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Employer Mandate Penalties Last Forever

The Internal Revenue Service (IRS)'s Office of Chief Counsel recently issued a memorandum (the "CCM") announcing that the Employer Shared Responsibility Payment ("Employer Penalty") under Code Section 4980H is effectively not subject to the Code's general statute of limitations. This is unwelcome news to employers who may have thought that by filing Forms 1094 and 1095 they were effectively assured that they would not owe the Employer Penalty after three years passed. The rationale used by the IRS is that liability for the Employer Penalty is not disclosed by an employer on any return filed with the IRS.

As a brief reminder, a large employer subject to the Affordable Care Act ("ACA"), referred to as an "ALE", could owe an Employer Penalty if it fails to offer "minimum essential coverage" to at least 95% of its full-time employees or if it offers such coverage, but that coverage is either not affordable or does not provide minimum value, provided that at least one full-time employee qualifies for a premium tax credit. The IRS cross-references information from Forms 1094 and 1095 (which employers use to report coverage to the IRS and to employees) with employees' Forms 1040 to determine whether an Employer Penalty may be due. The information on the Forms 1094 and 1095 alone is not sufficient to determine if an Employer Penalty is owed.

For most tax purposes, a 3-year statute of limitations starts running when a return is filed that reflects a liability (or shows no liability) for a given tax (although there are some exceptions, for example in the case of fraud or willful tax evasion). If no tax return is filed, then Code Section 6501(c)(3) tells us that the tax may be assessed "at any time".

The IRS first notes that it is settled case law that the United States is not subject to a statute of limitations unless Congress provides otherwise. Further, in order for a document to qualify as a "return" for purposes of Code Section 6501, Supreme Court case law provides –

(1) There must be sufficient data to calculate the tax liability,

(2) The document must purport to be a return,

(3) There must be an honest and reasonable attempt to satisfy the requirements of the tax law, and

(4) The taxpayer must execute the return under penalty of perjury.

In the CCM, the IRS noted simply that Forms 1094 and 1095 do not meet the first requirement above—they do not contain sufficient information to determine liability for the Employer Penalty. Specifically, they do not contain sufficient information to determine whether an employee qualified for a premium tax credit (no employer payment is due unless an employee obtains a premium tax credit).

The takeaway from the CCM is that the IRS may try to assess an Employer Penalty at any time, regardless of the amount of time that has elapsed, and regardless of whether the employer properly submitted Forms 1094 and 1095 to the IRS and to employees.