37 F. (2d) 38, reversed, but on other grounds, 282 U. S. 656. We are not now considering what the practice ought to be if there were need to open the proceeding for the submission of other evidence extrinsic to the claims themselves. Neither in the record nor in the argument do we find a suggestion of that need. Long before the amendment the Commissioner had ascertained the facts and had even notified the taxpayer of the justice of its claims and of the ruling of the Bureau that adjustments would be made accordingly. The dismissal of the claims, when finally announced, was for defects of form only. The defects had been corrected, and the dismissal may not stand.

We find it unnecessary to determine whether the conduct of the Commissioner in investigating the claims upon their merits and reporting to the claimant the result of his inquiry was a waiver of defects of form which would call for the return of overpayments though no amendment had been offered.

The judgment is

Affirmed.

UNITED STATES *v.* HENRY PRENTISS & CO., INC.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 234. Argued December 8, 9, 1932.—Decided January 9, 1933.

1. A general claim for refund, though irregular in form under the Treasury Regulations, may be amended after the period of limitation by specifying the grounds, if the amendment is made before final rejection. *United States* v. *Memphis Cotton Oil Co., ante,* p. 62. P. 83.
2. A statement, without explanation, to the effect that overpayments have been made in an aggregate amount, is broad enough to cover any deviation from the normal statutory rule in making the computation or assessment. *Id.*

3. The taxpayer claimed a refund of income and excess profits taxes, assessed under § 326 of the Revenue Act 1918, upon the ground that, owing to abnormal conditions affecting its capital and income, there could be no fair appraisal of its property in accordance with that section, and that it should have the benefit of a special assessment under §§ 327 (d) and 328, which provide for computation of the tax in such cases without reference to value of invested capital, by the ratio which the average tax of representative corporations engaged in a similar business bears to their average net income. *Held*, that the claim could not be turned by amendment into one for the revision of the assessment by increasing the value of real estate included in invested capital; and that a claim on that ground, coming after the time limited by statute for filing claims, was barred. Pp. 81, 83.
4. A request for a special assessment in accordance with § 327 (d) of the Revenue Act, 1918, calls for discretionary, administrative action not ordinarily reviewable in court, and suggests no challenge of the valuation, or need of a revaluation, of invested capital. P. 84.
5. Such an application so differs in essence and in its relation to administration from a claim based on undervaluation of the taxpayer's real estate capital in computing income and profits by the normal method of the statute, that the two must be regarded as different claims or "causes of action," the one not amendable by the other, tested either by the analogies of pleading or by the necessities and realities of administrative practice. P. 84.
6. Application for the special assessment being an appeal to discretion, a condition may reasonably be imposed that the inquiry shall be postponed until other and unrelated objections—in this case, reassessment of invested capital—have been either determined or abandoned. P. 88.
7. The taxpayer in this case having elected to pursue its application for a special assessment after having been informed by the Commissioner that, by the Bureau's practice, the invested capital and net income must first be definitely determined, either by acquiescence in figures already reported or through an appeal,—*held* equivalent to an agreement that the claim for a special assessment should be deemed to be a distinct one from that for a revision of the values; so that retraction, if ever possible, was too late when the statute of limitations had interposed its bar. P. 87.
8. Whether this Court has jurisdiction on certiorari to review parts of a judgment adverse to the respondent although the respondent

has neither secured nor applied for a writ of certiorari, will not be decided where, assuming the existence of the power, the case does not impel its exercise. P. 88.

57 F. (2d) 676, reversed.

CERTIORARI [1] to review the reversal in part of a judgment recovered by the present respondent in a suit against the United States based on overpayments of income and excess profits taxes.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key, John G. Remey, Joseph H. Sheppard, Erwin N. Griswold,* and *Wm. H. Riley, Jr.,* were on the briefs, for the United States.

