DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

February 24, 2022

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Affected IRMs: 5.7.3; 5.7.4; 5.7.6

**MEMORANDUM FOR DIRECTOR, FIELD COLLECTION**

**FROM:** Kareem Williams, Acting Director, Collection Policy

Karee William

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Date: 2022.02.24 12:34:15 -05'00'

**SUBJECT:** IRM Deviation: Procedures for Addressing the Impact of COVID-19 Employer Tax Relief on the Trust Fund Recovery Penalty (TFRP) Program

The purpose of this memorandum is to implement a temporary deviation in accordance with Internal Revenue Manual (IRM) 1.11.2.2.4, When Procedures Deviate from the IRM, to provide guidance to Field Collection employees working Trust Fund Recovery Penalty (TFRP) cases affected by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Families First Coronavirus Response Act (FFCRA), Notice 2020-65, as modified by Notice 2021-11, the Consolidated Appropriations Act, 2021 (CAA), and the American Rescue Plan Act of 2021 (ARP).

This guidance supersedes IRM deviation memorandum SBSE-05-1221-0070 and provides guidance on postponing assessment of the TFRP on certain 2020 and 2021 employment tax periods as a result of the effect of the CARES Act, the FFCRA, Notice 2020-65, as modified by Notice 2021-11, the CAA, and the ARP on the calculation of the penalty. Postponing assessment of the TFRP will help ensure the TFRP is accurately calculated.

**Effective Date:** This guidance is effective 02/24/2022 through 01/03/2023.

**Source of Authority**: The source of authority for the TFRP is 26 U.S. Code § 6672, Failure to Collect and Pay over Tax, or Attempt to Evade or Defeat Tax. This memorandum was written to address the effect of payroll tax deferral relief provided by the CARES Act and Notice 2020-65, as modified by Notice 2021-11, on the TFRP program. This memorandum also addresses the effect of COVID-19 employer tax credits, provided by the CARES Act, FFCRA, CAA, and ARP, on the TFRP program.

**Background (Section 2302, CARES Act: Employer Tax Deferrals)**

On 03/27/2020, the CARES Act was signed into law. Section 2302 of the CARES Act allows employers to defer the deposit and payment of the employer portion of social security taxes and certain railroad retirement taxes. The payroll tax deferral period began on 03/27/2020 and ended on 12/31/2020. Employers must timely deposit fifty percent of the eligible deferred amount of tax by 12/31/2021 and deposit the remaining amount of deferred tax by 12/31/2022. However, if an employer pays any amount before the applicable dates, any such payment is first applied to reduce the employer's liability for an amount due on 12/31/2021 and then to the amount due on 12/31/2022. The amount of deferred tax will appear on the employer's account in the form of a deemed credit. The deemed credits will be reversed after the expiration of each respective repayment date, if not previously paid. Early repayments in excess of the module amount will trigger a systemic transaction code (TC) 767 to prevent the module from refunding or offsetting. The transaction date will generally match the cycle which generated the overpayment.

**Background (Notice 2020-65 and Notice 2021-11: Employee Tax Deferrals)**

On 08/08/2020, a Presidential Memorandum was issued, directing the Secretary of the Treasury to use his authority pursuant to section 7508A of the Internal Revenue Code to defer the withholding, deposit, and payment of certain payroll tax obligations.

In response to the Presidential Memorandum, Treasury and the IRS issued Notice 2020-65 on 08/28/2020. The Notice allowed employers the option to defer the employee portion of social security tax imposed on wages paid from 09/01/2020 through 12/31/2020 for eligible employees who earn less than $4,000 per bi-weekly pay period (or the equivalent threshold amount with respect to other pay periods) on a pay period-by-pay period basis. To comply with the requirements of Notice 2020-65, in order to pay the deferred amount of the employee portion of social security tax, employers who took advantage of the relief were originally required to ratably withhold and pay the amount of social security tax deferred from the employees' paychecks from 01/01/2021 through 04/30/2021.

