Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:04:WAFoster
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to: Delores Dillman
Revenue Officer
(Collection Policy)

from: Joseph W. Clark
Senior Technician Reviewer
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subject: Use of the Treasury Offset Program to Collect Delinquent Restitution Payments

This memorandum responds to your request concerning whether the Service may use the Treasury Offset Program to collect delinquent restitution payments.

The Treasury Offset Program (TOP) is a centralized administrative offset program,[1] administered by the Financial Management Service (FMS),[2] to collect delinquent nontax debts owed to federal and state agencies (including past-due child support). The statutory authority for TOP is found in the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3716, and 31 U.S.C. § 3701 *et. seq*.

The regulations governing TOP make it clear that the program is only to be used for the collection of debt that does not arise under the Internal Revenue Code. 31 C.F.R. § 285.2(b)(3) ("[TOP] does not apply to any debt or claim arising under the Internal Revenue Code.")

TOP has been used to collect a variety of debts owed to various federal and state agencies. See, e.g., Lepelletier v. U.S. Dept. of Educ., 2009 WL 4840153 (D.D.C. Dec. 14, 2008) (Delinquent student loan debt); Briggs v. U.S., 2009 WL 1176297 (N.D. Cal. Apr. 30, 2009) (Delinquent debt owed to the Army and Air Force Exchange Service); Miller v. U.S., 422 B.R. 168 (W.D. Wis. 2010) (Delinquent loan owed to the Department of Agriculture); Crenshaw v. Alabama Dept. of Human Resources, 2008 WL 4416434 (D. Md. Sept. 23, 2008) (Delinquent child support obligation owed in Alabama).

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[1] "Administrative offset" refers to the practice of withholding federal payment in satisfaction of a debt. Reeves v. Astrue, 526 F.3d 732, 738 n. 3 (11th Cir. 2008).

[2] FMS disburses federal payments, such as federal tax refunds and social security payments, on behalf of federal agencies. 31 CFR § 285.2.

A number of recent cases indicate that restitution may properly be collected under TOP. See United States v. Campbell, 245 Fed. Appx. 505 at *508 (6th Cir. 2007) ("TOP…merely provides another means by which the government can enforce the already-imposed restitution order."); United States v. Sadler, 3:95-cr-134-RLV, Doc. No. 124 (W.D.N.C. July 2, 2008) (Financial Litigation Unit properly used TOP to offset restitution debt against tax refund and any errors were harmless); United States v. Whitburn, 2008 U.S. Dist. LEXIS 20026 (W.D. Okl. March 14, 2008) (inmate's participation in the Inmate Financial Responsibility program did not prohibit Financial Litigation Unit of Department of Justice from using TOP to collect unpaid restitution debt); see also United States v. Harrison, 2007 WL 2332662 at *2 (N.D. Tex. Aug. 16, 2007) (stating, in dicta, that the statutes governing TOP mention the word "debt" and that "it is well-settled that the term 'debt' [for purposes of the Federal Debt Collection Procedure Act, 28 U.S.C. § 3001 *et. seq*.] includes the amount due for restitution"); Beardslee v. United States, 2008 U.S. Dist. LEXIS 79347 (N.D. Cal., September 19, 2008) (denying plaintiff's motion to stay Department of Justice's debt collection efforts, which included using TOP to collect unpaid restitution).

Our office is in agreement with these authorities that delinquent restitution debt qualifies for offset under TOP and, consequently, that delinquent restitution debt owed to the Service may also be offset under TOP. This conclusion is not precluded by 31 C.F.R. § 285.2(b)(3), which mandates that TOP only be used to collect debt that does not arise under the Internal Revenue Code. For reasons which we discuss below, we conclude that restitution owed to the Service does not arise under the Internal Revenue Code.