A suit can not be maintained for taxes illegally collected unless a claim for them has been filed within the time prescribed by law. *Savings Institution* v. *Blair,* 116 U. S. 200. See also, *Jonesboro Grocer Co.* v. *United States,* 66 Ct. Cls. 320, cert. den., 280 U. S. 562; *Feather River Lumber Co.* v. *United States,* 66 Ct. Cls. 54; *Grays Harbor Motorship Corp.* v. *United States,* 71 Ct. Cls. 167; *Snead* v. *Elmore,* 59 F. (2d) 312; *Art Metal Const. Co.* v. *United States,* 47 F. (2d) 558, cert. den., 283 U. S. 863.

The relief granted by allowing a special assessment is not similar to that which is sought in this suit. *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 271.

The distinction between what may be amended and what may not is no doubt one of degree. *Solomon* v. *United States,* 57 F. (2d) 150.

Where a pleading is amended to allege a new cause of action the new cause is subject to a defense of the statute of limitations although the action was commenced before the statute ran. *Seaboard Air Line* v. *Renn,* 241 U. S.

[1] 287 U. S. 585.

290; *Union Pacific Ry.* v. *Wyler,* 158 U. S. 285; *Baltimore & Ohio S. W. R. Co.* v. *Carroll,* 280 U. S. 491.

Recognition of a right to sue based upon an amended claim, filed after expiration of the statutory period, stating a new ground for refund, would involve a departure from the rule that where the United States consents to be sued a literal and meticulous compliance by the taxpayer with statutory requirements is imperative. See *United States* v. *Michel,* 282 U. S. 656; *Maas & Waldstein Co.* v. *United States,* 283 U. S. 583; *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342.

If notice on July 16, 1925, that the original claim would be rejected is equivalent to a rejection, recovery is barred for another reason. A claim for refund can not be amended after rejection but must be considered as a new claim. *Jonesboro Grocer Co.* v. *United States, supra; Solomon* v. *United States, supra; Mutual Life Ins. Co.* v. *United States,* 72 Ct. Cls. 204, cert. den., 284 U. S. 628; *Wausau Sulphate Fibre Co.* v. *United States,* 72 Ct. Cls. 189.

The statutory period within which claims may be filed is measured, not by the period within which a claim timely filed is considered by the Commissioner, but by the five-year period after the return was due, or the four-year period after the tax was paid. The decision below would dispense with the statute in all such cases.

Some cases have held that if facts and reasons are stated in the claim the taxpayer need not mention a provision of law applicable to his claim, nor is he precluded from advancing in court a new reason or theory applicable to his claim, nor from amending a defective claim by submitting additional evidence to the Commissioner relating to the ground presented in the claim. See *Dreyfuss* v. *Lines,* 24 F. (2d) 29; *McKesson & Robbins* v. *Edwards,* 57 F. (2d) 147; *Swift & Co.* v. *United States,* 67 Ct. Cls.

322; *Paul Jones & Co.* v. *Lucas,* 33 F. (2d) 907; *Union & N. H. Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Wunderle* v. *McCaughn,* 38 F. (2d) 258. Those conditions are not present here. No reference to the real estate item is found in the original claim. The only claim upon which a timely suit could have been brought was the original claim; but, as the ground there stated is not the ground urged in the present suit, recovery is barred. *United States* v. *Felt & Tarrant, supra; Bemis Bro. Bag. Co.* v. *United States,* 60 F. (2d) 944; *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626; *Snead* v. *Elmore, supra; J. P. Stevens Engraving Co.* v. *United States,* 53 F. (2d) 1; *H. Lissner Co.* v. *United States,* 52 F. (2d) 1058; *Solomon* v. *United States, supra; J. H. Williams & Co.* v. *United States,* 46 F. (2d) 155; *Taylor-Lockwood Co.* v. *United States,* 71 Ct. Cls. 360. The facts disclose no waiver by the Commissioner which would bring the case within the rule of *Tucker* v. *Alexander,* 275 U. S. 228.

Mr. Joseph F. Murray, with whom *Messrs. William P. Jeffery* and *Arthur Mattson* were on the brief, for respondent.

The claim for refund, duly filed March 25, 1924, is sufficient to support the maintenance of this suit.

