

Office of Chief Counsel
Internal Revenue Service
Memorandum

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subject: New Collection Due Process rights where a tax period is the subject of both a restitution-based assessment and an assessment arising out of a civil examination.

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE

Whether a taxpayer is entitled to a second collection due process (CDP) notice and a hearing where a tax period is the subject of both a restitution-based assessment and an assessment arising out of a civil examination?

CONCLUSION

Because the restitution-based assessment and assessment after the civil exam are two separate and distinct assessments, the Service should provide CDP notices and hearings for both assessments.

BACKGROUND

On April 16, 2010, Federal Excise Tax Improvement Act of 2010, Pub.L.No. 111-237, amended section 6201(a) to require assessment and administrative collection of the amount of restitution under an order pursuant to 18 U.S.C. § 3556, for failure to pay any tax imposed under the Internal Revenue Code, "in the same manner as if such amount were such tax". Section 6201(a)(4). Thus, the Service can not only make an

assessment based on a restitution order, but can file notices of federal tax lien and issue administrative levies to collect such assessment.

After a criminal case is closed the Service may conduct a civil examination of a taxpayer for any tax period for which the period of limitation for assessment is still open, even if such tax period was the basis of the amount ordered as restitution in the criminal case. The civil tax liability is determined separately from the amount of restitution determined by the federal district court in the earlier criminal case. See Muncy v. Commissioner, T.C. Memo. 2014-251, at 16 (2014); Chief Counsel Notice 2013-012, *Deficiency and Litigation Issues Concerning Tax Periods For Which Criminal Restitution Has Been Ordered*. Thus, the Service not only assesses and collects on the restitution order pursuant to section 6201(a)(4) but also may determine the civil tax liability and assess that amount (after providing any required notices of deficiency under sections 6212 and 6213).

The civil tax examination can result in a tax liability that differs from the amount ordered as restitution. In particular, a taxpayer's tax liability may exceed amounts of restitution ordered for the tax period at issue. See Morse v. Commissioner, 419 F.3d 829, 833-35 (8th Cir. 2005) (holding that despite a federal criminal case against the same taxpayer resulting in a sentence that the taxpayer make restitution to the Service, the doctrine of res judicata did not apply to preclude a civil fraud penalty assessment because a criminal prosecution for filing false income tax returns did not involve the same cause of action as the civil tax case); Gillum v. Commissioner, T.C. Memo. 2010-280, *aff'd*, 676 F.3d 633 (8th Cir. 2012) (although restitution is based upon an estimate of the civil tax liability, it is not a determination of civil tax liability and generally does not bar the Commissioner from assessing a greater amount of civil tax liability).

The restitution based assessment is recorded under the Master File Transaction (MFT) Code 31 and the civil examination based assessment is recorded under the MFT Code 30. See IRM 5.19.23.1.3. To prevent double collection, any payments made to satisfy the restitution-based assessment are also applied by the Service to satisfy the civil tax assessment for the same tax period. See IRM 5.19.23.1.2. See also United States v. Tucker, 217 F. 3d 960 (8th Cir. 2000) (explaining that criminal restitution for a tax crime should be ordered in favor of the IRS and calculated based on the tax owed and that "any amounts paid to the IRS as restitution must be deducted from any civil judgment IRS obtains to collect the same tax deficiency"), United States vs. Helmsley, 941 F.2d 71, 102 (2d Cir. 1991) ("[W]e believe it is self-evident that any amount paid as restitution for taxes owed must be deducted from any judgment entered for unpaid taxes in such a civil proceeding.").

Following an assessment the Service is required to issue notice and demand for the payment, pursuant to section 6303. If the taxpayer neglects or refuses to pay the assessed amount, the amount demanded becomes a lien under section 6321, and the Service can file a Notice of Federal Tax Lien under section 6323. Pursuant to section 6320(a), the Service shall notify the taxpayer after the filing of a NFTL of the taxpayer's

right to request a post-filing CDP hearing. The Service can also levy on the taxpayer's property under section 6331 to collect the assessed amount, but only after providing the taxpayer a pre-levy notice and right to a CDP hearing pursuant to section 6330 (with several exceptions enumerated in section 6330(f) where only a post-levy notice and right to hearing must be provided).

Due to the Service's ability to collect on two separate and distinct assessments, you ask whether the Service should provide CDP rights for the second time based on a civil assessment if CDP rights were previously given to the taxpayer after the restitution-based assessment. Alternatively, the same question arises when the restitution-based assessment is made after the civil assessment.¹

DISCUSSION

Sections 6320(b)(2) and 6330(b)(2) each provide that a taxpayer is entitled to one CDP hearing before the Office of Appeals with respect to the tax and tax periods covered by the CDP notice. Thus, as a general rule, the taxpayer has an opportunity for only one CDP lien hearing and one CDP levy hearing for each tax and tax period. See Investment Research Associates, Inc. v. Commissioner, 126 T.C. 183 (2006) (upholds regulations only allowing hearing from filing of first NFTL); Shirley v. Commissioner, T.C. Memo. 2014-10 (Appeals did not abuse discretion by refusing to consider years for which petitioner received previous CDP hearings).

However, there are limited circumstances where more than one hearing may be provided for the same tax and same tax period. Treas. Reg. §§ 301.6320-1(d)(2) Q&A-D1 and 301.6330-1(d)(2) Q&A-D1 provide that the taxpayer is entitled to a second CDP hearing where the same type of tax and period is involved, but the amount of unpaid tax has increased because of an additional assessment of tax (not including additional assessments for accruals of interest and penalties) or a new assessment for an accuracy-related or filing-delinquency penalty. See Concert Staging Services, Inc. v. Commissioner, T.C. Memo. 2011-231, at 10. See also Freije v. Commissioner, 131 T.C. 1, at 5 (2008) (holding that since in certain circumstances the Commissioner may assess tax more than once for the same tax period, it is quite reasonable that a taxpayer can have a separate opportunity for a hearing regarding each of the distinct assessments).

Because separate assessments are made based on the restitution order and the civil examination, these assessments are computed based on different criteria, and may be for different amounts, we conclude that this is comparable to the situation mentioned in the regulation where an additional assessment is made for the same tax and period.

¹ The cases where the assessment based on the civil exam will precede the restitution-based assessment are rare.

Thus, sections 6320 and 6330 require that separate CDP rights be given for the restitution based assessment and for the civil based assessment.²

If you have any questions or need further assistance, please contact Alina Solodchikova at (202) 317-5209.

² We note that the issues a taxpayer can raise in a CDP hearing on the restitution-based assessment are limited since the liability cannot be challenged and is not subject to a settlement. Chief Counsel Notice 2011-18, The Assessment and Collection of Criminal Restitution, Q-A 19.