



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

8.25.1

SEPTEMBER 11, 2018

EFFECTIVE DATE

(09-11-2018)

PURPOSE

- (1) This transmits revised IRM 8.25.1, *Trust Fund Recovery Penalty (TFRP), Overview and Authority*.

MATERIAL CHANGES

- (1) Added new 8.25.1.1, **Program Scope and Objectives**, and its related subsections to comply with the Deputy Commissioners of Services and Enforcement and Operations Support memorandum dated September 14, 2016, entitled **Heightened Awareness, Sensitivity, and Understanding of Internal Controls**.
- (2) Moved previous 8.25.1.1, *Trust Fund Recovery Penalty (TFRP) Overview*, to new 8.25.1.1.1, *Background*.
- (3) Moved previous 8.25.1.2, *Trust Fund Recovery Penalty (TFRP) Authority*, to new 8.25.1.1.2, *Authority*.
- (4) Moved previous 8.25.1.2(3), which contained content on TFRP and bankruptcy, to new 8.25.1.6, *TFRP and Bankruptcy*.
- (5) As a result of the Material Changes in (1), (2) and (3), above, subsections in this IRM have been renumbered accordingly.
- (6) At 8.25.1.3.3(2) b), added a note and cross-references to IRM 5.1.21.6.5 and IRM Exhibit 5.1.21.3
- (7) At IRM 8.25.1.5(10), added a reference to Fast Track Mediation guidance in IRM 8.26.3.
- (8) Revised 8.25.1.5.3, *Effects of RRA 98 - Ex Parte Communications in TFRP*, paragraph (3)(a), second Note, to replace reference to SBSE's interim guidance with references to IRM 5.7.4 and IRM 5.7.6.
- (9) Revised 8.25.1.7.1, *Fast Track Mediation (FTM)*, to reflect Rev. Proc. 2016-57, which created an updated fast track program, SB/SE Fast Track Mediation - Collection (FTMC), and obsoleted Rev. Proc. 2003-41.
- (10) Revised 8.25.1.7.5, *Post-Appeals Mediation (PAM)*, to reflect Rev. Proc. 2014-63, which superseded Rev. Proc. 2009-44, and to replace 8.26.10 reference with 8.26.9.
- (11) Editorial changes were made throughout this IRM.

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 8.25.1, *Trust Fund Recovery Penalty (TFRP), Overview and Authority*, dated October 14, 2014.

AUDIENCE

Appeals

Anita M. Hill
Director, Case and Operations Support

8.25.1

Trust Fund Recovery Penalty (TFRP) Overview and Authority

Table of Contents

8.25.1.1 Program Scope and Objectives

8.25.1.1.1 Background

8.25.1.1.2 Authority

8.25.1.1.3 Responsibilities

8.25.1.1.4 Program Reports

8.25.1.1.5 Terms and Acronyms

8.25.1.1.6 Related Resources

8.25.1.2 Identifying Trust Fund Taxes

8.25.1.2.1 Employment Tax

8.25.1.2.1.1 Employment Tax Examination (ETE) Assessments

8.25.1.2.2 Excise Tax

8.25.1.2.3 TFRP and Limited Liability Companies (LLCs)

8.25.1.3 Requirements for Liability Under IRC 6672

8.25.1.3.1 Definition of a Responsible Person

8.25.1.3.2 Definition of Willfulness

8.25.1.4 TFRP Assessment Process

8.25.1.4.1 Related TFRP Liabilities

8.25.1.5 Historic Legislative Effects on TFRPs Worked in Appeals

8.25.1.5.1 Effects of TBOR1 - TFRP Recording Requirements

8.25.1.5.2 Effects of TBOR2 - Addition of Pre-Assessment Appeal and ASER Extension

8.25.1.5.3 Effects of RRA 98 - Ex Parte Communications in TFRP

8.25.1.5.4 Effects of RRA 98 - Mediation

8.25.1.5.5 Disclosure

8.25.1.6 TFRP and Bankruptcy

8.25.1.7 Types of TFRP Appeals

8.25.1.7.1 Fast Track Mediation (FTM)

8.25.1.7.2 Pre-assessment (TBOR2) Appeals

8.25.1.7.3 Jeopardy Assessment Redetermination Proposal

8.25.1.7.4 Post-assessment Appeals

8.25.1.7.4.1 Request for Abatement Claim

8.25.1.7.4.2 Request for Refund Claim

8.25.1.7.4.3 Claim Reconsideration

8.25.1.7.5 Post-Appeals Mediation (PAM)

8.25.1.1
(09-11-2018)
Program Scope and Objectives

- (1) Purpose: This IRM provides a general overview of the law, process and general authorities pertaining to the Trust Fund Recovery Penalty (TFRP) program.
- (2) Audience: Appeals Technical Employees (ATEs), Appeals Account Resolution Specialists (AARS) and Appeals Team Managers (ATMs) working TFRP appeals received from Collections.
- (3) Policy Owner: Appeals Policy is under Director, Case and Operations Support.
- (4) Program Owner: Appeals Policy is the program office responsible for providing technical and procedural guidance to the Appeals organization.
- (5) Contact Information: Appeals employees should follow established procedures on *How to Contact an Analyst*. Other employees should contact the Product Content Owner shown on the Product Catalog Information page for this IRM.

8.25.1.1.1
(09-11-2018)
Background

- (1) IRM 8.25 provides guidance to Appeals employees on the legal and procedural requirements affecting the various types of TFRP cases worked in Appeals.
 - IRM 8.25.1 describes the various types of TFRP cases and the point in the Compliance process when they can come to Appeals.
 - IRM 8.25.2 covers Appeals Technical Employee (ATE) procedures for TFRP appeals from case receipt through closure.
- (2) The TFRP facilitates the collection of tax and enhances voluntary compliance. The TFRP is intended to serve as an alternative means for collection of unpaid trust fund taxes when not fully collectible from a business that does not pay the taxes. .

