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EXCISES: A TIME OF REPOSE?

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*"In all litigation, in all such matters of taxation, there should be what we call a time of repose, a statute of repose."****

Something about a statute of repose normally adduces great sleepiness. When that statute is a tax statute, and when that tax statute is an excise tax statute, visions of a heaven for weary technicians are naturally conjured. It may therefore be surprising to learn that one of the stirring tax issues of our time is whether there is a statute of limitations for manufacturers, retailers and collected excise taxes imposed by the Internal Revenue Code of 1954.

The true importance of this issue can be assessed adequately only in the context of the nature of federal excise taxes, that is, taxes which bear no relation to the profitability of the taxpayer's business, taxes characterized by the absence of a consistent congressional philosophy and by a corresponding absence of a consistent administrative and judicial interpretation.

The leading case in the area, *McDonald v. United States*,[1] and its progeny[2] emasculated the statute of limitations for the so-called "collected excise taxes."[3] The broad language of these cases has led the Internal Revenue Service and many others to speculate upon the extension of the rationale of these decisions to the federal manufacturers and retailers excise taxes. The magnitude of the issue thus raised may be measured in part by the value of the protection such

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*** 65 Cong. Rec. 8131 (1924) (remarks of Senator Ashurst).

1 315 F.2d 796 (6th Cir. 1963).

2 Hulette v. United States, 315 F.2d 826 (6th Cir. 1963); Carter v. United States, 63-2 CCH USTC ¶ 15,535 (D.C. Ill.). Decisions preceding *McDonald* and in accord: People's Outfitting Co. v. United States. 58 F.2d 847 (Ct. Cl. 1932); Cohan v. United States, 198 F. Supp. 591 (D.C. Mich. 1961).

3 The "collected excise taxes" are taxes imposed by chapter 33 of the Internal Revenue Code on facilities and services, *e.g.*, the 20% tax imposed on amounts paid as initiation fees and club dues to a social, athletic or sporting club. Int. Rev. Code of 1954, § 4241. The actual taxpayer and the person having the obligation to report and pay over the tax to the Government are different persons. For example, the club dues tax is imposed upon the club member, but the club has the duty to collect the tax from the member, file a return, and pay over the tax; and the communications tax is imposed upon the telephone user, but collected by the telephone company.

a statute of limitations would afford, for taxpayers in these three categories incur an aggregate annual liability in excess of six billion dollars.[4]

This article will evaluate the correctness of *McDonald* and subsequent decisions and administrative rulings, examine the applicability of *McDonald* to federal manufacturers and retailers excises, and assess the need for corrective legislation.

THE STATUTE AND THE FORM

Section 6501(a) of the Internal Revenue Code of 1954[5] provides for a three-year period of limitations on the assessment of excise taxes by its requirement that the amount of any tax imposed by Title 26 "shall be assessed within 3 years after the return was filed. . . ." Section 6501(c)(3) provides that in "the case of failure to file a return," the tax may be assessed at any time. Thus the key to the applicability of the three-year period of limitations depends on the delineation of exactly what actions constitute the filing of a return.

Most lawyers, including that unique breed who devote their time to tax matters, associate the term "tax return" with a form prescribed by the Internal Revenue Service for the reporting of tax liability. In the case of excise taxes, that schedule is Form 720, entitled "Quarterly Federal Excise Tax Return." The detailed portion of the form is divided by headings into major groups of excises—retailers, facilities and services, manufacturers, and products and commodities. Under each of these headings, specific categories of tax are itemized together with a space for the insertion of the tax applicable to each category. For example, the manufacturers tax on the sale of trucks imposed by section 4061(a) is reflected under the title "Truck, bus and trailer chassis and bodies; tractors." The form provides no space for the reporting of individual taxable transactions or total taxable transactions, either by number or amount; nor is there space for the reflection of exclusions or exemptions from the tax or for price readjustments, or for the reporting of non-taxable transactions.

