DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

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MEMORANDUM FOR DIRECTOR, FIELD EXAMINATION

FROM: Heather J. Yocum /s/ Heather J. Yocum
Director, Examination Field and Campus Policy

Katherine L. Fox /s/ Katherine L. Fox
Director, Examination Case Selection

SUBJECT: Interim Guidance for Classification of Criminal Restitution Returns

This memorandum issues guidance for the classification of restitution-based assessment returns until IRM 4.1.5, *Case Building, Classification, Storage and Delivery*; IRM 4.8.6, *Criminal Restitution and Restitution-Based Assessments*; and IRM 4.8.11, *Fraud Program Responsibilities*, are published. Please distribute this information to all affected employees within your organization.

Purpose: This guidance requires the Local Technical Service Fraud Coordinator (LTSFC) to complete the classification review using Counsel approved criteria in situations where a civil examination should be considered for returns with court-ordered criminal restitution. This allows the LTSFC to complete the full classification process.

Background/Source(s) of Authority: SB/SE Examination Policy-Field Exam Special Processes (FESP) began a pilot program in 2014 to test the feasibility of having the Special Enforcement Program Subject Matter Experts (SEP SMEs) review cases with court ordered criminal restitution using Counsel approved factors to determine whether the cases warranted examination. The use of Counsel approved criteria eliminated the requirement to obtain Area Counsel's approval for non-assertion of the civil fraud penalty on successfully prosecuted cases where the Court ordered criminal restitution.

Currently, IRM 4.8.6.3.2, *Civil Actions on Cases with a Restitution-Based Assessment*, directs the LTSFC to only complete a first review of the CI closing documents to determine if a civil examination is warranted based on the facts of the case.

In addition, IRM 4.1.5.3.2.13, *Classification Criteria Criminal Restitution Returns*, directs the SEP SME to conduct the second screening/classification of the case package following the classification criteria.

Procedural Change: The classification criteria for criminal restitution returns is moved from IRM 4.1.5 to IRM 4.8.6 because criminal restitution cases are no longer sent to PSP for classification. IRM 4.8.6.3, *Role and Responsibilities of the Local Technical Services Fraud Coordinator*, establishes the LTSFC's responsibility for screening/classification of returns with court ordered criminal restitution and removes the requirement to secure Counsel approval when it is determined a return does not warrant examination. IRM 4.8.11.5.4, *Processing a CI Closing Package*, now exempts restitution based assessments (RBA) from Area Counsel approval when civil action isn't warranted.

Effective Date and Effect on Other Documents: This guidance is effective immediately and will be incorporated into IRM 4.1.5.3.2.13, *Classification Criteria Criminal Restitution Returns*; IRM 4.8.6, *Criminal Restitution and Restitution-Based Assessments*; and IRM 4.8.11.5.4, *Processing a CI Closing Package*.

Contact: Ronald Zarriello, Program Manager**,** Examination Field and Campus Policy, Field Examination Special Processes, with any questions.

Attachments:
Attachment 1 – IRM 4.1.5

Attachment 2 – IRM 4.8.6

Attachment 3 – IRM 4.8.11

Distribution: IRS.gov

Attachment 1 – IRM 4.1.5

4.1.5.3.2.13
Classification Criteria Criminal Restitution Returns

(1) Once a criminal case has been completed, the closing documents (case closing package) will be sent to Technical Services. For additional information, see IRM 4.8.11.7, *Special Features for Civil Resolution Cases With Restitution-Based Assessments*.

(2) Removed

Attachment 2 – IRM 4.8.6

4.8.6.3.2
Civil Actions on Cases with a Restitution-Based Assessment

(1) Upon notification from the Centralized Restitution Coordinator (CRC) the restitution assessment process has been completed, the Local Tech Services Fraud Coordinator (LTSFC) must take appropriate civil actions within 90 days.

(2) The LTSFC will review the Criminal Investigation (CI) closing package and conduct research (IDRS, PACER, etc.) to determine if a civil examination is warranted based on the facts of the case using the If/Then table below.

If…	**Then…**
The case is in fraud/grand jury suspense	Follow IRM 4.8.6.3.2.1, *Cases in Fraud or Grand Jury Suspense*
The case is not in fraud/grand jury expense	Follow IRM 4.8.6.3.2.2, *Cases NOT in Fraud or Grand Jury Suspense (Not Established on AIMS)*

(3) If necessary, the LTSFC will contact CI and/or the cooperating agent to obtain relevant documents/information to make their determination. See IRM 4.8.11.5.3, *Review of Form 13308 and Related Information from CI*.

(4) The LTSFC should consider the following factors when conducting their reviews:

- Cases already open on AIMS need appropriate civil actions to conclude the civil examination.
- Some cases may have already been sent to the field for civil resolution. See IRM 4.8.6.3 (3), *Role and Responsibilities of the Local Technical Services Fraud Coordinator*.
- Since restitution cases may also be Conditions of Probation (COP) cases, the procedures under IRM 4.8.11.6, *Special Features for Civil Resolution Cases with Tax-Related Conditions of Probation*, should also be addressed in connection with the procedures outlined in this section.
- If the case was a grand jury investigation, be mindful of grand jury secrecy rules.

