

**TENNESSEE DEPARTMENT OF REVENUE
REVENUE RULING # 96-14**

WARNING

Revenue rulings are not binding on the Department. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Departmental policy.

SUBJECT

Whether a corporation who believed it had no nexus in Tennessee and thus timely filed franchise, excise tax returns marked “No Business Activity” but who later correctly determines that it did have Tennessee nexus can compute and carry forward losses when the years for which the losses were incurred are now barred by the statute of limitations.

SCOPE

Revenue Rulings are statements regarding the substantive application of law and statements of procedure that affect the rights and duties of taxpayers and other members of the public. Revenue Rulings are advisory in nature and are not binding on the Department.

FACTS

Corporation X, a foreign corporation with a Tennessee Certificate of Authority, believed it did not have sufficient nexus in Tennessee under Title 15 U.S.C.A. §§ 381 through 384, also known as Public Law 86-272, to be subject to Tennessee corporate franchise, excise taxes. Therefore, for years prior to the tax year 1994 it timely filed its franchise, excise tax returns for each calendar year marked “No Business Activity” and paid only the minimum franchise tax of \$10.00. It apportioned none of its losses to Tennessee for excise tax loss carryover purposes. The Tennessee Department of Revenue did not audit any of the years in question and made no adjustments to the taxes computed on the returns.

Because of recent United States Supreme Court decisions which Corporation X believes have clarified the definition of solicitation under Public Law 86-272, the corporation has now correctly determined that it does have Tennessee nexus for franchise, excise tax purposes and that it has been subject to such taxes all along.

QUESTIONS PRESENTED

1. Can the Tennessee Department of Revenue now assess Corporation X for additional franchise, excise taxes for tax years prior to 1992?
2. For tax years prior to 1992, does the statute of limitations found in T.C.A. § 67-1-1501(b) prevent Corporation X from apportioning net operating losses to Tennessee and carrying them forward to tax years subsequent to 1991 provided such losses are computed in accordance with Tennessee's statutes governing net operating loss carryovers?

RULINGS

1. No, provided there is no evidence that the returns filed for tax years prior to 1992 were false or fraudulent and filed with intent to evade the taxes.
2. No, but the Tennessee loss carryover computed for the barred year will be reduced by any net earnings that should have been apportioned to Tennessee for subsequent years.

ANALYSIS

1. The Statute Of Limitations On Assessments

T.C.A. § 67-1-1501(b) and (b)(2) make the following provisions concerning the assessment of additional taxes by the Tennessee Department of Revenue:

(b) Notwithstanding the provisions of subsection (a), the amount of any tax imposed under any title, wherein the filing of a return is required by the state, shall be assessed within three (3) years from December 31 of the year in which the return was filed, and no levy or other proceeding to enforce the collection of such tax without assessment shall be made or begun after expiration of such period; provided, that:

(2) In the case of a false or fraudulent return with the intent to evade the tax, the tax may be assessed or a levy or other proceeding to enforce collection of such tax may be begun with or without assessment at any time;

The statute of limitations gives the Department three years from the end of the year in which a return is filed to assess for additional taxes. However, in the event evidence shows a return has been falsely or fraudulently filed with intent to evade taxes, the statute of limitations never runs and the Department can make and enforce collection of an assessment for additional taxes at any time.

Since Corporation X timely filed its franchise, excise tax returns, its return for the tax year 1991 would have been filed in 1992. Three years from December 31, 1992 would end December 31, 1995. Unless there is evidence showing that Corporation X filed its tax returns for tax years prior to the tax year 1992 falsely or fraudulently with intent to evade taxes, the statute of limitations has run and the Department cannot make or enforce collection of an assessment for additional taxes for those years. The Department has until December 31, 1996, December 31, 1997 and December 31, 1998 to assess additional taxes for the tax years 1992, 1993 and 1994 respectively.

2. Loss Carryovers For Barred Years Can Be Adjusted

The statute of limitations on assessments found in T.C.A. § 67-1-1501(b) is set forth above and provides that the Department has three (3) years from December 31 of the year in which the return was filed to assess for additional taxes. The statute of limitations on refunds is found in T.C.A. § 67-4-1802 and provides that refunds of taxes may be made within three years from the end of the year in which payment was made. In the case of federal revisions, corporate excise taxes may be refunded within three years from the date of redetermination of net income by the I.R.S. T.C.A. § 67-1-1802(a)(1), (2) and (3) are set forth in part as follows:

(a)(1) The commissioner of revenue, with the approval of the attorney general and reporter, . . . is empowered and directed to refund to taxpayers all taxes collected or administered by the commissioner that are, on the date of payment, paid in error or paid against any statute or clause of the constitution of this state or of the United States . . . The authority granted in this subdivision extends only to taxes for which a claim is filed, with the commissioner under oath and supported by proper proof, within three (3) years from December 31 of the year in which the payment was made. The entire disputed amount of tax, penalty and interest must be paid before any claim for refund thereof can be filed . . .

(2) The commissioner is authorized to make refunds without a claim being filed if the commissioner is in possession of proper proof and facts that a refund is due within three (3) years from December 31 of the year in which the payment was made.

(3) The commissioner is authorized to refund corporate excise taxes due a taxpayer because of a decrease in net income divulged by an examination by the internal revenue service; provided, that a claim is filed with the commissioner, supported by proper proof, within three (3) years from the date of such redetermination of net income by the internal revenue service.

Both the statute of limitations on assessments and the statute of limitations on refunds prohibit only assessments and refunds for barred years. Neither statute prohibits adjustments for a barred year as long as no assessments or refunds are made for the barred year itself.

There is nothing in the statute of limitations to prevent Corporation X from apportioning to Tennessee losses incurred for tax years prior to 1992 and carrying such losses forward to successive tax years provided the loss carryovers are computed and carried forward in accordance with Tennessee law. The Tennessee loss carryover computed for a barred year will be reduced by any net earnings that should have been apportioned to Tennessee for subsequent years.

In the case of Corporation X, adjustments to barred year apportionment formulas and loss carryovers may work in favor of the taxpayer in that taxes for an open year may be reduced by loss carryovers from barred years. This is because the apportionment ratios of

0% on returns filed for years in which losses were incurred and which are now barred will be increased to a larger percentage. However, if apportionment ratios are reduced for loss years which are now barred, the loss carryover available to an open profitable year is reduced, and an assessment of additional excise tax for the open year will result.

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APPROVED: Ruth E. Johnson, Commissioner

DATE: 4/16/96