for obtaining relief. Rather than enumerating a myriad of details regarding the type of material that must be amassed to implement each individual application[23] it is sufficient to point out the principles which must be borne in mind in marshalling the proof.

Any attempt to claim that the tax as levied is excessive and discriminatory must take certain factors into consideration. The ultimate test applicable to claims under all of these subsections is whether the event or condition relied on caused a reduction in net profits.[24] If it had no effect on the net profits, proof of such an event or condition is worthless.[25] A claim based on section 722(b)(1) must grow out of the happening of some physical event. The event need not occur in the tax-

[21] "Section 722 provides that the constructive average base period net income, constructed under that Section shall, in the determination of the tax, be used 'in lieu of the average base period net income otherwise determined under this subchapter.' . . . We consider it inescapable that the average constructed under section 722 must take the place of any average elsewhere determined in the same subchapter." 7 T.C. 1065 at 1073 (1946).

[22] 7 T.C. 1325 (1946).

[23] See the following for listings of materials and ideas applicable to various special situations: TREAS. BULL. ON SECTION 722 (1944); BICKFORD, EXCESS PROFITS TAX RELIEF (1945); HOFFMAN, PRACTICAL PROCEDURES IN CLAIMING EXCESS PROFITS TAX RELIEF (1945); 2 MONTGOMERY, FEDERAL TAXES ON CORPORATIONS 1945-46, p. 532 et seq.; Miller, "Relief Provisions of the New Excess Profits Tax Act," 21 TAXES 195 (1943); Polk, "Excess Profits Tax Relief," 21 TAXES 432 (1943); Bock, "Possibilities for Excess Profits Tax Relief," 21 TAXES 443 (1943); Seidman, "Excess Profits Tax Relief in 'Variant Profits Cycle' Cases," 21 TAXES 422 (1943); Seghers, "Relief Under Excess Profits Tax Law," 22 TAXES 275 (1944); Kopple, "Suggested Methods in the Application for Sec. 722 Relief," 22 TAXES 308 (1944); Mills, "The Brewing Industry and Section 722," 22 TAXES 444 (1944); Seidman, "The Treasury's Bulletin on Section 722 Relief," 22 TAXES 194 (1945); Groseclose, "Expanding Business and the Excess Profits Tax," 18 TEMPLE L. Q. 504 (1944); Seidman, "Case Histories of Some Section 722 Settled Claims," 24 TAXES 2 (1946); Diamond, "Problems of Proof and Procedure Under Section 722," 24 TAXES 579 (1946); Simons and Shultz, "The Missing Link in Relief Cases," 24 TAXES 803 (1946); Simons and Seghers, "Relief from Excess Profits Tax Burdens, with Special Reference to Section 722," 21 TAXES 67 (1943); See also, Miller, "Section 722, A Case Study," N.Y. UNIV. FOURTH ANNNUAL INST. ON FED. TAX. 899 et seq. (1946).

[24] The Fish Net and Twine Company v. Commissioner of Internal Revenue, 8 T.C. No. 10 (1947), is an example of a case where a taxpayer failed to show that its low earnings or operating losses were due to the economic conditions alleged to exist.

[25] See for example the discussion in the TREAS. BULL. ON SECTION 722, Part II(A) (1944) of the effect of the 1937 strike in the Appalachian coal fields.

payer's own business, but it must be unusual and peculiar, it must happen during or immediately prior to the base period, and it must interrupt or diminish the corporation's normal production, output or operation. Typical examples usually cited are fires, floods, and strikes.[26]

Contrasted with a claim under section 722(b)(1), a claim under section 722(b)(2) is grounded on economic conditions rather than the happening of a physical event. There must be proof that the economic condition is both temporary and unusual for the taxpayer or the industry.[27] In proving an industry-wide condition one must take cognizance of the difficulty often present in proving that the taxpayer is a member of the particular industry. A typical example of a temporary economic condition is a price war,[28] and an example of what the bureau considers to be an unjustifiable condition is a drop in net profits due to errors in managerial judgment.[29]

Claims under section 722(b)(3) rest upon variant profit cycles or sporadic profit experiences affecting the taxpayer's industry as a whole rather than the taxpayer alone. Consequently one is again faced with the problem of proving that the taxpayer is a member of a particular industry. Variant profit cycles are generally proved by comparing charts of the industry's profit cycle with those of business generally.[30] The point of contrast between section 722(b)(1,2) and (b)(3) is that (b)(1,2) are founded on abnormalities in the base period while under (b)(3) the conditions in the base period may be normal for the industry but the industry's profit cycle does not coincide with that of business in general.

