

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:4:AEGoldstein
POSTN-117943-18

date: August 23, 2018

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TWC by [Signature]

subject: Referring certain restitution-based assessments to the Department of Justice for judgment and the effect on the collection period of limitations

ISSUE

Whether reducing a restitution-based assessment to judgment would extend the collection period of limitations for restitution ordered solely as a condition of supervised release or probation.

CONCLUSION

Where a restitution-based assessment is based upon restitution ordered solely as a condition of supervised release or probation, reducing the assessment to judgment will not extend collectability beyond the termination of supervised release or probation. Accordingly, the Service should not refer a restitution-based assessment to the Department of Justice for the commencement of a collection enforcement suit where the restitution was ordered solely as a condition of supervised release or probation.

BACKGROUND

I.R.C. § 6201(a)(4)(A) provides that the Service must assess restitution ordered pursuant to 18 U.S.C. § 3556 for failure to pay tax imposed by Title 26. Section 3556 provides that restitution may be ordered in accordance with 18 U.S.C. § 3663. Section 3663(a)(1)(A) provides that restitution may be ordered when a court sentences a defendant convicted of certain enumerated criminal offenses, but no criminal offense under Title 26 is listed. Section 3663(a)(3) provides, however, that restitution may be ordered for any criminal offense as part of a plea agreement. Additionally, any restitution ordered as a condition of supervised release under 18 U.S.C. § 3583(d) or as a condition of probation under 18 U.S.C. § 3563(b)(2) is made in accordance with 18

U.S.C. § 3663. An amount of restitution ordered in any of these situations must be assessed.

We advised in CC Notice 2011-18 that an amount of restitution assessed under section 6201(a)(4) was administratively collectable by the IRS under the full section 6502 collection period (i.e., generally 10 years). We advised that the Service may also request that the Department of Justice file a civil suit to reduce the restitution-based assessment to judgment before the end of that 10-year period to avail itself of the 20-year judgment lien on real property under 28 U.S.C. § 3201(c).

In 2017, the Fifth Circuit issued an opinion in United States v. Westbrook, 858 F.3d 317, 328 (5th Cir. 2017), vacated on other grounds by 138 S. Ct. 1323 (2018), which held that when a court orders that a defendant pay restitution solely as a condition of supervised release, the court cannot order the defendant to begin paying that restitution before the period of supervision begins. See also United States v. Hassebrock, 663 F.3d 906, 924 (7th Cir. 2011) (“[A] defendant cannot be required to pay restitution until his period of supervised release begins.”). Although the opinion specifically addresses the lack of enforceability before the defendant’s period of supervised release begins, the court’s reasoning applies with equal force to the termination of supervised release and to probation. Thus, restitution ordered solely as a condition of supervised release or probation is collectible only during the period of supervised release or probation, not before or after.

If the underlying restitution that was ordered is not enforceable before the period of supervised release or probation begins or after it ends, then the Service may also be unable to assess and collect the amount of that restitution outside of the period of supervised release or probation. Section 6325(a) provides that the Service must release a lien “imposed with respect to any internal revenue tax not later than 30 days after the day on which... the liability for the amount assessed, has been fully satisfied or has become legally unenforceable...” If the restitution is ordered solely as a condition of supervised release or probation and that supervised release or probation period has expired, then the restitution liability would become “legally unenforceable” after the end of that period. Additionally, in our view, the liability in a restitution-based assessment matter is the underlying restitution ordered in the criminal case; the assessment of that amount does not transform the underlying liability or create a new liability. Therefore, if the restitution liability itself is no longer legally enforceable even if it is not fully satisfied, it seems logical that the Service would have to release the lien based on the assessment within 30 days after the day on which the restitution liability becomes legally unenforceable.

As a result, we have previously advised the Service that where restitution was ordered solely as a condition of either supervised release or probation:

- (1) The Service can only make an assessment of an amount of restitution once the condition of restitution has begun. The assessment of an amount of restitution will have to wait until the taxpayer is released from prison for those

cases where restitution is ordered solely as a condition of supervised release, or until the taxpayer begins his or her term of probation where restitution is ordered solely as a condition of probation.

- (2) The Service can only administratively collect an amount of restitution ordered solely as a condition of either supervised release or probation during the actual period of either supervised release or probation, regardless of the general 10-year collection period of section 6502.

After beginning to review cases consistent with this advice, Collection asked whether the collection period of limitations for a restitution-based assessment based upon restitution ordered solely as a condition of supervised release or probation could be extended if the Service referred the restitution liability to the Department of Justice under section 7401 and the Department of Justice filed suit under section 7402 before a taxpayer's period of supervised release or probation expired.