McDONALD AND OTHER CASES

One might conclude that filing a "return" is an easy matter, requiring only that one supply the information called for on the face of the form, sign it, and mail it to the appropriate District Director. But, in the words of *McDonald*, "Not so in the case of excise taxes."[6]

That case involved the following fact situation. In his idle hours,

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[4] I.R.S. News Release, IR-633, October 4, 1963.

[5] References to sections or to the Code are to the Internal Revenue Code of 1954 unless otherwise noted.

[6] The context is different; McDonald v. United States, supra note 1, at 800.

Mr. McDonald whiled away the time at the Idle Hour Country Club, a social club within the meaning of Section 1710 of the Internal Revenue Code of 1939 (the predecessor of Section 4241 of the Internal Revenue Code of 1954). In 1947, McDonald purchased a $1,000 bond from the Club. Thirteen years later, the Internal Revenue Service claimed that the amount paid for the bond was an amount paid as an "initiation fee" and therefore subject to the 20% tax imposed on the payment of such fees. McDonald contested the assessment, both on its merits and upon the ground that the assessment was barred by the period of limitations prescribed by Section 3312(a) of the 1939 Code (the predecessor to section 6501(a)). He pointed out that the club had filed the prescribed excise tax return for the relevant period, which had reflected the club dues and initiation fees tax it thought due.

The statute of limitations question presented to the United States Court of Appeals for the Sixth Circuit was simply whether a return had been filed in 1947 which would bar the assessment of tax in 1960. The Government contended that no return had been filed, since the taxable event (payment for the bond) was not reflected in the taxes reported on the return. It was argued that the system of periodic returns, rather than a separate return of each tax, was adopted by the Internal Revenue Service for purposes of more convenient reporting, and that this should not prevent suspension of the limitation statute where the return failed to disclose the transaction subject to imposition of the tax.

The court was "constrained to agree with the Government's position."[7] It recognized that a different rule pertained to income taxes, but thought the situation applicable to each tax distinguishable.

> The limitation statute before us (§ 3312) is different than that applying to income taxes (§ 275, 276 I.R.C. 1939). In the latter case, the filing of a return *begins* the period of limitation; the taxes must be assessed "within three years *after* the return was filed." The filing of a return starts the running of the statute. Not so in the case of excise taxes. The assessment must be made "within four years *after such taxes become due*," provided a "return" was timely filed.[8] (Emphasis in original.)

The court was undaunted by the drastic consequences which resulted from its decision.

> Having in mind the admitted good faith of McDonald and his Club, and the thirteen years that the government delayed

[7] McDonald v. United States, supra note 1, at 800.

[8] Ibid.

> in making the assessment, it would appear that our holding frustrates the traditional purpose of a limitations statute. . . . Under the view we express, the door is open for the government to go back, without limit in time, and make assessments against citizens who honestly believed they had made all the returns and paid all the taxes that the law required. We may not, however, extend the statute here involved beyond its clear language. The good faith of the taxpayer in failing to file a return cannot aid them here. . . . The absence of any limitation, under the situation before us, may indeed visit unfair burdens and expense upon innocent taxpayers. If so, Congress can provide the needed remedy.[9]

Both the rationale of the court's decision, based upon the transactional nature of the excise tax, and the broad language of the opinion are on their face equally applicable to non-collected excises, the manufacturers and retailers excises. This was recognized, or at least assumed, by the dissenting judge:

> The Court concedes that a good faith income tax return, although erroneously excluding certain includable items of income, nevertheless suffices to start the running of the income tax statute of limitations. But in refusing to apply that good faith rule to the excise tax statute of limitations, the Court holds that no statute of limitations applies to unreported taxable items erroneously omitted from a composite excise tax return.
>
> Federal excise taxes apply to innumerable goods and services. Literally hundreds of other particular items, otherwise taxable, might arguably fall within the many statutory exemptions of various classes of such items. See 26 U.S.C.A. § § 4001-5801.[10]

The dissenting judge also rejected the majority's distinction between the income tax statute of limitations and the excise tax statute of limitations. He held that the filing of a composite return erroneously omitting certain items in good faith constitutes the filing of a "return" within the meaning of Section 3312(b) of the 1939 Code and that consequently, the filing of such a good faith return suffices to start the running of the statute of limitations on the erroneously omitted items.

