

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

# Notice

CC-2007-008

February 27, 2007

**Subject:** Litigating Cases Involving  
Criminal Restitution

**Cancel Date:** Effective until further  
notice

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## Purpose

This Notice provides Chief Counsel attorneys direction in the handling of civil cases involving criminal restitution.

## What is Restitution?

Restitution is a legal remedy that may be ordered as an independent element of a criminal sentence by a United States district court. 18 U.S.C. §§ 3663(a)(1)(A) and 3663A(a)(1). A restitution order requires a defendant to pay money or render services to a victim of a crime to redress the victim's loss. In criminal tax cases, the Internal Revenue Service is considered a victim. Restitution is often ordered in criminal tax cases pursuant to a plea agreement in which the defendant agrees to pay a specific sum. See 18 U.S.C. § 3663(a)(3) (authorizing restitution in any criminal case to the extent agreed to by the parties to the plea agreement); United States v. Thompson, 39 F.3d 1103, 1105 (10<sup>th</sup> Cir. 1994). Restitution can also be required of persons convicted of any offense as a condition of probation or supervised release. 18 U.S.C. §§ 3563(b)(2) and 3583(d); United States v. Butler, 297 F.3d 505, 518 (6<sup>th</sup> Cir. 2002), cert. denied, 538 U.S. 1032 (2003); United States v. Bok, 156 F.3d 157, 166 (2d Cir. 1998).

Restitution is calculated according to the "loss caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413 (1990); Weinberger v. United States, 268 F.3d 346, 357 (6<sup>th</sup> Cir. 2001); United States v. Baker, 25 F.3d 1452, 1456 (9<sup>th</sup> Cir. 1994); United States v. Trigg, 119 F.3d 493, 500 (7<sup>th</sup> Cir. 1997). In most criminal tax cases involving restitution, the probation office calculates the amount of tax loss from evidence admitted at trial or from the plea agreement and generally recommends this amount for restitution in the presentence investigation report. The sum fixed in a restitution order should include interest under Internal Revenue Code provisions to a specified date. Following entry of the restitution order, interest accrues as provided in 18 U.S.C. section 3612(f). Restitution generally does not include civil penalties. See United States v. Daniel, 956 F.2d 540, 543-544 (6<sup>th</sup> Cir. 1992).

Restitution is not assessable as a tax but payments of restitution for taxes owed should be credited against the civil liability for unpaid taxes, as provided in a plea agreement or court

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order. See United States v. Helmsley, 941 F.2d 71, 102 (2d Cir. 1991) (reducing judgment in civil proceeding for unpaid taxes by amount of restitution paid). Taxpayers responsible for paying restitution remain subject to tax return filing requirements. An assessment of the taxpayer's civil liability should be made (subject to notice of deficiency procedures, if applicable) as soon as possible after the restitution order to ensure proper application of the payments to the relevant tax year.

Restitution may relate to, but is not the equivalent of, civil tax liability. An award of restitution does not bar the Service from determining civil liability in an amount greater than the amount awarded. Morse v. Commissioner, 419 F.3d 829, 833-35 (8<sup>th</sup> Cir. 2005); Hickman v. Commissioner, 183 F.3d 535, 537-38 (6<sup>th</sup> Cir. 1999); M.J. Wood Associates, Inc. v. Commissioner, T.C. Memo. 1998-375. An award of restitution also does not prevent a taxpayer from challenging the Service's determination that the civil liability exceeds the amount of the restitution ordered. A restitution award may only be contested by direct appeal of the criminal case.

### **Creel v. Commissioner**

The Eleventh Circuit, in Creel v. Commissioner, 419 F.3d 1135 (2005), affirmed the Tax Court's unpublished Order and Decision, in a collection due process case under section 6330. In Creel, No. 3037-01 (January 14, 2004), the Tax Court concluded that a taxpayer's civil tax liabilities had been compromised previously by the United States Attorney in connection with that office's acknowledgement that a criminal restitution order was satisfied. The Office of Chief Counsel disagrees with both courts' conclusions.

Creel pleaded guilty in the district court to two counts of willfully failing to file income tax returns for 1987 and 1988. During the plea phase, Creel prepared and filed returns for various years. As part of his plea, he was ordered to pay restitution of \$83,830 "plus any applicable penalties and interest" for taxable years 1986 through 1991. From 1994 to 1998, Creel paid \$83,830 in restitution. The Service applied these payments first to satisfy Creel's 1986 tax liability (including penalties and interest) and then to satisfy a portion of his 1987 tax liability.

In 1998, the U.S. Attorney filed a Cancellation and Release stating that the lien of judgment was "fully released, satisfied, discharged and cancelled" because it was "paid in full." The U.S. Attorney also filed a satisfaction that stated, "the . . . restitution imposed by the Court . . . having been paid or otherwise settled, the Clerk . . . is hereby authorized and empowered to satisfy the Judgment as to the monetary imposition only."

The Service sent Creel a notice of intent to levy for his 1985 and 1987 through 1991 outstanding tax liabilities from which Creel requested a collection due process hearing with the Service's Office of Appeals. Appeals issued a determination after the hearing sustaining the proposed levy action.

Creel argued in Tax Court that he did not owe any tax, penalty, or interest for the 1987 through 1991 tax years because he believed his restitution payments and the satisfaction of judgment for restitution and release of the judgment lien meant that everything he owed to the Government was paid. The court inferred from petitioner's testimony and from the inclusion of "applicable penalties and interest" in the restitution order that the civil tax liability was compromised by the satisfaction and release given by the U.S. Attorney for those tax years. The court drew negative inferences, citing Wichita Terminal Elevator Co. v. Commissioner, 6 T.C. 1158, 1165 (1946), from the Commissioner's failure to call a witness on the restitution

issue, e.g., from the Department of Justice or the U.S. Attorney's Office. The court also dismissed the Commissioner's legal arguments that the U.S. Attorney did not have authority to settle the tax liabilities.