LAW AND ANALYSIS

Restitution is the sentencing court's determination of the actual harm to the victim — in a tax case, that victim is the Government — and is an attempt to compensate the victim for the actual harm caused. See United States v. Chalupnik, 514 F.3d 748, 754 (8th Cir. 2008); United States v. Galloway, 509 F.3d 1246, 1253 (10th Cir. 2007) (restitution must be based on actual loss, not on the amount of gain to the defendant); United States v. Germosen, 139 F.3d 120, 130 (2d Cir. 1998). In a criminal tax case, the court's order of restitution recognizes that the defendant has failed to pay some amount of tax, in full or in part, owed to the Government. Morse v. Commissioner, 419 F.3d 829, 834 (8th Cir. 2005); Gillum v. Commissioner, T.C. Memo. 2010-280 at *6, aff'd, 676 F.3d 633 (8th Cir. 2012); Hickman v. Commissioner, 183 F.3d 535, 537-538 (6th Cir. 1999). Restitution itself is a court-ordered liability and is independently collectable under the civil judgment collection procedures of the Federal Debt Collection Procedures Act of 1990, which sets forth the "civil procedures for the United States ... to recover a judgment on ... an amount that is owing to the United States on account of ... restitution." 28 U.S.C. §§ 3001(a)(1), 3002(3)(B); see also 18 U.S.C. § 3613(a) ("The United States may enforce a judgment imposing a fine in accordance with the practices and procedures for the enforcement of a civil judgment under Federal law or State law. . .") and (f) ("In accordance with section 3664(m)(1)(A) of this title, all provisions of this section are available to the United States for the enforcement of an order of restitution.").

Restitution is a liability and the assessment of an amount of restitution does not create an additional liability. An assessment by the Service does not create a liability, regardless of whether it is the assessment of a tax liability shown on a return under section 6201(a)(1) or of an amount of restitution under section 6201(a)(4)(A); it is merely a bookkeeping entry that records the amount of the liability. See, generally, sections 6201-03. The assessment of a liability is a prerequisite for the panoply of

administrative collection tools available to the Service under the Code. See, e.g., sections 6321-23 (liens) and 6331 (levies).

Outside of the context of restitution, tax liabilities arise before the Service refers the liabilities to Department of Justice for collection, regardless of whether those referrals are made before or after assessment. When the Service refers a liability to the Department of Justice under section 7401, it may do so in order to obtain, among other things, a judgment. Section 7402(a). Provided that these liability collection cases are filed timely before the assessment period expires under section 6501(a) (for those suits referred before an assessment is made) or before the collection period expires under section 6502(a) (for those suits referred after an assessment is made), the referral of tax liabilities to the Department of Justice for judicial collection is appropriate if authorized under section 7401. If a timely assessment has been made, the Service's referral of a liability to the Department of Justice and the commencement of such a collection suit before the collection period under section 6502 expires effectively extends the collection period for that liability to the lifetime of the judgment. See section 6502(a) ("If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.")

Unlike tax liabilities, restitution liabilities are already judicially enforceable as a judgment without the need to refer the matter to the Department of Justice. See supra, 28 U.S.C. §§ 3001(a)(1), 3002(3)(B); 18 U.S.C. § 3613(a) and (f). Referral to the Department of Justice of an amount of restitution assessed or assessable under section 6201(a)(4) would appear to be redundant as a practical matter because the Department of Justice already has the legal authority to judicially collect restitution under Titles 18 and 28. Despite this, the Service would gain at least one benefit for referring such a liability to the Department of Justice: it allows the collection period of limitations of that restitution-based assessment to be extended under the flush language of section 6502(a): "If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended. . ."

Where restitution is ordered as part of the criminal judgment (whether by reason of a tax-related Title 18 conviction or as agreed in a plea agreement for a Title 26 conviction), the restitution liability is enforceable for the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person ordered to pay restitution. 18 U.S.C. § 3613(b). Therefore the Service may benefit from referring to the Department of Justice the assessment of an amount of restitution liability to extend the collection period of its administrative collection tools. If the restitution is ordered as a condition of supervised release or probation and not as part of the criminal judgment, however, this benefit disappears. Section 6502(a) provides that the extension of the collection period of limitations "shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable." This parallels the language of section 6325(a), providing that the Service must release a federal tax lien "imposed with respect to any internal revenue tax not later than 30 days

after the day on which... the liability for the amount assessed, has been fully satisfied or has become legally unenforceable. . ." Therefore, if a liability is itself no longer legally enforceable or fully satisfied, there is no benefit to the Service to referring the assessment to the Department of Justice for judicial collection.

In sum, because the restitution ordered solely as a condition of either supervised release or probation is not legally enforceable upon the close of this period, the flush language of section 6502(a) could not serve to extend the collection period of limitations. As a result, we see no legal or practical benefit to referring to the Department of Justice an amount of restitution ordered solely as a condition of supervised release or probation because those amounts are already judicially enforceable by the Financial Litigation Units of the U.S. Attorneys' Offices, and filing suit will not extend the collection period of limitations. If the restitution is ordered as an independent part of the sentence, however, the filing of a suit by the Department of Justice after receiving a referral of the amount of liability would extend the Service's ability to use its administrative collection tools under section 6502(a).