

IRM PROCEDURAL UPDATE

DATE: 01/27/2023

NUMBER: sbse-05-0123-0186

SUBJECT: Updated Guidance on ESRP Cases; Caution INTSTB Calculations

AFFECTED IRM(s)/SUBSECTION(s): 5.9.13

IRM 5.9.13.18.2(9) Added form number to be used when request to close filing requirements.

9. **No Longer Required to File Return.** If the caseworker determines the debtor is no longer required to file or is no longer in business, the caseworker should request to close the filing requirements and request the appropriate TC 590/591 to satisfy the module by preparing Form 4844, Request for Terminal Action. See IRM 5.1.11.8.3, No Return Secured Taxpayer Not Required to File for This Period, and IRM 5.1.11.8.4, No Return Secured Taxpayer No Longer Required to File (Final). The history should be documented to explain why filing is not required and the research conducted or information provided, to verify the business is closed.

IRM 5.9.13.18.6 Revised whole section to provide updated guidance on how to address ESRP cases in bankruptcy.

1. **IRC 5000A - Individual Shared Responsibility Provision.**
 - a. **Assessment and Treatment under Bankruptcy.** When applicable, the Individual Shared Responsibility Payment (SRP) liability will be assessed under MFT 35 or for mirrored accounts, MFT 65. Even though the SRP may be thought of as a penalty, it is not treated as one when filing a proof of claim. Rather, for bankruptcy purposes, the SRP will be treated as an income tax and excise tax under 11 USC 507 (a)(8). See IRM 5.9.13.19.3, Unsecured Priority for additional information.

NOTE: The SRP follows the tax year Form 1040, 1040A, or 1040EZ information from which it arose. Since there is no "tax return" on the SRP module, the caseworker must use the Form 1040, 1040A, or 1040EZ from the same year as the SRP assessment for all information needed in order to correctly classify the liability.

- b. **Including the SRP on a Proof of Claim.** APOC will calculate and classify assessed balances due for the Shared Responsibility

payment; however, it will NOT compute unassessed claims or issue a flag. Caseworkers will not file estimated claims for an unassessed SRP.

CAUTION: If the taxpayer incurs a pre-petition SRP liability prior to the bar date it should be included on the Proof of Claim. If the IRS discovers a pre-petition SRP after the bar date, please see IRM 5.9.13.7.1, Late Filed Claims, or IRM 5.9.13.8, Amended Claims, for guidance.

NOTE: If needed, IRM 5.9.13.20, Claim Calculations, explains how to manually calculate an assessed SRP liability.

- c. **Multiple Persons Assessed the SRP.** Problems may arise with proofs of claim involving SRPs that have been assessed against both spouses under MFT 65 mirrored accounts.
- d. **Duplicate Spousal SRP Assessments.** A proof of claim may list two identical SRPs when a married couple files a joint bankruptcy, and each has been assessed a SRP for the same module(s). The assessments may either be in the same or differing amounts. When AIS computes the total amount of a claim on Form B410, the sum equals the amounts of each module. That total amount computed by AIS cannot be systemically overridden, so when both spouses have duplicate SRP assessments, the amount of the claim on Form B410 is overstated. Caseworkers should follow the procedures outlined in IRM 5.9.13.18.4, Duplicate and Mirror Assessments and NMF Periods, choosing the appropriate option based on local procedures.

CAUTION: Caseworkers should not assume that assessments made against both spouses for the same period are duplicates simply because they are for the same tax period. Before assessments are treated as duplicates, caseworkers should verify that the shared responsibility payment assessments are for the same underlying liability (jointly filed Form 1040), and are not for separately filed Forms 1040.

- e. **Collection of Proper Amount.** The IRS must not over-collect. The IRS's policy is to collect the unpaid SRP only once.
 - f. **Post-Petition SRP assessments in Chapter 13.** An 11 USC 1305 claim may be filed for taxes that become payable while the case is pending. This includes any amounts due for the SRP. If the Form 1040, 1040A or 1040EZ is a post-petition module (see IRM 5.9.10.9(1), Post-Petition Tax Liabilities), the SRP is also post-petition.
2. **ACA Provision Section 9008 - Annual Fee on Branded Prescription Pharmaceutical Manufacturers and Importers (Branded Prescription Drug Fee or BPD Fee)**

- a. **General Information.** The Annual Fee on Branded Prescription Pharmaceutical Manufacturers and Importers (Branded Prescription Drug Fee or BPD Fee), imposes an annual fee on manufacturers and importers of branded prescription drugs (BPDs) with gross sales to specified government programs exceeding \$5 million. See IRM 25.21.1, Branded Prescription Drug Fee for further information.

NOTE: An entity that owes a BPD fee may be a debtor in a bankruptcy case.

- b. **Assessment and Treatment under Bankruptcy.** When applicable, the Branded Prescription Drug (BPD) liability will be assessed under MFT 03, however it will have a period ending in 08 to distinguish it from all other assessments under the same MFT. For bankruptcy purposes, it will be treated as an excise tax under USC 507(a)(8)(E). See IRM 5.9.13.19.3, Unsecured Priority, for additional information.

NOTE: Since no return is required to report the BPD fee, the BPD fee is considered to be incurred in the year that is two years before the fee year, at the time the entity sales to the Government programs exceed \$5 million. The bankruptcy three-year priority period would begin when the tax is incurred.