Employers who did not take advantage of the relief provided for in Notice 2020-65 were required to timely withhold the employee portion of social security tax on any wages paid from 09/01/2020 through 12/31/2020 and to timely deposit the withheld amounts.

On 01/19/2021, the IRS issued Notice 2021-11. Notice 2021-11 modified Notice 2020-65 by extending the time period during which employers must ratably withhold and pay the deferred employee portion of social security tax. The due date for the withholding and payment of the deferred employee portion of social security tax was postponed until the period beginning on 01/01/2021 and ending on 12/31/2021. Payments made by 01/03/2022 are considered timely because 12/31/2021 is a federal holiday.

**Background (Section 2301, CARES Act: Employee Retention Credit)**

Section 2301 of the CARES Act was designed to encourage employers to keep employees on the payroll by providing employers with a refundable employee retention credit (ERC). Although the CARES Act was enacted on 03/27/2020, employers could claim the employee retention credit under section 2301 of the CARES Act from 03/13/2020 through 12/31/2020. This refundable tax credit was equal to 50% of up to

$10,000 in qualified wages (including health plan expenses) paid to each employee, capped at $5,000. Eligible employers were entitled to request an advance of the credit for any amounts not covered by the reduction in deposits via Form 7200.

**Background (FFCRA: Credit for Sick and Family Leave Wages)**

The FFCRA, enacted on 03/18/2020, required certain businesses and tax-exempt entities to provide paid leave to workers unable to work due to circumstances related to COVID-19. The FFCRA implemented the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act which required employers to provide their employees up to two weeks (up to 80 hours) of paid sick time and up to 10 weeks of paid family leave. It required employers to provide qualified sick leave wages and qualified family leave wages for leave taken from 04/01/2020 through 12/31/2020. The FFCRA offset these costs with refundable tax credits against the employer share of social security taxes. Eligible employers were entitled to request an advance of these credits for any amounts not covered by the reduction in deposits via Form 7200.

**Background (CAA: Employee Retention Credit and Credit for Sick and Family Leave Wages)**

The CAA, enacted on 12/27/2020, made changes to the ERC via the Taxpayer Certainty and Disaster Tax Relief Act (TCDTRA), Division EE of the CAA. Notable changes included extending the period for qualified wages for the ERC through 06/30/2021. The CAA also made changes to the Credits for Sick and Family Leave Wages via the COVID-related Tax Relief Act of 2020 (Tax Relief Act), Subtitle B of Title II of Division N of the CAA. Notable provisions included extending the period of leave for which qualified leave wages for the credit for sick and/or family leave could be paid through 03/31/2021 (without regard to when the wages are actually paid), although the mandate for employers to provide such leave still expired on 12/31/2020; clarifying that the determination of whether an amount was a qualified leave wage was to be determined without regard to the exclusions from employment under sections 3121(b)(1) through (22) of the Internal Revenue Code; and certain provisions related to qualified leave subject to the Railroad Retirement Tax Act. Eligible employers were entitled to request an advance of these credits for any amounts not covered by the reduction in deposits via Form 7200.

**Background (ARP: Employee Retention Credit, Credit for Sick and Family Leave Wages, and COBRA Credit)**

The ARP, enacted on 03/11/2021, added a new COBRA premium assistance credit, modified the ERC, and created and codified credits for qualified sick and family leave wages similar to the credits enacted under the FFCRA. Notable changes included the extension of the period for qualified wages for the ERC through 12/31/2021* and the creation of a new period of leave from 04/01/2021 through 09/30/2021 for which qualified leave wages for the credit for sick and/or family leave could be paid (without regard to when such wages are actually paid). Under the ARP, the employment tax credits are taken against the employer share of Medicare tax. Certain eligible employers were entitled to request an advance of these credits for certain amounts not covered by the reduction in deposits via Form 7200.

***Note:** Under the Infrastructure Investment and Jobs Act, enacted on 11/15/2021, the time for eligible employers to claim an ERC was changed to 09/30/2021, with the exception for recovery startup businesses (RSBs), who were still entitled to claim an ERC through 12/31/2021.