Under section 722(b)(4) the claim is based upon a change in the character of the business, or the commencement of the business immediately prior to or during the base period. It appears that this is the ground most often alleged in seeking relief,[31] and it has presented some of the most serious difficulties. The difficulties are related to proof of commencement of business or commitment to a course of ac-

[26] Seidman, "Case Histories of Some Section 722 Settled Claims," 24 TAXES 2 at 4 (1946); 4 P-H FED. TAX SERV., ¶ 48, 128 (1946).

[27] 8 T.C. No. 10, at p. 8 (1947). The court in that case stated, "the next burden of the petitioner would be to show that the alleged price war or competition . . . was a temporary economic event unusual in the case of this taxpayer or in the case of the industry as a whole."

[28] Seidman, "Case Histories of Some Section 722 Settled Claims," 24 TAXES 2 at 6 (1946).

[29] TREAS. BULL. ON SECTION 722, Part III(A) (1944).

[30] Seidman, "Case Histories of Some Section 722 Settled Claims," 24 TAXES 2 at 8 (1946).

[31] Miller, "Section 722 Cases Now Pending Before the Tax Court," N. Y. UNIV. FOURTH ANNUAL INST. ON FED. TAX. 874 (1946).

tion before January 1, 1940,[32] and what constitutes a change in character of the business. The bureau's position is that commencing business must amount to something more than mere incorporation,[33] and to be committed to a course of action the taxpayer must have taken such definite action to effect a change within a reasonably definite time that it cannot withdraw without incurring a substantial loss.[34] The statute lists certain activities which are included within the term "change in the character of business" and the bulletin[35] serves as a guide in delimiting the scope of the activities.[36]

Section 722(b)(5), aptly labeled the "catch-all" provision, allows claims based on "any other factor" which is relevant, and there has been considerable controversy regarding the merit of attempting to prove a claim under it. The bulletin seeks to keep the application of (b)(5) within narrow bounds,[37] but certain writers relying upon the House and Senate Committee reports have spelled out certain hypothetical situations in which (b)(5) should be applicable.[38]

The corporations seeking to claim under section 722(c)[39] will attempt to prove one of three things: that they engage in a business where intangible assets which are not included in invested capital play an important part in production of income, or that capital does not play an important part in the production of income, or that their invested capital is abnormally low. Again the bulletin sets up standards which the bureau considers must be met[40] and again the bulletin is critized.[41]

Once the tax as levied has been proved excessive and discriminatory, whether under section 722(b) or (c), there remains the problem of constructing an average base period net income under section 722 (a). The statute sets out only the general requirements which must be met, i.e., it must "be a fair and just amount representing normal earnings," and leaves the taxpayer without any rules to guide him in construction. Consequently the taxpayer is generally faced with one of three problems in attempting to construct the base. They are: What

[32] See § 722(b)(4) for certain acquisitions which, if made prior to May 31, 1941, will be considered as made on December 31, 1939.

[33] TREAS. BULL. ON SECTION 722, Part V(I)(B) (1944).

[34] Id., Part V(C).

[35] Ibid.

[36] For criticism of the Bulletin's position see: Tarleau, "Currently Controversial Aspects of Section 722," 1 TAX L. REV. 197 at 202 (1946).

[37] TREAS. BULL. ON SECTION 722, Part VI (1944).

[38] Maloney and Wood, "The Treasury Department's Bulletin on Section 722," 23 TAXES 39 (1945).

[39] Domestic corporations organized subsequent to December 31, 1939 and certain foreign corporations; see I.R.C., § 712(b).

[40] TREAS. BULL. ON SECTION 722, Part VII (1944).

[41] Evans, "Section 722(c)," N.Y. UNIV. FOURTH ANNUAL INST. ON FED. TAX. 971 (1946).

is normal income? What is the effect of the sentence found in section 722(a) which prevents one from making use of events occurring after December 31, 1939? What is the connection between the push-back rule and the commitment rule in section 722(b)(4), if any? The conflict on the subject of normal income has raged chiefly around commitments which were made prior to December 31, 1939 for the purpose of filling orders which were in some way affected by or connected with the war in Europe. Such commitments of course invoke the push-back rule of section 722(b)(4) which allows the construction of the base to be set back two years. When the problem of determining what factors are to be used in constructing the new base is presented, the government by reference to GCM 24013[42] contends that any commitment which in any way hinges on the war is a reflection of an abnormal condition and cannot be employed in constructing the base period net income. The government's position has been contested[43] and though there has been one decision handed down on the problem by the Tax Court[44] the opinion has done little to clarify the condition[45] because the factual situation in that case was so unusual.