8.25.1.1.2
(09-11-2018)
Authority

- (1) IRC 6672 is the authority for the TFRP. The TFRP is a penalty against any **re-sponsible** person required to collect, account for, and pay over taxes held in trust who **willfully** fails to perform any of these activities. The TFRP may be imposed for:
 - Willful failure to collect tax,
 - Willful failure to account for and pay tax, or
 - Willful attempt in any manner to evade or defeat tax or the payment thereof.

Note: **Responsibility** is a function of duty, status and authority.

- (2) According to IRC 6672, the TFRP is equal to the total amount of tax evaded, not collected, or not accounted for and paid over. IRC 6672 applies to the employees' portion of employment tax, namely, the withheld income tax and employee's portion of FICA. It does not apply to the employers' portion of employment taxes. The TFRP also applies to **collected** excise taxes.

Note: Section 1411 tax, although called a Medicare tax, is not designated as a Trust Fund tax.

- (3) The IRS's policy on assertion of the trust fund recovery penalty is in Policy Statement 5-14, *Trust Fund Recovery Penalty Assessments*. See IRM 1.2.14.1.3, Policy Statement 5-14 (Formerly P-5-60).

8.25.1.1.3
(09-11-2018)
Responsibilities

- (1) Appeals is the sole function that may make the **final administrative determination** for purposes of IRC 6672(b)(3)(B).

8.25.1.1.4
(09-11-2018)
Program Reports

- (1) Planning, Quality and Analysis (PQA) provides trends and data analyses and detailed summary reports for Appeals.

8.25.1.1.5
(09-11-2018)
Terms and Acronyms

- (1) The table below lists common acronyms used in this section:

Term	Acronym
Appeals Centralized Database System	ACDS
Assessment Statute Expiration Date	ASED
Appeals Technical Employee	ATE
Automated Trust Fund Recovery	ATFR
Collection Statute Expiration Date	CSED
Employment Tax Adjustment Program	ETAP
Employment Tax Examination	ETE
Fast Track Mediation	FTM
Federal Insurance Contributions Act	FICA
Limited Liability Company	LLC
Payroll Service Provider	PSP
Post-Appeals Mediation	PAM
Professional Employer Organization	PEO
Revenue Officer	RO
Single Member Owner	SMO
Taxpayer Bill of Rights 1	TBOR1
Taxpayer Bill of Rights 2	TBOR2
Trust Fund Recovery Penalty	TFRP

8.25.1.1.6
(09-11-2018)
Related Resources

- (1) IRM 8.25.2, *Working Trust Fund Recovery Penalty Cases in Appeals*, provides guidance to Appeals employees on working TFRP cases.
- (2) Guidance for Account & Processing Support (APS) employees for TFRP processing procedures is contained in IRM 8.20.5 (carding in) and IRM 8.20.7 (closing).

Trust Fund Recovery Penalty (TFRP) Overview and Authority 8.25.1

page 3

- (3) The Taxpayer Bill of Rights, *TBOR*, applies to Appeals employees' interactions with taxpayers. For more information, visit <http://irweb.irs.gov/AboutIRS/tbor/default.aspx>.

8.25.1.2 (12-07-2012) Identifying Trust Fund Taxes

- (1) TFRP assessments are based on liabilities recorded on the following tax forms:

Number	Title
Form CT-1	Employer's Annual Railroad Retirement and Unemployment Return
Form 720	Quarterly Federal Excise Tax Return
Form 941	Employer's Quarterly Federal Tax Return
Form 943	Employer's Annual Federal Tax Return for Agricultural Employees
Form 944	Employer's Annual Federal Tax Return
Form 945	Annual Return of Withheld Federal Income Tax
Form 1042	Annual Withholding Tax Return for U.S. Source Income of Foreign Persons
Form 8288	U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests
Form 8804	Annual Return for Partnership Withholding Tax (IRC 1446)

Note: The TFRP is limited to that portion of the liability from these returns that is "collected" and held in trust for the benefit of the U.S. Government.

8.25.1.2.1 (12-07-2012) Employment Tax

- (1) The TFRP is normally applied to tax liabilities associated with employment tax returns for withheld Income Tax, withheld Social Security Tax, or withheld Railroad Retirement Tax.
- (2) IRC 3402(a) requires employers to withhold income tax from employees' wages.
- (3) IRC 3102(a) requires employers to withhold Social Security tax.
- (4) IRC 7501(a) provides that these withheld funds are held by the employer in trust for the benefit of the United States.
- (5) IRC 1446 requires certain partnerships with foreign partners to withhold tax on the foreign partners' share of effectively connected income.
- (6) The fiduciary liability to withhold and ultimately pay over trust fund taxes arises at the time wages are paid. This is true even though the deadline for payment and/or reporting the withheld portion of wages may be some time later.
- (7) The TFRP allows the government to reach parties otherwise shielded from tax liability, such as:

8.25 Trust Fund Recovery Penalty (TFRP)

- a. officers
- b. shareholders
- c. employees of a corporation, partnership or LLC
- d. outside entities, in some cases

It is not necessary to assess the TFRP against parties already fully liable for the tax in question.

Example: The owner of a sole proprietorship, the general partner of a regular partnership, and a Qualified Intermediary do not require assessment of the TFRP.

8.25.1.2.1.1
(09-11-2018)

Employment Tax Examination (ETE) Assessments

- (1) IRC 3509 applies to an audit or adjustment procedure for the reclassification of workers from non-employees (usually independent contractors) to employees. Under this section, the tax is assessed using either of two lower tax rates.

