

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

# Notice

CC-2011-018

August 26, 2011

**Subject:** The Assessment and Collection of  
Criminal Restitution

**Cancel Date:** Upon incorporation  
into CCDM

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## Purpose

This notice addresses the Internal Revenue Service's authority under I.R.C. § 6201(a)(4) to assess and collect the amount of criminal restitution ordered for failure to pay any tax under Title 26, as established in the Firearms Excise Tax Improvement Act of 2010 ("the FETI Act"), Pub. L. No. 111-237, § 3. Specifically, this notice addresses three general topics: the applicability of section 6201(a)(4) to criminal restitution ordered by a federal court; the assessment of that restitution amount; and the collection of the restitution-based assessment.

## Background

Federal district courts may sentence a defendant to pay restitution upon conviction of certain criminal offenses. When a federal district court orders restitution, it does so pursuant to 18 U.S.C. § 3556. Criminal restitution serves to compensate a victim for the loss caused by that defendant. In some criminal cases the Internal Revenue Service may be identified as a victim, therefore a court may order a defendant to pay restitution to the Internal Revenue Service for a tax-related loss. Restitution is ordered pursuant to 18 U.S.C. § 3556, and the enforcement of that order is retained by the government under Title 18, including 18 U.S.C. § 3664. In criminal tax cases resolved through the plea agreement process, the defendant may agree to an order of restitution. In contested cases (*i.e.*, when there is a trial) the court may order restitution as a condition of probation or supervised release. The Service can accept payments of restitution as the victim, but neither Title 18 nor Title 26 provide the Service with the power to administratively collect on a restitution order because restitution is not a tax. With the enactment of the FETI Act, however, Congress empowered the Service to use its administrative collection tools to enforce a restitution-based assessment – while not collecting on the restitution order itself – by requiring the Service to assess the amount of Title 18 criminal restitution as a tax under Title 26.

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Section 3 of the FETI Act amends section 6201(a) by adding section 6201(a)(4), which provides that:

- the “Secretary shall assess and collect the amount of restitution under an order pursuant to [18 U.S.C. § 3556] for failure to pay any tax imposed under this title in the same manner as if such amount were such tax,”
- the restitution-based assessment must be made only after the appeal period for the restitution order expires, and
- the existence or amount of the assessed restitution may not be challenged.

In addition, the FETI Act amends section 6213(b) by adding section 6213(b)(5), which provides that a restitution-based assessment is not subject to deficiency procedures.

Finally, the FETI Act amends section 6501(c) by adding section 6501(c)(11), which provides that the restitution-based assessment may be made – and a court proceeding to collect this amount may be begun without assessment – at any time.

## **Discussion**

### **I. The Applicability of I.R.C. § 6201(a)(4) to Specific Restitution Orders**

Question 1: When is the FETA Act effective to require assessment of restitution under section 6201(a)(4)?

Answer 1: The amendments made by the FETI Act – and therefore the Service’s ability to make an assessment for restitution – are effective for any restitution ordered after August 16, 2010. An order of restitution typically is included or incorporated by reference in the Judgment and Commitment Order issued by the court. Accordingly, the date when restitution is ordered is the date the Judgment and Commitment Order is entered by the court.

Question 2: Does the Service have the authority to assess restitution ordered in any criminal case, or only in those criminal cases pertaining to taxes?

Answer 2: Section 6201(a)(4)(A) provides that the Service may only assess an amount of restitution ordered “for failure to pay any tax imposed under [Title 26].” Not every conviction in a Title 26 criminal case will result in an order of restitution that will be assessable. Conversely, a restitution-based assessment is not limited to conviction under Title 26. Restitution ordered in sentencing for a conviction under Title 18 may also be assessable if the offense of conviction is based upon a failure to pay a tax imposed under Title 26. Whether a criminal restitution order can be assessed as a tax under section 6201(a)(4) depends on the nature of the criminal offense for tax

purposes. Generally, if the restitution ordered is traceable to a tax imposed by Title 26 (e.g., cases stemming from an underreporting of income, an inflated credit or expense, or an alleged overpayment of tax that results in a false refund), then the restitution may be assessed as a tax. On the other hand, criminal cases in which the restitution ordered is not traceable to a tax – such as when a taxpayer submits false documents or tells lies during an examination – may not result in assessable restitution.

