

Part I

Section 6501. – Limitations on Assessment and Collection

(Also, § 4971.)

Rev. Rul. 2003-88

ISSUE

What starts the running of the statute of limitations for purposes of the excise taxes imposed by § 4971 of the Internal Revenue Code on failure to satisfy the minimum funding standards of § 412?

FACTS

Employer X maintains a defined benefit pension plan (“the Plan”) qualified under § 401(a) that is subject to the requirements of § 412. The Plan has an accumulated funding deficiency under § 412 as of the end of the 2002 plan year. As a result, X is liable for the initial excise tax under § 4971(a) for failure to meet the minimum funding standards. Form 5500 is timely filed for the Plan for the 2002 plan year and the form discloses the amount of the accumulated funding deficiency. However, X fails to file Form 5330 to report the excise tax liability on the accumulated funding deficiency.

LAW AND ANALYSIS

Section 4971 imposes excise taxes on the failure to satisfy the minimum funding standards of § 412. The amount of the taxes, for which the employer is liable, is related to the amount of an accumulated funding deficiency, as defined in § 412(a), and, in the case of a plan to which § 412(m)(5) applies, to the amount of an unpaid liquidity shortfall under § 4971(f). Although the determination of whether there is an accumulated funding deficiency is made at the end of the plan year, the tax on the accumulated funding deficiency is imposed for the taxable year (of the employer who maintains the plan) in which the plan year ends.

Section 6501(a) provides that, except as otherwise provided in that section, the amount of any tax imposed by Title 26 of the United States Code (which includes § 4971) shall be assessed within three years after the return was filed (whether or not the return was filed on or after the date prescribed), and no proceeding in court without assessment for the collection of the tax shall be begun after the expiration of that period. Section

6501(a) further provides that, for this purpose, the term “return” means the return required to be filed by the taxpayer.

However, there are exceptions to the three year rule in § 6501(a). Section 6501(e)(3) provides that, except as otherwise provided in § 6501(c), in the case of a return of a tax imposed under a provision of subtitle D (which includes § 4971), if the return omits an item of the tax properly includible thereon that exceeds 25 percent of the amount of the tax reported thereon, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time within six years after the return is filed. However, § 6501(e)(3) also provides that in determining the amount of tax omitted from the return, there shall not be taken into account any amount of tax imposed by chapter 43 (which includes § 4971) that is omitted from the return if the transaction giving rise to the tax is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the Treasury or his delegate of the existence and nature of the item.

Section 6501(c) provides several rules that take precedence over the provisions of § 6501(e)(3). Section 6501(c)(3) provides that in the case of a 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. Also, § 6501(c)(4) provides that if both the taxpayer and the Secretary of the Treasury or his delegate have consented in writing before the expiration of the time prescribed in that section, the tax may be assessed at any time before the expiration of the period of extension.

Section 6058(a) requires employers that maintain certain funded plans of deferred compensation, including plans qualified under § 401(a), to file an annual information return. Section 301.6058-1(a)(1) of the Procedure and Administration Regulations provides that the annual return of the plan is the appropriate *Annual Return/Report of Employee Benefit Plan* (Form 5500 series). Section 54.6011-1(a) of the Excise Tax Regulations, however, requires any employer liable for tax under § 4971 to file Form 5330, *Return of Excise Taxes Related to Employee Benefit Plans*. Generally, filing a Form 5500 does not start the § 6501 statute of limitations for assessment for taxes. Absent a specific statutory or regulatory exception, Form 5500 is not designated for the reporting of tax. Section 6501(l)(1) provides an exception for taxes imposed by § 4975. Section 6501(l)(1) states, in pertinent part, that for purposes of § 4975, the return to be used for purposes of starting the running of the statute of limitations on assessments shall be the return filed by the plan for the year in which the act giving rise to the liability occurred. No such exception exists for § 4971. Therefore, the general rule of § 6501(a) applies. The return used for purposes of the statute of limitations for § 4971 is Form 5330, as designated by § 54.6011-1(a). Disclosure of information on Form 5500 does not commence the running of the statute of limitations under § 6501 because only disclosure on the return required to report and pay the tax (Form 5330) is relevant.

If an accumulated funding deficiency or unpaid liquidity shortfall is disclosed on the Form 5330 or in an attached statement, the statute of limitations for collecting the tax imposed by § 4971 expires three years after the filing of the Form 5330 in which the deficiency or unpaid liquidity shortfall is disclosed. If an accumulated funding deficiency or unpaid liquidity shortfall is not disclosed on the Form 5330 or in a statement attached to the Form 5330, the statute of limitations on assessment is six years. However, either of these periods may be extended by a written agreement for an agreed-upon period of time.

If Form 5330 has not been filed for a year in which an accumulated funding deficiency or unpaid liquidity shortfall occurs, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time after the date prescribed for filing the return. In each case, the statute of limitations is determined without regard to whether the accumulated funding deficiency or unpaid liquidity shortfall has been disclosed on Form 5500.

HOLDING

The filing of Form 5330 starts the running of the statute of limitations for purposes of the excise taxes imposed by § 4971 on failure to satisfy the minimum funding standards of § 412. If an accumulated funding deficiency or unpaid liquidity shortfall is disclosed on Form 5330 or in an attached statement, the three-year statute of limitations of § 6501(a) applies. However, if the deficiency or unpaid liquidity shortfall is not disclosed on Form 5330 or in an attached statement, the six-year statute of limitations of § 6501(e)(3) applies.

If Form 5330 is not filed for that year, § 6501(c)(3) permits the tax to be assessed at any time after the date prescribed for filing the return. Because X has failed to file Form 5330 to disclose the accumulated funding deficiency, the tax under § 4971 may be assessed, or a proceeding in court for the collection of the tax may be begun without assessment, at any time.

DRAFTING INFORMATION

The principal author of this revenue ruling is James Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Flannery may be reached at 1-202-283-9888 (not a toll-free number).