#

- (3) To determine the portion of the ETE assessment that reflects the use of full rates for assertion of the TFRP, review Form 4668, *Employment Tax Examination Changes Report*, attached to the Form 941 for the last quarter of each year of the audit .
- (4) To determine the portion of the Employment Tax Adjustment Program (ETAP) assessment that reflects the use of full rates for assertion of the TFRP, review the ETAP under-reporter or full rate issues for the Form 941 for the first quarter of each year of the adjustment.

Note: No combination of rates applies to ETAP adjustments.

- (5) By comparing the balance due assessment amounts with the rates as shown below, the ATE will be able to determine if the assessment is computed using a reduced rate or full rate, as long as the assessment is not a mixture of IRC 3509 rates:
 - Single rate (all applicable returns filed timely by the employer) – Employer’s portion of FICA; 20% of the employee’s portion of FICA plus 1.5% of the wages as income tax withholding
 - Double rate (no applicable returns filed timely by the employer) – Employer’s portion of FICA; 40% of the employee’s portion of FICA plus 3% of the wages as income tax withholding

8.25.1.2.2
(12-07-2012)

Excise Tax

- (1) Although most TFRPs are asserted for failure to pay over withheld employment taxes, the penalty also applies to “collected” excise taxes. Penalties on collected excise taxes may be asserted on persons responsible for collecting, accounting for, and paying over the taxes to the Government. Taxes in this category and their Code sections are:

- Taxes on certain communications services, IRC 4251;
 - Taxes on indoor tanning services, IRC 5000B;
 - Taxes on certain transportation by air, IRC 4261 and IRC 4271; and
 - FIRPTA taxes (withholding from the disposition of a United States real property interest by a foreign person), IRC 1445.
- (2) IRC 4263 (c) requires the air carrier that provides a person's initial segment of air transportation that begins or ends in the United States to pay the section 4261 tax, even if it wasn't collected.
- (3) To the extent the 5000B tax is not collected, the tax shall be paid by the person who performs the indoor tanning service. See IRC 5000B(c)(3).
- (4) The TFRP on excise tax is usually asserted against the collecting agency. However, if there is doubt that the penalty can be collected from the collecting agency alone, the penalty may be asserted against the responsible persons of the collecting agency and /or the collecting agency.
- (5) The assessment statute expiration date (ASED) for excise tax (and Railroad Retirement Tax Act (RRTA)) is generally 3 years from the due date of the return (without regard to any extension) or from the date the return was filed, whichever is later. See IRC 6501.

8.25.1.2.3 (09-11-2018) **TFRP and Limited Liability Companies (LLCs)**

- (1) When the primary taxpayer is a Limited Liability Company (LLC), TFRP consideration is usually appropriate-
- a. For all classifications of LLCs, when considering an employee or non-member third party, the usual procedures for determining responsibility and willfulness apply.
 - b. When the LLC is classified as a corporation for tax purposes, the usual procedures apply.
 - c. When the LLC is classified as a partnership for tax purposes, the members are not liable for the company debts under state law; so, a TFRP determination is required in order to hold members responsible.
- (2) TFRP consideration may not be necessary for the single member owner (SMO) of a LLC that did not elect to be treated as a corporation:
- a. For certain excise taxes that accrued prior to January 1, 2008 and for employment taxes on wages paid before January 1, 2009, a single member LLC that did not elect to be treated as a corporation is disregarded as an entity separate from its owner, and the SMO is personally and fully liable for all employment taxes, not just the trust fund portion.
 - b. A TFRP investigation is required where an otherwise disregarded LLC is treated as a corporation for certain excise taxes that accrue on or after January 1, 2008 and for employment taxes on wages paid on or after January 1, 2009.

Note: See also IRM 5.1.21.6.5, Trust Fund Recovery Penalty, and Exhibit 5.1.21.3.

8.25.1.3
(09-11-2018)

**Requirements for
Liability Under IRC 6672**

- (1) The TFRP may be asserted against any person “responsible” for collecting, accounting for, and paying over trust fund tax who:
- a. willfully fails to collect such tax, or
 - b. fails to truthfully account for and pay over such tax, or
 - c. willfully attempts in any manner to evade or defeat any such tax or the payment thereof.

8.25.1.3.1
(09-11-2018)

**Definition of a
Responsible Person**

- (1) A “responsible person” is one who has the duty to perform or the power to direct the act of collecting, accounting for, or paying over trust fund taxes. When evaluating responsibility, consider the factors established in cases in the same circuit, or a higher court, that most resemble the ATE’s case. Cases with similar issues can be Shepardized to locate similar cases in the different circuits.

Example: Pursuant to *Howard v. United States*, 711 F.2d 729 (5th Cir. 1983), more than one person may be held responsible, not just the most responsible person. Shepardizing reveals 19 cases in 5 circuits covering the issue.

Example: Pursuant to *Roth v. United States*, 779 F.2d 1567 (11th Cir. 1987), in some cases a person may be liable for failure to pay over withheld funds to the United States, even if ordered by the corporation’s chief executive officer not to pay the taxes.

Example: According to *Thibodeau v. United States*, 828 F.2d 1499 (11th Cir. 1987), the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees are important factors to consider in determining responsibility.

- (2) Most TFRP cases involve officers of corporations. However, a responsible person may be one or more of the following:
- a. an officer or employee of a corporation
 - b. a member or employee of a partnership
 - c. a corporate director or shareholder
 - d. a related controlling corporation
 - e. employee of a sole proprietorship
 - f. limited liability company (LLC) member, manager or employee
 - g. a Payroll Service Provider (PSP)

Note: The use of a third-party payer such as a PSP or a PEO does not relieve the common law employer and employees of the common law employer who are responsible for collecting, accounting for, and paying over the common law employers’ employment taxes from the responsibility of ensuring that all of the common law employers’ Federal employment tax obligations are met.