Whether a restitution order relates to a tax imposed under Title 26 is a case-specific determination made by Criminal Investigation (CI) in appropriate consultation with the Office of Division Counsel/Associate Chief Counsel (Criminal Tax). Restitution ordered for a criminal violation of the following statutes may meet the requirements necessary to be assessed as a tax: I.R.C. §§ 7201, 7202, 7203, 7205, 7206(1), 7206(2), 7206(4), 7206(5), 7207, and 18 U.S.C. §§ 286, 287, and 371. This is not an all-inclusive list, but is representative of the most frequently encountered criminal statutes that may result in a restitution-based assessment.

Question 3: Can the Service assess restitution in cases when the restitution is ordered as part of a plea agreement, as a condition of supervised release, or as a condition of probation?

Answer 3: Yes, provided that the criminal offense is “for failure to pay any tax imposed under this title” as described in Answer 2, above. See section 6201(a)(4)(A). Under this provision, the Service must assess certain restitution ordered pursuant to 18 U.S.C. § 3556. 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. Restitution ordered in any of these situations must be assessed.

Question 4: Courts sometimes order an individual criminal defendant to pay the unpaid income tax liabilities and employment tax liabilities of a business entity as restitution. Can these liabilities be assessed against the individual criminal defendant?

Answer 4: Yes, provided the restitution ordered is determined to be assessable as described in Answer 2, above. Accordingly, the Service may assess any restitution ordered payable by a criminal defendant, even if the restitution relates to the unpaid income or employment tax liabilities of the corresponding business entity or employer. In these cases, the Service must adjust the unpaid tax liability of the corresponding business entity or employer to account for any payments made through restitution or the

restitution-based assessment against the criminal defendant.<sup>1</sup> Likewise, the Service must adjust the unpaid restitution-based assessment liability of the criminal defendant to account for any payments made by or on behalf of the business entity or employer.

Question 5: If a state court orders a criminal defendant to pay restitution to the Service, is the state court's order of restitution also assessable?

Answer 5: No. State courts order restitution under state criminal statutes, not the federal criminal restitution provision of 18 U.S.C. § 3556. Under section 6201(a)(4)(A), the Service may only assess restitution ordered pursuant to 18 U.S.C. § 3556. Because the state court restitution is not ordered pursuant to 18 U.S.C. § 3556, restitution ordered by a state court is not assessable as a tax by the Service.

## II. The Assessment of the Amount of Criminal Restitution Ordered

Question 6: When is the earliest date by which the Service can assess the amount ordered as criminal restitution?

Answer 6: Section 6201(a)(4)(B) provides that the Service can assess no earlier than the date by which "all appeals of such [restitution] order are concluded and the right to make all such appeals has expired." This means that, even though a Federal district court may order restitution, the earliest assessment date for each applicable tax year will be the **latest** of the following dates: the date on which the criminal defendant's final judgment is issued; the date the last appeal expires; or the date on which certiorari has been denied.

A criminal defendant has 14 days to appeal from the later of either (i) the date the district court enters the judgment or restitution order, or (ii) the date the government files its notice of appeal. Fed. R. App. P. 4(b)(1). The criminal defendant need not specify whether the appeal is of the order of restitution; an appeal of the conviction itself; or the sentence in general. The appeal itself is sufficient to stay a restitution-based assessment. If the criminal defendant fails to appeal the restitution order either within the 14-day period or a court-ordered extension, the Service may assess the restitution pursuant to section 6201(a)(4). If the criminal defendant appeals the restitution order, the Service cannot assess the restitution while the appeal is pending.

After the court of appeals enters a final judgment, a criminal defendant has 90 days within which to petition the Supreme Court, subject to an extension for good cause for a period not exceeding 60 days. Sup. Ct. R. 13. If the court of appeals affirms the district court or dismisses the appeal and the criminal defendant fails to petition the Supreme Court, then the Service can assess restitution pursuant to the district court's order upon the expiration of the period during which a writ of certiorari may be sought. If a petition

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<sup>1</sup> 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 . . . a civil proceeding. Restitution [in a tax case] is in fact and law a payment of unpaid taxes."

for a writ of certiorari has been timely filed, but is later denied by the Supreme Court, then the Service can assess pursuant to the district court's restitution order upon the entry of an order denying the petition on the Supreme Court docket.