The limitation on use of events occurring subsequent to December 31, 1939 has provoked the phrase "peeping behind the curtain." The purpose of the limitation is to prevent the use of events which are at least in part affected by the impact of war on our economy. When this problem is met it can be surmounted in one of several ways. An example of one method which may be used is the hypothetical question-expert witness system followed with great success in the *East Texas* case. In that case expert witnesses were asked hypothetical questions which carefully omitted reference to elements known to have resulted from actual experience after December 31, 1939. Counsel should, however, be cautioned to be prepared with post-1939 data to justify the taxpayer's contentions since in the case of *Monarch Cap Screw & Manufacturing Co.*[46] post-1939 data was used to show that prices in the base period were not depressed.[47] In addition it should be noted that there is an exception to the rule regarding "peeping behind the curtain"; found in section 722(a) and the last sentence of section 722 (b)(4). In order to fall within the exception a corporation must make a commitment before January 1, 1940 resulting in a consumation after December 31, 1939, or make certain acquisitions from certain competi-

[42] G.C.M. 24013, 1943 INT. REV. BULL. 794.

[43] 2 MONTGOMERY, FEDERAL TAXES ON CORPORATIONS, 1945-46, p. 555.

[44] Fezandie & Sperrle, Inc. v. Commissioner of Internal Revenue, 5 T.C. 1185 (1945).

[45] Simons, "The Fezandie Case," 24 TAXES 68 (1946).

[46] The Monarch Cap Screw & Manufacturing Co. v. Commissioner of Internal Revenue, 5 T.C. 1220 (1946).

[47] Simons, "Two Recent 722 Developments," 24 TAXES 254 (1946).

tors before May 31, 1941. The second case in which a taxpayer succeeded in obtaining relief under section 722 in the Tax Court was *7-Up Fort Worth Company, Inc. v. Commissioner of Internal Revenue*[48] involving the application of this exception to the "peeping" rule. It throws considerable light on the Tax Court's use of post-1939 data in the construction of a new average base period net income.

The problem of the connection between the push-back and the commitment rules under section 722(b)(4) has come about solely as a result of the Treasury's interpretation of the statute and as yet has not been settled by a Tax Court decision. Briefly stated, the commissioner contends that in any case where there has been a change which invokes the push-back rule the constructive base will be limited to the productive capacity to which the taxpayer was committed as of December 31, 1939. Thus if under the push-back rule the taxpayer could show that by the end of 1939 it could have sold 5000 units of a new commodity and its production capacity, actual or committed, as of that time was only 3000 units, the commissioner will seek to limit the constructive base to a 3000 unit basis. It is questionable whether this is a sound construction of the statute and well-reasoned objections have been voiced thereto.[49]

The actual material to be used in establishing what is a fair and just amount representing normal earnings will vary with every application. Generally under section 722(b)(1) and (2) earnings records in some unaffected period will be the chief evidence used, whereas under (b)(3) it will be statistical data showing cyclical variations from the profit cycle of business in general. Under (b)(4) the evidence varies greatly depending on the change in character, from the use of forecasts that may have been drawn up by the corporation officials before December 31, 1939 to the use of expert witnesses and hypothetical questions. Respecting section 722(c) no more can be said than that some writers express pessimism regarding availability of materials to establish an average base period net income if the corporation was organized after December 31, 1939.[50]

Under the heading of procedure the taxpayer is confronted with the practical problems of filing claims and submission of proof. Except in the case of a taxpayer who has an adjusted excess profits tax net in-

[48] 8 T.C. No. 6 (1947).

[49] Tarleau, "Currently Controversial Aspects of Section 722," 1 TAX L. REV. 197 at 205 (1946). 2 MONTGOMERY, FEDERAL TAXES ON CORPORATIONS, 1945-46, p. 552. Maloney, "Special Relief Under the Excess Profits Tax—Section 722," CURRENT PROBLEMS IN FEDERAL TAXATION (American Bar Assn. Section of Taxation, Practicing Law Institute) p. 40 (1946).