- h. a responsible party within a PSP
- i. a Professional Employer Organization (PEO)
- j. a responsible party within a PEO
- k. a responsible party within the common law employer (client of PSP/PEO)
- l. a lender, a surety, or any other person with sufficient control over funds to direct disbursement of the funds, or
- m. in some cases, a person assuming control after accrual of the liability.

Note: For issues involving responsibility after the fact, see *Slodov v. United States*, 436 U.S. 238 (1978).

- (3) In each situation, determine who had a duty to see that taxes were withheld, collected, or paid over to the government at the specific time the failure occurred.

8.25.1.3.2
(12-07-2012)
Definition of Willfulness

- (1) The trust fund recovery penalty is a civil penalty; so the degree of willfulness in failing to collect or pay over any tax leading to liability for this penalty is not as great as that necessary for criminal proceedings. Willfulness in the context of the TFRP is defined as intentional, deliberate, voluntary, and knowing, as distinguished from accidental. "Willfulness" is the attitude of a responsible person who with free will or choice either intentionally disregards the law or is plainly indifferent to its requirements. Some factors to consider when determining willfulness are:

- Whether the responsible person had knowledge of a pattern of noncompliance at the time the delinquencies were accruing;
- Whether the responsible person had received prior IRS notices indicating that employment tax returns have not been filed, or are inaccurate, or that employment taxes have not been paid;
- The actions the responsible party has taken to ensure its Federal employment tax obligations have been met after becoming aware of the tax delinquencies; and
- Whether fraud or deception was used to conceal the nonpayment of tax from detection by the responsible person.

- (2) Appeals employees must determine if the actions/inactions of a responsible person who permits funds withheld as tax to be used to pay operating expenses of the business are willful. Were the person's explicit or implicit directions willful to a degree sufficient to make the person liable for the TFRP? There is no need to show that a responsible person had any evil intent or desire to defraud the Government of the withheld taxes. When determining willfulness, Appeals officers must research the large body of Court decisions on this topic and Shepardize. Starting points for common willfulness issues include:

- The government must show that the responsible party was aware of the outstanding taxes and either deliberately chose not to pay the taxes or recklessly disregarded an obvious risk that the taxes would not be paid. *Phillips v. United States*, 73 F.3d 939, (9th Cir. 1996).
- A responsible person's failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid satisfies the IRC 6672 willfulness requirement. *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997).
- The payment of net wages to employees when funds are not available to pay withholding taxes is a willful failure to collect and pay over under IRC 6672. If funds are not available to cover both wages and withholding taxes, a responsible person has a duty to prorate the available funds between the United States and the employees so that the taxes are fully paid on the amount of wages paid. For purposes of determining willfulness, an employee owed wages is merely another creditor of the

8.25 Trust Fund Recovery Penalty (TFRP)

business, and preferences to employees over the government constitute willfulness. *Hochstein v. United States*, 1991 U.S. Dist. LEXIS 5317.

- A mistaken belief that payments to other creditors were required to be made in preference to trust fund taxes does not make the failure to pay non-willful. *Thomsen v. United States*, 887 F.2d 12, [**17-18] (1st Cir. 1989).
- (3) The circuits are split on the issue of allowing a reasonable cause defense to negate willfulness:
- The Eighth and First Circuits have determined that reasonable cause is not a defense. *Olsen v. United States*, 952 F.2d 236 (8th Cir. 1991); *Harrington v. United States*, 504 F.2d 1306 (1st Cir. 1974).
 - The Ninth Circuit has not stated specifically that the reasonable cause defense does not apply; however, it has determined that “conduct motivated by a reasonable cause may, nonetheless, be willful.” *Phillips v. United States*, 73 F.3d 939 [*942] (9th Cir. 1996).
 - The Tenth, Eleventh, Second, and Fifth Circuits have determined that the reasonable cause defense could apply to willfulness determinations under Section 6672, but under extremely limited circumstances. *Smith v. United States*, 555 F.3d 1158 [*1170] (10th Cir. 2009) (reasonable cause defense must be narrowly construed with respect to Section 6672); *Thosteson v. United States*, 331 F.3d 1294 [*1301] (11th Cir. 2003) (court does not decide whether reasonable cause applies, but notes that this defense is exceedingly limited); *United States v. Winter*, 196 F.3d 339 [*345] (2d Cir. 1999) (reasonable cause defense negated willfulness only if the responsible person reasonably believed that taxes were being paid); *Logal v. United States*, 195 F.3d 229 [*233] (5th Cir. 1999) (reasonable cause defense is exceedingly limited.).

8.25.1.4 (12-07-2012) TFRP Assessment Process

- (1) The Collection function has sole responsibility for recommending assertion of the TFRP. Examination function personnel may refer potential TFRP cases to Collection for investigation.
- (2) Revenue Officers (ROs) are responsible for determining collection potential as well as investigating who they believe was responsible and willful for non-payment. Appeals does not consider collectibility.
- (3) ROs use the Automated Trust Fund Recovery (ATFR) program to calculate the amount of the penalty to be proposed, as well as to document their investigation and request for assertion, which requires managerial approval.
- (4) Before a TFRP is assessed, taxpayers must be mailed or hand delivered a 60-Day Notice of Proposed Assessment, Letter 1153. Letter 1153 advises taxpayers of the proposed penalty and of their appeal rights. Issuance of the Letter 1153 prior to the ASSED is required on all TFRP assessments.
 - a. If the taxpayer agrees with the proposed penalty, he/she will return a signed Form 2751, *Proposed Assessment of the Trust Fund Recovery Penalty*.
 - b. If the taxpayer disagrees, he/she may discuss the proposed penalty with the revenue officer group manager, request Fast Track Mediation (FTM), or file a timely written protest.