If the petition for a writ of certiorari is granted, the Service can assess only after the Supreme Court enters a final judgment with respect to the case either affirming the district court or dismissing the appeal. If an appellate court modifies the district court's order, the Service is only permitted to assess the amount of the restitution pursuant to the modified order.

Question 7: When a court issues a criminal restitution order, what is the amount that will be assessed?

Answer 7: A restitution-based assessment under section 6201(a)(4)(A) can be no less than, and no greater than, the amount ordered as restitution. The Service's authority to assess the amount of the restitution order as a tax is solely founded upon the district court's power to order restitution under 18 U.S.C. § 3556. The Service has no discretion to assess a lesser or greater amount than ordered when relying upon section 6201(a)(4).

Question 8: If the Service assesses the amount ordered as criminal restitution, can the taxpayer challenge the existence or amount of the assessment in any administrative or judicial proceeding?

Answer 8: No. Section 6201(a)(4)(C) precludes any attempt by the taxpayer to challenge a restitution-based assessment made under section 6201(a)(4) on the basis of the existence or amount of the underlying tax liability. For example, even though the restitution ordered may have been for unpaid income taxes for a tax period never examined by the Service, the Service's assessment of that amount of restitution, pursuant to section 6201(a)(4) is not subject to deficiency procedures. See section 6213(b)(5). A restitution-based assessment is uncontestable. Although the restitution-based assessment is uncontestable, in certain rare instances the original trial court may reduce the restitution order as explained in Answer 10, below.

Question 9: How will the Service determine the tax periods for which the restitution-based assessment should be made?

Answer 9: To the extent the restitution order identifies a specific amount attributable to each distinct tax period, the restitution-based assessment should be broken down and made for each respective tax period. To the extent a judgment or restitution order identifies several tax periods but only a single, lump-sum restitution amount, the Service should determine how the lump-sum should be allocated among the distinct tax periods to most accurately reflect the tax loss.

Question 10: If the amount of criminal restitution ordered and the subsequent restitution-based assessment is determined to be excessive by a subsequent examination, can the Service abate any portion of the assessment?

Answer 10: If the Service determines, pursuant to examination, that the restitution amount ordered is excessive, the Service should contact the Justice Department's Tax Division or the proper U.S. Attorney's Office and request a modification of the restitution order. When the restitution order is amended, the Service may abate the related assessment under section 6404 to bring it in line with the amount in the amended order. Although the taxpayer is not precluded from seeking abatement under section 6404 before the restitution order is modified (notwithstanding the restrictions of section 6404(b)), a valid and meritorious section 6404 request by the taxpayer still requires the taxpayer or the Service (through the Justice Department) to seek modification of the restitution order in order to reduce the amount because the Service is bound by the actual terms of the restitution order in making an assessment under section 6201(a)(4)(A).

Question 11: If the amount of criminal restitution ordered and the restitution-based assessment is determined by a subsequent exam to be less than the taxpayer's actual tax liabilities, can the Service make a supplemental assessment under the authority of section 6201(a)(4)?

Answer 11: No. Section 6201(a)(4) only authorizes the Service to make a civil assessment in the amount of restitution reflected in the court's order. Any additional amounts of tax or penalty not identified in the restitution order are to be assessed under the authority of section 6201 not including subsection (a)(4). Pursuant to section 6201(e), this additional amount may be subject to deficiency procedures for additional income, estate, gift, and certain excise taxes.

Question 12: Will interest under section 6601 accrue on a restitution-based assessment?

Answer 12: Yes. Because restitution-based assessments are assessments made under Title 26, underpayment interest will accrue as it would on any other Title 26 assessment. Accordingly, underpayment interest generally will accrue from the last date prescribed for payment (as determined under section 6601(b)) of the liability that is the subject of the restitution order to the date of payment. For example, if a calendar year end taxpayer is ordered to pay restitution as to the 2004 tax year, underpayment interest will generally accrue from April 15, 2005. Underpayment interest will accrue at the underpayment rate established under section 6621. Title 18 interest that accrues on the restitution ordered is not assessable by the Service (i.e., interest accruing on the restitution order under 18 U.S.C. § 3612(f), which is separate and legally distinct from interest accruing on the restitution-based assessment under section 6601). Any Title 18 interest on the restitution ordered that is paid to the Service as a victim will be applied against the assessed amount, which includes any Title 26 interest, as provided by the

normal application of involuntary payment rules established by the Service. In cases in which the total amount of restitution ordered includes some form of Title 26 interest, care should be taken to ensure that the amount of underpayment interest accruing under Title 26 is not assessed twice.

