Office of Chief Counsel
Internal Revenue Service
memorandum

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subject: Prohibition on Challenging the Amount of Court-Ordered Restitution at a Collection Due Process (CDP) Hearing

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

Issue

Whether a taxpayer may challenge the amount of restitution at a CDP hearing.

Conclusion

A taxpayer cannot challenge the amount of court-ordered restitution at a CDP hearing. A district court's final order cannot be modified by challenging the amount of ordered restitution at a CDP hearing. Also, I.R.C. § 6201(a)(4) prohibits collateral attacks on a restitution order in a subsequent legal and administrative proceeding under the Internal Revenue Code, of which a CDP hearing is an example. Furthermore, a challenge to the amount of restitution in a CDP hearing is prohibited under I.R.C. § 6330(c)(4) because the criminal tax case itself is considered a prior judicial hearing on that issue in which a taxpayer meaningfully participated.

Background

"Restitution is a compensation for loss; full or partial compensation paid by a criminal to a victim, not awarded in a civil trial for tort, but ordered as part of a criminal sentence or as a condition of probation." Black's Law Dictionary 1428 (19th Ed. 2009). In cases where a defendant committed a tax-related crime, the Internal Revenue Service is typically a victim. Federal district courts may order a defendant to pay restitution to the Service to compensate it for its actual loss. Federal district courts order restitution pursuant to 18 U.S.C. § 3556. Restitution can be ordered in a criminal tax case as an

independent part of a sentence if it is an aspect of a plea agreement or if the defendant is convicted of a Title 18 criminal tax offense, as a condition of a supervised release, or as a condition of probation. 18 U.S.C. §§ 3663(a)(3), 3663A; 3583(d), 3563(b)(2). When a criminal tax case is settled between the defendant and the government, the parties enter into a plea agreement which typically waives an appeal of the restitution order. 18 U.S.C. § 3663(a)(3). Although the plea agreement is generally prepared by the government, it is negotiated with the defendant, and the defendant can object to certain provisions of the agreement including those that relate to the existence and amount of the tax loss and agree to the amounts which are greater than the loss resulting from the count or counts of conviction. United States v. Sloan, 505 F.3d 685, 695 (7th Cir. 2007); United States v. Cooper, 498 F.3d 1156, 1158 (10th Cir. 2007). If the criminal tax case is not amicably resolved and goes to trial, the amount of restitution is then determined by the judge in a sentencing hearing. Before the sentencing hearing a probation officer prepares a presentence report that shows calculations of the amount of restitution. The presentence report is based on, among other things, the information provided by the prosecutor and the defendant about the tax loss and an affidavit of the defendant about the ability to pay. After reviewing the presentence report, the court may require additional documentation or hear testimony. 18 U.S.C. § 3664(d)(4). The defendant can object to the investigation report, offer evidence, and call witnesses that can attest to the amount of the restitution. After the hearing, the judge decides on the amount of the restitution, which the defendant must pay as a condition of probation under 18 U.S.C. § 3563(b)(2) or supervised release under 18 U.S.C. § 3583(d).

Prior to August 16, 2010, the Service was not able to administratively collect on a restitution order, because restitution was not assessable as a tax. On August 16, 2010, the Federal Excise Tax Improvement Act of 2010 (FETI Act), Pub. L.No. 111-237, amended section 6201(a) to require assessment and administrative collection of "amount of restitution under an order pursuant to [18 U.C.S. § 3556], or for failure to pay any tax imposed under the [I.R.C.] in the same manner as if such amount were such tax". Section 6201(a)(4).

Before the Service can administratively collect on any assessment, it generally affords CDP hearing rights to a taxpayer[1] pursuant to sections 6320 or 6330. Section 6320(a) provides that the Service shall notify a taxpayer when a Notice of Federal Tax Lien is filed against a taxpayer's property and allow that taxpayer to request a CDP hearing. Similarly, section 6330(a) states that the Service shall provide a taxpayer with a notice of intent to levy explaining that the taxpayer has a right to a CDP hearing. Sections 6320(b)(2) and 6330(b)(2) allow only one hearing with respect to a tax and tax periods covered by the notice ("CDP notice"). During the CDP hearing, a taxpayer can raise a number of issues that relate to the unpaid tax, such as: 1) spousal defenses; 2) a challenge to the appropriateness of collection actions; and 3) potential collection alternatives. Section 6330(c)(2)(A). Typically, a taxpayer may also challenge the underlying tax liability pursuant to section 6330(c)(2)(B). A taxpayer, however, may

[1] The terms "defendant" and "taxpayer" are identical for the purposes of restitution-based assessments. "Defendant" is used generally when discussing restitution orders; "taxpayer" is used generally when discussing the tax assessment based on the amount ordered as restitution.

contest the underlying tax liability only if it did not have a prior opportunity to dispute such tax liability. Also, pursuant to section 6330(c)(4) a taxpayer can raise only those issues at a CDP hearing that were not raised or considered at a previous CDP hearing or any other previous administrative or judicial proceeding and a taxpayer meaningfully participated in such a hearing or proceeding.

