



**Zero Returns and the
Statute of Limitations: *Law
Office of John H. Eggertsen*
(6th Cir. 2015)**

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Timeline

1998: S corp. election made and ESOP established

2001: Congress passes legislation mandating that S corp. ESOPs have broad-based ownership

2005: special excise tax comes into effect, S corp tries to comply



Timeline

2006: S corp. and ESOP file returns for 2005. No form 5330 was filed because it was thought that no excise tax was owed

2008: IRS audit starts

2011: IRS issues deficiency notice to S corp. for excise tax

Feb. 2014: Tax Court rules that section 4979A provides the exclusive SOL and that the deficiency notice is time barred.

Timeline

Oct. 2014: Tax Court, on motion for reconsideration, reverses, finding that section 6501 applies and that the notice of deficiency is timely

Sept. 2015: 6th Circuit affirms



Section 4979A(e)(2)(D)

Statute of limitations The statutory period for the assessment of any tax imposed by this section by reason of paragraph (3) or (4) of subsection (a) shall not expire before the date which is 3 years from the later of—

- (i) the allocation or ownership referred to in such paragraph giving rise to such tax, or
- (ii) the date on which the Secretary is notified of such allocation or ownership.

Section 4979A(e)(2)(D)

- Note that section 4979A(e)(2)(D) does not **cut off** the period for assessment. But what was the intent of Congress?





Initial Holding

- The Tax Court found that the 2005 Form 1120S and the 2005 ESOP annual returns, filed in 2006, contained information sufficient to notify the Secretary “of such allocation or ownership.”
- Accordingly, the Tax Court initially held that 2011 notice of deficiency was untimely.



Reconsideration

On a motion for reconsideration, the Tax Court held that section 4979A(e)(2)(D) did not displace section 6501 but only supplemented it.

Hence, section 6501, which keys off a filed return, is operative.

“Form 5330 is the form in which the excise tax . . . is required to be reported.”

No Form 5330 was filed.



Reconsideration

“[T]he limitations clock may start in some settings even when the taxpayer fails to file the right return—say the taxpayer filed the same return for another reason . . . or filed the wrong return but with all of the necessary information A key predicate for this exception is that the return filed must contain ‘sufficient data to calculate tax liability.’” *Eggertsen*, Sixth Circuit op.



Final Holding

On motion for reconsideration, the Tax Court held the returns filed did not permit the Secretary to **calculate** the excise tax, and that therefore the SOL was open when the 2011 notice of deficiency was issued.



Lessons learned

- “Special” statutes of limitations may not be deemed to **displace** section 6501.
- In addition to filing the returns required to be filed, thought should be given to filing zero returns for taxes the taxpayer does *not* think it owes.
- Failing that, the taxpayer should make sure enough information is disclosed on the returns it files so that other taxes could in theory be calculated.
- *Eggertsen* teaches that overdisclosure in this sense is a good practice.



Managing Tax Audits and Appeals 2015

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