

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

Release Number: 20200801F

Release Date: 2/21/2020

CC:TEGEDC:GCDAL:JHFetter  
POSTU-119833-19

**Via Email**

UILC: 6501.00-00, 4980H.00-00

Date: December 26, 2019

to: Paul A. Marmolejo  
Program Manager  
TE/GE Exempt Organizations

from: Jeremy H. Fetter  
Area Counsel (Gulf Coast Area Dallas)  
(Tax Exempt & Government Entities Division Counsel)

---

subject: Statute of Limitations for IRC § 4980H

**This memorandum responds to your request for advice. This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.**

**ISSUE**

Whether the Employer Shared Responsibility Payment imposed by section 4980H<sup>1</sup> is subject to any statute of limitations on assessment?

**SUMMARY CONCLUSION**

No, there is no applicable statute of limitations on assessment because there is no tax return filed to report an employer's liability for the ESRP.

**FACTS**

Section 4980H creates two separate assessable payments, one that is applicable when an Applicable Large Employer ("ALE") fails to offer its full-time employees ("FTE")

---

<sup>1</sup> Unless otherwise provided, all section references are to the Internal Revenue Code of 1986, as amended ("I.R.C." or "Code"), and the applicable Treasury Regulations ("Treas. Reg.") thereunder.

essential minimum coverage, the other that is applicable when the ALE offers FTEs essential minimum coverage, but at a rate that is not considered affordable to them.

Section 4980H(a) imposes an assessable payment on ALEs who fail to offer minimum essential insurance coverage to their FTEs and at least one FTE has been certified as having enrolled in a health plan with respect to which the premium tax credit (“PTC”) under section 36B or any cost-sharing reduction under section 1402 of the Affordable Care Act (or advance payment thereof) is allowed or paid to that FTE. The ALE is not liable for the section 4980H(a) payment until at least one FTE is certified as qualified for the PTC.

Section 4980H(b) imposes a separate payment on ALEs that offer insurance that is unaffordable so that one or more FTEs are certified to the employer as being qualified for PTC. Unlike the section 4980H(a) payment, the section 4980H(b) payment is derived from the actual number of FTEs who are certified as qualified for the PTC. Therefore, the amount of the payment cannot be determined until it is known exactly how many employees may be entitled to the PTC.

Anything that an ALE is liable to pay under section 4980H is called the Employer Shared Responsibility Payment (“ESRP”). To determine the ESRP, the Service collects information from both the ALEs and their FTEs. Specifically, ALEs are required to file Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns*, and Forms 1095-C, *Employer Provided Health Insurance Offer and Coverage*, for each of its employees. The IRS then takes the information transmitted on those forms and cross references the Forms 1040 filed by the FTEs to determine if any, and how many, FTEs received a PTC for the year. Based on that information, the IRS computes the potential ESRP liability under section 4980H owed by the ALE and sends Letter 226-J<sup>2</sup> proposing such assessment. It is not possible to determine, using only the information contained on the Forms 1094-C and 1095-C, the amount of an ESRP owed by an ALE, or if such payment is even owed at all. Even though there is no return that can be filed by an ALE to report and pay a determined liability under section 4980H, ALE taxpayers have claimed that the filing of required information returns is sufficient to start the statute of limitations under section 6501(a).

## LAW AND ANALYSIS

Section 6501 states that the amount of any tax imposed by Title 26 shall generally be assessed within three years after the return was filed. The term “return” means the return required to be filed by the taxpayer. In interpreting this language, courts have routinely held that the applicability of “[s]ection 6501 depends upon the filing of a tax return to begin the running of the limitations period.” Sage v. United States, 908 F.2d 18, 25 (5th Cir. 1990) (quoting Aqbanc, Ltd. v. United States, 707 F. Supp. 423, 426-27 (D. Ariz. 1988)); Mullikin v. United States, 952 F.2d 920 (5th Cir. 1991). Accordingly, if an employer is required to make a return and reports on that return a liability for the

---

<sup>2</sup> Tax Exempt / Government Entities uses Letter 5307-A in lieu of Letter 226-J, in order to satisfy the requirements of section 7611.

payment under section 4980H, the general period of limitations under section 6501 will apply.

Section 4980H, however, does not have a separate limitations period. It is “well settled that the United States is not subject to statutes of limitations in enforcing its rights unless Congress explicitly provides otherwise.” Agbanc, Ltd. v. United States, 707 F. Supp. 423, 426 (D. Ariz. Nov. 16, 1988) (citing United States v. Tri-No Enterps., Inc., 819 F.2d 154, 158 (7th Cir. 1987); United States v. Podell, 572 F.2d 31, 35 n.7 (2d Cir. 1978)); Armstrong v. United States, No. 18-CV-06532-LHK, 2019 WL 2548139, at \*6 (N.D. Cal. June 20, 2019) (“there are myriad United States Supreme Court and Circuit Court decisions which hold that if Congress has not clearly provided a statute of limitations for a statutory provision, no statute of limitations is applicable” (citing E.I. Du Pont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924) (“[T]he United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.”); United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U.S. 120, 125 (1886) (“[T]he United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations unless congress has clearly manifested its intention that they should be so bound.”); United States v. Insley, 130 U.S. 263, 266 (1889) (same); Schaefer v. Town of Victor, 457 F.3d 188, 206 n.23 (2d Cir. 2006) (same); United States v. Telluride Co., 146 F.3d 1241, 1244 (10th Cir. 1998) (“[A]n action on behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.”); United States v. Massachusetts Water Res. Auth., 256 F.3d 36, 40 n.3 (1st Cir. 2001) (“[A]n action on behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.”)). Therefore, if there is no return that starts the section 6501 limitations period, the Service would not be subject to any limitations period for assessing the section 4980H payments.

The Supreme Court test to determine whether a document is sufficient for statute of limitations purposes has several elements: First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury. See Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd 793 F.2d 139 (6th Cir, 1986); I.R.M. 25.6.1.6.14.(1)

There is no return filed by the ALEs that satisfies the first requirement of the Beard test outlined above with respect to either section 4980H payment, as they do not contain sufficient data to calculate the liability. Neither the Form 1094-C nor the Form 1095-C includes information with respect to FTEs' eligibility for the PTC, an essential piece of information for either section 4980H payment. The IRS determines an ALE's potential liability for the ESRP using both the information provided on these filed information returns and information contained in Forms 1040 filed by the FTEs. Generally, an ALE will not know whether FTEs are eligible for the PTC, and therefore, it will not know whether it has a potential liability under section 4980H at the time it files Forms 1094-C

and 1095-C and would have no way of calculating the amount owed. Thus the filing of those information returns is insufficient to satisfy the Beard test and would not start the statute of limitations for assessment of a payment owed under section 4980H.

### CONCLUSION

Because there is no return that contains the necessary data to calculate the amount of an ESRP that could be owed by an ALE, there is no statute of limitations for the ESRP under section 6501(a). The filing of the required information returns (Forms 1094-C and 1095-C) is insufficient to begin the running of the statute of limitations because they do not contain sufficient data to calculate the amount of the ESRP that would be owed, thus failing to satisfy the test articulated in Beard v. Commissioner. As Congress provided no other limitations period for assessing the ESRP, there is none that is applicable.

---

JEREMY H. FETTER  
Area Counsel  
(Tax Exempt & Government Entities Division  
Counsel: Gulf Coast Area)

cc: Barbara Wulf  
Program Manager  
SB/SE Employment Tax Policy