**Affected Tax Periods**

The guidance in this memorandum applies to the following tax periods:

- Form 941 series for the quarterly return periods ending 06/30/2020 (01/202006), 09/30/2020 (01/202009), 12/31/2020 (01/202012), 03/31/2021 (01/202103), 06/30/2021 (01/202106), 09/30/2021 (01/202109), and 12/31/2021 (01/202112) *

- Form 943 series for the annual return periods ending 12/31/2020 (11/202012) and 12/31/2021 (11/202112)

- Form 944 series for the annual return period ending 12/31/2020 (14/202012) and 12/31/2021 (14/202112)

- Form CT-1 for the annual return period ending 12/31/2020 (09/202012) and 12/31/2021 (09/202112)

***Note:** While the Form 941 series for the quarterly return period ending 03/31/2020 is also impacted as a result of the deferral of the employer portion of social security tax and COVID-19 employer tax credits under sections 2301 and 2302 of the CARES Act, this quarterly return period is not included as an affected tax period for this memorandum.

**Revenue Officer (RO) Procedural Changes**

Previously, under IRM deviation memorandums SBSE-05-0421-0021 and SBSE-05-1221-0070, the Service postponed assessment of the TFRP until after 01/03/2022 and 01/03/2023, respectively, on tax periods where the employer was eligible to defer the employer and/or employee portion of social security tax. **Effective 02/24/2022**, the Service will postpone assessment of the TFRP on affected 2020 and 2021 employment tax periods (see above section titled, **"Affected Tax Periods"**) until **after 01/03/2023** unless:

- An exigent circumstance exists, and the RO secures Area Director (AD) approval; **or**
- The employer filed an Offer-in-Compromise (OIC); **or**
- The employer filed for bankruptcy

ROs pursuing assessment of the TFRP for any one of the reasons listed above must notify SB/SE Headquarters Collection Policy, Employment Tax before requesting managerial approval of the Form 4183. ROs must send an email to *SBSE Coll Policy TFRP with a cc to their group manager (GM) and their local ATFR coordinator. The email should contain the following information:

- Employer name
- Employer identification number (EIN)
- Tax periods for proposed assessment of the TFRP
- Date the employer filed bankruptcy, date the employer filed an OIC, or the date the RO secured AD approval (provide copy of email or ICS case history documentation date) to pursue assessment due to exigent circumstances

ROs should refer to the **IF/THEN** table below regarding assessment actions already taken on affected 2020 and 2021 tax periods.

| IF | THEN |
|---|---|
| You assessed an affected 2020 tax period in accordance with IRM deviation memorandums SBSE-05-0421-0021 or SBSE-05-1221-0070, **prior** to the effective date of this memorandum, 02/24/2022 | No action is required at this time. HQ Collection Policy, Employment Tax will contact you if action is needed. |
| You assessed an affected 2020 tax period **in error** (i.e., not in accordance with prior IRM deviation memorandums SBSE-05-0421-0021 or SBSE-05-1221-0070) | Send an email to *SBSE Coll Policy TFRP with a cc to your GM and your local ATFR coordinator.<br><br>The email should contain the following information:<br><br>• Employer name<br>• Employer identification number (EIN)<br>• Tax periods assessed |
| You assessed an affected 2021 tax period **prior** to the effective date of this memorandum, 02/24/2022 | No action is required at this time. HQ Collection Policy, Employment Tax will contact you if action is needed. |

