IRS Form 5329 and the Statute of Limitations

Quick-Take: The statute of limitations for the failure to take a required minimum distribution (RMD) is probably 6 years, notwithstanding the provisions of the SECURE 2.0 Act that say it is a 3-year statute of limitations.

Background: We know from prior missives that the SECURE 2.0 Act reduced the penalties for either (i) the failure to take a required minimum distribution (RMD) or (ii) making an excess contribution to an IRA. The penalties were reduced from 50% to 25%, or down to even 10% if the mistake is quickly rectified. The IRS can also waive the penalty completely if a missed RMD is promptly corrected and a Form 5329 is filed with an explanation that the failure to take the RMD was due to reasonable error.

Limitations Periods: Less understood after the SECURE 2.0 Act is the revised statute of limitations that deals with either an individual's failure to take an RMD or an excess contribution is made by an individual to his/her IRA. Most thought that the new statute of limitations for missing an RMD is 3 years and the new statute of limitations for making an excess contribution to an IRA is 6 years. However, for many individuals, the statute of limitation period in which the IRS can assess a deficiency is 6 years is probably for both, either for making an excess contribution to an IRA, or for the failure to take an RMD. This 6-year statute of limitations is still better than previously, when the IRS really did not have any limitations period to hinder it when making assessments associated with retirement account contributions and withdrawals.

No Retroactivity: Earlier this year the Tax Court in *Couturier v. Commissioner, 162 Tax Court 4 (2024)* [*No. 19714*-16] announced that the shorter 6-year statute of limitations associated with an excess IRA contribution was not retroactive. [The penalty for an excess contribution to an IRA is 6% each year that the excess contribution stays in the IRA as of December 31. There is no penalty if the excess contribution is corrected by October 15 of the year that follows the year in which the excess IRA contribution is made.] While the Tax Court did not address the statute of limitations associated with an account owner's failure to take an RMD regarding the retroactivity of the SECURE 2.0 Act's 3-year statute of limitations, there is a good chance that if confronted with the question, the Tax Court would also find that that shorter statute of limitations was not retroactive either.

6-Year Statute of Limitations for Missed RMDs: For 2022 and subsequent years, the 'lookback period' for a missed RMD is 6 years, not 3 years. The only way to retain the shorter 3-year statute of limitations period for any year is to timely file a Form 5329 with the IRS each year that indicates that no penalty is owed for that year and attach enough information to the Form to show the IRS why the account owner believes that there was no missed RMD for the year. This is sometimes called a *zero-filing.* Few individuals will take the time or incur the expense to file a '*protective'* Form 5329 when no tax is due, just to start a shorter statute of limitations to run against the IRS.

Conclusion: The failure to timely file a Form 5329 along with the individual's Form 1040 will cause the 6-year statute of limitations to apply to future IRS audits that there was a failure to take an RMD. The only way to shorten that statute of limitations from 6 years to 3 years is to use the *zero-filing* strategy with Form 5329, which most account owners are unlikely to do.

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