Four days later, the Sixth Circuit followed *McDonald* in *Hulette v. United States*.[11] Like *McDonald*, *Hulette* involved the applicability

[9] Id. at 801.

[10] Id. at 801-02. The sections of the 1939 Code cited include manufacturers and retailers excises.

[11] 315 F.2d 826 (6th Cir. 1963), supra note 2.

of the initiation fees tax imposed by the 1939 Code to transactions in club securities with a substantial lapse of time between the taxable transaction (1949) and the assessment of tax (1960). The court noted the existence of one factual difference between *Hulette* and *McDonald*:

> . . . In McDonald, the excise tax return form (Treasury Department Form 729) called for reporting "club dues" and "initiation fees" in separate categories. In this case, the form used (Treasury Department Form 720) combined "club dues, initiation fee, life memberships," and called for one total figure. We do not consider that this difference in fact requires a legal result different from the McDonald case.[12]

The court also declined to accord significance to the fact that Mr. Hulette had apparently paid an excise tax on dues during the same period that the taxable initiation fee was paid, so that the return filed by the club actually reflected the payment of a tax for the taxpayer in the category of "club dues, initiation fees, life memberships."

Seemingly intent upon proving that bad news comes in threes, a district court decision following the *McDonald* and *Hulette* decisions rounded out the year 1963. In *Carter v. United States*,[13] the rule was expressed broadly:

> The statute of limitations does not commence to run in an excise tax matter until the specific transaction subject to tax is reported on the appropriate return.

The *Carter* court did not even cite the applicable provision of law, even though the issue before it involved an interpretation of Section 6501 of the 1954 Code, rather than the 1939 Code provisions construed in the prior cases. While the court in *McDonald* thought the different limitations provisions of the 1939 Code pertaining to income and excise taxes significant, no importance was attached in *Carter* to the fact that the 1954 Code had obliterated this distinction. While the question before the court involved a collected excise tax, the rule was stated to apply to "an excise tax matter." The court also indicated that the transaction must be reflected on "an appropriate return," possibly ruling out the reflection of the transaction on an income tax return filed by the same taxpayer. Finally, the court spoke of a "transaction" reported on a return, evidently ignoring the fact that excise tax returns never call for the reporting of transactions, but only for the reporting of tax.

The year 1963 was not the only bad year for judicial logic. In 1961, the United States District Court for the Eastern District of

12 Hulette v. United States, supra note 2, at 828.

13 63-2 CCH USTC ¶ 15,535 (D.C. Ill.), supra note 2.

Michigan ruled that section 6501 did not bar the assessment of club dues not reflected by a return filed by the Detroit Yacht Club.[14] Ignoring the fact that statutes of limitation are customarily intended to bar the collection of debts not previously paid, the court thought, "It would seem strange indeed to hold that the statutory period of limitations had run as to taxes otherwise required to be paid but which were omitted from such return." The rationale was the same as that followed in *McDonald:*

> The club dues tax is a divisible tax; each charge made for the use of a club facility constitutes a taxable transaction. . . . A failure to report a taxable transaction where the tax involved is divisible and a combined tax return is used permits the commissioner to assess the deficiency at any time since the statute of limitation has not started to run.[15]

Cohan relied upon a 1932 case, *People's Outfitting Co. v. United States,*[16] which interpreted the statute of limitations of the Revenue Act of 1924 as applied to the tax imposed on the retail sale of jewelry. While the *People's Outfitting* case had held that the return was fraudulently filed (thus making it immaterial whether a return had actually been filed), it also had held that no return was made of sales "upon which it is agreed no tax was paid."[17] As shall be seen, the Internal Revenue Service has ignored the holding of the *People's Outfitting Co.* case for more than 30 years.

THE ADMINISTRATIVE POSITION

For essentially the same reasons as were articulated in *McDonald et al.*, the Internal Revenue Service has held that the statute of limitations on collected excise taxes does not commence to run where the taxpayer fails or refuses to pay the tax, even though the collecting agency has filed timely returns of like taxes paid by other taxpayers for the same period. If, however, the collecting agency places the Government on notice that the taxpayer "fails or refuses" to pay the tax, the bar of the statute applies.[18] In the case of manufacturers and retailers excises, however, an entirely different set of rules is followed. These directives have been evolved in a series of published rulings,[19] which are integrated and summarized in the following paragraph.