| IF | THEN |
|---|---|
| You assessed an affected 2020 or 2021 tax period **in error** (i.e., not in accordance with current IRM deviation memorandum SBSE-05-0222-0015) **after** the date of this memorandum, 02/24/2022 | Send an email to *SBSE Coll Policy TFRP with a cc to your GM and your local ATFR coordinator.<br><br>The email should contain the following information:<br><br>• Employer name<br>• Employer identification number (EIN)<br>• Tax periods assessed |
| You already received approval of the Form 4183 for an affected 2020 or 2021 tax period*<br><br>***Note #1:** ROs may secure approval of the Form 4183 for the **sole purpose** of including an affected tax period with an in-business trust fund installment agreement (IBTF-IA) closing determination. However, if the installment agreement defaults, and if IRM deviation memorandum SBSE-05-0222-0015 is still in effect, then the RO may **not** issue the Letter 1153 and assess the TFRP until **after 01/03/2023** (unless one of the deviation reasons identified in this memorandum exists). ROs requesting Form 4183 approval for this reason must **still** send an email to *SBSE Coll Policy TFRP with a cc to their GM and their local ATFR coordinator **prior** to requesting GM approval of the Form 4183.<br><br>***Note #2:** If the RO is making a nonassertion determination (Form 9327) on **all** related responsible parties (RRPs) listed on the Form 4183, then the RO may submit the Form 4183 approval request to their GM for approval on the affected 2020 and/or 2021 tax period(s). ROs requesting Form 4183 approval for this reason must **still** send an email to *SBSE Coll Policy TFRP with a cc to their GM and their local ATFR coordinator **prior** to requesting GM approval of the Form 4183. If the Form 4183 also includes an RRP where the RO is proposing assessment of the TFRP on the affected 2020 and/or 2021 tax period(s), then the RO may **not** submit the Form 4183 approval request to their GM for approval (unless one of the deviation reasons identified in this memorandum exist). | 1. Do **not** issue the Letter 1153 **unless** the employer filed an OIC, filed for bankruptcy, or if there are exigent circumstances with AD approval.<br><br>2. Amend Form 4183.<br><br>3. Once GM approves the amended Form 4183, contact the ATFR Coordinator to move the affected 2020 and/or 2021 tax period to a new case.<br><br>4. Submit new Form 4183 to GM for approval on **non-affected** tax periods.<br><br>5. Proceed with normal assessment actions for all **non-affected** tax periods per existing procedures outlined in IRM 5.7.4 and IRM 5.7.6.<br><br>6. Follow the remaining RO procedures outlined in SBSE-05-0222-0015. |

| IF | THEN |
|---|---|
| You already issued a Letter 1153 | 1. Request amendment of Form 4183 to remove and rescind the recommendation to assess the affected tax period(s) via Letter 1153W (see IRM 5.7.4.7.2, Rescission of Proposed Assessment).<br><br>2. Document SBSE-05-0222-0015 as the reason for the amendment in the ICS and ATFR case histories as well as the Form 4183 narrative.<br><br>3. After securing managerial approval of the amended Form 4183, set the module to “not responsible”.<br><br>4. After securing managerial approval of the amended Form 4183, rescind the Letter 1153 for the affected tax period(s) using Letter 1153W.<br><br>5. Document the ICS and ATFR case histories with the reason for rescinding the recommendation.<br><br>6. Contact the ATFR Coordinator to move the affected 2020 and/or 2021 tax period to a new case.<br><br>7. Proceed with normal assessment actions for all **non-affected** tax periods, as applicable, per existing procedures outlined in IRM 5.7.4 and 5.7.6. |

If the RO needs to postpone assessment of the TFRP on an **affected tax period** (see above section titled, "**Affected Tax Periods**"), then the RO will:

1. Contact their local Automated Trust Fund Recovery (ATFR) coordinator to move the applicable employment tax period to a new case on the system.

   **Note:** The RO should complete the TFRP investigation (including assessment, as applicable) on all **non-affected** tax periods according to normal procedures outlined in IRM 5.7.3, IRM 5.7.4, and IRM 5.7.6.

2. Conduct the TFRP investigation **up to** the point of being ready to submit the TFRP package for managerial review and approval of the Form 4183 for all **affected** tax periods (this includes conducting the Form 4180 interview, issuing the Letter 3164-A, summonsing for bank records, etc.). Do **not** request approval of the Form 4183 and do **not** issue the Letter 1153. As a reminder, in no instance should a Letter 1153 ever be issued before securing group manager (GM) approval/signature of the Form 4183.