Law and Analysis

Congress intended to give federal district court orders – and criminal sentencing orders in particular – finality. See Dolan v. United States, 130 S. Ct. 2533, 2539-40 (2010) (recognizing the importance of the finality and certainty of a restitution determination in helping victims secure prompt restitution). When a federal district court issues its judgment and commitment order in a criminal case, the amount of restitution reflected in that order is considered final. Any subsequent modification of that restitution amount lies solely within the jurisdiction of the federal district court that ordered the restitution. No statute gives the Service the power to modify or compromise any district court's order unilaterally, not even an order of restitution where the Service is identified as the victim. The FETI Act does not change this, despite the Service's new ability to assess and collect this amount of restitution as if such amount were a tax. Likewise, a defendant convicted of a tax crime and ordered to pay restitution to the Service cannot launch a collateral attack on a federal district court's restitution order under any judicial or administrative proceeding under the Internal Revenue Code. Any challenge of the amount of restitution at a CDP hearing is an attempt to impermissibly modify the district court's final restitution order, and is therefore a prohibited collateral attack on that order. The only way the amount of a restitution order can be changed is if the restitution order is modified by the federal district court which issued the order. Accordingly, the Office of Appeals has no authority to change the amount of a restitution order or even entertain at a CDP hearing a challenge to the amount of restitution ordered. Sections 6201(a)(4) and 6330(c)(4) support this prohibition against review by the Office of Appeals of a district court's restitution order.

A. Section 6201(a)(4) prohibits a taxpayer from challenging the amount of restitution at a CDP hearing.

As added under the FETI Act, section 6201(a)(4)(C) effectively prohibits a taxpayer from collaterally attacking a district court's restitution order. Section 6201(a)(4)(C) explicitly provides that "[t]he amount of . . . restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under [the I.R.C.] (including in any suit or proceeding in court permitted under section 7422)." (Emphasis added). First, the right to have a CDP hearing is established within the Code by sections 6220 and 6330, therefore it is a proceeding under the Code. Because a CDP hearing is a proceeding authorized under the Code, section 6201(a)(4)(C) explicitly prohibits a challenge to the amount of restitution in such a proceeding. Second, section 6330(c)(2)(B) generally provides for the ability of a taxpayer to challenge the "existence or amount of the underlying tax liability," but section 6201(a)(4)(C) explicitly prohibits a challenge to the

amount of restitution "based on the existence or amount of the underlying tax liability." Although these two provisions appear to be in conflict, Congress passed and enacted section 6201(a)(4)(C) nearly a decade after section 6330. When Congress enacts a new statutory provision it is presumed to be aware of other statutory provisions using the same terms and the meanings ascribed to those terms. Commissioner v. Keystone Consolidated Indus., Inc., 508 U.S. 152, 159 (1993). A cardinal rule of statutory construction is that effect must be given to every clause of part of a statute, and multiple statues should be read in harmony together. Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631 (1973) (holding that the Supreme Court's task in interpreting separate provisions of a single act is to give the act the most harmonious, comprehensive meaning possible in light of legislative policy and purpose); D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932) (holding that general language of statutory provision will not be held to apply to matters specifically dealt with in another part of same enactment). Section 6201(a)(4)(C) should be seen, therefore, as a specific exception to the general CDP hearing rights under section 6330(c)(2)(B) which applies only in the case of restitution-based assessments.