Where a Form 720 is filed reflecting the payment of tax with re-

[14] Cohan v. United States, supra note 2.
[15] Id. at 601-02.
[16] 58 F.2d 847 (Ct. Cl. 1932), supra note 2.
[17] Id. at 851.
[18] Rev. Rul. 59-127, 1959-1 Cum. Bull. 656.
[19] Rev. Rul. 60-312, 1960-2 Cum. Bull. 398; Rev. Rul. 59-366, 1959-2 Cum. Bull. 418; Rev. Rul. 58-274, 1958-1 Cum. Bull. 459.

spect to any category of tax (*e.g.*, "Truck," "bus," etc.), a return is filed with respect to that category even though tax is erroneously, but in good faith, omitted on transactions within the same category. Where the word "none," a zero, or some like denial of liability is made with respect to all taxes in the summary portion of the Form 720, or where such a negative entry is made on any line of the return, a return is filed with respect to the class or particular item indicated. If no negative entry is made on a Form 720, a return is not filed for any category of tax in which the space opposite the category is left blank, even though the tax may have been reported for another category.

Thus while the Internal Revenue Service is in accord with the rule of *McDonald* in collected excise tax cases, it has not yet applied this rule to manufacturers and retailers excises. As shall be seen, however, even this somewhat more moderate position robs the statute of the vitality which Congress intended it to have.

LEGISLATIVE HISTORY OF EXCISE LIMITATION PROVISIONS

A. *Statutory Provisions and Committee Report*

Although all earlier Revenue Acts contained provisions relating to returns, the first statutory provision limiting the period in which an assessment could be made for excise taxes was enacted in the Revenue Act of 1921. This period of limitations was first meshed with the filing of a return in the Revenue Act of 1924. For example, Section 38 of the Revenue Act of 1909 (fifth paragraph) provided a penalty of 50 per cent of the tax "in the case of refusal or neglect to make a return"; similarly, penalties have been written into every subsequent major revenue act for the failure to file a return. Sections 9 and 14 of the Revenue Act of 1916 contained a period of limitations on the assessment of income taxes levied by that act, which provided in effect that the Commissioner was required to make all assessments on or before June 1 of the year succeeding the taxable year "except in cases of refusal or neglect to make such return and in case of erroneous, false, or fraudulent returns," in which case the Commissioner could make a return and an assessment thereon "at any time within three years after said return is due, or has been made. . . ."

Section 1322 of the Revenue Act of 1921[20] established a statute

[20] The Revenue Act of 1917 imposed "war excise taxes" upon the sale of automobiles and other named articles by the manufacturer, producer, or importer thereof. Section 601 of that Act provided for the making of returns by these taxpayers and specified that such returns should "contain such information and be made at such times and in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe." A similar provision was contained in section 903 of the Revenue Act of 1918 which imposed a wide variety of manufacturers excises.

of limitations for the assessment of excise taxes, estate taxes and all other taxes imposed by the Act, except income, excess-profits, and war-profits taxes. Section 1322 provided as follows:

> SEC. 1322. That all internal revenue taxes, except as provided in section 250 of this Act, shall, notwithstanding the provisions of section 3182 of the Revised Statutes or any other provision of law, be assessed within four years after such taxes became due, but in the case of fraud with intent to evade tax or willful attempt in any manner to defeat or evade tax, such tax may be assessed at any time.

Section 1320 of the Act proscribed the bringing of a suit for the collection of excise, estate, and other taxes "after the expiration of five years from the time such tax was due" except in the case of fraud or willful evasion. While the period of limitations for assessment and collection of excise taxes began to run irrespective of the filing of a return, section 3176 of the Revised Statutes did provide a penalty of 25 per cent for the failure to file an excise tax return without reasonable cause.

