



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SMALL BUSINESS / SELF-EMPLOYED DIVISION

December 5, 2017

Control Number: SBSE-05-1217-0089
Effective Date: 01-01-2018
Expiration Date: 01-01-2020
Impacted IRMs: IRM 5.9.4, IRM 5.9.5,
IRM 5.9.6, IRM 5.9.8,
IRM 5.9.9, IRM 5.9.10,
IRM 5.9.12, IRM 5.9.13,
IRM 5.9.14, IRM 5.9.17,
IRM 5.9.18, IRM 5.17.8,
IRM 5.17.10, IRM 5.17.11

MEMORANDUM FOR DIRECTOR, SPECIALTY COLLECTION INSOLVENCY

FROM: Kristen E. Bailey */s/ Kristen E. Bailey*
Director, Collection Policy

SUBJECT: Processing the MFT 43, Employer Shared Responsibility Payment
(ESRP) in Bankruptcy Cases

This memorandum provides guidance on Insolvency caseworker responsibilities for handling the Employer Shared Responsibility Payment (ESRP) assessed under MFT 43.

The following topics are covered in this Interim Guidance:

- General Information on the ESRP relating to Bankruptcy
- Filing and Calculating a Proof of Claim with ESRP MFT 43 Liabilities
- Post-Petition ESRP MFT 43 Liabilities
- Insolvency Interface Program (IIP) and Automated Discharge System (ADS) Processing of ESRP MFT 43 Liabilities
- Determining Dischargeability of MFT 43 ESRP Liabilities
- ESRP MFT 43 and Notice of Federal Tax Lien (NFTL) Filing by Field Insolvency
- Installment Agreement (IA) Reinstatements and ESRP MFT 43 Liabilities

The guidance issued in this memorandum is based on the Affordable Care Act Provision § 4980H: *Shared responsibility for employers regarding health coverage*. The guidance will be incorporated into the IRMs indicated above prior to the expiration of this interim guidance memo. Please ensure that this information is distributed to all affected employees within your organization.

Employees should elevate any questions through their appropriate management chain.

Attachment: MFT 43 Attachment

cc: Director, Headquarters Collection
Director, Collection Quality & Technical Support
www.irs.gov

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General Information on the Employer Shared Responsibility Payment (ESRP)
MFT 43 Related to Bankruptcy

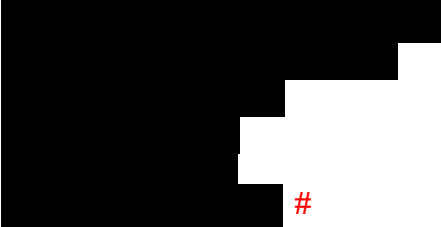
Impacts: IRM 5.9.4.19

1. **Purpose.** Late November 2017, Exam will begin assessing ESRP liabilities for calendar year 2015.
2. **Background.** Effective January 1, 2015, the Affordable Care Act required applicable large employers (ALE) to offer affordable, minimum value health coverage to full-time employees (and their dependents) or potentially be liable for an Employer Shared Responsibility Payment (ESRP) under IRC § 4980H.
 - An ESRP may be assessed under IRC § 4980H(a) if the ALE did not offer minimum essential coverage (MEC) to at least 95% (70% for 2015) of its full-time employees (and their dependents), and at least one full-time employee was allowed a premium tax credit (PTC).
 - An ESRP may be assessed under IRC § 4980H(b) if the ALE offered MEC to at least 95% (70% for 2015) of its full-time employees (and their dependents), but at least one full-time employee was allowed a PTC because the employer's self-only coverage was not affordable or did not provide minimum value, or the full-time employee was not offered coverage.
3. **Premium Tax Credit (PTC).** PTC is a refundable credit available to eligible individuals and families to help purchase health insurance through a Health Insurance Marketplace.
4. **Applicable Large Employer (ALE).** An ALE is an employer with 50 or more full-time employees (including full-time equivalent employees) in the prior calendar year. An ALE can be a corporation, a partnership, an LLC, or an individual.

Note: For calendar year 2015, employers with less than 100 full-time employees (and that satisfy certain conditions) will not be assessed an ESRP.
5. **MFT 43 ESRP.** Master File Transaction (MFT) 43 is the MFT code for the Employer Shared Responsibility Payment. The ESRP is treated as an excise tax. It is not based on a filed return and there is no form number associated with the ESRP. The assessment amount is calculated by the IRS, not the employer. When an assessment is made, IDRS will show a Transaction Code (TC) 298 with an amount due.

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6. **Payment Amount.** The ESRP is not a flat dollar amount. The ESRP is the total of a monthly calculation based on either the number of full time employees or the number of full time employees that were allowed a PTC.
7. **Letter 226J.** Letter 226J is a preliminary letter issued to notify the ALE of the proposed ESRP that may be assessed. This letter explains how the ESRP is calculated, the proposed amount, and a list of the employees who received a PTC. This letter gives the ALE an opportunity to respond before any liability is assessed or notice and demand for payment is made. **A TC 971 AC 782 will be input on IDRS with the date the Letter 226J is issued.**
8. **ESRP Group.** Employment Tax Group 2219 is responsible for the ESRP assessment process. The Tax Compliance Officers (TCO) in this group will calculate the ESRP and issue Letter 226J. The assigned TCO can be contacted when a caseworker has ESRP questions or an estimated amount is needed. To find the TCO assigned to a case, contact should be made with the group secretary at:



9. **Enforcement.** The ESRP amount owed is not subject to penalties. However, interest will continue to accrue until the total ESRP is paid. The Service can file a Notice of Federal Tax Lien and levy on any property of the taxpayer for failure to pay the ESRP.
10. **Treatment in Bankruptcy.** The ESRP MFT 43 liability will be treated as an excise tax under 11 USC § 507(a)(8)(E)(ii). See IRM 5.9.13.19.3, *Unsecured Priority*, for more information. If the Service has issued Letter 226J, the Employment Tax Group should be contacted for an estimated ESRP amount when the amount due is not assessed on the Integrated Data Retrieval System (IDRS).
11. **Determining if the ESRP MFT 43 Liability is Pre-Petition/Post-Petition.** The ESRP is an excise tax for which no return is due and arises when the Letter 226J is issued. The date the Letter 226J was issued is identified by a TC 971 AC 782 in the MFT 43 module. If the Letter 226J is issued before the petition date, it is considered a pre-petition liability. If the Letter 226J is issued on or after the petition date, it is considered a post-petition liability. For example:

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- *Pre-Petition ESRP*: A debtor files bankruptcy on 12/18/2017. The Service issues Letter 226J for 201512 on 11/5/2017. Since the letter was sent before the petition date, the ESRP is considered a pre-petition liability. The caseworker needs to contact the Employment Tax Group for an estimated ESRP amount to be listed on the pre-petition proof of claim if there is no TC 298 with an amount due on the module. If there is a posted amount due on the module, the Automated Proof of Claim (APOC) system will calculate and classify assessed balances due for ESRP liabilities.
- *Post-Petition/Pre-Confirmation ESRP*: A debtor files bankruptcy on 12/18/2017. The Service issues Letter 226J for 201512 on 6/5/2018. The bankruptcy plan has not been confirmed. Since the letter was sent after the petition date but before the confirmation date, the ESRP is considered a post-petition/pre-confirmation liability. The caseworker needs to contact the Employment Tax Group for an estimated ESRP amount and determine if a protective administrative or 11 USC § 1305 claim is needed when the liability amount is not assessed on IDRS.
- *Post-Petition/Post-Confirmation ESRP*: A debtor files bankruptcy on 2/18/2017 and their plan is confirmed on 12/5/2017. Letter 226J for 201512 is sent on - 2/9/2018. Since the letter was sent after the confirmation date, it should be treated like a post-petition/post confirmation liability. See *Post-Petition Employer Shared Responsibility Payment (ESRP) MFT 43 Liability*, in this interim guidance for more information.

NOTE: The calendar year and/or the date the ESRP MFT 43 liability is assessed are NOT used to determine the ESRP MFT 43 liability classification or dischargeability. Only the date of the Letter 226J is used to determine whether an ESRP MFT 43 is a pre-petition or post-petition liability.

12. Offsets and ESRP MFT 43. The Bankruptcy Code exception to the stay of pre-petition offsets only allows the offset of pre-petition income tax refunds to pre-petition income tax liabilities without lifting the stay. Since the ESRP MFT 43 liability is treated like an excise tax, offsets of pre-petition refunds to pre-petition ESRP modules are not permitted without the lifting of the stay. Offsets between post-petition modules are permitted without lifting of the stay. Pre-petition levy payments can be offset to an ESRP MFT43 liability. See IRM 5.9.4.5.1, *Addressing Credits, Refunds, and Offsets*, for more information.

13. ESRP MFT 43 Liabilities and Installment Agreement (IA) Reinstatement. When a taxpayer has incurred an additional liability that was not part of the original IA, the IA cannot be reinstated. An ESRP MFT 43 liability is considered an additional liability for
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the purposes of IA reinstatements. Therefore, if a debtor incurs an additional ESRP liability, the IA should not be reinstated. For more information, see IRM 5.9.17.23, *Addressing Prior Installment Agreements When Closing a Case*, IRM 5.9.17.23(4) *Installment Agreement (IA) Reinstatements*, and *Employer Shared Responsibility Payment (ESRP) MFT 43 Liabilities*, within this interim guidance.

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Filing and Calculating a Proof of Claim with ESRP MFT 43 Liabilities

Impacts: IRM 5.9.13.18.6, IRM 5.9.13.20 and, IRM 5.9.14.2.8(5)

1. ***Assessment and Treatment under Bankruptcy.*** 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)(ii). Unless secured by a valid Notice of Federal Tax Lien (NFTL), the ESRP MFT 43 assessment is considered priority if the date of the Letter 226J (TC 971 AC 782) is less than 3 years prior to the petition date. See IRM 5.9.13.19.3, *Unsecured Priority*, for additional information. If not secured by a valid NFTL and the date of the Letter 226J is more than 3 years prior to the petition date, the liability is unsecured general.

Note: Since there is no tax return filed for an ESRP MFT 43 module, the caseworker must use the date of the Letter 226J which is identified by the transaction code TC 971 AC 782 to determine classification of the tax period.

2. ***Including the ESRP MFT 43 Liability 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 Letter 226J has been issued, but no assessment has been made. Caseworkers will determine if a protective claim is required. See IRM 5.9.14.2.8(5), *Case Flag Conditions and Resolutions*, for more information.

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, see *Manually Calculating the ESRP MFT 43 Assessments*, below, as it explains how to manually calculate an assessed ESRP liability.

3. ***Post-Petition ESRP MFT 43 Assessments in Chapter 13.*** An 11 USC § 1305 claim may be filed for post-petition taxes that become payable while the case is pending. This includes any post-petition amounts due for the ESRP. Proof of Claim statement "Z9" is available and should be used to identify the ESRP assessment as post-petition on the 11 USC § 1305 claim. It states, "ESRP is post-petition since Letter 226J was issued post-petition."
4. ***Administrative Claims in Chapter 11.*** Administrative claims may be filed for post-petition MFT 43 ESRP assessments in some Chapter 11 bankruptcy cases. Proof of Claim statement "Z9" is available and should be used to identify the ESRP assessment as post-petition on the Administrative claim. It states, "ESRP is post-petition since Letter 226J was issued post-petition."

5. ***Manually Calculating ESRP MFT 43 Assessments.*** Pull TXMOD & INTSTB on each applicable assessment and follow the instructions below:

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1. Set Tax on the claim = Tax (from INTSTB)
2. Set Penalty on the claim = 0
3. Set Interest on the claim = Total INT (from INTSTB)

Caution: If the calculated Tax amount from step 1 above is ≤ 0 then set Tax on the claim = zero and set the Interest on the claim = Bal Due (from INTSTB).

