

How to Determine if Restitution was Ordered as a Component of the Sentence or as a Condition of Supervised Release or Probation

Restitution ordered as a component of the sentence should be assessed when the case is “final.” See 26 U.S.C. § 6201(a)(4)(B). If the case was resolved by a plea agreement in which defendant waived the right to appeal, assessment should be made upon completion of the district court case (i.e., when the judgment is entered). If the conviction was obtained via a trial or the plea agreement does not contain an appeal waiver, the assessment should not be made until the deadline for filing an appeal has expired. If the defendant does file a timely appeal, the assessment should be made after completion of the appellate court proceeding. For questions as to when an appellate court proceeding is “final” if the defendant files a petition with the Supreme Court, contact Counsel.

Restitution ordered solely as a condition of supervised release or probation is collectible only during the period of supervision or probation; it is not collectible either before or after the term of supervised release or probation. See *United States v. Westbrook*, 858 F.3d 317, 328 (5th Cir. 2017), judgment vacated on other grounds, 138 S.Ct. 1323, and remanded for further consideration in light of *Marinello v. United States*, 138 S.Ct. 1101 (2018); see also *United States v. Hassebrock*, 663 F.3d 906, 924 (7th Cir. 2011). Accordingly, in a case where restitution is ordered solely as a condition of supervised release or probation, restitution may only be assessed and collected during the period of supervision or probation.

Guidance on how to determine whether restitution was ordered as a component of the sentence or solely as a condition of supervised release or probation is provided below.

NOTE: If there is doubt as to how a judgment of conviction and/or terms of supervised release or probation should be interpreted, contact Counsel.

How to determine if restitution was ordered as a component of the sentence or as a condition of supervised release or probation:

- 1) Determine if restitution was imposed for a Title 26 offense or a Title 18 offense for failure to pay a tax.
 - a. If restitution was imposed for a Title 18 offense, then any restitution imposed was ordered as a component of the sentence.
 - b. If restitution was imposed for a Title 26 offense, then restitution may have been ordered solely as a condition of supervised release or probation. Proceed to Step 2.
 - i. Note: Where a defendant pleads guilty and agrees to pay restitution as part of the plea, the district court may order restitution as a component of the sentence. See 18 U.S.C. § 3663(a)(3).
- 2) Examine the judgment of conviction and determine if the defendant pleaded guilty. Proceed to Steps 2) b. and 2) c.
 - a. There are 3 categories of Judgments of Conviction:
 - i. Judgment of Conviction Without a Plea Agreement
 1. Defendant found guilty after a trial, or
 2. Defendant pleads guilty but does not enter into a plea agreement.
 - ii. Judgment of Conviction With a Plea Agreement
 1. Defendant pleads guilty and enters into a plea agreement.
 - b. If there is a judgment of conviction without a plea agreement, then the district court had authority to order restitution only as a condition of supervised release or probation for the Title 26 convictions, regardless of whether the judgment of conviction stems from the defendant being found guilty after a trial or pleading guilty without entering into a plea agreement.

- c. If there is a judgment of conviction with a plea agreement, then the nature of the restitution order depends on the plea agreement and on the district court's order. Examine the plea agreement to determine whether defendant agreed to pay restitution as part of the plea agreement, and examine the judgment form to determine whether restitution was ordered as a component of the sentence or solely as a condition of supervised release or probation.
 - i. If restitution was included in the plea agreement and if the court ordered restitution as an independent part of the sentence, then restitution was ordered as a component of the sentence and **not** solely as a condition of supervised release or probation.
 - 1. This remains true even if restitution is also imposed as a condition of probation or as a condition of supervised release so long as restitution is also imposed as an independent part of the sentence.
 - ii. If restitution was included in the plea agreement, the court may have ordered restitution solely as a condition of supervised release or probation. Examine the judgment form to determine how restitution was ordered.
 - 1. If restitution appears *only* on the page listing the conditions of supervised release, it was ordered solely as a condition of supervised release.
 - 2. If restitution is listed on the "Criminal Monetary Penalties" page of the judgment, it was ordered as a component of the sentence and **not** solely as a condition of supervised release or probation.
 - iii. If restitution was *not* included in the plea agreement, then restitution was ordered solely as a condition of supervised release.

If restitution was ordered solely as a condition of supervised release or probation, when can the Service assess the restitution?

