

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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subject: Validity of the Ex Post Facto Clause Barring Restitution-Based Assessments Made Under I.R.C. § 6201(a)(4)

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

ISSUE

Whether the Service is barred from making a restitution-based assessment under I.R.C. § 6201(a)(4) because the statute is retroactively applied, and therefore, violates the Ex Post Facto Clause of the U.S. Constitution.

SUMMARY CONCLUSION

Because the Firearms Excise Tax Improvement Act of 2010 confers authority to the Service to assess and collect criminal restitution ordered after August 16, 2010, the Service is not retroactively applying section 6201(a)(4) to the restitution ordered against in . The failure to pay penalties assessed on each tax period as they relate to the restitution-based assessment, however, are inappropriate.

BACKGROUND

In conducting our analysis, we have relied only on the facts submitted, which are outlined below. If we have misrepresented any facts or if any relevant facts have been omitted, please contact our office immediately as our analysis and resulting conclusions may change.

The taxpayer _____ was convicted of three counts of falsifying _____ income tax returns in violation of I.R.C. § 7206(1) for the tax years _____. On _____, the U.S. District Court for the _____ ordered restitution in the amount of \$ _____. The Service assessed against _____ the amount of restitution on _____, plus penalties, in the following manner:

Tax Period	Restitution assessment (Code 298)	Penalty for late payment of tax (Code 276)

Interest on these assessments has accrued pursuant to I.R.C. § 6601. The Service also applied _____ payments of restitution to these liabilities.

On _____, the Service issued a Final Notice of Intent to Levy to collect unpaid restitution amounts, and the taxpayer timely filed a CDP hearing request.

On _____ representative sent a letter to the IRS Office of Appeals contesting the proposed levy action against the taxpayer. Among other things, the representative alleged that the “IRS should be barred from making a restitution based assessment pursuant to IRC § 6201(a)(4) because it is a retroactive application in violation of the Ex Post Facto provision of the United State[s] Constitution.”

ANALYSIS

- A. The restitution-based assessments were appropriate and did not violate the Ex Post Facto Clause of the Constitution.

In 2010, the President executed the Firearms Excise Tax Improvement (“FETI”) Act, which, among other things, authorized the Commissioner to “assess and collect the amount of restitution under an order pursuant to section 3556 of title 18” for restitution orders relating to the “failure to pay any tax imposed under [title 26].” I.R.C. § 6201(a)(4). Section (3)(c) of the FETI Act provides that the effective date of the amendments to title 26 relating to criminal restitution “shall apply to restitution ordered after the date of the enactment of this Act.” FETI Act, Pub. L. No. 111-237, § 3(c), 124 Stat. 2497, 2498 (2010). The FETI Act was enacted on August 16, 2010; therefore, the

amendments to title 26 apply to restitution ordered after August 16, 2010. See CC Notice 2011-18, Q&A 1. The Service can only assess the amount of restitution once the final judgment is issued, and the taxpayer's appeal concludes or the right to make an appeal expires. § 6201(a)(4)(B).

Article I of the Constitution prohibits Congress from passing ex post facto laws. U.S. Const. art. I, §§ 9-10. Ex post facto laws are criminal or punitive statutes that retroactively impose punishment for an act that was not criminal when committed; retroactively increase punishment for a crime after its commission; or deprive a defendant of a defense that was available at the time the crime was committed. Sanders v. Allison Engine Co., 703 F.3d 930, 942 (6th Cir. 2012). In its analysis, the Sixth Circuit considers whether the statute is retroactive, and if so, whether the statutory scheme is civil or criminal, and if civil, whether the statute is "so punitive either in purpose or effect as to negate [Congress's] intent to deem it civil." Id. (citing Smith v. Doe, 538 U.S. 84, 92 (2003)); U.S. v. Coccia, 598 F.3d 293, 297-299 (6th Cir. 2010). The Sixth Circuit considers the following factors to determine whether a punitive purpose or effect exists: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. Sanders, 703 F.3d at 945 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963)).

