**Office of Chief Counsel**
**Internal Revenue Service**
# memorandum

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to: Area Counsel (Heavy Manufacturing and Transportation)
Division Counsel
(Large and Mid-size Business) CC:LM:HMT

from: Senior Technician Reviewer, Branch 8
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(Passthroughs and Special Industries) CC:PSI:8

subject: Period of Limitation Applicable to Taxpayers of Collected Excise Taxes

This Chief Counsel Advice responds to your October 11, 2002, memorandum requesting guidance regarding the period of limitation on assessment under § 6501 of the Internal Revenue Code applicable to taxpayers of certain excise taxes. For the excise taxes at issue here, the person liable for tax is the person making the payment for facilities or services on which tax is imposed (the taxpayer) and the person responsible for collecting the tax and paying it over to the government generally is the person receiving the payment on which tax is imposed (the collector). In accordance with § 6110(k)(3), this Chief Counsel Advice should not be used or cited as precedent. Please call Patrick S. Kirwan at (202) 622-3130 if you have any further questions about this matter.

ISSUES

(1) How is the period of limitation on assessment under § 6501(a) determined with respect to a taxpayer making a payment that is subject to the tax imposed by § 4251, 4261, or 4271?

(2) Is the answer to (1) affected by any of the following?

(a) The taxpayer's refusal to pay the tax due.
(b) The collector's reporting (or failing to report) a taxpayer's refusal to pay tax under § 49.4291-1 of the Facilities and Services Excise Tax Regulations.
(c) Any agreement by the collector to extend the collector's period of limitation on assessment.

(3) Is the answer to (1) affected by § 6501(e)(3)?

CONCLUSIONS

(1) The tax generally must be assessed against the taxpayer within three years from the filing date of the return filed by the collector for the taxable period to which the amount paid relates.[1]

(2) The period of limitation on assessment against the taxpayer is not affected by any of the following.

(a) The taxpayer's refusal to pay the tax due.
(b) The collector's reporting (or failing to report) a taxpayer's refusal to pay tax under § 49.4291-1.
(c) Any agreement by the collector to extend the collector's period of limitation on assessment.

(3) To the extent that the collector's return omits an amount properly includible that exceeds 25 percent of the amount of tax reported on that return, tax may be assessed against a taxpayer within six years after the return is filed.

LAW

Section 4251 imposes a tax on the amount paid for certain communications services. Section 4261 imposes taxes on amounts paid for certain transportation of persons by air. Section 4271 imposes a tax on the amount paid for certain transportation of property by air. These taxes are referred to as "collected taxes."

Section 4291 requires generally that any person receiving a payment for facilities or services on which tax is imposed must collect the tax from the person making the payment and pay it over to the government. Under § 49.4291-1, if a taxpayer refuses to pay the tax, the collector is required to report to the IRS the name and address of the person making the payment subject to tax, the nature of the facility provided or service rendered, the amount paid therefore, and the date on which paid. Upon receipt of this information, the IRS will proceed against the person to whom the facilities were provided or the service was rendered to assert the amount of the tax due.

Section 6011(a) provides that any person liable for the collection of any tax must make any return or statement required by regulations. Section 40.6011(a)-1(a)(1) of the Excise Tax Procedural Regulations provides generally that liability for certain excise taxes is to be reported on Form 720, Quarterly Federal Excise Tax Return. That section also provides that a notation on any line on the form clearly indicating a denial

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[1] The period for assessment against the collector under § 6672 or § 7501(a) also is determined by reference to the filing date of the collector's return on which the tax should have been reported.

of liability for that particular tax constitutes a return of that tax and that a Form 720 filed with the word “none” written across it constitutes a return of all of the taxes reportable on the form. Section 40.6011(a)-1(a)(3) provides that the person required to collect a collected tax, and not the person incurring liability for the tax, must file the Form 720.

Section 40.6302(c)-1(a)(2) provides that for purposes of 26 CFR part 40, the tax imposed by §§ 4251, 4261, and 4271 is treated as a tax liability incurred during the semimonthly period in which the tax is collected.

Section 6501(a) provides generally that tax shall be assessed within three years after the return was filed.

Section 6501(b)(4) provides that the filing of a return on which an entry is made with respect to a tax imposed under subtitle D (including an entry showing no liability for that tax) constitutes the filing of a return of all amounts of that tax which, if properly paid, would be required to be reported on that return. Subtitle D includes the collected taxes.

