

ID: CCA_2016032309174852

UILC: 6201.01-06

Number: **201616011**

Release Date: 4/15/2016

From: [REDACTED]

Sent: Wednesday, March 23, 2016 9:17:48 AM

To: [REDACTED]

Cc:

Bcc:

Subject: FW: restitution question

Your question was whether a restitution assessment would be premature if at the time the assessment was made, there was appeal pending under 28 U.S.C. § 2255. A 28 U.S.C. § 2255 motion is a motion to vacate, set aside or correct a sentence. It presumes that the motion is filed by a prisoner, because it is available to a prisoner in custody under a sentence of a court claiming the right to be released upon the grounds that the sentence was in violation of the Constitution or U.S. laws, or that the court was without jurisdiction to impose the sentence, or that the sentence was in excess of the authority of law, or that it was subject to a collateral attack.

For the purposes of a restitution-based assessment, however, the focus is on an order of restitution. Section 6201(a)(4)(B) provides that the assessment “shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.” The term “such order” in the phrase “all appeals of such order” refers to the restitution order itself, not the overall sentence. If a defendant is appealing the denial of a 28 U.S.C. § 2255 motion to vacate a prison sentence, it is not an appeal of the restitution order. If a motion under 28 U.S.C. § 2255 is granted, the result would be that the taxpayer would be released. It would not have any effect on the restitution ordered. See, e.g., Smullen v. United States, 94 F.3d 20, 22 (1st Cir. 1996) (“The principal issue is whether a criminal defendant, who is in custody, may under 28 U.S.C. § 2255 collaterally challenge the restitution order imposed as a part of his sentence. [O]nly two circuits to have explicitly addressed this matter, we hold he may not.”). Therefore, the IRS is not prohibited from making a restitution assessment while the 28 U.S.C. § 2255 motion was pending.