

**M e m o r a n d u m****465.1549**

To: Out-of-State – Auditing (DMA)

November 21, 1973

From: Headquarters – Tax Counsel (DJH)

Subject: Section 6487

SR --- XX-XXXXXX

We are replying to your memorandum of October 25, 1973, which requested our opinion as to the proper application of Section 6487 of the Sales and Use Tax Law to the following situation:

A taxpayer with no permit files a return covering specified past periods. One or more years later we initiate an audit of the account. One view has it that at any time within a three year period following the date on which the return was filed we can assert additional tax for the period covered by the return. An opposing view is that only at the time of our audit the statute is only open for an eight year period; that to take the first approach would penalize the taxpayer for filing a return.

After discussing the matter with Mr. Jack Najarian as to audit policy considerations, it is our opinion that at the time of your audit the statute of limitations is only open for an eight year period.

We concede that there is language in the first sentence of Section 6487, i.e., "...or within three years after the return is filed...", which supports the position that, at any time within a three year period following the filing of a return, additional tax may be asserted for the period covered by the return. Applied literally, this could mean that if a return is filed covering a ten year period during which no returns were filed, the audit staff could wait three years and then issue a determination covering a thirteen year period. In the same situation, if the taxpayer did not file a return and a field billing order was issued at the end of the ten years, the field billing order could only go back eight years pursuant to the second sentence of Section 6487.

We do not believe that the difficulties in the rejected approach are avoided by only going back eight years from the time the return is filed. This use of an eight year limitation only points

up that this is basically a problem arising because of a failure to file returns. If the full eight year failure to file period is to be applied, an audit must be conducted when the return is filed.

We agree with the argument that the rejected approach would penalize a taxpayer for filing a return. When timely returns are not filed, the question of when periods outlaw should not turn on the fortuitous fact of whether the periods are cleared by a return or a field billing order.

We note that Section 6487 was amended in 1951 to add the eight-year limitation period in cases of failure to file a return. We do not believe that the thrust of the amendment can be avoided by having the taxpayer file a return which is then used as the basis for keeping the early periods open for an additional three years.

Mr. Najarian informs us that the basic policy decision of the audit staff is to carry audits back only eight years, even in fraud or intent to evade cases. We do not believe that a taxpayer who voluntarily files a return should be put in any worse position.

DJH:kw

cc: Mr. Glenn Rigby  
Mr. J. Najarian