

M e m o r a n d u m**320.0120**

To: Mr. Rick Slater
Supervisor, Collections

Date: January 30, 1990

From: Gordon P. Adelman
Tax Counsel

Subject: M--- A--- G---
Account No. SR -- XX-XXXXXX

You requested a legal opinion regarding the application of the statute of limitations relating to a possible fraud prosecution involving the above captioned account.

The audit period was from July 1, 1983 through September 30, 1986. The Report of Field Audit is dated February 23, 1987, with a reaudit dated October 15, 1987. The District Administrator's fraud recommendation letter is dated February 23, 1987. The Board hearing on the petition for redetermination was November 15, 1989.

Section 7154, Revenue and Taxation Code reads:

“Any prosecution for violation of any of the penal provisions of this part shall be instituted within three years after the commission of the offense, or within two years after the violation is discovered.”

Application of the statute to the audit period indicates that if a fraudulent return was filed for the last quarter covered by the audit (July – September 1986) the return was due not later than November 1, 1986. Three years from the “commission of the offense” would have been November 1, 1989.

Two years “after the violation is discovered” could be interpreted to be from the date of the fraud recommendation which was February 23, 1987, since the violation was “discovered” during the audit. Even using the reaudit date of October 15, 1987 as the discovery date, the two-year period would have ended October 15, 1989.

The Board redetermined the tax as computed by the reaudit dated October 15, 1987 and applied the fraud penalty. The redetermination hearing was November 15, 1989. Although Section 6487, Revenue and Taxation Code, requires the Board to issue a notice of determination within three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined or within three years after the return is filed,

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whichever period expires the later, this statute does not apply in the case of fraud. Thus, while a penalty for fraud may attach, Section 7154 cited above will preclude criminal prosecution due to the running of the statute of limitations as indicated above.

Attached is a copy of the Board hearing summary and hearing officer report for your information.

GPA:sr

Attach.

cc: Mr. Dewey Roberts (w/enc.)