Note: See IRC 7502, IRC 7503, and IRC 7508A for general information on determining timely receipt.

- (5) FTM takes place before a protest is submitted, but it does not extend the time allowed to request a pre-assessment (TBOR2) appeal.
- (6) Except in the case of a Jeopardy assessment, the taxpayer has 60 days in which to file a timely pre-assessment protest (75 if the letter was addressed outside of the United States). A TBOR2 protest is considered timely if it is mailed on or before the 60th day (75th if outside of the United States), i.e., timely mailed is timely filed. The 60-day period is measured from the mailing date of the Letter 1153 or from the delivery date if Letter 1153 is delivered in person.
- (7) A timely mailed protest is still timely for purposes of IRC 6672(b)(3)(B) even if the protest is inadequate.
- (8) Most TFRP cases that are considered by Appeals are pre-assessment (TBOR2) protests; however, Appeals may receive Fast Track Mediation, Jeopardy, post assessment TFRP claims, claim reconsiderations and post-Appeals mediation cases as well.
- (9) Although IRM 8.25 includes basic information for all of these TFRP appeals, its main focus remains pre-assessment TBOR2 appeals and TFRP refund claims and reconsiderations. IRM 8.25.2, *Working Trust Fund Recovery Penalty Cases In Appeals*, contains information on these TFRP appeals.
- (10) Guidance for Fast Track Mediation (FTM) cases is found in IRM 8.26.3, **Fast Track Mediation for Collection Cases**.
- (11) Guidance for Post Appeals Mediation (PAM) cases is found in IRM 8.26.9 , **Post-Appeals Mediation Procedures for Collection Cases**.
- (12) Guidance for jeopardy assessment appeals is found in IRM 8.7.1.6, *Jeopardy and Termination Assessments Cases*.

8.25.1.4.1
(12-07-2012)
Related TFRP Liabilities

- (1) For each person that Collection determines is responsible for the TFRP, each quarterly period in dispute is a distinct work unit which requires it's own consideration. The corporate name is noted on each work unit.
- (2) Separate assessments are made against each responsible person for the total amount of that person's liability for each quarter.

Example: If two individuals are found responsible for the entire liability of \$10,000, composed of \$3,000 for the quarter ended March 31, 2006, \$2,000 for the quarter ended June 30, 2006, and \$5,000 for the quarter ended September 30, 2006, separate assessments of \$3,000, \$2,000, and \$5,000 respectively are made against each responsible person.

- (3) The IRS does not divide the assessments between the responsible persons, so the full amount may be collected from any one of them. In cases where a person is found responsible for only part of the liability, assessments are made for those portions only.

Example: Using the figures above, if the second responsible officer was found to be liable for only \$1,000 of the September quarter, the assessment against that person for that quarter would only be \$1,000.

8.25 Trust Fund Recovery Penalty (TFRP)

- (4) In years prior to 2001, TFRP assessments were combined such that in the examples above, only one assessment would have been made against each of the responsible persons for the total amount of all quarters.

Example: Using the figures from example one, each responsible person would be assessed one assessment of \$10,000. For example: Using the figures in example two, the first responsible person would be assessed \$10,000, and the second responsible person would only be assessed \$6,000 (\$3K + \$2K + \$1K).

- (5) Even though the IRS may make assessments against more than one responsible person for a particular quarterly liability, it ultimately only collects the total amount once. See Policy Statement 5-14. The business or one responsible person may pay the entire amount, or everyone responsible may split payment of the amount. Depending on the timing of Collection efforts, the IRS may collect one portion from one, a larger or smaller portion from another, and the balance from yet one or more other responsible persons.

Note: For Policy Statement 5-14 purposes, the TFRP is considered "collected" only after two years have passed from the date of payment and the payer has not filed a claim for refund. So there may be cases where the IRS retains more than 100% payment until the TFRP is conclusively collected.

- (6) When possible, related cases involving two or more officers of the same corporation are transmitted to Appeals at the same time. However, responsible persons may be in different locations and considered by different Appeals offices. When these cases are in separate jurisdictions, Appeals employees need to coordinate their findings.
- (7) Counsel may ask for assessments against a party who was not previously determined to be a responsible person to support a third-party action in court against persons potentially responsible for the liability. Administrative appeals will not be available in these cases. In this situation, IRC 6672(b) does not apply. The IRS should defer from making notice and demand for the TFRP assessment that was requested by Counsel. If the Government is successful with respect to the assessed third party in the refund proceeding, then the IRS may rely on the judgment (rather than on its usual federal tax lien) in order to effect collection of the TFRP amount sustained by the court.

8.25.1.5 (12-07-2012) **Historic Legislative Effects on TFRPs Worked in Appeals**

- (1) In Appeals, it is important to keep in mind that all laws are subject to change due to amendment, the influence of new legislation, and of course, a Court's interpretation. The history of the TFRP, which evolved from a criminal offense to a civil penalty, exemplifies this fluidity. This section explores some of the legislative changes that have influenced the way various TFRP cases are worked in Appeals.

8.25.1.5.1 (12-07-2012) **Effects of TBOR1 - TFRP Recording Requirements**

- (1) IRC 7521, which was part of the Taxpayer Bill of Rights 1 (TBOR1), provides for audio recordings by the taxpayer upon advance notification.
- (2) Appeals will allow audio recordings on all cases that have face-to-face conferences on issues not deemed frivolous. In all such cases, the taxpayer must follow the requirements of IRC 7521: give 10 days advance notice, and provide their own recording equipment. The ATE will also make an audio recording of the conference with IRS equipment.