- 6. Case Flag Conditions and Resolutions - LETTER 226J ISSUED FOR ESRP.** This flag is issued to alert the caseworker that the government issued Letter 226J explaining to the taxpayer an amount the IRS plans to assess unless further information is provided to change or nullify the amount, but the taxpayer's response time hasn't expired prior to the bankruptcy filing and an assessment is not yet made. The caseworker will need to contact the assigned Employment Tax TCO, determine the amount in the Letter 226J and determine whether a protective claim is necessary. (See *General Information on the Employer Shared Responsibility Payment (ESRP) MFT 43 Related to Bankruptcy*, within this interim guidance for TCO contact information.) If a protective claim is necessary, the caseworker will update the record with the amounts and update the flag. If the protective claim is not necessary, the period can be removed and the flag updated.

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Post-Petition Employer Shared Responsibility Payment (ESRP) MFT 43 Liabilities

Impacts: IRM 5.9.6.13, IRM 5.9.6.13.1, IRM 5.9.8.12, IRM 5.9.8.13, IRM 5.9.8.14.2, IRM 5.9.8.16.4, IRM 5.9.9.11.3, IRM 5.9.9.11.4, IRM 5.9.10.9, IRM 5.9.10.13, IRM 5.17.8.15, IRM 5.17.8.17, IRM 5.17.10.10.3, IRM 5.17.10.11, and IRM 5.17.11.14

1. **General Information.** An Employer Shared Responsibility Payment (ESRP) MFT 43 liability is post-petition when the Service issues Letter 226J to an employer notifying them that one of their employees was allowed the premium tax credit (PTC) and the Letter 226J date is after the bankruptcy petition date. The date of Letter 226J is determined by the date of the TC 971 AC 782 on the ESRP MFT 43 module on IDRS. An ESRP MFT 43 liability may be pre-petition, post-petition/pre-confirmation, or post-confirmation based on when the Letter 226J was issued. For examples of pre-petition and post-petition ESRP MFT 43 liabilities, see *General Information on the Employer Shared Responsibility Payment (ESRP) MFT 43 Related to Bankruptcy*, within this interim guidance.

The treatment of post-petition ESRP MFT 43 liabilities depends upon the type of bankruptcy case filed by the debtor. It also depends upon whether the debtor is an individual or a non-individual. See paragraphs (2) through (5) below for a further discussion by bankruptcy chapter.

Note: The treatment of pre-petition ESRP MFT 43 liabilities in bankruptcy plans depends on the classification of the liability on the proof of claim - secured, unsecured priority, or unsecured general. For additional information on treatment of liabilities in bankruptcy plans according to classification, see:

- IRM 5.9.8.14.2, *The Plan of Reorganization*
- IRM 5.9.9.6, *Chapter 12 Plans*, through IRM 5.9.9.8, *Chapter 12 "Pay-out" Arrangements*
- IRM 5.9.10.5, *The Chapter 13 Plan*, and subsections

See *Determining Dischargeability of Employer Shared Responsibility Payment (ESRP) MFT 43 Liabilities*, within this interim guidance for determining if an ESRP MFT 43 liability is dischargeable, including post-petition ESRP MFT 43 liabilities.

2. **Chapter 7 Bankruptcy Cases.** The treatment of post-petition ESRP MFT 43 liabilities in a Chapter 7 case depends upon whether the debtor is an individual or a non-individual.

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- a) *Individual Chapter 7 Cases.* Since most Chapter 7 cases filed by individuals do not involve the post-petition operation of a business, the Chapter 7 bankruptcy estate will rarely have employees and incur a post-petition ESRP. If, however, the Chapter 7 estate filed employment tax returns (and therefore did have employees), contact Counsel to determine if the estate was the employer for purposes of the ESRP. Otherwise, the post-petition ESRP will be a post-petition excise tax incurred by the debtor and will not be claimable (or dischargeable) in the Chapter 7 case. If a claim does need to be filed against the Chapter 7 estate for the post-petition ESRP, use Form 6338-A, *Request for Payment of Internal Revenue Taxes*. Include proof of claim statement Z9, caption ESRP on the Form 6338-A stating, "ESRP is post-petition since Letter 226J was issued post-petition."
- b) *Non-Individual Chapter 7 Cases.* In Chapter 7 cases filed by non-individual debtors, the bankruptcy estate is *not* a separate taxable entity. Any post-petition ESRP MFT 43 liability incurred by the non-individual debtor is claimable as an administrative expense of the bankruptcy estate on Form 6338-A. Include proof of claim statement Z9, caption ESRP on the Form 6338-A stating, "ESRP is post-petition since Letter 226J issued post-petition."
- 3. Chapter 11 Bankruptcy Cases.** The treatment of a post-petition ESRP MFT 43 liability is similar to a Chapter 7.
- a) *Individual Chapter 11 Cases.* Post-petition/pre-confirmation ESRP MFT 43 liabilities owed by an individual debtor who is an ALE sole-proprietor qualify as an administrative expense of the Chapter 11 estate if the estate was the employer for purposes of the ESRP. If the estate filed employment tax returns, contact Counsel to determine if it was the employer for purposes of the ESRP. If the post-petition/pre-confirmation ESRP MFT 43 liability was incurred by the estate and is claimable as an administrative expense, use Form 6338-A, *Request for Payment of Internal Revenue Taxes*. Include proof of claim statement Z9, caption ESRP on the Form 6338-A stating, "ESRP is post-petition since Letter 226J was issued post-petition."
- b) *Non-Individual Chapter 11 Cases.* In Chapter 11 non-individual cases, the bankruptcy estate is not a separate taxable entity. Post-petition/pre-confirmation ESRP MFT 43 liabilities owed by the non-individual debtor in a Chapter 11 case are claimable as administrative expenses on Form 6338-A. The Form 6338-A should include proof of claim statement "Z9", caption ESRP stating, "ESRP is post-petition since Letter 226J was issued post-petition."