When a criminal tax investigation is underway, the IRS suspends that audit of a taxpayer that would establish a civil tax liability for income tax for a tax year. The information a criminal investigator (Special Agent) finds is generally not shared with a civil tax examiner (Revenue Agent) because information presented to a grand jury is subject to secrecy limitation under federal rules of criminal procedure. If the Department of Justice ("Justice") agrees with IRS's determination that a crime occurred, Justice will take the case. Justice's criminal tax prosecution focuses on proving a type of proscribed conduct (i.e., evasion) occurred, and not establishing that actual tax liability for a tax year because Justice must only establish that a substantial tax deficiency exists. See U.S. v. Kaatz, 705 F.2d 1237, 1246 (10th Cir. 1983). Typically, then Justice will focus on the larger, easily provable items of underreported income or improper deductions; other tax adjustments and any civil tax penalties are not investigated by the civil examiners until after the criminal action. See United States v. Touchet, 658 F.2d 1074, 1076 (5th Cir. 1981); United States v. Stoehr, 196 F.2d 276, 284 (3d. Cir. 1952) (The exact amount due is not normally determined in the criminal action; the determination of that amount must await the defendant's acquiescence or a final civil judicial determination).

If a taxpayer is held criminally liable, a district court may order restitution under Title 18 of the United States Code (Crimes and Criminal Procedure) as part of the sentencing

procedures.[3] Nevertheless, the taxpayer's liability under the Internal Revenue Code (Title 26) is only established when the Service makes an assessment under I.R.C. § 6201. Furthermore, because a criminal investigation suspends an audit, an order of restitution will often be imposed months or even years before the taxpayer's civil tax liability is determined and an assessment made.[4]

Absent such assessment, the Service may not utilize any of the administrative collections provision in the Internal Revenue Code to collect from the taxpayer. Instead, Justice's Financial Litigation Units have traditionally been responsible for pursing delinquent amounts due under restitution orders and remitting them to the victim – in this case the Service.[5] See, e.g., Whitburn, 2008 U.S. Dist. LEXIS 20026 at *2 (Financial Litigation Unit pursued delinquent restitution); Sadler v. United States, 2009 WL 1043963 at *1 (W.D.N.C. April 17, 2009) (same); see also Helmsley, 941 F.2d at 101 (Holding that the Service may be a victim for purposes of restitution).

As the foregoing discussion makes clear, restitution payments to the Service do not arise under the Internal Revenue Code. This is because the restitution order is, in effect, simply a direction to the convicted taxpayer to make a payment; it does not represent the taxpayer's finally determined or official civil tax liability. Consequently, because restitution payments to the Service do not arise under the Internal Revenue Code and because restitution payments are entitled to offset under the TOP program, we conclude that the Service may use the TOP program to collect delinquent restitution payments.

We hope that you find this information helpful. If you require further assistance, please do not hesitate to contact William Foster at (202) 622-3881.

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[3] Under the Mandatory Victims Restitution Act of 1996, district courts *must* order restitution for tax crimes involving "fraud or deceit." 18 U.S.C. §§ 3663A(a)(1), 3663A(c)(1)(A)(ii); United States v. Senty-Haugen, 449 F.3d 862, 865 (8th Cir. 2006).

[4] While I.R.C. § 6201(a)(1) authorizes the Service to immediately assess any amounts shown on a tax return, additional amounts determined by examination/audit may be assessed only *after* the taxpayer has the opportunity to contest the adjustments proposed by the Service in the United States Tax Court. United States v. Touchet, 658 F.2d 1074 (5th Cir. 1981); United States v. Taylor, 305 F.2d 183, 187 (4th Cir. 1962). The taxpayer may give up the opportunity by signing a waiver (Form 870) and agreeing to immediate assessment. Touchet, 658 F.2d at 1076.

[5] Upon receipt of these funds, the Service applies any restitution payments against a taxpayer's unpaid liability for the tax year. See United States v. Tucker, 217 F.3d 960, 962 (8th Cir. 2000); United States v. 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…a civil proceeding.").