

Hutchinson Technology, Inc.,  
Appellant,

**ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT**

vs.

Docket Nos. 7398-R and 7504-R

Commissioner of Revenue,  
Appellee.

Dated: September 15, 2003

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The Honorable Sheryl A. Ramstad, Judge of the Minnesota Tax Court, heard Cross Motions for Summary Judgment on May 15, 2003, at the Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Blvd, St. Paul, Minnesota.

Walter Pickhardt, Attorney at Law, Faegre & Benson, represented the Appellant.

Cecelia Krettek Morrow, Assistant Attorney General, represented the Appellee.

Both parties submitted briefs. The matter was submitted to the Court for decision on June 20, 2003.

The Court, having heard and considered the evidence adduced at the hearing, and upon all of the files, records and proceedings herein, now makes the following:

**ORDER**

1. Appellant's Motion for Summary Judgment is hereby denied.
2. Appellee's Motion for Summary Judgment is hereby granted in part.
3. The Court Administrator shall set the matter on for trial.

IT IS SO ORDERED.



BY THE COURT,

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Sheryl A. Ramstad, Judge  
MINNESOTA TAX COURT

DATED: September 15, 2003

**MEMORANDUM**

The parties bring cross-motions for summary judgment asking the Court to determine whether Appellant Hutchinson Technology, Inc. (“HTI”) was entitled to claim a dividend received deduction under Minn. Stat. § 290.21, subd. 4, for dividends deemed to have been paid by HTI Export, Ltd. (“Export”) for the period beginning September 26, 1994, and ending September 26, 1999 (“tax years in issue”).<sup>1</sup> The Commissioner of Revenue (“Commissioner”) relies upon the plain meaning of Minn. Stat. § 290.21, Subd. 4(e) in denying the dividend received deduction to HTI. However, HTI maintains that claiming the deduction was consistent with the instructions to the tax returns that the Commissioner had published during the tax years in issue and should be allowed.

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<sup>1</sup>HTI moves for partial summary judgment, whereas the Commissioner moves for complete summary judgment. Both parties agree that computational issues remain in both Docket No. 7398-R and Docket No. 7504-R, but the Commissioner claims they likely can be resolved without trial. While HTI’s Notice of Appeal raises four issues, the parties address only the Commissioner’s denial of the dividend received deduction in their respective Motions. In addition, HTI’s Notice of Appeal challenges the Commissioner’s assessment of penalty for 1995, as well as the calculation of interest and the calculation of Net Operating Loss for 1998.

Previously, this Court ruled that Export qualified as a “foreign operating corporation” (“FOC”) under Minn. Stat. § 290.01, subd. 6(b), but made no determination whether HTI would be allowed the dividend received deduction for dividends received from Export. Hutchinson Tech., Inc. v. Commissioner of Revenue, Dckt. No. 7398-R (Minn. Tax Ct. Jan. 2, 2003). That issue is now before the Court. For the reasons set forth below, the Court finds that the deduction should be denied. Therefore, HTI’s Motion is denied, and the Commissioner’s Motion is granted in part.

### **Background**

HTI is a Minnesota corporation that manufactures and sells precision parts used in computer hard drives. Export<sup>2</sup> was a wholly owned subsidiary of HTI which qualified as a foreign sales corporation (“FSC”) under federal tax laws during the tax years in issue.<sup>3</sup> During those years, HTI ran its export sales, totaling \$39 million to \$71 million in gross receipts annually, through Export in order to maximize federal tax benefits available to Export. HTI paid commissions to Export, and Export paid a fee for services to HTI, both as allowed under the Internal Revenue Code and as set forth in an Inter-Company Agreement between HTI and Export. The commissions owed exceeded the fee earned each year so that HTI offset the commissions against its fee during the tax years in issue.

In addition, the earnings of Export were, by statute, deemed paid as a dividend to HTI for each of the tax years in issue, and HTI was required to report these deemed dividends as income, which it did.

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<sup>2</sup> Export was organized under the laws of Barbados for all but the first four months during the tax years in issue, when it was organized under the laws of the United States, Virgin Islands.