Section 6501(c)(3) provides that, in the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time.

Under § 6501(c)(4), the three year period of limitation on assessment may be extended if the IRS and the taxpayer both timely consent in writing.

Section 6501(e)(3) provides that, in the case of certain excise tax returns, if the return omits an amount of tax properly includible that exceeds 25 percent of the amount of tax reported on that return, the tax may be assessed, or a proceeding in court for the collection of that tax may be begun without assessment, at any time within six years after the return is filed.

Section 6672(a) provides that any person required to collect, truthfully account for, and pay over any tax imposed by this title that willfully fails to collect such tax, or truthfully account for and pay over such tax, shall, in addition to other penalties provided by law, be liable for a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Section 7501(a) provides that any person required to collect and pay over any tax holds the amount of tax collected in a special fund in trust for the United States and the amount of the fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as are applicable with respect to the taxes from which the fund arose.

ANALYSIS

In general, § 6501(a) provides that any tax must be assessed within three years after the return is filed. In the case of collected excise taxes, the taxpayer is not the person required to file the return; § 40.6011(a)-1(a)(3) provides that the collector must file the return. Therefore, the return with respect to taxes paid by the taxpayer is the return of the collector. The filing of the collector's return begins the three year period set forth in § 6501(a). Under § 6501(b)(4), the filing of an excise tax return on which an entry is made for a particular tax constitutes the filing of a return of all amounts of that tax which, if properly paid, would be required to be reported on that return. Thus, the return filed by the collector with an entry on the line for the relevant collected tax constitutes the return for taxes that should have been but were not paid by taxpayers during the period covered by the return. If, however, the collector does not file a return, § 6501(c)(3) provides that the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time. In that case, the IRS may make an assessment against either the collector or the taxpayer, as appropriate, at any time.

This issue has been addressed in two revenue rulings. In Rev. Rul. 58-158, 1958-1 C.B. 562, the IRS considered whether the period of limitation had run where the taxpayer had not paid the tax and the collector failed to file a return. The ruling holds that because the tax was not paid and a return was not filed the tax could be assessed against the taxpayer at any time. In Rev. Rul. 60-58, 1960-1 C.B. 638, the IRS considered what was the applicable period of limitation with respect to a claim for overpayment where the taxpayer paid the tax and the collector filed a return. The ruling holds that the taxpayer had three years from the date that the return was filed by the collector to claim a refund for any overpayment of tax.

Under § 49.4291-1, if a taxpayer refuses to pay the tax, the collector must report that refusal to the IRS. However, the report to the IRS is not a return and is not required to be provided to the IRS with the collector's return. Therefore, the report does not affect the period of limitation for assessment against the taxpayer under § 6501, which begins with the filing of the collector's return. While not a return, the report to the IRS under § 49.4291-1 may be considered with respect to the imposition of the § 6672(a) penalty for willful failure to collect, truthfully account for, and pay over tax because the report is evidence that the collector attempted to collect the tax.

When the collector consents to an extension of the period of limitation under § 6501(c)(4), the collector signs for itself, and that consent applies only to the period during which an assessment may be made against the collector. In addition, unlike the taxpayer, the collector generally is not liable for tax and instead is assessed under § 7501 or § 6672.[2] The taxpayer has not consented in writing to any extension of the period for assessing tax against the taxpayer. Thus, the taxpayer's period of limitation begins with the filing of the collector's return and ends, unless extended by the taxpayer, three years after the filing of the return.

Section 6501(e)(3) provides that, if certain excise tax returns omit an amount of tax properly includible that exceeds 25 percent of the amount of tax reported on that return, tax must be assessed within six years after the return is filed. Amounts that a taxpayer

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[2] Under certain circumstances, a person responsible to collect the § 4261 tax may be liable for tax under § 4263(c) if tax is not paid by the taxpayer.

fails or refuses to pay are not amounts properly includible on the collector's return.[3] Thus, a failure or refusal to pay tax does not provide a six year period of assessment against the taxpayer under § 6501(e)(3). If, however, the collector omits from its return an amount of tax collected from a taxpayer (and therefore properly includible) exceeding 25 percent of the tax reported on the return, the six year period would apply to both the collector and the taxpayer.[4]

[3] However, under § 49.4291-1, the collector has an obligation to report this refusal to the IRS and failure to report the refusal is evidence to be used in determining whether a collector is liable under § 6672(a).

[4] The taxpayer's defense would be proving that the tax was paid.