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Any tax liability that is incurred during the Chapter 11 case, including the ESRP, should be paid when due under the tax laws, or the case is subject to conversion or dismissal under 11 USC § 1112(b)(4)(I). But, if the Service doesn't bring a motion to convert or dismiss, the plan should provide for payment on the effective date of the plan. Post-confirmation ESRP MFT 43 liabilities owed by a Chapter 11 debtor are not claimable on Form 6338-A and they are not paid under the bankruptcy plan. For additional information, see:

- IRM 5.9.8.12, *Post-Petition/Pre-confirmation BMF Monitoring*
- IRM 5.9.8.14.2(4), *The Plan of Reorganization, Plan Provisions*
- IRM 5.9.8.16.4, *Accrual of Post-Confirmation Tax Liabilities*
- IRM 5.9.8.16.4.1, *Post-Confirmation Tax Liabilities of the Non-individual Debtor or Individual Debtor (Pre-BAPCPA)*

4. Chapter 12 Bankruptcy Cases. The treatment of post-petition ESRP MFT 43 liabilities in a Chapter 12 case depends upon whether the debtor is an individual or a non-individual.

a) *Individual Chapter 12 Cases.* The individual in a Chapter 12 case may be a sole-proprietor that is an ALE that incurs a post-petition ESRP MFT 43 liability. There are no provisions in Chapter 12 cases for filing a claim for a post-petition liability incurred by the debtor (11 USC § 1305 does not apply in Chapter 12 cases). Since an individual debtor may have property that remains property of the bankruptcy estate while the Chapter 12 plan for pre-petition liabilities is being administered, a TC 520 cc 84 should be input to post-petition ESRP MFT 43 liabilities on IDRS. The TC 520 will alert Service employees to contact Insolvency before taking any collection actions on post-petition liabilities. For additional information about post-petition liabilities owed by the individual debtor in a Chapter 12 case, see IRM 5.9.9.11.3, *Post-petition Liabilities in Chapter 12 - Individual Cases.*

Note: If the Chapter 12 estate, rather than the debtor, filed employment tax returns, it is possible that the estate rather than the debtor incurred the ESRP. Contact Counsel to determine if an administrative expense claim should be filed if the estate had filed employment tax returns.

b) *Non-Individual Chapter 12 Cases.* The Chapter 12 case filed by a non-individual debtor is very similar to the Chapter 11 case filed by a non-individual. When the non-individual debtor in a Chapter 12 case incurs a post-petition/pre-confirmation ESRP MFT 43 liability, the ESRP MFT 43 liability is an administrative expense claimable on Form 6338-A. Include proof of claim statement "Z9" on the Form

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6338-A to clarify that the ESRP MFT 43 liability is a post-petition debt. Generally, post-confirmation ESRP MFT 43 liabilities of the Chapter 12 non-individual debtor are not claimable as administrative expenses on Form 6338-A. For additional information on post-petition debts of the non-individual debtor in a Chapter 12 case, see IRM 5.9.9.11.4, *Post-Petition Liabilities in 12 - Non-Individual Cases*.

- 5. Chapter 13 Bankruptcy Cases.** Non-individual debtors are ineligible to file Chapter 13. Only individuals or an individual and their spouse are eligible to file a Chapter 13 case. When the debtor in a Chapter 13 bankruptcy case is the sole-proprietor of a business classified as an ALE, a post-petition ESRP MFT 43 liability may be assessed against the debtor. The individual as the sole proprietor may be held personally liable for the debt.

Similar to post-petition income tax liabilities, the Service may treat post-petition ESRP MFT 43 liabilities of the Chapter 13 debtor in various ways. At the local level, Field Insolvency (FI) determines how FI caseworkers handle post-petition liabilities. One option FI may choose is to request a modification of the Chapter 13 bankruptcy plan so the post-petition liability can be paid through the plan and file a 11 USC § 1305 claim for the post-petition ESRP MFT 43 liability. If an 11 USC § 1305 claim is filed, caseworkers should include the proof of claim statement "THIS CLAIM IS BEING FILED UNDER THE AUTHORITY OF TITLE 11 USC § 1305" on the claim. Additionally, to clarify that the ESRP MFT 43 liability is post-petition, proof of claim statement "Z9" should also be included on the claim.

When the post-petition ESRP MFT 43 liability is not included on an 11 USC § 1305 claim, a TC 520 cc 84 should be input to the post-petition ESRP MFT 43 liability. The TC 520 cc 84 will alert IRS employees to contact Insolvency before taking collection action on post-petition liabilities as certain assets may remain property of the bankruptcy estate throughout the life of the Chapter 13 plan.

For additional information on post-petition liabilities in Chapter 13 cases, see IRM 5.9.10.9, *Post-Petition Tax Liabilities*, through 5.9.10.9.2, *11 USC Section 1305 Claims*.

Note: If the Chapter 13 estate, rather than the debtor, filed employment tax returns, it is possible that the estate rather than the debtor incurred the ESRP. Contact Counsel to determine if an administrative expense claim should be filed if the estate had filed employment tax returns.

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Insolvency Interface Program (IIP) and Automated Discharge System (ADS)
Processing of Employer ESRP MFT 43 Liabilities

Impacts: IRM 5.9.12 and IRM 5.9.18

1. ***IIP Initial Actions.*** After the case is loaded onto AIS, IIP will input TC 520 using the petition date on all balance due periods for validated TINs with an ESRP MFT 43 module.

Upon case initialization on AIS, IIP will systemically open the case classification of "ACA MFT=43", if an ESRP MFT 43 module exists and has a liability. The case classification will be used for statistical purposes only.