<sup>3</sup> Export elected in 1985 to be treated as an FSC for federal income tax purposes.

HTI claimed a deduction equal to 80 percent of the deemed dividends (“dividend received deduction”) pursuant to Minn. Stat. § 290.21, subd. 4 on its Minnesota corporate franchise tax returns and also claimed a deduction from its taxable income for the fees HTI paid Export during the tax years in issue. The Commissioner denied these deductions in a Notice of Change in Your Tax dated July 16, 2001.

### **Scope of Review**

Summary judgment is appropriate where it is determined that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. Proc. 56.03; DLH, Inc.v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (summary judgment permits the court to dispose of an action on the merits if there is no genuine issue as to any material fact). A material fact is one of such a nature as will affect the outcome of the case depending on its resolution. Zappa v. Fahey, 245 N.W.2d 258, 259-60 (Minn. 1976). We find that there are no material facts in dispute with respect to the dividend received deduction, and the issue is properly presented for partial summary judgment.

### **Statutory Framework**

#### **Taxing a Business with Foreign Subsidiaries**

The State of Minnesota taxes interstate and multi-national businesses by apportioning the income derived from business activities occurring within and outside Minnesota between Minnesota and other states or countries according to a formula. See Minn. Stat. § 290.17. Using the three factors of sales, property, and payroll, this formula determines the amount of a business’ total income apportioned to, and thus

taxable by, the State. Amoco Corp. v. Commissioner of Revenue, 658 N.W.2d 859 (Minn. 2003); Minn. Stat. § 290.17.

An entity that has income from businesses wholly unrelated to Minnesota would not be taxed on the unrelated income. However, a business with subsidiaries physically located outside of Minnesota that provide benefit to, or receive some benefit from, the Minnesota operations would be subject to the allocation formula provided they are part of a “unitary business” as defined in Minn. Stat. § 290.17, subd. 4(a). Amoco Corp., 658 N.W.2d at 865. Where “business activities or operations [conducted by the entities] result in a flow of value between them”, the entities are considered part of a “unitary business.” Minn. Stat. § 290.17, subd. 4(b). As such, “the entire income of the unitary business is subject to [the] apportionment [formula].” Minn. Stat. § 290.17, subd. 4(a).

The income of the foreign members of a unitary business is not included in the apportionable base, but any dividends paid to the parent by the foreign members are included, subject to a dividend received deduction. Minn. Stat. § 290.21, subd. 4(a)(1986). This dividend received deduction allows a receiving corporation an 80 percent exemption if the receiving corporation owns 20 percent or more of the paying corporation. Here, the issue is whether HTI is entitled to that deduction for dividends received from Export during the tax years in issue.

Minn. Stat. § 290.21, subd. 4(e) (“Subd. 4(e)”) provides that “[t]he [dividend received] deduction . . . does not apply if the dividends are paid by an FSC as defined in section 922 of the Internal Revenue Code”. The Commissioner relies upon the plain meaning of this language as the basis for contending that HTI is not entitled to the dividend received deduction as a matter of law because Export is an FSC. There is no

dispute that Export was an FSC for federal income tax purposes during the tax years in issue.<sup>4</sup>

HTI, on the other hand, asserts that Subd. 4(e) denies the dividend received deduction only when the dividends are “actually paid,” rather than “deemed to be paid”. Further, HTI contends that Subd. 4(e) denies the deduction only for dividends paid by non-unitary FSCs, not a unitary FSC like Export. In support of its argument, HTI claims that the Commissioner’s instructions<sup>5</sup> to the 1991 Corporate Franchise Tax Return, the first year that FOCs were recognized in the State, support HTI’s entitlement to the deduction, in providing as follows:

If an FSC fits the definition of a foreign operating corporation, its exempt foreign trade income will be included when computing its adjusted net income. This adjusted net income is listed on line 9, Schedule MC, of the foreign operating corporation’s shareholders as a deemed dividend (which is eligible for the dividend received deduction).

Instructions to 1991 Corporate Franchise Return, Pugh Aff., Ex. A, pg. 11.