8.25.1.5.2
(07-17-2013)
**Effects of TBOR2 -
Addition of
Pre-Assessment Appeal
and ASED Extension**

- (3) Procedures for making audio recordings are described in Notice 89-51, 1989-1 C.B. 691. Appeals employees will follow the provisions of that Notice, or its successor, when allowing recordings in cases within Appeals jurisdiction.

- (1) The Taxpayer Bill of Rights 2 (TBOR2), enacted on July 30, 1996, requires the IRS to send a preliminary 60-day notice of proposed assessment at least 60 days before making notice and demand for payment of the TFRP. Assessment is delayed during the 60-day period, and if the taxpayer files a protest, until a final determination is made unless it is determined that collection of the TFRP is in jeopardy. The preliminary notice, Letter 1153 (DO), provides for the protest of the proposed assessment.
- (2) The issuance of the Letter 1153 (DO) prevents the Assessment Statute from expiring during the 60-day protest period and for an additional 30 days to allow for assessment (90 days total). A protest is timely if it is mailed on or before the 60th day (75th day if the letter was addressed outside the United States) after the mailing or personal delivery of Letter 1153 (DO). This gives the taxpayer a full 60 days (75 days if the letter was addressed outside the United States) to respond to Letter 1153 (DO). The 60- or 75-day appeal period begins the day AFTER the Letter 1153 (DO) is mailed or personally delivered.

Note: No legal authority has been found which would permit the restarting of this 60-day appeal period through the re-issuance of the original Letter 1153 (DO) with a new date.

- (3) To provide the IRS time to process the assessment or appeal, TBOR2 included a provision that extends the assessment statute under certain circumstances. Pursuant to IRC 6672(b)(3), if the 60-day notice is issued before the expiration of the assessment statute, the statute will not expire before the later of:
- the original ASED,
 - the ASED extended by a waiver (Form 2750), properly executed,
- Note:** Check IDRS for TC 971 AC 330 indicating the responsible party signed a waiver
- 90 days after the 60-day notice was mailed or delivered in person, or
 - if a timely protest is filed, 30 days after Appeals' final administrative determination, defined below.

Note: The ASED is not extended by (d) in Fast Track Mediation cases

- (4) Appeals is the sole function that may make the "final administrative determination" for purposes of IRC 6672(b)(3)(B). To ensure that the statute is protected on these cases, Appeals will not release jurisdiction before the case is resolved, e.g., Appeals will not release jurisdiction on cases that are under-developed or that come to Appeals with incomplete files. Issues raised by the taxpayer will be determined based on the information available in the file and provided by the taxpayer during the conference.
- (5) The ASED, suspended during the appeals process, begins running again on the earlier of the date of the Appeals Team Manager's (ATM) approval signature (the final administrative determination) on

- Form 5402, Appeals Transmittal and Case Memo, or
- Form 866 or Form 906, Closing Agreements

- (6) When the ATM enters a closing date on the Appeals Centralized Database System (ACDS) on a case with a TBOR2 statute code, ACDS automatically removes the TBOR2 statute code and generates a revised statute date in the statute date field by adding 30 days to the ATM Approval Date (ACAPDATE). The ATM should ensure that the approval signature dates on Form 5402, Form 866, or Form 906 are identical to the ACAPDATE.

8.25.1.5.3
(09-11-2018)

Effects of RRA 98 - Ex Parte Communications in TFRP

- (1) Section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) Public Law 105-206 provides that the Commissioner shall ensure an independent Appeals function that prohibits ex parte communications between appeals officers and other IRS employees that appear to compromise the independence of the appeals officers.
- (2) Rev. Proc. 2012-18, effective for communications after May 15, 2012, contains the general rules governing ex parte communications between Appeals and employees from other IRS functions. IRM 8.1.10, *Ex Parte Communications*, has supplemental information and guidance specifically for Appeals employees, including documentation requirements and procedures for curing ex parte communication breaches.
- (3) Ex parte communication issues that Appeals employees need to be particularly aware of include-

- a. The date and content of the Collection history and if entries made after receipt of the protest were shared with the taxpayer/representative.

Note: See section 2.03(4)(c) of Rev. Proc. 2012-18 and IRM 8.1.10.4.2 for rules and guidance on the administrative file.

Note: Pursuant to IRM 5.7.4 , **Trust Fund Compliance, Investigation and Recommendation of the Trust Fund Recovery Penalty**, and IRM 5.7.6 , **Trust Fund Compliance, Trust Fund Penalty Assessment Action**, Collection no longer permits inclusion of summary narrative memorandums and/or rebuttals.

- b. The content of discussions between Appeals and Collection Control Point Monitor (CPM) employees, which are strictly limited to communicating the current status of the TFRP case and requesting updates to ATFR calculations.

Example: If case is still open, or when closed and date closed and calculating Form 2749 updates through ATFR.

8.25.1.5.4
(12-07-2012)

Effects of RRA 98 - Mediation

- (1) RRA 98 includes IRC 7123(b), which requires the Secretary to prescribe procedures under which a taxpayer or Appeals may request non-binding mediation on an issue unresolved at the conclusion of appeals procedures or an unsuccessful attempt to enter into a closing agreement under IRC 7121.