(5) For additional information, refer to:

- Technical Services SharePoint home page
- IRM 4.8.11.5.7, *Technical Services Memorandum Regarding Civil Action*
- IRM 4.8.11.7, *Special Features for Civil Resolution Cases with Restitution-Based Assessments*
- IRM Exhibit 4.8.11-7, *Civil Resolution Cover Memo to Field Examination - Optional Template*
- IRM Exhibit 4.8.11-8, *Civil Resolution Cover Memo to PSP*

4.8.6.3.2.2
Cases NOT in Fraud or Grand Jury Suspense (Not Established on AIMS)

(1) Removed

(2) Removed

(3) When reviewing the CI closing package to determine if a civil examination is warranted, the LTSFC must consider the following factors in their aggregate, and the case facts and circumstances:

a. **Collectibility** - Is there any chance of collection? Is there enough economic potential to pursue? Has the court ordered restitution to third-party victims? Does the Integrated Collection System (ICS) indicate an open or previous collection case?
b. **Asset forfeiture** - Have all the assets been identified and have they been seized by the IRS or other agencies?
c. **Full paid** - Has the court ordered restitution been paid in full? Has the taxpayer fully cooperated with the IRS? What is the intent of the taxpayer? Is it worthwhile for us to pursue the Civil Fraud Penalty only?
d. **Sentence** - How long is the taxpayer's sentence? What is the age of the taxpayer? After incarceration, will the taxpayer be able to make regular payments toward an outstanding liability?
e. **Deminimis tax** - Are the additional tax and penalties material enough to reopen the case and expend field resources? If reopening for the Civil Fraud Penalty, is it material enough?
f. **Public records** - Is there a sufficient amount of information to determine the taxpayer's liability in available public records? Does the IRS have documentation to support the Civil Fraud Penalty if applicable?
g. **Tax return** - Do we have a copy of the return(s) at issue and any related returns, whether electronic or paper? If not, the facts and circumstances will determine the extent of additional evidence necessary to overcome a situation where a return is unable to be produced.
h. **Rule 6(e)** - Is there enough non-grand jury information available to determine the correct tax liability and sustain the civil fraud penalty?
i. **Westbrooks** - Was this case identified as a Westbrooks case (see IRM 4.8.6.2.1(2), *Roles and Responsibilities of Centralized Group Tax Examiners*)? Was there a jury trial? If so, was restitution ordered solely as a condition of either supervised release or probation?

(4) The LTSFC must document the review results and take action depending on whether a civil examination is warranted using the If/Then table below:

If…	Then…
A civil examination is warranted	Follow IRM 4.8.11.5.6, *Case File Not Maintained in Suspense*.
A civil examination is not warranted	Prepare a memorandum to file (see IRM 4.8.11.5.7) within 90 days addressing each of the factors discussed in paragraph (3) above, and sign the document and then forward the memorandum and applicable files to the group manager for approval. All research and the activity record along with the memorandum and the CI closing package will be saved in the electronic case file (see IRM 4.10.15.9, *Generic Workcenter*). **Exception:** Foreign Bank and Financial Accounts (FBAR) and Abusive Transaction Investigation (ATI) promotor/preparer penalty cases are not required to be maintained in RGS. The case will be considered closed and should be backed up to the server and archived as outlined in Archiving Cases in RGS. **Note:** If the factors in paragraph (3) above are thoroughly considered and documented, the decision to forego an examination does not require Counsel approval.

(5) The LTSFC is responsible for completing the applicable sections of Form 13308, *Criminal Investigation Closing Report (Tax and Tax Related Only)*, and responding back to CI.

(6) If the case includes Examination related COP, the procedures under IRM 4.8.11.6 should also be addressed in connection with the procedures outlined in this section.

Attachment 3 – IRM 4.8.11

4.8.11.5.4
Processing a CI Closing Package

(1) No change

(2) No change

(3) No change

(4) No change

(5) The Local Technical Service Fraud Coordinator (LTSFC) must document the review results and take action depending on whether a civil action is warranted using the If/Then table below:

If…	**Then…**
Civil action is warranted	Prepare a memorandum containing specific instructions for civil resolution (including COP and restitution procedures if applicable) of the case to the appropriate examination group or PSP, as applicable. Refer also to IRM 4.8.11.5.7.
Civil action is not warranted	Document their determination and obtain Area Counsel approval (See IRM 25.1.6.3 (17) requiring written Area Counsel recommendation or concurrence for non-assertion of the appropriate civil fraud penalty). The case will be considered closed. **Exception:** Counsel approval isn't required for restitution based assessments (RBA) that don't meet the criteria for a civil examination; see IRM 4.8.6.3.2.2.

(6) Removed

(7) Unchanged

(8) If the case includes Examination-related COP refer also to IRM 4.8.11.6 and subsections thereafter.

Note: Technical Services is responsible for completing the applicable sections of Form 13308 and responding back to CI accordingly.

(9) If the case includes a restitution-based assessment (RBA), refer also to IRM 4.8.11.7 and subsections thereafter.