Section 250(d) of the 1921 Act imposed a less restrictive rule in the case of income taxes, providing that the assessment was to be made "within four years after the return was filed," and that in the case "of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due. . . ."

Under the caption "RETURNS," section 1307 of the 1921 Act provided:

> SEC. 1307. That whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return or such statements as he deems sufficient to show whether or not such person is liable to tax.

The reasons for the enactment of sections 1322 and 1320 are explained in the report of the Senate Finance Committee:

> The laws relating to the time within which assessments may be made, suits brought for the collection of taxes, refunds or credits for taxes filed, and court actions instituted for the recovery of taxes illegally or erroneously collected have in the past been uncertain and annoying to taxpayers.
>
> By section 1322 of this bill the time for the making of an assessment increase of taxes other than income, excess profits, war-profits, or corporation excise taxes under the Act of

> August 5, 1909, has been limited to four years after the tax became due. In section 250(d) the time for assessing income, excess-profits, and war-profits taxes under this bill has been limited to four years, and under prior Acts to five years. Section 1320 of this bill prevents the bringing of any suit or proceeding by the Government in any court for the collection of internal-revenue taxes after the expiration of five years from the time such tax was due, except in the case of fraud.[21]

In the Revenue Act of 1924, however, the statute of limitations pertaining to excise, estate and other taxes was changed to conform more closely to the provisions of the income tax statute of limitations. Thus, subsection (b) of Section 1009 of the Revenue Act of 1924 provided that in case "of a failure to file a required return" of excise taxes, the tax might be assessed, or a proceeding for collection might be begun, at any time.

The reports of the House and Senate Committees regarding the reason for the more stringent section 1009 are unenlightening.[22] The Committees do discuss, however, the reasons for making a corresponding change in the estate tax statute of limitations, contained in section 310(a) of the 1924 Act. In explaining this change from prior law (which was the same for both excise and estate taxes), the House Committee on Ways and Means stated:

> The only limitations upon the assessment and collection of estate taxes at present are the general limitations in sections 1320 and 1322 of the existing law. These are four years from the time the tax became due in the case of assessments and five years from the time the tax became due in case of suits or proceedings for collection. These provisions as now worded have been found particularly undesirable in the case of estate taxes in view of the fact that if no returns are filed by estates the Treasury Department had no knowledge of the tax liability until the periods of limitation, which run from the date the tax became due, have expired. For these reasons, it is proposed to start the running of the statute in estate tax cases from the date the return is filed. In other words, the period of limitation will not begin to run until the Department has information upon which it can proceed to determine and assess

[21] S. Rep. No. 275, 67th Cong., 1st Sess. (1921).

[22] These reports state that, "Substantially similar provisions occur in sections 1320 and 1322 of the existing law." H. Rep. No. 179, 68th Cong., 1st Sess. (1924); S. Rep. No. 398, 68th Cong., 1st Sess. (1924). As is evident, this statement is not accurate, inasmuch as the 1924 Act requires the filing of a return as a condition to the running of the period of limitations.

the amount of tax and, if necessary, institute suit for its collection.[23]

The Revenue Act of 1924 also expanded the provisions relating to the collection of income tax to provide that in the case of a failure to file a return, a collection of any income tax could be begun at any time without assessment. The following is an excerpt from the discussion on the Senate floor regarding the change:

> MR. SMOOT. Anyone who wants to attempt any fraud with the Government ought to be put on notice. We are claiming here that the Government must be put on notice.
> MR. FLETCHER. I think you ought to insert the words "with such intent" after the word "failure," so as to read, "or of a failure with such intent to file a return."
> MR. SMOOT. The Government of the United States may not have notice at all. It may have no chance whatever to protect itself.
> MR. FLETCHER. But here you are providing that in case of failure to file a return the Government is authorized to proceed in court at once for collection of such taxes without any assessment at any time.
> MR. GEORGE. The real effect of the amendment is simply to relieve from any statute of limitations a mere failure to make a return. That is all it is. That is what it does clearly.[24]

This discussion clearly indicates that the purpose of the amendment was to protect the Government by requiring that notice be given it by the filing of a return. In other words, notice is the principal ingredient of a return.