Trust Fund Recovery Penalty (TFRP) Overview and Authority 8.25.1

page 13

8.25.1.5.5
(12-07-2012)

Disclosure

- (1) IRC 6103(e)(9) provides for disclosure of information where more than one person is held liable for the TFRP. Once a person is determined to be liable then, upon their written request, the IRS may disclose, in writing, the name of any other person determined to be liable, whether the IRS has attempted to collect the penalty from the other liable person, the general nature of the collection activities and the amount collected.
 - a. A person is determined to be liable for purposes of IRC 6103(e)(9) when that person is assessed. Therefore, no disclosure is permitted until after the person is assessed.
 - b. If Appeals receives a disclosure request with ONLY a request for the names of liable persons, the written request may be responded to once an assessment is made. Appeals should make no disclosures concerning the collection actions, since we are not in a position to know everything that may have occurred. Refer those requests to the Disclosure or Collection function
 - c. Also, do not disclose names on any pending cases, since disclosure is only permitted TO ASSESSED trust fund recovery penalty persons ABOUT ASSESSED trust fund penalty cases. These IRC 6103(e)(9) disclosures are permissible to the assessed responsible officer or their attorney-in-fact. (Normally, this would be a person given a Power of Attorney by the responsible person in order to practice before the IRS relative to the TFRP issue).
- (2) For more information, refer to IRM 21.1.3.2, *General Disclosure Guidelines*, and for a full discussion, refer to IRM 11.3.40, *Disclosure of Official Information, Disclosures Involving Trust Fund Recovery Penalty Assessments*.

8.25.1.6
(09-11-2018)

TFRP and Bankruptcy

- (1) In bankruptcy, TFRPs are generally excepted from an individual's discharge because they are entitled to priority status. See *11 U.S.C. 507(a)(8)(C)*, *11 U.S.C. 523(a)(1)(A)*, *11 U.S.C. 727(b)*, *11 U.S.C. 1141(d)(2)*, and *11 U.S.C. 1328(a)(2)*. However, this exception to discharge does not apply to Chapter 13 cases filed before October 17, 2005.
 - a. In Chapter 13 cases filed before October 17, 2005, TFRPs were dischargeable if they were provided for by the plan.
 - b. For Chapter 13 cases filed on or after October 17, 2005, TFRPs are excepted from discharge whether or not they were provided for in the plan or included on a timely filed proof of claim. See *11 U.S.C. 1328(a)(2)*.

8.25.1.7
(12-07-2012)

Types of TFRP Appeals

- (1) Appeals may become involved in a TFRP case in several ways as described in the following subsections.

8.25.1.7.1
(09-11-2018)

Fast Track Mediation (FTM)

- (1) Fast Track Mediation (FTM) takes place while the TFRP is still under the jurisdiction of SB/SE Collection. Appeals becomes involved by serving as a mediator trying to facilitate settlement negotiations between SB/SE Collection and the taxpayer.
- (2) Rev. Proc. 2016-57 is the authority for FTM in Collection cases. The goal of FTM is to help taxpayers resolve TFRP disputes with Collection before a decision is final. If a settlement can be negotiated while the case is still with Collection, it eliminates the need for a formal TFRP appeal. Refer to IRM

8.26.3, Alternative Dispute Resolution (ADR) Program, Fast Track Mediation for Collection Cases, for guidance on FTM.

8.25.1.7.2
(12-07-2012)
**Pre-assessment
(TBOR2) Appeals**

- (1) After an RO establishes responsibility and willfulness and determines collectibility, they recommend assessment of the TFRP and issue a Letter 1153 (DO), which provides the taxpayer with an opportunity to have their cases heard in Appeals prior to assessment.

Note: Appeals no longer accepts untimely (informal) pre-assessment TFRP appeals.

8.25.1.7.3
(12-07-2012)
**Jeopardy Assessment
Redetermination
Proposal**

- (1) A jeopardy assessment may be made by Collection when a responsible person appears to be placing assets beyond the reach of the Government to defeat collection of a potential liability. When a jeopardy assessment is made on an unagreed TFRP liability, because the taxpayer has not had an opportunity to appeal, the taxpayer will be given post-assessment appeal rights. Jeopardy assessment TFRP cases must be worked expeditiously.
- (2) For an administrative review of a jeopardy assessment, the taxpayer must file a written proposal with the Area Director within 30 days from the date of the notice of jeopardy assessment letter, requesting redetermination of whether or not:
 - a. the making of the assessment is reasonable under the circumstances, and/or
 - b. the amount so assessed or demanded as a result of the action is appropriate under the circumstances.

Appeals has 15 days to complete this appeal before the taxpayer has the right to judicial review.

8.25.1.7.4
(12-07-2012)
**Post-assessment
Appeals**

- (1) After the TFRP has been assessed, the taxpayer may file a formal or informal claim.
- (2) A claim is either:
 - a request for abatement of assessed tax, or
 - a request for refund of a tax paid or of a credit not previously reported or allowed.

8.25.1.7.4.1
(09-11-2018)
**Request for Abatement
Claim**

- (1) A request for abatement of an assessed TFRP liability may be submitted in a variety of ways.
- (2) Abatement letters can be submitted by taxpayers at any time, without payment, prior to the collection statute expiration date (CSED).
- (3) Taxpayers who submit a request for reconsideration of TFRP liability via Form 656-L, Offer in Compromise (Doubt as to Liability), must offer consideration (i.e. \$1.00 or more).

Note: Per Internal Revenue Code (IRC) 7122(f), Forms 656-L are subject to the 24-month mandatory determination period. Before Appeals considers this type of case, Forms 656-L must be processed at the Brookhaven Centralized OIC site, and a formal rejection letter issued and timely appealed. If you are

uncertain if a taxpayer's Form 656-L has been processed by COIC, submit an inquiry to *SBSE COIC Brookhaven (sbse.coic.brookhaven@irs.gov).