### **Construing the Creel Decision**

The Eleventh Circuit acknowledged in Creel that the government was correct "in the abstract" when arguing that satisfaction of criminal tax liability does not generally include satisfaction of civil tax liability. The court noted the general rule that the government can seek restitution through criminal proceedings and pursue recovery of excess civil tax liability in subsequent civil proceedings. The court, nevertheless, found that the "unique facts and the nuances" of the case dictated a departure from this general rule. Specifically, the court held that ambiguous language in the restitution judgment and the actions of the U.S. Attorney permitted the conclusion that satisfaction of the criminal obligations of the defendant in this instance subsumed civil liability. The court misconstrued the facts of the case.

To reduce the chance that another court would reach a similar conclusion, the distinction between civil and criminal liabilities must also be well understood and clearly articulated in any collection due process case or other litigation in which the issue arises. If a taxpayer suggests, as Creel did, that he paid "everything he owed" related to his tax delinquency when he satisfied his restitution obligation, the taxpayer may be suggesting that unpaid penalties, interest, and tax were compromised in conjunction with resolution of the criminal case. Section 7122(a) vests compromise authority in the Secretary of the Treasury prior to the referral of a case to the Justice Department and reserves such authority to the Attorney General or his delegate following referral.

Post-referral compromises should be set forth in writing. The taxpayer has the burden of proving the existence of a compromise or settlement. See generally Parks v. Commissioner, 33 T.C. 298, 301 (1959) (placing burden on taxpayer to prove existence of settlement or compromise).

### **Relevant Documentary Evidence**

The taxpayer has the burden of presenting evidence to prove that, contrary to the normal course of events, civil tax liability was compromised by satisfaction of a restitution obligation. Relevant documentary evidence would include: (1) the plea agreement (if applicable); (2) related waivers or exceptions; (3) the criminal judgment; (4) the restitution order; (5) the satisfaction of judgment (if applicable); and (6) any certificate releasing the judgment lien. These documents can be obtained from the U.S. Attorney's Office for the district where the criminal case was prosecuted by contacting the Criminal Investigation special agent assigned the case. The prosecuting attorney should have items (1) through (4), and the Financial Litigation Unit attorney in the U.S. Attorney's Office should have items (5) and (6). If the special agent is unavailable or unable to assist, contact the IRS Criminal Tax Division, the prosecuting attorney or Financial Litigation Unit directly.

### **Revised Restitution Procedures and Forms**

The Department of Justice recently revised the U.S. Attorneys' Manual to include standardized language for use by U.S. Attorneys in restitution orders and in the restitution portion of plea agreements. See United States Attorneys' Manual § 6-4.360, Compromise of Criminal Liability/Civil Settlement (September 2006), citing Tax Resource Manual §§ 56-59 (September

2006). The promulgation of these standards may increase the number of cases in which courts order defendants to pay restitution to the United States. The new standard language reflects the Tax Division's long-standing policy of not compromising civil tax liability in conjunction with a plea agreement and is intended to ensure that Tax Division trial attorneys and Assistant U.S. Attorneys do not inadvertently compromise civil tax liabilities, penalties or interest for criminal prosecution years.<sup>1</sup> It is expected that use of the standard language and forms should significantly reduce latent ambiguities concerning whether civil liabilities were compromised by satisfaction of the restitution obligation.

### **Chief Counsel's Litigating Position**

It is Chief Counsel's position that the Eleventh Circuit fundamentally misconstrued the facts of Creel in concluding that civil liability was compromised by satisfaction of a criminal restitution obligation. In future cases arising in the Eleventh Circuit, attorneys should strive to distinguish Creel on its facts. In factually similar cases arising in other circuits, attorneys should argue that Creel was wrongly decided. In factually dissimilar cases arising outside the Eleventh Circuit, Creel should also be distinguished on its facts.

When restitution related issues arise in the course of litigation or other aspects of Chief Counsel's practice, attorneys should coordinate promptly with the office of Associate Chief Counsel (Procedure & Administration). General questions regarding restitution should be addressed to Branch 2, Administrative Provisions and Judicial Practice (Procedure & Administration) at (202) 622-4940. Questions concerning collection due process cases involving restitution, including assistance in preparing appropriate motions, should be addressed to Branch 1, Collection, Bankruptcy & Summonses Division, Office of Associate Chief Counsel (Procedure & Administration) at (202) 622-3610.

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Deborah A. Butler  
Associate Chief Counsel  
(Procedure & Administration)

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<sup>1</sup> Authority to compromise criminal or civil liability in settling a criminal case lies with "the Attorney General or his delegate." Section 7122(a). The Attorney General has delegated this authority to the Assistant Attorney General for the Tax Division. 28 C.F.R. § 0.70. The Assistant Attorney General has not delegated this authority in criminal cases to U.S. Attorneys. The U.S. Attorneys' Manual directs that "United States Attorneys may not make agreements which prejudice civil or tax liability without the express agreement of all affected Divisions and/or agencies." United States Attorneys' Manual §§ 9-16.300, 9-27.630. U.S. Attorneys do not have the authority to settle civil tax liabilities in criminal cases unless proper approval is obtained from the Tax Division.