

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

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date: August 02, 2010

to: Holly McCann  
(Chief, Excise Tax Program)

from: Frank Boland  
(Chief, CC:PSI:7)

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subject: Follow-up request for Non-Taxpayer Specific Legal Advice On the Statutory Period of Limitations for Information Returns (Forms 720-TO/CS)

This memorandum responds to your request for reconsideration, dated May 25, 2010, of our Chief Counsel Advice dated January 28, 2010 regarding the statute of limitations that applies to assessing a penalty under § 6725 of the Internal Revenue Code. In our January 28, 2010, memorandum, we concluded that in the case of a failure to file an information report under § 4101(d), the IRS may assess the penalty imposed by § 6725 at any time. In the case of a filed report that does not contain the required information or contains incorrect information, the penalty generally must be imposed within 3 years after the report was filed.

Your request for reconsideration asks that we take two cases into account in making our determination in finding that the statute of limitations applies at all to assessing this penalty. The first case is Bufferd v. Comm'r, 506 U.S. 523 (1993) which cited Automobile Club of Mich. v. Comm'r, 353 U.S. 180 (1957).

In Bufferd, the court ruled that the statute of limitations against an S corporation shareholder was measured from the time of the individual shareholder's return rather than from the time of the S corporation's return. The court stated that the S corporation return "lack[ed] the data necessary for the computation and assessment of deficiencies." The second case is Schiff v. U.S., 919 F.2d 830 (2d Cir. 1990). In Schiff, an individual wrote on his Form 1040, U.S. Individual Income Tax Return, "I DO NOT UNDERSTAND THIS RETURN NOR THE LAWS THAT MAY APPLY TO ME. THIS MEANS THAT I TAKE SPECIFIC OBJECTION UNDER THE 4th or 5th AMENDMENTS OF THE U.S. CONSTITUTION TO THE SPECIFIC QUESTION." One of the arguments made by the individual is that assessment was barred by the 3 year statute of limitations. The court found that

such a return set forth no financial information at all and concluded that “for statute of limitations purposes, such a return is treated as if no return was filed.”

You asked us if these two cases lead to the conclusion that there is no statute of limitations for assessing the § 6725 penalty on situations where the Forms 720-TO/CS do not contain the required information or contains incorrect information. Your suggestion is that because such returns do not contain financial data from which an assessment can be made, then the statute of limitations does not apply. In other words, you suggest that Forms 720-TO/CS are not returns as described in Bufferd and Schiff.

Both of the cases you cite are income tax cases concerning income tax returns. The information requested in an income tax return requires financial data from which an assessment can be made. In contrast, the forms in question here are not income tax returns and do not request financial data from which an assessment can be made. However, that does not mean that they are not returns for purposes of the statute of limitations. Section 6501(a) states that “the term ‘return’ means the return required to be filed by the taxpayer.” Section 4101(d) gives the Secretary the authority to require information reporting by those who are required to register under § 4101(a). This information reporting is to be done on Forms 720-TO/CS. Therefore, Forms 720-TO/CS are the “returns” described in § 6501 even though a tax assessment may not be made from the information provided. Since Forms 720-TO/CS are returns, if such a return is filed without the required information or contains incorrect information, under § 6501(a) the penalty imposed by § 6725 generally must be imposed within 3 years of filing.

If you have any questions or comments regarding this memorandum please contact Chase Langley at (202) 622-3130.