- (4) Once an assessment has been made, the IRS generally will not consider any claim for abatement unless the taxpayer establishes to the Compliance Area Director's satisfaction that unusual circumstances merit consideration.
- (5) Only Appeals may consider a claim for abatement if the assessment was made on the basis of a decision of Appeals. The area director will forward the claim to Appeals for consideration and the taxpayer will be notified if Appeals decides not to consider the claim.

8.25.1.7.4.2 (10-14-2014) **Request for Refund Claim**

- (1) The TFRP imposed against a responsible person is divisible. Accordingly, unlike a refund suit for income taxes, a responsible person need not pay the full amount of the assessment in order to invoke the refund jurisdiction of the district court or the Court of Federal Claims.
- (2) When seeking a refund of TFRPs, the taxpayer is required to pay the tax attributable to one individual for each period of liability, if the claim is based on employment taxes, or one transaction, if the claim relates to a TFRP for excise taxes. The government may then place the unpaid portion of the TFRP before the court by means of a counterclaim.

Note: If the amount required cannot be accurately determined, the IRS may accept a representative amount.

- (3) According to IRC 6511 (a), the taxpayer must pay the proper portion of tax, and within two years, must submit a separate Form 843 for each quarter in question to retain the option of judicial review.
- (4) If the aforementioned requirements for judicial review are met, the claim is considered a **formal** claim.
- (5) If a taxpayer requests a refund of a TFRP liability within the two-year requirement, it may be worked as a formal claim even if it was not initially made on the required Form 843, as long as the taxpayer files a Form 843 prior to petitioning the court.

Note: See IRM 8.25.2.3.2.4 for exception to the two year limitation for petitioning the court.

- (6) Collection Advisory has the option of referring a claim directly to Appeals without review if:
 - a. Appeals has already made a determination on the case
Example: TBOR2, OIC, etc.
Note: This is because Collection does not have the authority to reverse Appeals' decisions.
 - b. It is not clear that the claimant was given adequate access to the appeal process (or it is clear that they were not), and a determination by Appeals would be beneficial to the Government's position

8.25 Trust Fund Recovery Penalty (TFRP)

- c. There are other situations in which it is deemed advisable to ensure or strengthen the Government's position in potential litigation

Note: When Appeals makes a determination on a refund claim referred without a prior Collection decision, the appropriate claim closing letter must be issued. If a formal claim is partially/fully denied, Appeals is responsible for issuing the claim disallowance letter that starts the 2 year time frame for the taxpayer to have the claim considered by the court. The ATE should ensure that a previous claim disallowance letter has not been issued. Issuance of an additional claim disallowance letter may appear to restart the 2 year time frame to request adjudication.

8.25.1.7.4.3
(09-11-2018)

Claim Reconsideration

- (1) Most claims are first worked by Technical Services-Advisory (Advisory). Formal claims must be processed promptly since the taxpayer may file suit if the claim is not acted upon within six months of filing. While under its jurisdiction, Collection Advisory will issue interim status letters as needed to avoid unnecessary litigation. If Advisory denies all or part of a formal claim, the taxpayer may request Appeals consideration. Cases received by Appeals under these circumstances are claim reconsiderations and should be worked promptly.
- (2) The appeal rights afforded a taxpayer with their claim disallowance letter depend on whether they took the steps necessary to stop collection action pending claim consideration with the posting of a bond, as outlined in IRC 6672(c).
 - a. If section 6672(c) is not applicable, Advisory will notify the taxpayer of the denial by issuing a Letter 3784, which gives the taxpayer 30 days to request Appeals consideration and two years to file suit in Federal District Court or the Court of Federal Claims. If the taxpayer submits a timely request, Advisory forwards the case to Appeals as a claim reconsideration. Having Appeals reconsider a claim does not extend the time frame for the taxpayer to petition the court.
 - b. If section 6672(c) is applicable, Advisory will notify the taxpayer of the denial by issuing a Letter 3783, which advises the taxpayer of the 30 days they have to request an administrative appeal and notifies the taxpayer of the 2 year time period to file suit in Court to obtain recovery of any sums paid, and of the authority of the IRS to initiate collection actions if a suit is not filed within 30 days of the date of Letter 3783. If the taxpayer submits a timely request, Advisory forwards the case to Appeals as a claim reconsideration. Having Appeals reconsider a claim does not extend the time frame for the taxpayer to petition the court.

Note: See IRM 8.25.2.3.3.4(6) for more details.

- (3) Effective for unpaid tax attributable to taxable periods beginning after December 31, 1998, IRC 6331(i) requires the IRS to withhold collection of TFRP liabilities that are the subject of a refund suit during the pendency of the litigation. Levies and collection proceedings in court are specifically prohibited.
- (4) Even for tax periods prior to and including December 31, 1998, the policy of the IRS is to refrain from initiating collection action when a refund suit is pending on a divisible assessment, provided that the interests of the government are adequately protected and the revenue is not in jeopardy.

- (5) Appeals also receives informal claims for reconsideration. Appeals represents the final administrative determination on these claims. The taxpayer cannot petition the court.

8.25.1.7.5
(09-11-2018)
**Post-Appeals Mediation
(PAM)**

- (1) Post-Appeals mediation (PAM) for TFRP became permanent on December 29, 2014.
- (2) PAM takes place after settlement negotiations between Appeals and the taxpayer are complete but unsuccessful. PAM occurs while the TFRP is under Appeals' jurisdiction, which means the written request for mediation must be made before the case is closed by Appeals.
- (3) Refer to PAM procedures in Rev. Proc. 2014-63 and IRM 8.26.9, **Alternative Dispute Resolution (ADR) Program, Post-Appeals Mediation Procedures for Collection Cases**.