On _____, the district court ordered the taxpayer to pay restitution in the amount of \$ _____ for making false statements on an income tax return for tax periods _____, which represent _____ violations under I.R.C. § 7206(1). All appeal deadlines expired for the taxpayer on _____.

Since the effective date of the FETI Act is August 16, 2010 and the Service made its restitution-based assessments on _____ section 6201(a)(4) is not retroactively applied. See Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 504-505 (1995); Collins v. Youngblood, 497 U.S. 37, 43 (1990). The fact that the restitution-based assessments are based on unpaid _____ taxes in _____ does not render section 6201(a)(4) retroactive. See Portley v. Grossman, 100 U.S. 714 (1980) (holding no constitutional violation in applying an amendment when the defendant committed federal offenses prior to its enactment but violated his parole after the fact). Additionally, section 6201(a)(4)(A) is civil and not a criminal statute. Although the statute is a civil statute, it is not punitive because the statutory language does not sanction, punish, or criminalize behavior. Sanders, 703 F.3d at 945 (citing Cuthall v. Sundquist, 193 F.3d 466, 474 (6th Cir. 1999)). Rather, the purpose of the statute is to direct the Service to assess and collect the amount of restitution already ordered by a federal court in an earlier criminal proceeding. See Doe v. Bredesen, 507 F.3d 998, 1006 (6th Cir. 2007). The Service assessed an amount equal to the court-ordered

restitution for the taxpayer as evenly split among the tax periods. By assessing the amount already ordered by the sentencing court, the amount of the restitution-based assessment is not excessive because it is no greater than the amount of restitution ordered by the sentencing court.¹ Id.

B. The “failure to pay” penalties relating to the restitution-based assessment are inappropriate and should be abated.

Section 6651(a) provides for two “failure to pay” (FTP) penalties. Section 6651(a)(2) provides a penalty for the failure “to pay the amount shown as tax on any return... on or before the date prescribed for payment.” Section 6651(a)(3) provides a penalty for “failure to pay any amount in respect of any tax required to be shown on a return[,] which is not so shown... within 21 calendar days from the date of notice and demand.”

Based on the facts of this particular case, section 6651(a)(2) does not apply. tax liability arises from underreporting income rather than a failure to pay an amount reported as due and owing on the day the return was filed. Similarly the conditions that must be met for section 6651(a)(3) to apply are not present in this case. Section 6651(a)(3) applies if a taxpayer files a tax return which omits or underreports the correct tax, and the taxpayer further fails to pay that correct tax after notice and demand has been issued. The amount of the correct tax and the extent to which underreported the tax liability were not facts determined in the criminal case and were not material facts with respect to sentencing. None of these facts are found in either the criminal case’s opinion or the restitution order. These facts, in addition to the issuance of notice and demand, must be determined at least by the Service before this penalty can be applied. The amount of tax reported on a return is immaterial in making a restitution-based assessment because the only prerequisites for a restitution-based assessment are effectively whether a federal court ordered restitution for failure to pay a tax, and the amount of that restitution. See § 6201(a)(4)(A). Alternatively, the amount of the restitution could conceivably include the FTP penalty if the restitution order or an underlying court document specifically included it, or if the defendant agreed to it in a plea agreement. See 18 U.S.C. § 3663(a) (describing how the court determines restitution ordered under 18 U.S.C. § 3556).

Although was convicted of falsifying tax returns, he did not enter into a plea agreement which included any discussion of penalties, and his restitution order did not show an amount of restitution attributed to penalties. Thus neither the section 6651(a)(2) or the 6651(a)(3) penalty applies based on the restitution-based assessment, although these penalties could conceivably be imposed following a civil tax examination of the tax periods at issue.

¹ As discussed in prior advice, interest under I.R.C. § 6601 will accrue on a restitution-based assessment as it would on any other Title 26 assessment. Accordingly, underpayment interest generally will accrue from the last date prescribed for payment (as determined under section 6601(b)) of the liability that is the subject of the restitution order to the date of payment. See also CC Notice 2011-18, Q&A 12.