The controlling regulation provides merely that the facts upon which the claim is based "should"—not "must" or "shall"—be set forth under oath. But does it require that such facts be set forth in the claim? Neither the statute nor the regulation tells us definitely. When are such facts to be submitted? How? Where? Certainly there is no positive direction that the facts must be set forth in the claim itself at the time it is filed. The very words of the regulation itself show that the word "facts" is not used synonymously with the word "claim." The regulation does not say that all the facts relied upon should be set forth in the claim or that the claim shall contain all

the facts relied upon. The obvious answer is that the facts could be submitted with or in the claim, or later, as the exigencies of the particular case demanded. Any facts not already in the possession of the Commissioner were required to be furnished to him before the claim had been disposed of finally by allowance or rejection. *Union & N. H. Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Warner* v. *Walsh,* 24 F. (2d) 449, 450.

This also is the only practical view. *Lancaster Cotton Mills* v. *United States,* 59 F. (2d) 270, 275. Frequently the Commissioner will pass on a refund claim upon the data set forth in the return itself or upon data which he secures through his own independent examination of the books of the taxpayer. He is not restricted to the data or grounds advanced by the claimant. *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Lancaster Cotton Mills* v. *United States, supra.* Often claims for refund are determined upon information conveyed to the Commissioner for the first time at the oral hearing, which usually is granted if requested by the taxpayer. There are many other practical reasons why, at least before experience taught differently, the Commissioner thought it would be unwise to frame a positive requirement that all facts and all theories of relief had to be set forth in the claim itself.

A seasonably filed claim was a "duly filed" claim within the meaning of the statute and the regulation, whether or not at the time it was filed it set forth all the facts and theories upon which suit was brought later. *Union & N. H. Trust Co.* v. *Eaton,* 20 F. (2d) 419; *Tucker* v. *Alexander,* 15 F. (2d) 356; reversed, 275 U. S. 228; *Red Wing Malting Co.* v. *Willcuts,* 15 F. (2d) 626; *Warner* v. *Walsh,* 24 F. (2d) 449, 450, s. c., 27 F. (2d) 952; *Wunderle* v. *McCaughn,* 38 F. (2d) 258.

The brief filed with the Commissioner April 12, 1926, was a permissible amendment of a "duly filed" claim for

refund sufficient to support the maintenance of this suit. *Tucker* v. *Alexander,* 275 U. S. 228; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Union Trust Co.* v. *McCaughn,* 24 F. (2d) 459, 461.

A recovery based on an amendment of a timely filed claim for refund was allowed in the following cases, among others, although in each instance the amendment was filed after the time for filing claims had expired: *Lehigh & Wilkes Barre Coal Co.* v. *United States,* 38 F. (2d) 637; *Zeller* v. *United States,* 35 F. (2d) 870; *McKesson & Robbins* v. *Edwards,* 57 F. (2d) 147; *Lancaster Cotton Mills* v. *United States,* 59 F. (2d) 270; *Memphis Cotton Oil Co.* v. *United States,* 59 F. (2d) 276.

The basis of the decisions is two-fold, first, that the purposes of the statute had been complied with in that the Commissioner by his acceptance and consideration of the claim was being sued on a ground of relief of which he had been fully advised in time to make a refund; and, secondly, even assuming that strict compliance with the statute was necessary, there had been a permissible waiver by the Commissioner of such strict compliance.

The Circuit Court of Appeals erred in refusing to include in respondent's invested capital for 1918 and 1920 the actual value of the intangible property acquired in 1916.

Mr. Justice Cardozo delivered the opinion of the Court.

Respondent (the plaintiff in the court below) brought suit against the United States in a District Court to recover overpayments of income and excess-profits taxes for the years 1918 and 1920. The overpayments had come about, so it was claimed, from the undervaluation by the Commissioner of the respondent's invested capital, with a consequent exaggeration of the profits to be taxed. Two items or classes of property were the subject of the con-