   **Note #1:** ROs may secure approval of the Form 4183 for the **sole purpose** of including an affected tax period with an in-business trust fund installment agreement (IBTF-IA) closing determination. However, if the installment agreement defaults, and if IRM deviation memorandum SBSE-05-0222-0015 is still in effect, then the RO may **not** issue the Letter 1153 and assess the TFRP until **after 01/03/2023** (unless one of the bulleted situations identified above exist). ROs requesting Form 4183 approval for this reason must **still** send an email to *SBSE Coll Policy TFRP with a cc to their GM and their local ATFR coordinator **prior** to requesting GM approval of the Form 4183.

   **Note #2:** If the RO is making a nonassertion determination (Form 9327) on **all** related responsible parties (RRPs) listed on the Form 4183, then the RO may submit the Form 4183 approval request to their GM for approval on the affected tax period(s). ROs requesting Form 4183 approval for this reason must **still** send an email to *SBSE Coll Policy TFRP with a cc to their GM and their local ATFR coordinator **prior** to requesting GM approval of the Form 4183. If the Form 4183 also includes an RRP where the RO is proposing assessment of the TFRP on an affected tax period(s), then the RO may **not** submit the Form 4183 approval request to their GM for approval until **after 01/03/2023** (unless one of the bulleted situations identified above exist).

3. Create an incoming Other Investigation (OI) on the Integrated Collection System (ICS) to complete the TFRP investigation on the affected modules if the ICS case is being closed.

4. Hold the TFRP OI (for the affected tax periods) in inventory and document the ICS and ATFR case histories with reference to IRM deviation memorandum, SBSE-05-0222-0015. Document the reason for not submitting the Form 4183 for managerial approval.

5. Schedule a follow-up between 02/21/2023 and 02/27/2023 to allow time for payments and credit reversals to post.

6. Secure managerial approval of the Form 4183 once all payments and credit reversals have posted to the taxpayer's account and complete the TFRP investigation.

**Group Manager (GM) Procedural Changes**

If the RO resolves the case on ICS and needs to keep the OI open to complete the TFRP investigation on an affected tax period after 01/03/2023, then the GM will:

1. Move the TFRP OI to the non-CDP hold file (XXXX-XX99).

   **Important:** Reassign prior TFRP OIs for affected tax periods from the GM hold file (XXXX-XX00) to the non-CDP hold file (XXXX-XX99) to standardize the monitoring process.

2. Keep the TFRP OI in the non-CDP hold file until or after the scheduled follow-up date (between 02/21/2023 and 02/27/2023).

3. Move the separate ATFR case containing the affected modules to the queue within the ATFR system.

   **Note:** If there is an open case on ATFR that includes both affected and non-affected tax periods, then contact your local ATFR coordinator to separate the affected periods onto a new case on ATFR. The case with the affected periods may **only** be returned to the ATFR queue after securing managerial approval of the Form 4183 on the ATFR case with the **non-affected** periods. As a reminder, please review IRM 5.7.4.2.1, Factors When Considering Trust Fund Balance Owed Amounts, prior to initiating disposal of a case on ATFR.

4. Maintain possession of the physical TFRP case file for the affected tax periods until the case is reassigned to an RO to complete the TFRP investigation.

5. Assign the TFRP OI on ICS and the case on ATFR back to the originating RO (when possible) to complete the TFRP investigation. GMs will return the physical TFRP case file to the RO at this time.

**Contact:** If you have any questions, you may contact Andra Kullman, Employment Tax Program Manager, or a member of your staff may contact Kerri Hansen, Program Analyst, or Javier Escudero, Program Analyst. ROs should elevate all questions to Collection Policy through their local management chain.

**CC:** Director, Civil Enforcement Advice and Support Operations
Director, Collection Operations – Quality and Technical Support
Director, Specialty Collection – Offer in Compromise
Director, Specialty Collection – Insolvency
Director, Campus Collection
Director, Appeals, Case and Operations Support
Director, Office of Servicewide Penalties
Taxpayer Advocate Service
Assistant Division Counsel, SB/SE
IRS.gov (https://www.irs.gov/)