While the 1924 legislation was under consideration by Congress, the Bureau of Internal Revenue issued S.T. 446, III-1 Cum. Bull. 463 (1924), interpreting section 903 of the 1921 Act relating to excise taxes. Contained in the ruling is the following statement:

> Careful reading of section 903 discloses that the tax is to be returned and paid upon the basis of monthly periods. Each month therefore constitutes a separate and distinct taxable period. For the purpose of collection the amount due for each month constitutes therefore a separate tax.

S.T. 446 related to a taxpayer who had apparently filed his excise tax returns but failed to report the tax on certain sales. It is significant that the Bureau of Internal Revenue did not find that there was a

23 H. Rep. No. 179, supra note 22.
24 65 Cong. Rec., 7133 (1924).

"failure to file a return" but merely that the taxpayer had filed "improper returns." Moreover, it is categorically stated in S.T. 446 that each month constitutes a separate and distinct taxable period and that for the purpose of collection, the amount due each month constitutes a separate tax.

Sections 1009(a) and 1009(b) of the Revenue Act of 1924 contain essentially the same language as subsections (a) and (b) of Section 3312 of the Internal Revenue Code of 1939. Similarly, section 277(a)(1) of the 1924 Act and section 275(a) of the 1939 Code, pertaining to income taxes, contain basically the same language, and provide that income taxes should be assessed within three years "after the return was filed," while the sections relevant to excise taxes in the 1924 Act and the 1939 Code provide that taxes must be assessed within four years "after such *taxes became due*" (emphasis supplied), except in cases of fraud or failure to file a return.

While, as has been seen,[25] the Sixth Circuit thought this difference to be of some importance, it would appear that no significance was intended by Congress, particularly since the provisions pertaining to income and excise limitations in the 1924 Act and the 1939 Code (sections 278(a) and 1009(b) of the 1924 Act, section 276(a) and section 3312(b) of the 1939 Code, respectively) both provided that in the case of a failure to file a return, the tax might be assessed at any time. In the 1954 Code, all statute of limitations provisions were consolidated into section 6501, and the difference between the "taxes became due" and "return was filed" language was resolved in favor of the latter.

B. *Evaluation of Legislative History*

McDonald and its progeny distinguished between the effect of the income tax statute of limitations and the excise tax statute, principally because the income tax is imposed upon net income during a given period while the excise tax is a transactions tax. This distinction may be somewhat misleading. While it is common to say that the income tax is imposed upon income and that the excise tax is imposed upon sales (or uses), both taxes are in reality imposed upon persons, and the totality of transactions by the person has an effect upon the tax liability of the person for any given period, whether the period is a statutory one, as in the case of the income tax, or a reporting period established as a matter of "convenience," as in the case of the excise tax. While, as noted above, the Government currently places great emphasis on the transactional nature of excise taxes, this is a relatively recent policy, for a ruling issued contemporaneously with the enactment

[25] McDonald v. United States, supra note 1.

of the 1924 Act considered the excise tax to be imposed for a given period.

In any event, the striking features about the historical development of the Revenue Acts relating to the excise period of limitations are that the initial excise statute of limitations was enacted in 1921 to change the past law that was "uncertain and annoying to taxpayers"; that the limitations provisions enacted in 1921 were more favorable to the excise taxpayer than to the income taxpayer; and that the changes made in 1924 were made merely to make the excise tax provisions conform to the income tax provisions.

The reports of the House and Senate Committees, *supra,* relating to the reason for conditioning the running of the limitations period on the filing of a return are significant. In simple terms, the Treasury was hard put to assess a deficiency in the estate tax unless it was known that a taxpayer had died, and had transferred property upon his death. Similarly, it would be difficult for the Department to assess a deficiency in excises unless it was known that a person was in the business of manufacturing, of making retail sales, or of operating a social club. It is appropriate to note, however, that the last sentence of the committee report is troublesome. That sentence provided that the period will not begin to run "until the Department has information upon which it can proceed to determine and assess the *amount* of tax. . . ." (Emphasis supplied.)[26] A fair reading of this sentence is that in order for the statute to run, the Department must be made aware of the transfer of property by death, and having been made so aware, it may then examine the books, records and other relevant data of the taxpayer and proceed to determine the correctness of the tax reported and, if in error, assess additional tax. This notice conception of the function of a return is confirmed by the Senate Floor debates quoted above.