Because the issue raised under section 6330(c)(2)(B) is specifically prohibited by the language of section 6201(a)(4)(C), a taxpayer cannot challenge the amount of restitution based on "the existence or amount of the underlying tax liability," in a CDP hearing.[2] This means that even if the restitution ordered is based in whole or in part on unpaid income taxes for a tax period never examined by the Service, the district court's determination of that amount of restitution is uncontestable under section 6201(a)(4). See also section 6213(b)(5) (assessment of restitution is not subject to deficiency procedures). Other CDP rights pursuant to section 6330(c)(2), however, may be available to that taxpayer.[3]

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[2] We note that although section 6201(a)(4)(A) requires the Secretary to collect the amount of restitution ordered pursuant to 18 U.S.C. § 3556 in the same manner "as if such amount were such tax", this language suggests that the restitution ordered is not itself a tax liability. The distinction between restitution in a criminal tax case and tax liability is further illustrated by the potentially inconsistent manner in which restitution may be determined by a federal district court. For example, restitution determined under the Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-132, § 204(a), 111 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663(A)), applies to certain tax cases and directs that the amount of restitution is generally the amount of property taken from the victim (an actual loss to the government in a tax case) under 18 U.S.C. § 3663A(b)(1)(A) and (B), whereas restitution ordered pursuant to a plea agreement may be "to the extent agreed to by the parties in a plea agreement" for any amount greater or less than the loss attributable to the criminal offense. 18 U.S.C. § 3663(a)(3). See, e.g., Sloan, 505 F.3d at 695; Cooper, 498 F.3d at 1158. Conceivably then, the restitution ultimately ordered in a criminal case could differ depending on how the case was ultimately resolved, independent – at least in part – of the defendant's actual tax liability for the tax period at issue. The distinction between restitution and tax liability, however, does not mean that the Service can collect both restitution for a certain tax period and the taxpayer's full civil tax liability for the same period, as this would be impermissible double collection. See United States v. Helmsley, 941 F.2d 71, 102 (2d Cir. 1991) ("[W]e believe it is self-evident that any amount paid as restitution for taxes owed must be deducted from any judgment entered for unpaid taxes in such a civil proceeding.").

[3] As identified in CC Notice 2011-18, Q&A 17 and 18, the Service may be restricted in the types of installment agreements available for restitution-based assessments and may be prohibited from compromising restitution-based assessments. See I.R.C § 7122(a).

The prohibition against the Secretary's subsequent review of a court order issued prior to a CDP hearing is not unique to section 6201(a)(4); at least one other provision in the Code similarly restricts CDP hearing rights. I.R.C. § 6305 precludes any review by the Secretary of amounts ordered pursuant to a state court order under section 425(b) of the Social Security Act (non payment of child support obligations). Section 6305(a) provides that the Service "shall assess and collect the amount . . . as if such amount were a tax[.]" This language is nearly identical to that of section 6201(a)(4)(A). Additionally, section 6305(b) provides that "[n]o court of the United States . . . shall have jurisdiction over any action . . . brought to restrain or review the assessment and collection of [these] amounts . . . nor shall any such assessment and collection be subject to review by the Secretary in any proceeding." The Service has interpreted this restriction under section 6305(b) as prohibiting any CDP rights for a child support levy. This prohibition on any review, arguably even more restrictive than that of section 6201(a)(4), was addressed by the First Circuit in Prestwich v. IRS, 796 F.2d 582 (1st. Cir. 1986). The Prestwich court relied on Swain v. Swain, 604 F. Supp. 181, 184 (S.D. Miss. 1984)("Any action to test the validity of the original [state certification of amounts due from defaulting parents owing child support] and to recover any funds wrongfully withheld should logically be brought against the state agency involved . . . not in the federal court system.") and stated that "[s]ection 6305 (b) . . . reflects the logical intent of Congress to keep the IRS from becoming embroiled in matters between states and individuals in which the federal agency has no direct involvement." Section 6201(a)(4)(C) similarly reflects the logical intent of Congress to prevent the Service from unilaterally reducing the amount of restitution ordered by a federal district court.

The Service's assessment of the amount of restitution ordered by a federal district court does not, however, prevent the Service from assessing civil penalties and tax liabilities on top of the criminally ordered restitution if the amount of restitution is less than the defendant's total tax liabilities for that same period. See Helvering v. Mitchell, 303 U.S. 391 (1938) (holding that Congress may impose both a criminal and a civil sanction in respect to the same act or omission); Morse v. Commissioner, 419 F.3d 829, 833-35 (8th Cir. 2005) (holding that despite a federal criminal case against the same taxpayer resulting in a sentence the taxpayer pay a fine and make restitution to the Service, the doctrine of res judicata did not apply to preclude a civil fraud penalty assessment on a tax deficiency because criminal prosecution for filing false income tax returns did not involve same cause of action as civil tax deficiency case). Cf. United States v. Helmsley, 941 F.2d 71, 102 (2d Cir. 1991) ("It is true that the government may pursue a tax evader for unpaid taxes, penalties and interest in a civil proceeding. However, we believe it is self-evident that any amount paid as restitution for taxes owed must be deducted from any judgment entered for unpaid taxes in such a civil proceeding."). In other words, the restitution amount is a floor and not a ceiling with respect to the tax period at issue.[4] Although the amount of a restitution may not be the actual amount of