### **Actual vs. Deemed Dividends**

We first analyze the manner in which Export paid dividends to HTI during the tax years in question. Enacted in 1988, Minn. Stat. § 290.01, subd. 6b created FOCs as a subset of “domestic” corporations and specified their treatment under the corporate franchise tax statutes. See Act of May 7, 1988, ch. 719, Art. 2, §§ 9, 12, 30, 57, 1988 Minn. Laws 1788-89, 1791-92, 1805-07, 1827. Three operative provisions were enacted

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<sup>4</sup> Congress adopted FSC legislation in 1984 to encourage United States firms to increase their exports by providing tax incentives which would enable United States manufacturers to compete in the foreign market. If a corporation met the requirements of an FSC, a certain portion of its income was exempt from federal income tax.

<sup>5</sup> These instructions were substantially the same and subject to only minor changes, each year through 1997, and when modified in 1998, the substance remained the same.

regarding FOCs in the 1988 legislation. Relevant here is Minn. Stat. § 290.17, subd. 4(g), providing that the adjusted net income of an FOC is deemed to be paid as a dividend to its shareholder parent, and “[s]uch deemed dividend shall be treated as a dividend under Section 290.21, subdivision 4.” In other words, Export’s adjusted net income is deemed to have been paid as a dividend to HTI during the tax years in issue.

While the parties do not dispute that dividends **actually paid** by an FSC would not qualify for the dividend received deduction under Subd. 4(e), HTI asserts that Subd. 4(e) denies the deduction only if dividends are **actually** paid, as distinguished from those that are **deemed** paid. HTI argues that the legislative history supports allowing HTI to deduct 80 percent of the dividends **deemed** to have been paid by Export to HTI during the tax years in issue. In brief, HTI argues that the statute is ambiguous, thus requiring the Court to consider testimony given before the House and Senate Tax Committees in which the Commissioner and various legislators explained the intended consequences of proposed changes in the taxation of foreign source income. HTI claims that testimony clearly shows that those changes were intended to provide the recipients of deemed dividends of FOCs with an 80 percent dividend received deduction. HTI relies upon the determination in Hutchinson Technology that Export is an FOC as, therefore, entitling HTI to the dividend received deduction during the years in issue.

The Commissioner contends that the language of Subd. 4(e) and Minn. Stat. § 290.17, subd. 4(g) is clear and unambiguous, so that resorting to legislative intent in construing the provisions is legally impermissible. Furthermore, the Commissioner relies upon the normal interpretation of the term “deemed,” as used in statutes, and asserts

that it creates a conclusive presumption of the fact or act so that the **deemed** dividend created by Minn. Stat. § 290.17, subd. 4(g) is conclusively presumed to be a dividend and thus subject to treatment as a dividend.

HTI fails to point to any ambiguity in the words of the statutes at issue that cause this Court to ignore the plain meaning of the statutory language. “Where the statutory language is clear and unambiguous, courts must give effect to its plain meaning.” Green Giant Co. v. Commissioner of Revenue, 534 N.W.2d 710, 712 (Minn. 1995). We cannot rely upon legislative history “to infer something that is not plainly there.” U.S. Sprint Communications Co. v. Commissioner of Revenue, 578 N.W. 2d 752 (Minn. 1998).

The language of Subd. 4(e) clearly states that the dividend received deduction “does not apply if the dividends are paid by an FSC....” Subd. 4(e) says nothing about whether the dividends are **actually** paid, as opposed to having been **deemed** paid, by an FSC. To construe the statute as suggested by HTI, this Court would need to rewrite Subd. 4(e). Additionally, the language of Minn. Stat. § 290.17, subd. 4(g) specifically cross references Minn. Stat. § 290.21, subd. 4 insofar as how the **deemed** dividend should be treated. Since Subd. 4(e) itself makes no distinction between **deemed** or **actually** paid, we cannot rewrite the statute to do so. Furthermore, distinguishing between **deemed** and **actual** dividends in this instance ignores the normal interpretation of the term “deemed”. “[T]he word ‘deemed’...create[s] a conclusive presumption of the fact deemed to be a fact. With a few exceptions, this appears to be the normal interpretation of the word ‘deemed’ as used in the statutes....” First Nat’l Bank of Mankato v. Wilson, 234 Minn. 160, 165, 47 N.W.2d 764, 768 (1951). Thus, the **deemed** dividend created by § 290.17, subd. 4(g) is conclusively presumed to be a