troversy. In each year there has been an omission to include the full value of the real estate; indeed the parties have stipulated that the value of the real estate was greater by the sum of $46,371.08 than the sum allowed in the assessment. In each year also there had been an omission to include the value of intangible property, and particularly good will. The District Court held that there could be no relief in respect of either item for the year 1918 because the claim for refund filed with the Commissioner did not comply with the statute and the Treasury Regulations. In respect of both items, real estate and intangibles, relief was granted to the taxpayer to the extent of overpayments for the year 1920. The result was a judgment in favor of the respondent for $7,975.21. Cross-appeals followed to the Court of Appeals for the second circuit. Upon the taxpayer's appeal, the decision was that the defective refund claim for 1918 had been made good by amendment, and that the tax for that year, as well as for 1920, had been overpaid as to the real estate. Upon the government's appeal, the decision was that the item of intangibles should have been excluded for both years. 57 F. (2d) 676. A writ of certiorari, designed to bring up the ruling as to the amendment of the claim for 1918, was granted by this court on the petition of the government. No petition for a writ was submitted by the taxpayer.

On June 16, 1919, respondent filed its income and excess profits tax return for the year 1918, showing a total tax of $535,144.20, which it paid. On December 28, 1920, it paid for the year 1918 an additional tax of $119,191.19, as the result of an additional assessment, receiving back, however, $9,559.19 on the completion of the audit. Within the time prescribed by law there was filed with the Commissioner, on March 14, 1924, a claim for refund. In this claim, the respondent demanded the repayment of $200,000. It stated in substance as the ground for this demand

that owing to abnormal conditions affecting its invested capital and income, there could be no fair computation of the tax by the appraisal of the cash value of its property in accordance with § 326 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1091, 1092, 1093), and that it should have the benefit of a special assessment under §§ 327 and 328.

Section 327 of the Act provides in subdivision (d) that the tax shall be determined in accordance with § 328 " where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in Section 328."

Section 328 provides in effect that in cases covered thereby the tax shall be computed without reference to the value of the invested capital and shall be determined by the ratio which the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income.

The respondent's claim for refund, with the specification of the erroneous denial of a special assessment as the statement of its grievance, was filed, as we have seen, in March, 1924. On May 14 of that year, the respondent received from the Commissioner a letter acknowledging the filing and notifying the claimant of the procedure to be followed. " No consideration," it was there written, " may be given under the provisions of Sections 327 and 328 until statutory net income and invested capital are definitely determined. It is therefore necessary that you acquiesce in the net income and invested capital as shown in the revenue agent's report of March 25, 1920, for the

year 1918, or submit exceptions, if any, which you may take thereto. If exceptions are taken they should be presented in the form of an appeal prepared in accordance with the provisions of Treasury Decision 3492, a copy of which is enclosed."

The respondent does not assert that in response to this notice it took any appeal or filed any exceptions complaining of the assessment of capital or income. If any such document were in existence, it would have been equivalent to an amendment of the claim, and no doubt would be in evidence. What the respondent chose to do was obviously to acquiesce in the report that the cash value of the capital had been fairly ascertained, and to take its stand on the position that under §§ 327 and 328 its tax should be determined without reference to such value and in accordance with other methods both exceptional and discretionary. Accordingly the Commissioner proceeded to a consideration of the claim that error had been committed in failing to give the taxpayer the benefit of a special method of assessment. On July 16, 1925, the respondent was advised by written notice that there was no evidence of abnormal conditions sufficient to call for a departure from the usual forms of computation. The notice, signed by an acting deputy commissioner, closes with these words: " In accordance with the above conclusions, your claim will be rejected." To this is added a statement that the collector for the taxpayer's district will be officially notified of the rejection at the expiration of thirty days.

Notwithstanding this notice, the Bureau of Internal Revenue kept the proceeding open. Writing to the respondent on February 23, 1926, the Solicitor of the Bureau states that his office has before it for consideration the application for a special assessment of the taxes for 1918, and that " before a final decision is reached " the taxpayer " will be granted an opportunity to be heard

orally." If such a hearing is not desired, "the decision in the matter will be based upon the record as it now stands." In answer to that invitation the respondent requested an oral hearing, which it received, and also filed on April 8, 1926, a statement under oath, which, by concession, was equivalent in form to an amended proof of claim. In this statement the respondent put before the Commissioner the evidence both as to the undervaluation of the real estate and as to the exclusion of intangibles.* The Commissioner rejected the claim on September 3, 1926, by signing the rejection schedule.