2. ***IIP Closing Actions.*** If a case is dismissed, IIP will perform the requisite closing actions on the ESRP MFT 43 module when the closure method is input. IIP will identify modules with a TC 520 on closed cases and input a TC 521 on the appropriate modules.
3. ***ADS Background.*** For bankruptcy purposes, the ESRP MFT 43 liability is treated as an excise tax for which a return is not required. It will be classified as a priority excise tax when it was incurred within the three years prior to the filing of the bankruptcy petition. The ESRP MFT 43 liability is incurred when the Service issues Letter 226J, which certifies to an employer that an employee was allowed the premium tax credit. The date Letter 226J is issued can be identified by TC 971 AC 782.
4. ***ADS Discharge Actions.*** ADS will flag a module where the MFT code is 43 and the date of the TC 971 AC 782 is within the three years prior to the petition date. The issued flag will read "MF43 PR 3YR". ADS will make the discharge determination for this condition and input closing transactions on IDRS. If any additional flagged conditions prevent systemic discharge on the module, the caseworker must determine appropriate discharge actions according to the chapter of the bankruptcy, method of closure, and the exceptions to discharge. The ESRP is excepted from discharge under the applicable provisions of 11 USC § 523(a)(1). See *Determining Dischargeability of MFT 43 ESRP Liabilities*, within this interim guidance and IRM 5.9.17, *Closing a Bankruptcy Case*, for more information.

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Determining Dischargeability of Employer Shared Responsibility Payment (ESRP)
MFT 43 Liabilities

Impacts: IRM 5.9.8.14.2, IRM 5.9.8.15, IRM 5.9.8.16.4 and subsections, IRM 5.9.10.9 and subsections, IRM 5.9.17.7, IRM 5.9.17.7.2, IRM 5.9.17.7.9, IRM 5.9.17.9, IRM 5.9.17.12 and subsections, IRM 5.9.17.13 and subsections, and IRM 5.9.17.14 and subsections

1. ***Introduction.*** ESRP MFT 43 liabilities are treated as excise taxes under 11 USC § 507(a)(8)(E)(ii). A return is not required or filed for ESRP MFT 43 liabilities. ESRP MFT 43 liabilities arise when the Service issues Letter 226J to an applicable large employer (ALE). When Letter 226J is issued to a debtor during the three years immediately preceding the date of the filing of their bankruptcy petition, the ESRP MFT 43 liability is a priority excise tax debt.

2. ***General Background Information.*** Individual debtors may be liable for ESRP MFT 43 liabilities when they are an ALE sole proprietorship that is assessed ESRP MFT 43 liabilities. Individual debtors that are partners may be liable under state law for the debts of the partnership, which would include ESRP liabilities incurred by the partnership. Non-individual debtors may be liable for ESRP MFT 43 liabilities when they are an ALE assessed ESRP MFT 43 liabilities.

a) ***Entities Discharged in Bankruptcy.*** Individual debtors may receive a discharge when they file Chapter 7, 11, 12, or 13 bankruptcy cases. Discharge may be granted upon completion of their Chapter 11, Chapter 12, or Chapter 13 bankruptcy plan. Individuals may be granted hardship discharges in Chapter 11, 12, or 13 bankruptcy cases. Even though no plan is filed in Chapter 7 bankruptcy cases, individuals may receive a discharge in Chapter 7.

Non-individual debtors may receive a discharge when they reorganize in Chapter 11 bankruptcy cases. They do not receive a discharge when they liquidate in Chapter 11 nor do they receive a hardship discharge in Chapter 11. Non-individual debtors in Chapter 12 cases may receive a discharge upon completion of their Chapter 12 plan or they may be granted hardship discharges. Finally, there is no discharge issued to non-individual debtors in Chapter 7 bankruptcy cases.

b) ***Eligibility for Discharge.*** For a debtor to receive a discharge, the debtor must be eligible to receive a discharge. Individual debtors may not be eligible to receive a discharge in their current Chapter 7 or Chapter 13 bankruptcy case if they received a discharge in a prior bankruptcy case. Additionally, individuals liquidating in Chapter

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11 may not be eligible to receive a discharge in their current case because they received a discharge in a prior bankruptcy case. The restriction does not apply to individuals reorganizing in Chapter 11 cases nor does the restriction apply to debtors currently in Chapter 12 bankruptcy cases.

Non-individual debtors reorganizing in Chapter 11 are not restricted from receiving a discharge in their current case if they reorganized in a prior Chapter 11 case and received a discharge.

For additional information, see IRM 5.9.5.7.1(5), *Discharge Limitations*, and IRM 5.9.5-3, *Allowable Elapsed Time Between Bankruptcy Filings and Discharges*.

c) *Notice of Bankruptcy Filing to IRS*. Regardless of chapter, the IRS must receive timely notice of an individual bankruptcy case for debts to be discharged. IRS must also receive timely notice in the non-individual Chapter 12 case for debts to be discharged. For additional information on Chapter 7 No Asset cases, see IRM 5.9.17.9(4), *Lack of Notice in Chapter 7 No Asset Cases*. For additional information on individual Chapter 7 Asset, Chapter 11, Chapter 12, and Chapter 13 cases, see IRM 5.9.17.7.9, *Procedures for Processing Bankruptcy Discharges when the IRS Received No Notice or Late Notice in the Asset Case*.

- 3. Determining Dischargeability.** As there is no return associated with ESRP MFT 43 liabilities, there is no exception to discharge for non-filing or late filing of tax returns. Additionally, there is no exception to discharge due to fraud, as it would be difficult to prove fraud with no filed tax return. However, if the Service can prove that the debtor willfully attempted to evade the assessment or collection of ESRP MFT 43 liabilities, with the written concurrence of Area Counsel, the ESRP MFT 43 liabilities may be excepted from discharge. For more information on the willful evasion exception to discharge, see IRM 5.9.17.7.2, *The Fraud or Willful Evasion Exception to Discharge*.