dividend and will be treated as a dividend. Finally, where the legislature intended to specify treatment given to **actual** dividends in Minn. Stat. § 290.178, subd. 4(g), it expressly stated that “[d]ividends **actually paid** by a foreign operating corporation...shall be eliminated from the net income of the unitary business in preparing a combined report for the unitary business.” Minn. Stat. § 290.17, subd. 4(g) (emphasis added). Subd. 4(e) makes no such distinction between **deemed** and **actual** dividends, and neither do we.

Accordingly, regardless of the fact that Export’s dividends to HTI were not **actually paid**, we apply the plain meaning of the statute and find that the dividend received deduction should be disallowed as to the dividends Export is **deemed** to have paid HTI during the tax years in issue.

#### **Unitary vs. Non-unitary Dividends**

HTI also asserts that Subd. 4(e) is limited to non-unitary FSCs, relying upon the legislative history pertaining to FSCs and FOCs. Again, the clear and unambiguous language of Subd. 4(e) and Minn. Stat. § 290.17, subd. 4(g) obviates the necessity of looking to the legislative history and supports our finding that HTI is not entitled to claim the dividend received deduction for the tax years in issue. Subd. 4(e) expressly states that the deduction “does not apply if the dividends are paid by an FSC...”, without distinguishing between unitary and non-unitary FSCs. Since there is no ambiguity or irreconcilable conflict in the governing statutes, this Court need not resort to the canons of construction. Subd. 4(e) does not say that the dividend received deduction does not apply if the dividends are paid by a **non-unitary** FSC. Rather, Subd. 4(e) says what it means and means what it says: “[t]he deduction provided for in [Minn. Stat. § 290.21,

subd. 4] does not apply if the dividends are paid by a FSC....” Therefore, we find that HTI is not entitled to the deduction for the dividends paid by Export during the tax years in issue.

### **The Commissioner’s Instructions Are Not Controlling**

HTI next argues that the Minnesota corporate tax return instructions support its position that the dividend received deduction should be allowed in this case. The Commissioner does not dispute that the instructions are consistent with HTI’s claimed deduction during the tax years in issue, but contends that they are not controlling authority in the matter now before this Court. Rather, the Commissioner relies upon the plain meaning of the statutes in denying the deduction.

We are once again asked to resort to principles of statutory construction despite the absence of ambiguity in the controlling authority. HTI seeks to have this Court adopt an administrative interpretation that is inconsistent with the plain meaning of the statute. “[W]hen a statute is clear on its face, there is no need to look further for aids in its interpretation.” Northwestern Bell Telephone Co. v. Commissioner of Revenue, Dckt. No. 3803 (Minn. Tax Ct. Aug. 11, 1986). We cannot write a provision into law even if there exists contrary administrative interpretations. Mankato Citizens Telephone Co. v. Commissioner of Taxation, 275 Minn. 107, 145 N.W.2D 313 (1966). Not only is the very need to look at an administrative interpretation lacking here because the statute on its face is clear, but even if we did consider the Commissioner’s instructions, they cannot extend or modify provisions of the statute. Id. The Minnesota Supreme Court has stated that “these instructions have no legal effect.” Commissioner of Revenue v. Richardson, 302 N.W.2d 23, 26 (Minn. 1981). This Court has previously rejected the argument that

the Commissioner must be bound by his instructions where they conflict with the law passed by the legislature. “Instructions are merely a guide to the taxpayer. If they are incorrect, they must be corrected when the error is called to the Commissioner’s attention.” Birkel v. Commissioner of Revenue, Dckt. No. 5514 (Minn. Tax Ct. Oct. 15, 1990). Therefore, we reject HTI’s argument and give no weight to the Commissioner’s instructions regarding the availability of the dividend received deduction.