We are holding in *United States* v. *Memphis Oil Co.*, decided herewith, *ante,* p. 62, that a general claim for refund, though irregular in form under the Treasury Regulations, may be amended after the period of limitation by specifying the grounds, if the amendment is made before final rejection. A statement, without explanation, to the effect that overpayments have been made in an aggregate amount is broad enough to cover any and all grounds for reassessment and return. This at all events is true where the basis of the grievance is that the tax has been erroneously computed even by the normal method—that there has been a deviation, in other words, from the statutory rule. Such is not the claim in controversy here. Here the taxpayer by its claim as originally presented abandoned the position that there had been any error of fact or law in the assessment of the tax according to the normal method, and planted itself on the position that the special method would be fairer. We are to say whether the ground thus deserted may be recovered by amendment.

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* Certain forms of intangibles, for example, good will, are excluded in general from the definition of invested capital, but there are special conditions in which there is a duty to include them. Revenue Act of 1918, § 326, (4) and (5).

The act of the Commissioner of Internal Revenue in granting or refusing a special assessment under § 327 (d) of the Act of 1918 is discretionary and administrative, not subject to be challenged in any court, at least in the absence of fraud or other irregularities. *Williamsport Co.* v. *United States,* 277 U. S. 551, 562. Discretionary and administrative also is the review of his determination by the Board of Tax Appeals. *Williamsport Co.* v. *United States, supra.* If this amendment is permissible, a request for the exercise of a discretionary jurisdiction will have been turned after the running of the statute (Revenue Act of 1921, c. 136, § 252, 42 Stat. 227, 268; Revenue Act of 1924, c. 234, § 1011; 43 Stat. 253, 342; Revenue Act of 1926, c. 27, § § 284, 1113, 44 Stat. 9, 66, 116) into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable, with exceptions few and narrow (*Williamsport Co.* v. *United States, supra,* p. 562) will have become justiciable at the end.

An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. *United States* v. *Memphis Oil Co., supra.* This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure. All will then depend on the degree and kind of the departure. A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substi-

tution being dependent upon administrative discretion. Overpayments there may have been in each case, yet in senses widely different. But the analogies of pleadings are not decisive of the controversy before us, wherever they may point and however helpful they may be. To make our conclusion sound, we must keep in mind also the necessities and realities of administrative practice. A demand for a special assessment in accordance with § 327 (d) of the statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital. On the contrary, the valuation of invested capital is irrelevant if the special method is accepted. The very basis of the application for the use of such a method is the presence of abnormal conditions whereby an unfair and disproportionate burden will be laid upon the taxpayer if invested capital is to be reckoned according to the statutory definition (§§ 325, 326) and the profits of the taxpayer subjected to a tax accordingly. Let the new method be adopted, and the value of the invested capital ceases to be a factor in the process. The taxpayer, it is true, may complain even then that there is a variance between such capital when restricted to the elements covered by the statute and invested capital when viewed as an economic concept, and that by reason of special conditions there should be an addition of other elements commonly excluded. See, e. g., J. H. Guild Co. *v.* Commissioner, 11 B. T. A. 914, 921. Indeed that is the very reason why a special assessment becomes necessary. The fact remains, however, that the grievance does not grow out of a failure of the assessors to value the invested capital truly according to the statute. It has no relation, for example, to an assessment of tangible property, such as land or buildings, at less than the cash value. The grievance that will support an application for a special method of assessment under subdivision (d) of § 327 assumes adherence to the statute, and counts upon extraordinary conditions as justi-

fying a claim that the statute is oppressive. If the special method is accepted, the income of the taxpayer is considered without reference to capital as commonly determined, and the tax becomes proportionate to that of other representative corporations engaged in a like business.