[4] The tax or penalty liabilities determined by the Service in excess of the amount ordered as restitution are not an assessment of the restitution ordered by a federal district court. Accordingly, section 6201(a)(4)(C) does not prohibit a taxpayer from challenging in any judicial or administrative proceeding under the Code those tax or penalty determinations that are in excess of the amount ordered

the taxpayer's full tax liability for that tax period under Title 26, the Service will effectively treat the amount of restitution as the minimum tax liability for the relevant tax period by assessing it "as if such amount were such tax" for that period. Section 6201(a)(4)(A).

B. Section 6330(c)(4) prohibits a taxpayer from challenging the amount of restitution at a CDP hearing.

The prohibition against a taxpayer raising the issue of the existence and the amount of restitution ordered is further supported by section 6330(c)(4)(A), which provides that "an issue may not be raised at the [CDP] hearing if – (i) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and (ii) the person seeking to raise the issue participated meaningfully in such hearing or proceeding." (Emphasis added).

A previous judicial proceeding includes any bankruptcy, district, or Tax Court action in which an issue in the CDP hearing has already been determined. For example, in Salazar v. Commissioner, T.C. Memo. 2008-38, the Tax Court held that taxpayers who had pending Chapter 7 bankruptcy proceeding in which IRS had submitted proof of claim for unpaid income and employment tax and to which the taxpayers had not filed objections, were precluded in their petition to the Tax Court from challenging underlying liabilities because the taxpayers already had an opportunity in Bankruptcy Court to dispute liabilities in question. In MacElvain v. Commissioner, T.C. Memo. 2000-320, the Tax Court granted the Service's motion for summary judgment because the taxpayer had filed an earlier district court suit which addressed the same tax years and the taxpayer actively participated in that earlier case. See also Goodman v. Commissioner, T.C. Memo. 2006-220 (holding that an agreed or stipulated judgment is judgment on the merits for purposes of res judicata); Summers v. Commissioner, T.C. Memo. 2006-219 at *6 (holding that an underlying income tax liability was not properly before the Tax Court because the taxpayers litigated the issue of underlying liability in federal district court and on appeal to the Third Circuit, and the Third Circuit affirmed the district court reducing the assessments to judgment for the same years at issue). Determination of the liability set forth in a restitution order is not necessarily a tax liability determination under Title 26; the court makes its determination of the restitution liability under 18 U.S.C. § 3664 and the related statutes. As discussed above, however, by assessing the restitution "as if such amount were such tax" the Service effectively treats restitution as if it were a tax liability once it assesses the restitution pursuant to section 6201(a)(4).

A taxpayer is a meaningful and active participant in a criminal proceeding against him regardless of whether he is *pro se* or is represented by court-appointed or private

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as restitution. For example, if a taxpayer is ordered to pay $100,000 in restitution for the tax period ending 20XX and the Service determines pursuant to a subsequent examination that the taxpayer has an additional unpaid tax liability of $20,000 and is subject to a section 6663 fraud penalty of $90,000 for that same period, section 6201(a)(4)(C) does not prohibit the taxpayer from challenging the $20,000 additional tax liability and the $90,000 fraud penalty, but does prohibit the taxpayer from challenging the $100,000 amount of restitution determined by the federal district court and assessed by the Service.

defense counsel. A defendant's active participation in a criminal case is guaranteed under Federal Rule of Criminal Procedure 43(a), which provides that a defendant must be present at every stage of a trial except as otherwise provided by the rule. See Crosby v. United States, 506 U.S. 255 (1993) (holding that the trial is not valid in absence of the defendant in the beginning of the trial). Even if the defendant enters into a plea agreement in the criminal case, he negotiates it and has the ability to object to it. If the case goes to trial, the defendant has the right to contest the existence or amount of the underlying tax liability by testifying, calling witnesses and producing documents. Therefore, the criminal tax case resulting in a restitution order issued against a defendant is a judicial hearing in which a taxpayer is a meaningful participant and as such it prevents a taxpayer from raising the amount and validity of a restitution-based assessment at a CDP hearing pursuant to section 6330(c)(4).

Please contact Branch 3 or Branch 4 of Procedure and Administration at (202) 622-3600 or (202) 622-3630, respectively, if you have any further questions.