### **Foreign Commerce Clause<sup>6</sup>**

HTI also contends that denial of a dividend received deduction for dividends deemed paid to it by Export is unconstitutional as a violation of the Foreign Commerce Clause of the United States Constitution. In support of this contention, HTI correctly points out that while some foreign operating corporations that are FSCs are organized under United States law, other foreign operating corporations that are FSCs are organized under foreign laws. HTI then argues that there is different treatment given to the dividends deemed paid by the two types of FSCs. Specifically, HTI’s constitutional challenge is that denial of the dividend received deduction to it discriminates against foreign operating corporations, like Export, which are FSCs organized under foreign law, in favor of foreign operating corporations which are not FSCs and which are organized under United States law.

In deciding Commerce Clause cases, courts must “make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing power, . . . ” Boston Stock Exchange v. State

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<sup>6</sup>This case was transferred to the Tax Court from the District Court using procedures outlined by the Minnesota Supreme Court in Erie Mining Co. v. Commissioner of Revenue, 343 N.W.2d 261, 264 (Minn. 1984). This Court, therefore, obtained jurisdiction over constitutional issues.

Tax Commission, 429 U.S. 318, 329, 97 S.Ct. 599, 606 (1977). The Commerce Clause does not require that all taxpayers be identically treated merely because they engage in foreign commerce, but rather focuses upon the burdens on interstate commerce.

Caterpillar, Inc. v. Commissioner of Revenue, 568 N.W.2d 695, 697-98 (Minn. 1997), *cert. denied* 522 U.S. 1112, 118 S.Ct. 1043 (1998). In determining the constitutionality of a tax involving interstate commerce, four factors must be considered: (1) whether the tax is imposed on an activity having a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against commerce; and (4) whether the tax is fairly related to services provided by the state.

See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079 (1977). Where foreign commerce is involved, there are two additional factors that must be considered: (5) whether the tax results in an enhanced risk of international multiple taxation; and (6) whether the tax impairs the uniformity of federal regulation of foreign commerce where such uniformity is essential. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446-448, 99 S.Ct. 1813, 1820-21 (1979); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 311, 114 S.Ct. 2268, 2276 (1994). Broader constitutional protection against interference is afforded where foreign commerce is involved because “matters of concern to the entire Nation are implicated.” Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue & Finance, 505 U.S. 71, 79, 112 S.Ct. 2365, 2370 (1992) citing Japan Line, Ltd., 441 U.S. at 445-46, 99 S.Ct. at 1819-20. HTI’s challenge here is that the Commissioner’s denial of the dividend received deduction violates the third prong of the Complete Auto test by discriminating against Export, a foreign

operating corporation organized under foreign law, in favor of foreign operating corporations which are not FSCs and which are organized under United States law.

Contrary to HTI's contentions, foreign operating corporations that are FSCs are not denied a dividend received deduction under Subd. 4(e) because they are organized under foreign law or because of where they do business. Instead, they are denied the dividend received deduction because of their unique nature as an FSC, a special type of corporation created and existing solely under the federal tax code. While Export was incorporated in a foreign country, Barbados, FSCs can be incorporated in the United States as well as in foreign countries. In fact, seventy-four percent of all FSCs are incorporated in the U.S. Virgin Islands, and Export itself was incorporated in the U.S. Virgin Islands from 1985 to 1995. Hunter R. Clark, Amy Bogran & Hayley Hanson, *The WTO Ruling on Foreign Sales Corporations: Costliest Battle Yet In an Escalating War between the United States and the European Union?* 10 Minn. J. Global Trade 291, 305-06 (Summer 2001). Accordingly, denying the dividend received deduction to foreign operating corporations that are FSCs does not afford different treatment on its face or based upon where the foreign operating corporation is incorporated.

### **Estoppel and Equal Protection Claims**

Next, we determine whether HTI's estoppel and equal protection claims raise genuine issues of material fact so that summary judgment cannot be granted. For the reasons below, we find that they do not.

#### **The Tax Court lacks jurisdiction to consider HTI's estoppel claim**

HTI asserts that if the Court decides that HTI is not entitled to the dividends received deduction, a remaining issue would require a trial as to whether the

Commissioner should be estopped<sup>7</sup> from denying the deduction because HTI relied to its detriment upon the Commissioner's instructions to the tax returns for the years in issue.