A claim or cause of action will be ill-defined for the purpose of an administrative remedy if the definition gives no heed to the understanding or conduct of administrative officers. We are to ask ourselves how a request for a special method of assessment might be expected to be viewed or acted on by those required to consider it. The presentation of such a claim, unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities.* The two proceedings, alike in form and in consequences, are essentially diverse. By the very terms of the statute, § 327 (d), the special assessment is the outcome of a special application; it is made on motion of the taxpayer. A revision for error of fact or law, on the other hand, may be made by the Commissioner on his own motion, and indeed is commonly so made, for it is incidental to his general duty to audit the accounts. Upon an application for special relief—under subdivision (d)—there are no compensating adjustments favorable to the government that will move an examiner to reconsider the value of the tangibles, and make it either less or greater. *Lewis* v. *Reynolds,* 284 U. S. 281. He will conceive of the invested capital as deposited in a separate compartment which there is no need for him to open. Upon a claim of deviation from the statute, the taxable balance for the

* The range of investigation upon special applications is considered by Albert E. James, a former member of the Board of Tax Appeals in an article "Special Assessment Cases in the Courts and the Board," published in vol. 8, part 1, National Income Tax Magazine, 287, 289, 290, August, 1930. See, also, Investigation of Bureau of Internal Revenue, Senate Report No. 27, Part I, 69th Congress, 1st Session, p. 215.

year will be subject to re-audit as if the tax were laid anew. The grievances differ so essentially that the assertion of the one must be felt to be unrelated to any complaint as to the other.

The conclusion derived from the analogies of pleadings in a lawsuit is thus seen to be confirmed by the probabilities, if not the certainties, of administrative practice. If this is not enough, however, there is confirmation from other sources. In the pages of this record we find convincing evidence that by the understanding of the parties the claim for a special assessment was to exclude any claim for the revision of the value of the capital, and that no such claim would be pressed, at all events while the claim for a new method of assessment was alive and undetermined. We have seen that in May, 1924, the Commissioner of Internal Revenue gave notice to the taxpayer that there could be no consideration of the prayer for relief under §§ 327 and 328 of the applicable statute "until statutory net income and invested capital are definitely determined." The taxpayer was accordingly informed in conformity, it seems, with the usual practice of the department, that it would be necessary to do one or other of two things: to appeal from the report as to invested capital and income in accordance with a prescribed form, or to acquiesce in it. Cf. *Commissioner* v. *Ohio Falls Dye & F. Works,* 50 F. (2d) 660; *Norton Co.* v. *Commissioner,* 50 F. (2d) 664. The notice would tend to show, though assent to its requirements were lacking, that in the judgment of the men intrusted with the administration of the act, the two subjects of inquiry are diverse and independent. Coupled with the assent of the taxpayer, its significance is heightened. There is no suggestion that the taxpayer, when faced with this alternative, resorted to an appeal. In these circumstances its conduct in proceeding with its application for a special assessment was a tacit assent to the condition imposed by the Commissioner and

an abandonment of any objection that capital and income had been erroneously valued if valuation was to be ascertained according to the normal method. We have seen that an application for a special assessment involves an appeal by the taxpayer to the Commissioner's discretion. The application being of that order, a condition may reasonably be imposed that the inquiry shall be postponed until other and unrelated objections have been either determined or abandoned. There is room for argument that the taxpayer, having won the privilege of a hearing on those terms, is estopped from retracting its assent and resuming the abandoned ground. *Sturm* v. *Boker,* 150 U. S. 312, 333, 334; *Davis* v. *Wakelee,* 156 U. S. 680, 689. At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the values. Retraction, if ever possible, must be held to be too late when the statute of limitations has interposed a bar.

The respondent complains of the ruling of the Court of Appeals whereby the value of intangibles was excluded from the invested capital for the year 1920 and the judgment of the District Court modified accordingly. The argument is that this court has jurisdiction in the exercise of its discretion to review those parts of the judgment adverse to the respondent, though no writ of certiorari was granted except to the petitioner, the government, nor was any other even asked for. We are not required at this time either to affirm or to deny the existence of the power that the argument imputes to us. If the power exists, the respondent has not persuaded us that our discretion should be moved to use it.

The judgment of the Circuit Court of Appeals should be reversed to the extent of the petitioner's objections thereto, and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.