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From:

Sent: Tuesday, October 07, 2008 7:19:12 AM

To:

Cc:

Subject: RE: Question re application of payments

I think that you are on the right track and [Amos](#) and [Muntwyler](#) are the places to start. Also, I am less concerned about the two troubling facts that you list, below. First, while it is true that the amounts remitted were agreed upon in settlement, the question is whether the payments were payments "received by agents of the United States as a result of distraint or levy or from a legal proceeding in which the government is seeking to collect delinquent taxes or to file a claim therefor." [Amos](#) at 69. In this case, there was a legal proceeding, which brings us to your second concern, that the legal proceeding was not instituted specifically to collect taxes. Although under your facts we are dealing with a complaint for civil forfeiture action, the complaint alleged that the funds were the proceeds of bankruptcy fraud. Moreover, the Service had filed proofs of claim in the _____ and _____ chapter 11 cases for employment/trust fund taxes. Accordingly, it seems to me that the Service may argue that the remittances trace directly to claims for taxes.

In addition, I think that you need to address the bankruptcy aspects of these matters. You indicate that the proceeds ultimately were remitted by the bankruptcy trustee. In [Energy Resources Co.](#), 871 F.2d 223, 230 (1st Cir. 1989), the First Circuit held that payments made pursuant to a Chapter 11 plan were involuntary. The Supreme Court affirmed, although that case principally stands for the proposition that, in the interest effectuating a successful reorganization, a bankruptcy court may direct the Service to which liability a payment must be applied. Accordingly, under the facts as outlined in your memorandum, I think that the Service further may buttress its position that the payments were involuntary because when all is said and done, they were remitted by a Chapter 11 trustee. I would direct your attention to chapter 16 of the Chief Counsel Bankruptcy Practice Deskbook (Designation of Payments in Bankruptcy), which has a thorough discussion of this matter.

These are just my informal thoughts and musings. Feel free to call me directly if you further want to discuss any of the these matters. _____ . Also, you might want to run this by someone in _____ because of the bankruptcy elements. _____ is the new branch chief over there and he may be reached at _____ .

Regards,