



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
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MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (GL) MSR

FROM: Alan C. Levine, Chief, Branch 1 (General Litigation)
SUBJECT: Impact of Criminal Restitution on the Collection Process

This memorandum responds to your memorandum regarding the above subject. This document is not to be cited as precedent.

ISSUE(S): Whether the Internal Revenue Service ("IRS") may use civil enforcement procedures even though a taxpayer who was convicted of a criminal tax violation is making restitution payments pursuant to an expired district court order?

CONCLUSION: Court-ordered restitution payments made by a taxpayer do not restrict the IRS from taking civil enforcement action against the taxpayer.

FACTS: The region has encountered several cases where a taxpayer was convicted of a criminal tax violation. The sentences have included time in prison, subsequent home confinement, a fine, and court ordered restitution. Typically the court has ordered a taxpayer to pay a certain amount of restitution per month during a period of supervised release from confinement. Taxpayers must also file timely income tax returns. Some taxpayers have continued to make restitution payments to the IRS after the restitution order expires. The IRS applies these payments to the outstanding tax liabilities.

After conclusion of the criminal case, the IRS examines the convicted taxpayer and often assesses civil liabilities, including civil fraud penalties and interest covering the tax periods for which the taxpayer was convicted. After failure to pay, the IRS takes appropriate civil enforcement action.

At least one taxpayer's attorney has asserted that the restitution payments are in the nature of payments under an installment agreement and that the IRS may take no enforcement action while the payments are continuing.

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LAW AND ANALYSIS

I.R.C. § 6331 provides for enforced collection of taxes by administrative levy and seizure. As detailed below, enforced collection is not restricted by restitution orders in criminal tax cases. We have coordinated this issue with the Office of the Assistant Chief Counsel (Criminal Tax) which found no substantive legal issues arising from the course of action outlined above. ^{1/} That office advised that Congress provided for restitution in criminal cases by the Victims and Witnesses Protection Act, 18 U.S.C. §§ 3663 and 3664 (VWPA). Courts have held that a restitution order is not in and of itself a civil judgment. See United States v. Mindel, 80 F.3d 394, 398 (9th Cir. 1996). Furthermore, the taxpayer cannot be compelled to continue making payments under an expired restitution order. See United States v. Diamond, 969 F.2d 961, 969 (10th Cir. 1992). The VWPA provided both in section 3663(h)(1), which was repealed in 1996, and its replacement, section 3664(m)(A), that an order of restitution may be enforced by the United States as provided by 18 U.S.C. §§ 3612 -13 or by other available and reasonable means. Strictly speaking the IRS is not enforcing the restitution order but is enforcing its later assessment of taxes for the periods involved in the criminal action. Therefore, under this analysis, the restitution order is separate from and in addition to any civil enforcement action the IRS may wish to take.

We have also analyzed whether payments made by a taxpayer pursuant to an expired restitution order could be construed as made pursuant to an installment agreement. We have concluded that the payments do not qualify as part of an installment agreement for several reasons. First, the restitution is not a result of a written agreement between a taxpayer and the IRS as required by section I.R.C. § 6159(a). The restitution payments do not facilitate collection because in most cases the monthly payment is inadequate to satisfy the liability prior to expiration of the statute of limitations on collection. Furthermore, the IRS does not even determine a taxpayer's civil liability until after the time the court set the restitution payments. Therefore, it is unlikely that the IRS would have entered into agreements with taxpayers immediately upon conclusion of a criminal tax trial. Additionally, section 6159(b)(3) permits the IRS to modify or terminate an agreement if the taxpayer experiences a change in financial condition. In many cases a change will occur because taxpayers resume employment and can often afford to make the larger payments needed to satisfy a newly assessed civil liability.^{2/}

^{1/} The Office of Criminal Tax stressed the need for coordination in these matters since the facts and circumstances of each case will dictate the conclusion reached.

^{2/} We note that section 3467 of the Restructuring and Reform Act of 1998 ("RRA") amends section 6159 to require the IRS to enter into installment agreements in certain situations. This section of the RRA, however, does not apply to agreements

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Restitution payments also do not meet most of the requirements set forth in Treas. Reg. § 301.6159-1, governing installment agreements. For tax periods prior to enactment of RRA 98, the IRS had statutory discretion with respect to entering into an installment agreement. Requiring the IRS to accept restitution payments as though they were made pursuant to an installment agreement deprives the IRS of this discretion. The current regulations also require a taxpayer to agree to a reasonable extension of the statute of limitations. Extension of the collection statute is rarely part of a restitution order. As in section 6159, the regulations require a written installment agreement that has a definite beginning and ending date. By contrast, taxpayers who continue to make restitution payments after expiration of the court order seem to imply that an open ended schedule is acceptable. Additionally, none of the other protections provided by the regulations are present in a typical restitution payment scheme. For example, if a taxpayer fails to make a timely installment payment when due, the IRS may alter, modify or even terminate the agreement according to Treas. Reg. § 301.6159-1(2)(ii)(A). The IRS is not afforded that opportunity through a restitution order.

We agree with the conclusions you reached with respect to a taxpayer's obligation to make restitution payments as well as civil tax liability payments. We also agree that any restitution payments should be applied to reduce the amount of tax due from a taxpayer.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

New I.R.C. § 6331(k) enacted by RRA 98 does not permit levy while an installment agreement is pending or in effect. This section was effective on July 22, 1998, with respect to installment agreements made on or after July 22, 1998. If a court determined that restitution payments that a taxpayer is still making are in fact pursuant to an installment agreement, the IRS might be subject to sanctions. Based on our conclusion that these payments are not made pursuant to an installment agreement, we think it is unlikely that a court would reach such a conclusion.

Taxpayers are now entitled to a Collection Due Process ("CDP") Notice pursuant to IRC § 6330 and a right to a CDP hearing with the IRS Office of Appeals prior to levy by the IRS. Section 6330 was effective on January 19, 1999. Therefore, we recommend exploring other less intrusive methods of collection when these situations arise, such as a bona fide installment agreement, before making a decision to levy.

entered into before the date of enactment (July 22, 1998). Furthermore, even if it did, the IRS is not required to enter into an installment agreement if the tax liability is over the ten thousand dollar limit set by the provision.

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We can identify no other litigating hazards that would change or qualify the conclusions reached in this memorandum.

If you have any further questions, please call Susan Watson at 202-622-3610.