Question 13: After the Service makes a restitution-based assessment, is Counsel approval needed regarding whether or not to conduct a full examination of the taxpayer and tax periods that are subject to the restitution-based assessment?

Answer 13: No. The Service generally does not need Counsel approval regarding its decision whether or not to conduct a full examination in cases in which there is a restitution order upon which a civil assessment can be made. Existing rules regarding Counsel approval necessary to impose the fraud and the fraudulent failure to file penalties continue to apply. See IRM 25.1.6.2(5), (6).

Question 14: Can the Service assess a civil fraud or accuracy-related penalty based on a restitution order?

Answer 14: No. The Service cannot automatically assess a civil fraud or accuracy-related penalty based on an order of restitution. Section 6201(a)(4) only provides that the Service must assess the amount of restitution reflected in the order. If the Service determines that a civil fraud or accuracy-related penalty is appropriate for the same transaction upon which the restitution order is based, the Service must follow its standard procedures set forth in the IRM. In these cases, the Service's examination function must issue a statutory notice of deficiency before a civil fraud or accuracy-related penalty can be assessed. As addressed in Answer 13, above, existing rules regarding Counsel approval necessary to impose the fraud and the fraudulent failure to file penalties apply. See IRM 25.1.6.2(5), (6).

### **III. The Collection of an Unpaid Restitution-Based Assessment**

Question 15: What is the period during which the Service may collect payment of a restitution-based assessment?

Answer 15: Section 6501(c)(11) provides that the Service may assess any restitution amount under section 6201(a)(4) and file a proceeding in court for the collection of an amount ordered as restitution even before the Service assesses the restitution amount. Once the restitution amount is assessed under section 6201(a)(4), the general 10-year statute of limitations for collection applies pursuant to section 6502(a). Like all other assessments, any suspension of the collection period of limitations under section 6503 may apply to a restitution-based assessment. The Service may also request that the Tax Division 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 under 28 U.S.C. § 3201(c).

Although the Service can assess and collect restitution pursuant to sections 6201(a)(4) and 6501, the restitution order itself, made under 18 U.S.C. § 3556, does not cease to exist when the Service makes its assessment of the amount of restitution. The Justice Department can rely on the collection procedures provided for collecting on a judgment entered pursuant to Title 18 to collect the restitution ordered. In other words, the Service's assessment of an amount of restitution under section 6201(a)(4) does not modify the authority of the Justice Department to collect the restitution ordered under Title 18.

Question 16: When does the statutory lien under section 6321 arise for restitution-based assessments?

Answer 16: Pursuant to section 6322, the date the statutory tax lien arises is the date the Service makes the restitution-based assessment. Section 6321 provides that a statutory tax lien arises “[i]f any person liable to pay any tax neglects or refuses to pay the same after demand[.]” Restitution-based assessments are no different than other assessments in this respect. Accordingly, the Service must give the taxpayer notice and demand payment for the restitution-based assessment. If the taxpayer neglects or refuses to pay, the statutory tax lien under section 6321 arises.

Question 17: Can the Service enter into an installment agreement with the taxpayer regarding a restitution-based assessment?

Answer 17: Yes, but with certain restrictions. The Service can enter into an installment agreement so long as it provides for the full payment of the restitution-based assessment or allows sufficient time for collection of the full amount of the restitution-based assessment after completion of the installment agreement. When the Service enters into an installment agreement – regardless of whether the restitution order includes a payment plan – the terms of the installment agreement may require the taxpayer to pay the civil assessment of tax more quickly than provided by the payment plan in the restitution order. An installment agreement to pay the civil assessment of tax should not require the taxpayer to make payments after the expiration of the statutory collection period, including any extensions or tolling. The Service should contact the Justice Department before entering into an installment agreement if the terms are different from the terms of the payment plan set forth in the restitution order, or no payment plan is provided in the restitution order.

Question 18: Can the Service accept an offer-in-compromise regarding the amount of restitution ordered or the restitution-based assessment?