Per 11 USC § 523, priority ESRP MFT 43 liabilities owed by individual debtors are non-dischargeable when the debtor receives a discharge under:

- 11 USC § 727 - Chapter 7
- 11 USC § 1141(d)(5)(A) - Chapter 11 plan completion discharge
- 11 USC § 1141(d)(5)(B) - Chapter 11 hardship discharge
- 11 USC § 1228(a) - Chapter 12 plan completion discharge
- 11 USC § 1228(b) - Chapter 12 hardship discharge
- 11 USC § 1328(b) - Chapter 13 hardship discharge

The following sections address determining dischargeability of ESRP MFT 43 liabilities by bankruptcy chapter and debtor type. Dischargeability can depend upon:

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- If the debtor is an individual or a non-individual
- If the bankruptcy was filed under Chapter 7, 11, 12, or 13
- If the debtor received a discharge upon completion of the bankruptcy plan
- If the debtor received a hardship discharge

4. Chapter 7 Bankruptcies. Only individual debtors receive discharges in Chapter 7 bankruptcy cases. Discharges are not granted to non-individual debtors in Chapter 7. When individual debtors are liable for pre-petition ESRP MFT 43 liabilities, the ESRP MFT 43 liabilities are non-dischargeable when the Letter 226J was issued within the 3-years prior to the bankruptcy petition date. If the Letter 226J was issued more than 3-years prior to the bankruptcy petition date, the ESRP MFT 43 liabilities are dischargeable unless Area Counsel agrees that they are non-dischargeable due to the willful evasion exception to discharge. As mentioned above, liabilities may also be non-dischargeable if the IRS was not notified timely of the bankruptcy case. There is no discharge of post-petition ESRP MFT 43 liabilities in Chapter 7 individual cases.

Note: When an ESRP MFT 43 liability is dischargeable, the Service may collect the ESRP MFT 43 liability after the discharge from exempt property secured by a pre-petition NFTL. The Service may also collect the ESRP MFT 43 liability from abandoned or excluded property due to the Service's statutory lien. A NFTL is not required to collect from abandoned or excluded property. For additional information, see IRM 5.9.17.4, *Exempt, Abandoned, or Excluded Property (EAEP)*, and subsections.

5. Chapter 11 Bankruptcies. As mentioned in Paragraph (2)(a), debtors in Chapter 11 bankruptcy cases may receive a discharge. In Chapter 11, all preconfirmation debts are discharged except to the extent that the plan provides otherwise for their payment (and in individual cases, the exceptions in 11 USC § 523(a) also apply). Individual Chapter 11 debtors typically receive a discharge when they complete their Chapter 11 plan of reorganization, but the court for cause, may allow a discharge upon confirmation. Individual debtors may also receive hardship discharges in Chapter 11 cases. There is typically no discharge when non-individual debtors liquidate in Chapter 11.

Insolvency caseworkers must review Chapter 11 bankruptcy plans closely. Plans should provide for full payment of priority tax claims with interest within the period that ends no later than 5 years after the bankruptcy petition date. That includes priority ESRP MFT 43 liabilities. Plans should also provide for full payment of any post-petition/pre-confirmation liabilities owed by the debtor on or before the effective date of the plan unless the Service agrees otherwise. That includes any post-petition/pre-

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confirmation ESRP MFT 43 liabilities owed by the debtor. The plan should not establish a bar date for filing administrative expense tax claims for post-petition/pre-confirmation tax liabilities nor should it contain language discharging liabilities not included on Form 6338-A.

In Chapter 11 cases, post-confirmation ESRP MFT 43 liabilities are not claimable and they are not dischargeable.

For additional information, see:

- IRM 5.9.8.12, *Post-Petition/Pre-Confirmation BMF Monitoring*
- IRM 5.9.8.14.2(4), *Plan Provisions*
- IRM 5.9.8.8.16.4, *Accrual of Post-Confirmation Tax Liabilities*
- IRM 5.9.8.16.4.1, *Post-Confirmation Tax Liabilities of the Non-Individual Debtor or Individual Debtor (Pre-BAPCPA)*
- IRM 5.9.17.12.1, *Closing Chapter 11 Non-Individual Entities that Reorganize in Chapter 11*

a) *Individual Debtors*. A Chapter 11 discharge for an individual debtor is similar to the discharge granted to an individual in a Chapter 7 case under 11 USC § 727. Pre-petition priority taxes in individual Chapter 11 cases are excepted from discharge pursuant to 11 USC § 523(a)(1)(A) *unless the confirmed plan provides otherwise*. For additional information, see IRM 5.9.17.12.3, *Closing Chapter 11 Cases Filed by Individuals*. When determining if ESRP MFT 43 liabilities are dischargeable in individual Chapter 11 cases, follow the guidance in Paragraph (4), *Chapter 7 Bankruptcies*, above. Any portion of the post-petition ESRP (whether incurred by the estate or the debtor) that should have been paid under the plan will be non-dischargeable. The plan could also provide that post-petition debts of the debtor are non-dischargeable, or that the ESRP is non-dischargeable.

b) *Non-Individual Debtors*. As mentioned previously, non-individual debtors typically do not receive a discharge when they liquidate in Chapter 11 bankruptcy cases. ESRP MFT 43 liabilities owed by non-individual debtors who liquidate in Chapter 11 are treated in the same manner as any other debt owed by non-individual debtors liquidating in Chapter 11. Liquidating non-individual Chapter 11 cases are closed following the guidance in IRM 5.9.17.10, *Closing Chapter 7 or Liquidating Chapter 11 Partnerships*, and IRM 5.9.17.12, *Closing Liquidating Chapter 11 Corporations and Liquidating Chapter 11 LLCs*.

Post-petition/pre-confirmation ESRP MFT 43 liabilities owed by non-individual debtors are claimable as administrative expenses on Form 6338-A, *Request for*

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Payment of Internal Revenue Taxes. While the Service is no longer required to file form 6338-A for post-petition/pre-confirmation tax liabilities in accordance with 11 USC § 503(b)(1)(D), it is the position of the Service that Form 6338-A will be filed.