There is other evidence in the early Revenue Acts that Congress considered a "return" simply to be information supplied by the taxpayer, in compliance with a form prescribed by the Commissioner, showing whether a person is liable for tax. For example, section 1002(a) of the 1924 Act like section 6001 of the present Code provides that every person liable for tax shall "make such returns . . . as the Commissioner . . . may from time to time prescribe." And section 1002(b) of the 1924 Act allows the Commissioner to "require any person . . . to make a return . . . as the Commissioner deems sufficient to show *whether or not* such person is liable to tax." (Emphasis supplied.)

It would seem, then, that Congress merely intended to require the

26 H. Rep. No. 179, supra note 22.

filing of a properly executed form that contained the information prescribed by the Commissioner. In the case of excises, Form 720 and prior excise forms have never required the reporting of each transaction or of any detailed information. As the Service has said, and correctly so:

> [W]here the Internal Revenue Service has adopted for use by taxpayers a return form which calls for somewhat detailed information and which, when properly executed, will provide the Service with a means of accurately auditing the tax computation, a question may arise as to whether the information furnished by any particular taxpayer is sufficient to qualify the form as a complete return. See *Commissioner v. Lane-Wells Company,* 321 U.S. 219. Ct. D. 1602, C.B. 1944, 539. However, a properly executed Form 720 does not require detailed information and does not provide a basis for independent verification of the tax computation. Only by inspection of the records and accounts required to be maintained by the person required to file the return can the accuracy of a return on Form 720 be verified by the Service. Thus, the question of sufficient information can have little or no application to Form 720. It is the mere entry of the amount of the tax liability on the appropriate line which determines that the person submitting the form has filed a return for the category or categories of tax listed on that line.[27]

It is apparent that Form 720 has never been intended to be a return of transactions, but only a return of tax. The requirement of the statute, then, is not that the taxpayer has filed a return of transactions, but that he has filed a return of tax.

It would be absurd, of course, to require that, in order to be considered a return for purposes of the statute of limitations, the return filed has to be correct as judged in the light of all subsequent events. Needless to say, if a taxpayer has filed such a return, he needs no statute of repose. Again, the Service does not prescribe any such requirement. It merely requires, in the words of the certification contained on the Form 720, that the return "to the best of my knowledge and belief is a true, correct and complete return."

In its simplest terms, the issue is thus whether Congress intended that excise taxpayers have a meaningful statute of repose. The Sixty-eighth Congress, which enacted the excise limitations provision in substantially its present form, was the same Congress that enacted Section 1008(b) of the Revenue Act of 1924 (now known as Section

[27] Rev. Rul. 59-366, 1959-2 Cum. Bull. 419.

1108(b) of the Revenue Act of 1926) to prevent retroactive assessment of excise taxes where a taxpayer has parted with possession of of an article, without collecting tax, relying upon a ruling, regulation or Treasury decision that the article is not taxable. The Sixty-eighth was a Congress concerned about harassment by revenue agents, unnecessary examinations of taxpayers (section 1005), reopening of closed matters (section 1006), and excessive administrative review (section 1007). The mood of this Congress is expressed by the following statements made on the Senate floor:

MR. CARAWAY:

> There should come a time when the taxpayer will be free from being harassed. As it is, he never knows whether his settlement will be accepted or not. Two or three or four years after the records are destroyed, some agent comes along and says that the taxpayer owes something else. The Government, like an individual, ought to be bound by a settlement where the payment is made on the advice of its agent.[28]

MR. McKELLAR:

> One of the most unpopular attributes, if I may call it that, of any tax measure is the attribute that the taxpayer never knows when he is through . . . [the taxpayer] ought not to be constantly menaced with opening and reopening of tax matters. . . .
>
> Oh no; a taxpayer never knows when he gets through. A corporation or individual doing business may have settled his taxes for five years previously, but he does not know when some inspector or accountant for the Government is going to come back to reassess him for taxes five years previously. There ought to be some limitation. It is unfair to the taxpayer as it now stands. It is not provided for in the succeeding section, section 1106, to which the Senator from Utah refers.[29]