Answer 18: No. The Service may not accept an offer-in-compromise that in any way modifies the terms of a restitution order. The defendant must notify the district court and the Justice Department of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay. The Justice Department may also notify the court of a change in the defendant's economic circumstances. Upon



receiving notice of changes in economic circumstances, the court may, on motion of a party or on its own motion, adjust a restitution payment schedule, or require immediate payment in full, as the interests of justice require. See 18 U.S.C. § 3664(k). Accordingly, the Service cannot accept an offer-in-compromise on a civil assessment based on a restitution order that would result in the taxpayer ultimately paying less than the ordered restitution amount.

On the other hand, if the Service has assessed civil tax liabilities, interest, and penalties in excess of the amount that was awarded as restitution, the Service may consider an offer-in-compromise to pay the additional taxes, penalties, and interest for the same tax periods for which restitution was ordered, but only if the defendant has paid or will pay, as part of the offer, the full amount of the restitution and related restitution-based assessment. Taxpayers submitting these types of offers should be informed that only the district court that entered the restitution order can modify it.

Question 19: Does a taxpayer have Collection Due Process rights under sections 6320 and 6330 when the Service attempts to collect a restitution-based assessment?

Answer 19: Yes. A taxpayer is entitled to a CDP hearing when the Service attempts to collect a restitution-based assessment, and the Service must comply with the notice, hearing, and verification requirements set forth in sections 6320 and 6330 as in any other CDP hearing. In a CDP hearing regarding the collection of restitution-based assessments, however, the taxpayer is precluded from contesting the underlying liability of a restitution-based assessment otherwise available under section 6330(c)(2)(B). As explained above in Answer 8, above, section 6201(a)(4)(C) precludes a taxpayer from challenging the existence or amount of the underlying tax liability upon which the restitution is based. Additionally, as explained in Answers 15 and 16, above, to the extent the taxpayer is seeking collection alternatives under section 6330(c)(2)(A)(iii), the Service cannot enter any installment agreement or offer-in-compromise that would result in the taxpayer paying less than the ordered restitution amount.

Question 20: Many criminal restitution orders include a payment schedule for the defendant. Is the Service precluded from any administrative collection (e.g., levy) of the restitution-based assessment while a taxpayer is making timely payments according to the restitution order's payment plan?

Answer 20: No. Neither the existence of a payment plan in the restitution order nor the defendant's timely payments in accordance with the payment plan preclude the Service from administrative collection of a restitution-based assessment, including levy and distraint under section 6331 et seq. Section 6201(a)(4)(A) explicitly provides that the Service "shall assess and collect the amount of restitution . . . in the same manner as if such amount were such tax." Furthermore, section 6501(c)(11) provides that the Service may seek "a proceeding in court for the collection of such amount . . . at any time." No statute prevents the Service from collecting a restitution-based assessment or suspends the collection period of limitations while a court-ordered restitution payment

plan is active. Likewise, the Justice Department is not precluded from actively pursuing additional avenues of collection in order to satisfy the restitution order itself while a restitution payment schedule exists.<sup>2</sup> When determining whether administrative collection is warranted while a taxpayer is making timely payments pursuant to the restitution order's payment plan, the Service will consider the taxpayer's ability to pay. Collection action will be subject to the CDP rights afforded a taxpayer under sections 6320 and 6330 as discussed in Answer 19, above. Pending the issuance of guidance to address procedures to be used when administrative collection action is warranted, if a court-ordered restitution plan is in effect and the Service is contemplating taking administrative collection action, attorneys must contact Branch 3 or 4 of Procedure and Administration to coordinate before providing advice on any proposed collection action.

Questions concerning this notice and how to proceed with the assessment or collection of criminal restitution should be directed to Branch 3 or 4 of Procedure and Administration at (202) 622-3600 or (202) 622-3630, respectively. Questions specifically regarding Answer 2 should be directed to the Office of Division Counsel/Associate Chief Counsel (Criminal Tax) at (202) 622-4470.

\_\_\_\_\_/s/  
Deborah A. Butler  
Associate Chief Counsel  
(Procedure & Administration)

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<sup>2</sup> See, e.g., United States v. Ekong, 518 F.3d 285, 286 (5th Cir. 2007) (per curiam) (affirming the government's ability to seek a writ of garnishment from defendant's pension plan notwithstanding a payment schedule included in the court's restitution order); United States v. James, 312 F. Supp. 2d 802, 806-07 (E.D. Va. 2004) (noting "the existence of this [payment] schedule does not mean that the government is precluded from pursuing other avenues of ensuring that defendant's restitution obligation is satisfied.").