"[T]he Tax Court is a creature of statute and has not been granted equity powers. The Court can grant equity relief only when such authority has been granted to the Commissioner and he has refused to exercise it." Stelzner v. Commissioner of Revenue, Dckt. No. 7005 (Minn. Tax Ct. Jan. 12, 2000) (quoting Simon v. Commissioner of Revenue, Dckt. No. 3549 (Minn. Tax Ct. Feb. 10, 1983)). Although the Commissioner has power to abate penalties and interest pursuant to Minn. Stat. § 270.07(e)(1998), he lacks the equitable power to abate taxes that are due. Id. We do not, therefore, have the power to estop the Commissioner and relieve HTI of its tax liability in this case. We do not necessarily agree that this produces an inequitable result on these facts, but find that, in any event, we do not possess the power to abate the taxes or consider HTI's estoppel claim.

**Unsubstantiated equal protection claim does not create factual issue**

HTI also contends that a trial is needed to determine whether HTI has been denied equal protection by reason of the Commissioner's conduct in disallowing HTI's claim, while allowing other similarly situated taxpayers to claim the dividend received deduction.

HTI must do more than merely raise unsubstantiated claims in order to resist the Commissioner's right to summary judgment; "[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a

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<sup>7</sup> Appellant's Reply Memorandum of Law in Opposition to Commissioner's Motion for Summary Judgment is the first time HTI claims estoppel in this case.

metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." DLH, Inc., 566 N.W.2d at 71.

Here, HTI does not argue that the applicable statutes violate equal protection. Instead, HTI contends the issue requiring a trial is "whether HTI has been denied equal protection by reason of the fact that the Commissioner apparently has allowed numerous taxpayers to claim the dividends received deduction, but not argues that HTI (a similarly situated taxpayer) is not entitled to that same deduction." HTI's Reply Memorandum of Law in Opposition to Commissioner's Motion for Summary Judgment at 3. To support its claim to a trial on the issue, HTI cites Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, 488 U.S. 336, 109 S.Ct. 633 (1989).

In raising the matter, HTI submits no evidence by way of supporting affidavits containing facts relevant to the claim or otherwise of any unequal treatment of similarly situated taxpayers. In order to satisfy its burden of establishing that there is a genuine issue of material fact precluding summary judgment for the Commissioner, HTI must submit more than the bare allegation that the Commissioner has apparently treated other similarly situated taxpayers differently. HTI fails to allege, much less offer, anything more than speculated facts which lack the specificity required to show a genuine issue for trial to avoid summary judgment pursuant to Minnesota Rule of Civil Procedure 56.05.

In Allegheny, the complaining taxpayers had suffered from ten years of "intentional systematic" undervaluation of similar properties, which resulted in their paying higher taxes. See Allegheny, 488 U.S. at 346, 109 S.Ct. at 639. HTI has

presented no evidence of any intentional, systematic, or different treatment of similarly situated taxpayers to preclude summary judgment upholding the denial of the dividend received deductions. Instead, HTI makes an unverified allegation that the Commissioner has allowed other similarly situated taxpayers to claim the deduction now denied to HTI. This Court requires that a party alleging a violation of equal protection under Allegheny not simply rely upon bald assertions of unequal treatment, but must produce a sufficient quantum of valid and reliable evidence. Mere speculation, anecdotes, or even just a few examples are not sufficient. Tysdal v. County of Hennepin, File No. TC-9811 (Minn. Tax Ct. Nov. 21, 1990). Therefore, HTI has failed to meet its burden to prove a violation of equal protection.

**Partial v. Complete Summary Judgment**

Both parties concur that computational issues remain in this case despite the Court's ruling on the dividend received deduction. Although the Commissioner contends that no trial is necessary to resolve the outstanding issues, HTI has moved for partial summary judgment because of the remaining computational issues. Regardless of the confidence of counsel that the remaining issues are primarily computational questions that will not require a trial to the Court, the record as it now stands includes issues on appeal that still need to be addressed. Thus, the Court Administrator shall set the matter for trial and so notify the parties.

S.A.R.