The Service can only make an assessment of an amount of restitution once the period of supervision or probation has begun. For a defendant who receives a custodial (jail or prison) sentence, the conditions of supervised release don't take effect until the defendant is released from custody. Therefore, the Service cannot assess the amount of restitution while the taxpayer is incarcerated. So, when restitution is ordered solely as a condition of supervised release, the Service will have to wait until the taxpayer is released from prison before assessing the restitution.¹ Accordingly, restitution-based assessments assessed while the taxpayer is incarcerated are premature, and should be abated under I.R.C. § 6404(a)(3) as erroneously assessed.

Note: If a taxpayer has appealed his conviction or sentence, then the Service cannot assess the restitution until the appeal has terminated, even if the taxpayer is not appealing the requirement that restitution be paid as a condition of supervised release or probation.

How does restitution ordered solely as a condition of supervised release or probation affect collection of restitution-based assessments?

1) What is the period for collection?

Restitution ordered solely as a condition of supervised release or probation is only enforceable beginning with the first day of that period (the first day of supervised release following a prison term or the first day of probation, respectively) and ending with the last day of that conditional period as directed by the sentencing court. Tax Division reports that periods of supervised release are on average 1 to 3 years long, and periods of probation are on average 3 to 5 years long. These periods are therefore on average considerably shorter than the 10-year collection period for an assessed tax under I.R.C. § 6502.

¹ If restitution was ordered as a condition of probation, the Service can assess restitution as soon as the period of probation has begun.

Note: For all purposes, including United States Attorney's Office (USAO) collection purposes, if restitution is ordered solely as a condition of supervised release or probation and that period has expired, both the IRS and USAO FLU can no longer collect the amount of restitution ordered.

- 2) ***If restitution is ordered solely as a condition of supervised release or probation, will reducing the restitution-based assessment to judgment extend the collection period?***

No. Where a restitution-based assessment is based upon restitution ordered solely as a condition of supervised release or probation, reducing the assessment to judgment will not extend collectability beyond the termination of the supervised release or probation. Accordingly, the Service should not refer a restitution-based assessment to the Department of Justice for the commencement of a collection enforcement suit where the restitution was ordered solely as a condition of supervised release or probation. See [PMTA 2018-19](#), for a more detailed analysis of this subject.

- 3) ***If restitution is ordered solely as a condition of supervised release or probation, is the Service required to release its lien after the period of supervised release or probation has terminated?***

Section 6325(a) of the I.R.C. provides that the Service must release a lien "imposed with respect to any internal revenue tax not later than 30 days after the day on which... the liability for the amount assessed, has been fully satisfied or has become legally unenforceable..." If the restitution is ordered solely as a condition of supervised release or probation and that supervised release or probation period has expired, then the restitution liability would become "legally unenforceable" after the end of that period. Therefore, if the restitution liability itself is no longer legally enforceable even if it is not fully satisfied, the Service will have to release its lien based on the assessment.

Westbrooks Decision Tree
Assessing & Collecting Restitution Ordered Solely as a Condition of Supervised Release or Probation

How to Determine if Restitution was Ordered as a Component of the Sentence or as a Condition of Supervised Release or Probation (i.e., Whether the holding in United States v. Westbrooks, 858 F.3d 317 (5th Cir. 2017) applies to your case?)?

Restitution ordered solely as a condition of supervised release or probation is collectible only during the period of supervision or probation; it is not collectible either before or after the term of supervised release or probation. See *United States v. Westbrooks*, 858 F.3d 317, 328 (5th Cir. 2017), judgment vacated on other grounds, 138 S.Ct. 1323, and remanded for further consideration in light of *Marinello v. United States*, 138 S.Ct. 1101 (2018); see also *United States v. Hassebrock*, 663 F.3d 906, 924 (7th Cir. 2011). Accordingly, in a case where restitution is ordered solely as a condition of supervised release or probation, restitution may only be assessed and collected during the period of supervised release or probation. When restitution is **not** ordered solely as a condition of supervised release or probation it is ordered as a component of the sentence and should be assessed when the case is “final.” See 26 U.S.C. § 6201(a)(4)(B). **For additional information, please refer to the “Outline: How to Determine if Restitution was Ordered as a Component of the Sentence or as a Condition of Supervised Release or Probation.”**

NOTE: If there is doubt as to how a judgment of conviction and/or terms of supervised release or probation should be interpreted, contact Counsel.

