

K. STATUTE OF LIMITATION FOR EXEMPT ORGANIZATIONS RETURNS

We discussed the application of the statute of limitations to exempt organization cases in the 1982 CPE textbook. We would like to readdress two of the questions raised in that article. These are: (1) Is the initial excise tax on acts of self-dealing imposed annually or is it imposed in the year the act occurs and computed with reference to the number of years in the taxable period? and (2) For what year or years must a consent to extend the statute of limitations be obtained? For discussion purposes we will repeat the illustrative situation we used last year. (p. 50, 1982 CPE Text)

Situation: X, a private foundation using the calendar year as its tax year, filed its 1977 Form 990-PF on May 15, 1978. All subsequent annual returns were also filed timely. An examination initiated on January 1, 1981, revealed that on July 30, 1977, X entered into a five year lease for an office building owned by Y, a disqualified person. This transaction was revealed on the 1977 return and referred to in subsequent returns, resulting in the three year statute of limitations. No Form 4720 was filed, however, and no tax was paid. The case is unagreed.

1. For which years may the first level taxes under IRC 4941(a) be assessed?

If a transaction between a private foundation and disqualified person is determined to be self-dealing, there is generally one act of self-dealing occurring on the date the terms and conditions of the transaction and the liabilities of the parties are fixed. However, if the transaction relates to the leasing of property, the lending of money or other extension of credit, other use of money or property or payment of compensation, the transaction will be treated for purposes of IRC 4941 as giving rise to an act of self-dealing on the day the transaction occurs plus an additional act of self-dealing on the first day of each succeeding taxable year or portion of a taxable year within the taxable period. Reg. 53.4941(e)-1(e).

Thus, in the example, the leasing of the building from Y results in an act of self-dealing occurring on July 30, 1977, plus an additional act of self-dealing occurring on January 1, 1978, January 1, 1979, January 1, 1980, and January 1, 1981.

Pursuant to IRC 6501(n) the statute of limitations starts for an act of self-dealing when the foundation's return for the year in which the act occurred is filed. Thus, the statute of limitations for the initial act of self-dealing starts on May 15, 1978, the date on which the 1977 Form 990-PF was filed and, since the three year statute applies, will expire on May 15, 1981. The statute of limitations for the act of self-dealing deemed to have occurred on January 1, 1978, starts on May 15, 1979, and expires May 15, 1982, and so on for the subsequent years.

Since the statute of limitations has not expired on any year, first level taxes may be assessed for all years in the taxable period for each separate act of self-dealing, i.e., the one occurring on July 30, 1977, and the subsequent acts occurring on January 1, 1978, 1979, 1980 and 1981.

2. For which years must the statute of limitations be protected?

In answer to this question we stated in the 1982 CPE at page 51:

"Since the three year statute of limitations applies, the period for assessment of the first level taxes on the 1977 tax year will expire on May 15, 1981. Since the case is unagreed and will be forwarded for higher review the examiner working the case should get a consent to extend the statute of limitations for the year 1977. The statute need only be extended for the 1977 year rather than for each year in the taxable period since the tax is deemed imposed in that year even though the amount of tax to be imposed is computed with reference to each year in the taxable period." (Emphasis added.)

We have recently received indications from the Chief Counsel's office that the initial tax should be imposed on an annual basis rather than only in the year in which the act occurs. If this is correct, it does not necessarily change the answer that we gave last year with respect to what year or years to secure consents to extend the statute. However, until we get definitive answers to these questions extensions should be secured for each year in the taxable period. Thus, in the

example, the examiner should get a consent to extend the statute of limitations not only for the 1977 tax year but for all open years. (1977-1981).

The statute, with respect to the subsequent acts deemed to have occurred on January 1, 1978, January 1, 1979, etc., must be protected separately. Thus, for example, the statute with respect to the act occurring on January 1, 1978 (and expiring on May 15, 1982) is protected by securing consents for all open years, starting with 1978, with respect to this act. Whether or not the taxes are imposed annually, there is only one period of limitations applicable to all the tax years attributable to each act of self-dealing. This period begins by reference to the return filed by the private foundation for the year in which the act giving rise to the liability for the tax occurred and ends three or six years later, depending on whether the act was adequately disclosed on that return.