[50] Maloney, "Special Relief Under the Excess Profits Tax—Section 722," CURRENT PROBLEMS IN FEDERAL TAXATION (American Bar Assn. Section of Taxation, Practicing Law Institute) p. 48 (1946). Cf. Seidman, "Case Histories of Some Section 722 Settled Claims," 24 TAXES 2 at 15 (1946).

come in excess of 50 per cent of the normal tax net income[51] any taxpayer seeking section 722 relief must pay the tax as levied and file a separate Form 991 Application for Relief[52] with the commissioner within the time prescribed by section 322 I. R. C. for each year in which relief is sought.[53] The application is considered a claim for refund[54] and may be amended within the time allowed for filing the original claim, or withdrawn and a new claim filed if no substantial action has been taken by the commissioner.[55] Once the application is filed it goes into the hands of the Excess Profits Tax Council, a body set up in the bureau for the exclusive purpose of dealing with section 722 claims.[56] If the council disallows the claim in whole or in part it must send a notice of disallowance to the taxpayer in accordance with section 732(a) I.R.C. and this notice also serves as a notice of deficiency if one exists as a result of the council's decision. Under the same code section the taxpayer is then given a period of ninety days in which to file a petition with the Tax Court for a redetermination of the tax.

The procedural problems that have presented the greatest difficulty relate to the questions of when the Tax Court will review the council's determination and the scope of the review. The court has stated in the *Uni-Term Stevedoring Co.* case[57] that it would not consider a petition which seeks relief under section 722 unless the government has acted on a form 991 application and mailed a notice of disallowance under section 732. This position was reaffirmed in the *Pioneer Parachute Co.* case.[58]

There has been considerable speculation as to the scope of the court's review, and the limits are not yet precisely defined. However, the *East Texas* decision has resulted in considerable clarification. Some confusion arose as a result of the decision in the *Blum Folding Paper Box* case[59] where the court said: "This means that the applications must set forth not only the grounds for relief, but also a statement of the facts which the Commissioner is to consider in support of the reasons given. . . . The taxpayer may not, as here, file a superficial claim, leav-

[51] Such a taxpayer may proceed under I.R.C., § 710(a) (5).

[52] Sec. 722(d) I.R.C. requires that the claim follow the Regulations, hence one must file on Form 991 as prescribed.

[53] TREAS. REG., § 35.722-5(d) requires a separate application for each year.

[54] TREAS. REG., § 35.722-5(c).

[55] TREAS. REG., § 35.722-5(a).

[56] Bierman, "A New Deal Under Section 722," 24 TAXES 988 (1946).

[57] Uni-Term Stevedoring Co., Inc. v, Commissioner of Internal Revenue, 3 T.C. 917 (1944).

[58] Pioneer Parachute Co., Inc. v. Commissioner of Internal Revenue, 4 T.C. 27 (1944).

[59] The Blum Folding Paper Box Company, Inc. v. Commissioner of Internal Revenue, 4 T.C. 795 (1945).

ing the Commissioner in ignorance of the possible factual support for the claim, and then, after the resulting disallowance, come forward for the first time with the supporting statement of facts."[60] It was felt by many that this, along with certain changes in the rules of the Tax Court, meant that everything—grounds for relief, facts, and evidence —had to be submitted to the council and that nothing new could be introduced before the court.[61] But in its rulings during the trial of the *East Texas* case the court stated that the *Blum* case stands for the proposition that there must be a full disclosure of the factual basis of the claim before the council, but that this does not limit the evidence later submitted to the court.[62]

The decision on the merits by the division of the Tax Court hearing the petition is reviewed by the special division set up under section 732 (d) for the specific purpose of reviewing cases arising under section 721(a)(2)(C) and section 722. The Tax Court's final decision as evidenced by the special division's determination is not subject to judicial review under the statute.[63]

It may be concluded that there was justification for the criticism of the general relief provisions of the excess profits tax law at its inception and during its early development, but as of the date of this writing the establishment of the Excess Profits Tax Council, the clarification of regulations, and the decisions of the Tax Court cited herein all make for a workable though difficult general relief program. As one author has put it, these claims "mean just plain hard work."[64]

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[60] 4 T.C. 795 at 799 (1945).

[61] See a letter addressed to the Hon. Bolon B. Turner, Presiding Judge, Tax Court of the United States from John E. McClure, quoted in 4 P-H FED. TAX SERV., ¶ 48,213 (1946). Cf. BICKFORD, EXCESS PROFITS TAX RELIEF 285 (1945).

[62] 4 P-H FED. TAX SERV. ¶ 48, 133K (1946).

[63] I.R.C., § 732(c).

[64] BICKFORD, EXCESS PROFITS TAX RELIEF 271 (1945).