MR. ASHURST:

> I believe that if there be one thing that has tended to throw reproach upon the income-tax system it is the feeling that although a taxpayer may pay, and he may make an honest attempt to adjust his taxes, he is never certain that he is through. There are domiciliary visits, agents, letters coming to him saying his tax is not settled yet.
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> . . . .
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> In all litigation, in all such matters as taxation, there

[28] 65 Cong. Rec. 7129 (1924).
[29] 65 Cong. Rec. 8127 (1924).

> should be what we call a time of repose, a statute of repose. Business, in my judgment, does not object to paying high taxes when it is necessary, and such are necessary; but business does object, and business has a right to object, to being constantly harassed.[30]

It is unthinkable that a Congress concerned about harassment by revenue agents for the past periods *within the statutory period,* concerned about retroactive assessment of excise taxes, and concerned about the need for certainty in business operations would enact a statute of limitations for excise taxpayers that is more mirage than substance.

Thus, the legislative history of section 6501 strongly indicates that the excise tax period of limitations commences to run with respect to all categories of federal excise tax contained on Form 720 whenever a taxpayer executes a Form 720 for the same period and indicates thereon the presence or absence of liability for any category of tax, and where such information is true, complete and accurate to the best of the taxpayer's knowledge and belief. Such history of section 6501 conclusively indicates that, at the very least, assessment of excise tax is proscribed, in the case of manufacturers and retailers excises, according to the standards contained in Revenue Ruling 60-312, *supra,* and other current published statements of position by the Internal Revenue Service.

RECOMMENDATIONS

One of the principal measures of the fairness of any set of legal rules is whether they afford reasonable certainty of liability. In tax matters, where the burden of proving the absence of liability is on the taxpayer, it is essential that there be a time when the taxpayer is no longer required to retain records and other sources of evidence indicating his absence of liability. In business taxation, particularly excise taxation, a date should arrive when the taxpayer knows what his contingent liabilities are so that he may evaluate his ability to expand his business activities, distribute the profits of the business to its owners, determine wage and pricing policies, and conduct the normal operations of business. In collected excise matters, where the taxpayer and the person having the legal obligation to report tax are different persons and, as a result, the taxpayer often has little awareness of the presence or absence of tax liability, equally cogent reasons require that there be a time of repose.

It is clear from the legislative history of the excise tax statute of limitations that Congress intended excise taxpayers to be protected

[30] 65 Cong. Rec. 8131 (1924).

from assessments of tax on transactions occurring in the distant past. This legislative history has not even been alluded to by courts adjudicating the issue. Nevertheless, the many decisions rendered in ignorance of this congressional purpose have cast considerable doubt upon the existence of an effective statute of limitations for excises.

It is understood that the Internal Revenue Service is presently studying the implications of the *McDonald* line of decisions on its published administrative position. It is hoped that in this era of fair and impartial administration of the tax laws the Service will, at the very least, adhere to its present published position regarding the applicability of section 6501 to federal manufacturers and retailers excises. Still, it is recognized, that there are practical limitations which may prevent the Service from announcing a correct interpretation of section 6501 as applied to all categories of excises, for this would entail a rejection of *McDonald* and a modification of its previous rulings in the manufacturers and retailers area.

Congress should therefore consider legislation to make it clear that the good faith filing of Form 720 indicating the presence or absence of liability for any category of tax is the filing of a return with respect to all categories of tax sufficient to commence the running of the period of limitations prescribed by section 6501. At the same time, a provision might be considered which would extend the period of assessment beyond the three-year period in those cases where a certain percentage of tax is omitted from the return. As is well known, the income tax provisions provide ample precedents for such a provision.

Only with the adoption of a clarifying statutory provision may a lawyer confidently assure a client (say, for example, the Virginia Country Club), "Yes, Virginia, there is an excise tax statute of limitations."