In reorganizing Chapter 11 cases of non-individual debtors, debtors generally receive a “super discharge” of pre-confirmation tax debts when the Chapter 11 plan is confirmed *except* to the extent that the plan or confirmation order provides otherwise (11 USC § 1141(d)(1)(A)). However, if a non-individual debtor willfully evaded the assessment or collection of pre-confirmation ESRP MFT 43 liabilities and Area Counsel agrees, the pre-confirmation ESRP MFT liabilities are non-dischargeable.

- 1) Determining if pre-petition tax debts were discharged in non-individual Chapter 11 reorganizations is relatively simple. When the debtor has paid the amount due in the Chapter 11 plan, any balance remaining on pre-petition liabilities is discharged. That includes any unpaid balances on pre-petition ESRP MFT 43 liabilities.
- 2) Determining dischargeability of post-petition/pre-confirmation liabilities can be more complicated as more factors must be considered:
 - If the bankruptcy plan did not establish a bar date for filing administrative expense claims and did not contain language discharging unclaimed post-petition/pre-confirmation liabilities, those liabilities are non-dischargeable. That includes post-petition/pre-confirmation ESRP MFT 43 liabilities.
 - If the bankruptcy plan contained language discharging unclaimed post-petition/pre-confirmation liabilities and established a bar date for filing administrative expense claims, any unclaimed post-petition/pre-confirmation liabilities were discharged. That includes any post-petition/pre-confirmation ESRP MFT 43 liabilities.
 - If the bankruptcy plan set a bar date for filing administrative claims for post-petition/pre-confirmation liabilities and contained language discharging any amount not provided for in the plan, any amount owed on the post-petition/pre-confirmation liabilities exceeding the amount provided for in the plan was discharged. That includes amounts due on post-petition/pre-confirmation ESRP MFT 43 liabilities greater than the amount provided for in the plan.

- 6. Chapter 12 Bankruptcies.** Individual or non-individual debtors may file Chapter 12 bankruptcy cases. Both may receive a discharge upon completion of their bankruptcy plan. When circumstances beyond their control keep them from completing their plan, they may be granted a hardship discharge. In either case, pre-petition ESRP MFT 43 liabilities are non-dischargeable when the Letter 226J was issued within the 3-years

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prior to the filing of the bankruptcy petition as the ESRP MFT 43 liabilities are priority tax debts. If pre-petition ESRP MFT 43 liabilities are non-priority tax debts because the Letter 226J was issued more than 3-years prior to the filing of the bankruptcy petition, the ESRP MFT 43 liabilities are generally dischargeable. However, if the Service can prove that the debtor willfully evaded the assessment or payment of ESRP MFT 43 liabilities and Area Counsel agrees, the non-priority ESRP MFT 43 liabilities are non-dischargeable. As previously mentioned, liabilities may be non-dischargeable if the Service was not notified timely of the bankruptcy case.

Post-petition ESRP MFT 43 liabilities are not claimable and are non-dischargeable in individual Chapter 12 bankruptcy cases. Post-petition/pre-confirmation ESRP MFT 43 liabilities owed by non-individual debtors may be claimed as administrative expenses on Form 6338-A. There are no provisions for claiming post-confirmation ESRP MFT 43 liabilities in Chapter 12 cases of non-individual debtors. If the plan in the non-individual Chapter 12 case provided for the post-petition/pre-confirmation ESRP MFT 43 liability, the ESRP liability is dischargeable. If the plan in the non-individual Chapter 12 case *did not* provide for the post-petition/pre-confirmation ESRP MFT 43 liability, the ESRP liability is non-dischargeable.

It is very important that caseworkers review Chapter 12 plans thoroughly. Objections should be filed when plans do not provide adequately for the claims of the Service. In general, plans should provide for full payment of the Service's secured, priority, or administrative expense claims with post-confirmation interest when allowable. Unsecured general claims should receive an amount not less than the Service would receive in a Chapter 7 liquidation.

For additional information, see:

- IRM 5.9.9.6, *Chapter 12 Plans*, and subsections
- IRM 5.9.9.7, *Reasons to Object to the Plan*
- IRM 5.9.9.8, *Chapter 12 "Pay-out" Arrangements*
- IRM 5.9.9.11.3, *Post-Petition Liabilities in Chapter 12- Individual Cases*
- IRM 5.9.9.11.4, *Post-Petition Liabilities in Chapter 12- Non-Individual Cases*
- IRM 5.9.17.13, *Chapter 12 Discharge*, and subsections

- 7. Chapter 13 Bankruptcies.** Only individuals can file Chapter 13 bankruptcy petitions. Individuals may receive a discharge upon completion of the Chapter 13 plan. They

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may also receive a hardship discharge when they cannot complete the Chapter 13 plan.

a) Hardship Discharges. Chapter 13 debtors may receive a hardship discharge under 11 USC § 1328(b). The exceptions to discharge in the Chapter 13 hardship case are the same as the exceptions to discharge in an individual Chapter 7 case under 11 USC § 727 pursuant to 11 USC § 523(a)(1)(A). With the concurrence of Area Counsel, pre-petition ESRP MFT 43 liabilities may also be excepted from discharge due to willful evasion under 11 USC § 523(a)(1)(C) if the debtor willfully evaded the assessment or collection of ESRP MFT 43 liabilities. For more information on determining dischargeability of ESRP MFT 43 liabilities in Chapter 13 hardship cases, see the guidance above for Chapter 7 cases in Paragraph (4), *Chapter 7 Bankruptcies*.

b) Chapter 13 Plan Completion Discharges. When a debtor receives a discharge upon completion of a Chapter 13 plan under 11 USC § 1328(a), the remaining balance of debts “provided for” by the bankruptcy plan are discharged unless there is an applicable exception to discharge. The dischargeable liability may be a pre-petition debt or a post-petition debt included on an 11 USC § 1305 claim that was “provided for” by the debtor’s plan.