- c. **Including the BPD on a Proof of Claim.** APOC will not calculate and/or classify assessed balances due for the BPD. Caseworkers will be required to calculate and classify the period manually. APOC will not compute unassessed claims or issue a flag for unassessed periods; however, caseworkers should file estimated claims for an unassessed BPD, where necessary. If the sales were made in the year in which the petition was filed, the portion of the fee based on pre-petition sales would be a pre-petition claim, and the portion based on post-petition sales would be a post-petition administrative expense. The pre-petition portion could be estimated based on the ratio of pre-petition sales to total sales by the taxpayer for that year. In order to prepare an accurate estimate and file a protective claim, the caseworker would have to request the amount of pre-petition sales from the debtor, since the debtor is the only entity that may have that information. If that information can not be obtained, the IRS could either file a protective claim based on the information it has from the last year that it has data for (noting that it's an estimate), or refer the case to Counsel for a BR 2004 exam/request.

NOTE: Since the treatment of the BPD fee presents novel legal issues, SCI should work with Local Counsel in any bankruptcy case where the debtor owes, or may owe, the BPD fee.

3. **IRC 4980H – Employer Shared Responsibility Provision.** When applicable, the Employer Shared Responsibility Payment (ESRP) liability will

be assessed under MFT 43. The ESRP will be treated as an excise tax under 11 USC 507(a)(8)(E). When a proof of claim is required, the caseworker needs to take the following steps:

Steps	Actions to Take
<p>Collect all necessary dates</p>	<p>When a proof of claim is filed, the caseworker needs to consider the enrollment date of the plan, the due date of the Form 1094-C, the date of the employees' income tax returns claiming the credit, and the L226-J issuance date.</p> <ul style="list-style-type: none"> ○ The enrollment date will generally be November 1st of the year before the ESRP year. ○ The 1094-C due date would be February 28th if filing on paper or March 31st of filing electronically following the ESRP year. ○ The employees' return due date is April 15th of the year following the ESRP year. ○ The L226-J issuance date is identified by the TC 971 AC 782.
<p>Determine what type of claim is needed. The enrollment year and the Letter 226-J issuance date need to be considered when determining what type of claim to file:</p> <ul style="list-style-type: none"> ○ a pre-petition, ○ post-petition, or ○ both 	<ul style="list-style-type: none"> ○ If the enrollment date and the L226-J issuance date are pre-petition, then only file a pre-petition claim. ○ If the enrollment date and the L226-J issuance date are post-petition, then only file a post-petition claim. ○ If the enrollment date is pre-petition and the L226-J issuance date is post-petition, then file a pre-petition and a post-petition claim. <p>NOTE: See IRM 5.9.4.19.2(10), Determining if the ESRP Liability is Pre-Petition/Post-Petition.</p>

<p>Determine the claim classification when filing a pre-petition claim.</p>	<p>If there is no NFTL filed, it is a priority claim if either of the following apply:</p> <ul style="list-style-type: none"> ○ If a post-petition claim and a pre-petition claim are required for an ESRP liability (L226-J was issued post-petition), the ESRP liability should be listed as priority on the pre-petition claim. ○ If only a pre-petition claim is required, the liability would be priority, if the L226-J date, 1094-C due date, or employees' return due date are within three years before the petition date.
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- a. **Including the ESRP on a Proof of Claim.** APOC will calculate and classify assessed balances due for the ESRP; however, it will NOT compute unassessed claims. A flag will be issued in the situation where a L 226-J has been issued, but no assessment has been made. Caseworkers will need to determine the type of claim that is required. See IRM 5.9.14.2.8(4), Case Flag Conditions and Resolutions, for more information on this flag.

CAUTION: If the IRS discovers a pre-petition ESRP after the bar date, please see IRM 5.9.13.7.1, Late Filed Claims, or IRM 5.9.13.8, Amended Claims, for guidance.

NOTE: If needed, IRM 5.9.13.20, Claim Calculations, explains how to manually calculate an assessed ESRP liability.

- b. **Unassessed ESRP Assessment.** If the L 226-J was issued but an assessment has not been made, contact the ESRP unit, to determine the amount on the L 226-J, and determine whether a protective claim is necessary. See IRM 5.9.14.2.9(5), Period Flags and Resolutions.

REMINDER: A post-petition claim is required for this assessment. A pre-petition claim may also be required as a protective claim.

- c. **Post-Petition and Pre-Petition Claims.** When both claims will be filed, Proof of Claim statements "Y5" and "Y6" needs to be added to the pre-petition claim. It states, "While one or more ESRP assessments are post-petition, the pre-petition claim is being filed as a protective measure."

- d. **Post-Petition ESRP Assessments Claims.** When a post-petition ESRP claim is required, Proof of Claim statement 'Z9' needs to be used to identify the ESRP assessment as post-petition period on the administrative claim. It states, " ESRP is post-petition since Letter 226-J was issued post-petition."

IRM 5.9.13.20(2) Added caution on INTSTB calculations.

2. **INTSTB.** Command code INTSTB shows the tax, the assessed failure to pay penalty (FTP), the assessed interest, and assessed penalties other than FTP. These amounts comprise the "Assessed Total." INTSTB also reflects the accrued interest, accrued FTP and total accruals. Finally, it gives the total FTP (assessed and accrued), and the total interest (assessed and accrued) for a "Total Balance Due "(assessed total and accrued total).

CAUTION: CC INTST definer "B" does not compute TAX properly when the following transaction codes are present on the account: Any unreversed TC 680, TC 690, TC 694, Refunds (TC 840/844) and/or offsets out of the module will display an incorrect amount of TAX. Alternatively, use the Failure to Pay penalty (FTP) computation tables in CC INTST definer "D", to identify the correct amount of unpaid tax. See IRM 2.3.29-6, Command Code INTSTD Valid Response. Since APOC does not use INTSTB to calculate the tax, no manual actions are required on APOC claims.