- Pre-petition ESRP MFT 43 liabilities are generally dischargeable when the debtor received a discharge upon completion of the Chapter 13 plan.
- Post-petition ESRP MFT 43 liabilities are generally dischargeable when the debtor received a discharge upon completion of the Chapter 13 plan, the post-petition ESRP MFT 43 liability was included on an 11 USC § 1305 claim, *and* the plan “provided for” the post-petition ESRP MFT 43 liability.
- Post-petition ESRP MFT 43 liabilities are generally non-dischargeable when the Chapter 13 plan was *not* amended to “provide for” post-petition ESRP MFT 43 liabilities whether or not the liabilities were included on an 11 USC § 1305 claim.

As there is no return filed for ESRP MFT 43 liabilities, there is generally no exception to discharge for fraud. However, if the debtor willfully evaded the assessment or collection of ESRP MFT 43 liabilities, with the agreement on Area Counsel, the ESRP MFT 43 liabilities may be excepted from discharge due to willful evasion. As mentioned previously, Chapter 13 debts may be non-dischargeable if IRS was not notified timely of the bankruptcy case.

For additional information, see:

- IRM 5.9.10.9, *Post-Petition Tax Liabilities*, and subsections

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- IRM 5.9.17.7, *Discharge and Exceptions to Discharge*
- IRM 5.9.17.7.2, *The Fraud or Willful Evasion Exception to Discharge*
- IRM 5.9.17.14, *Chapter 13 Discharge Pre-BAPCPA*, and subsections

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Employer Shared Responsibility Payment (ESRP) Liabilities and Notice of Federal Tax Lien (NFTL) Filing by Field Insolvency (FI)

Impacts: IRM 5.9.5.9.3 and IRM 5.9.17.5.7

1. **General Background Information.** Field Insolvency (FI) caseworkers make Notice of Federal Tax Lien (NFTL) filing determinations in specific bankruptcy cases when the aggregate unpaid balance of assessment (UBA) meets the threshold of \$10,000 for filing a NFTL. A NFTL filing determination is the decision to file a NFTL, the decision to defer the filing of a NFTL, or the decision not to file a NFTL.
2. **Affordable Care Act.** NFTLs *cannot* be filed on Shared Responsibility Payment (SRP) liabilities owed by individual debtors and assessed on IDRS under MFT 35 or mirrored as separate SRP liabilities under MFT 65. NFTLs *can* be filed on Employer Shared Responsibility Payment (ESRP) liabilities assessed on IDRS under MFT 43. For additional information, see IRM 5.12.2.6.1, *ACA Shared Responsibility Considerations When filing NFTL*.

Non-individual debtors, such as corporations, partnerships or LLCs, may incur ESRP MFT 43 liabilities. Individual debtors may incur ESRP MFT 43 liabilities when they are the sole-proprietor of a business and that business is assessed an ESRP MFT 43 liability. Individual debtors may also incur ESRP MFT 43 liabilities when they are the general partner in a partnership assessed an ESRP MFT 43 liability.

3. **Cases with NFTL Filing Determinations by FI.** Caseworkers in FI make NFTL filing determinations in several situations. For a list of those situations, see IRM 5.9.5.9.3(1), *NFTL Filing by Field Insolvency (FI)*. For information on determining whether an ESRP liability assessed on IDRS under MFT 43 is pre-petition, post-petition, or post-confirmation, see the *General Information on the Employer Shared Responsibility Payment (ESRP) MFT 43 Related to Bankruptcy*, within this interim guidance.
4. **NFTL Filing Considerations.** In all instances, FI caseworkers follow the NFTL filing considerations listed in IRM 5.9.5.9.3(2), *NFTL Filing Considerations*.

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**Installment Agreement (IA) Reinstatements and Employer Shared Responsibility
Payment (ESRP) MFT 43 Liabilities**

Impacts: IRM 5.9.4.20, IRM 5.9.17.23, IRM 5.9.17.23.1, and IRM Exhibits 5.9.17-2 through 5.9.17-5

1. **General Information.** The filing of a bankruptcy petition suspends an active installment agreement (IA). At case closure, Insolvency addresses the suspended IA. Actions taken by Insolvency depend upon whether the modules included in the IA were satisfied or whether the modules remain outstanding. Actions also depend on whether the debtor has incurred additional liabilities that were not included in the suspended IA. *Shared Responsibility Payment (SRP) MFT 35 and/or MFT 65 liabilities are **not** considered additional liabilities.*

In general, Insolvency reinstates the suspended IAs when there are no additional liabilities. Insolvency does not reinstate the suspended IA when there are additional liabilities that were not included in the suspended IA. Insolvency notifies the debtor of the proposed termination of the IA by issuing Letter 2975-C, *Intent to Terminate Installment Agreement*. For additional information, see IRM 5.9.17.23, *Addressing Prior Installment Agreements When Closing a Case*, subsections, and related exhibits.

2. **ESRP MFT 43 Liabilities.** Similar to SRP MFT 35 and/or MFT 65 liabilities, there are no penalties assessed on ESRP MFT 43 liabilities. Interest accrues on both until the total SRP or ESRP liabilities are paid. However, the ESRP MFT 43 liability differs from the SRP MFT 35 and/or MFT 65 liability in that the ESRP MFT 43 liability is subject to enforcement actions. Those actions include the filing of a Notice of Federal Tax Lien (NFTL) and issuance of a levy to collect unpaid ESRP MFT 43 liabilities. SRP MFT 35 and/or MFT 65 liabilities are recessed by IDRS so they do not default an existing IA. IDRS does not recess an ESRP MFT 43 liability, which does default an existing installment agreement.
3. **ESRP MFT 43 Liabilities and IA Termination.** When liabilities on the suspended IA survive the bankruptcy and the debtor has unpaid ESRP MFT 43 liabilities that were not included in the suspended IA, the IA cannot be reinstated. Insolvency must send the Letter 2975-C to the debtor to advise them of the Service's intent to terminate the IA and to provide appeal rights following the guidance in IRM 5.9.17.23.1, *Installment Agreement Letters Used During Case Closure*.

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