

TAX LITIGATION ISSUES

Expert Analysis

Collecting Taxes From Convicted Defendants

At the conclusion of a criminal tax case, a convicted defendant is rightfully most concerned with the prospect of incarceration. Defendants, however, must be aware of other consequences of a conviction, including significant financial ramifications. While the federal restitution statutes do not permit restitution in tax cases, restitution is nonetheless relevant because it typically is required by plea agreements and, where a defendant is convicted after trial, may be imposed by sentencing judges as a condition of supervised release. Moreover, the Internal Revenue Service can pursue the defendant civilly for taxes, interest and penalties beyond what was at issue in the criminal case.

In one recent case, *Senyszyn v. Commissioner*,¹ a defendant who pleaded guilty to tax evasion but was not ordered to pay restitution persuaded the Tax Court that he was not liable for the unpaid taxes, penalties and interest sought

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by the IRS. This case underscores the critical role orders of restitution play in criminal tax cases: in the absence of a restitution order,

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the IRS was unable to recover civilly. By contrast, in cases where the sentencing judge orders restitution, the criminal judgment serves as a floor to the defendant's liability but does not preclude the IRS from seeking additional taxes, interest and penalties. Practitioners representing defendants in federal criminal tax cases should be mindful of the complex framework governing the availability of restitution, and the impact an order of restitution will

have on subsequent civil litigation with the IRS.

Restitution in Tax Cases

In most criminal cases, restitution is available to compensate victims for harm caused by the defendant. While the government is the victim in tax cases, the restitution statutes² do not authorize restitution for offenses charged under Title 26 of the United States Code, which covers tax offenses.³

Nonetheless, the government is not without recourse. The majority of criminal cases are resolved through guilty pleas, and the government generally includes provisions in plea agreements requiring defendants pleading guilty to tax offenses to file amended returns and make restitution.⁴ Thus, the Tax Division of the Department of Justice encourages that plea agreements require "the defendant to file, prior to sentencing, complete and correct initial or amended personal returns for the [relevant] years," and further encourages U.S. Attorneys to seek restitution in criminal tax cases.⁵ Moreover, district courts are permitted to impose restitution as a condition of supervised release.⁶

Restitution, of course, is not the sole process by which the government

may recover unpaid taxes from defendants; the IRS may also seek to recover “unpaid taxes, penalties and interest in a civil proceeding.”⁷ Importantly, while criminal restitution and civil liability are separate mechanisms, the government may not double recover: it cannot both collect restitution for its tax loss and recover in a civil proceeding the unpaid taxes that were the basis for the restitution.⁸ “Any amount paid to the IRS as restitution for taxes owed must be deducted from any civil judgment the IRS obtains to collect the same tax deficiency.”⁹

Senyszyn Case

The preclusion on double recovery does not render a restitution order superfluous. To the contrary, a recent decision of the Tax Court demonstrates the critical role restitution orders play in the government’s ability to recover its tax losses.

In the late 1990s and early 2000s, Bohdan Senyszyn, a former revenue agent, persuaded real estate developer David Hook to turn over control of his business by promising to reduce Hook’s tax burden through the formation of entities to hold real properties; Senyszyn controlled these entities, though Hook funded the real estate purchases.

In 2004, Hook filed a claim against Senyszyn alleging that Senyszyn embezzled more than \$400,000. The lawsuit led to a criminal investigation in which a revenue agent concluded that, “Mr. Senyszyn [] received \$252,726 of net ‘benefits’ from Mr. Hook that [Senyszyn] did not report on [his] 2003 Form 1040.”¹⁰

In 2007, Senyszyn pleaded guilty to tax evasion and other charges. Pursuant to a plea agreement, Senyszyn stipulated at sentencing

that he “knowingly and willfully did not include [in his 2003 return] about \$252,726.00 in additional taxable income that he acquired in 2003.”¹¹ Senyszyn agreed to file accurate amended personal returns for the tax years 2002 and 2003, and pay taxes and penalties owed on those returns, in advance of sentencing.¹² Finally, the plea agreement provided that, at sentencing, the “judge will order [Senyszyn] to pay restitution pursuant to 18 U.S.C. §3663 et. seq.”¹³

Contrary to his plea agreement, Senyszyn did not submit amended returns, or pay any tax, penalties or interest, in advance of sentencing. On Feb. 21, 2008, he was sentenced to 34 months imprisonment, five years of supervised release and a fine, but the judge did not order Senyszyn to make restitution.¹⁴

On June 30, 2008, Senyszyn amended his 2003 tax return, reporting \$252,726 of additional gross income and \$476,005 of undetailed expenses, resulting in a net loss of \$223,279. Based on this calculation, Senyszyn did not submit any tax payment in connection with the amended return. Thereafter, the IRS issued a notice of deficiency for 2003 seeking taxes and penalties based on Senyszyn’s failure to report \$252,726 in gross income: the amount Senyszyn had stipulated that he had failed to report.¹⁵

During a trial before the Tax Court, the revenue agent who participated in the criminal case explained that the \$252,726 figure was based on the total sums Hook transferred to Senyszyn (\$481,947) less the total sums Senyszyn transferred to Hook (\$91,437) during 2003. However, although he could document the transfers from Hook to Senyszyn, the agent “could not explain at trial how he came up with the \$91,437 figure.”¹⁶

Senyszyn, on the other hand, provided account statements detailing \$595,000 in transfers that he made to Hook during 2003.¹⁷

The IRS argued that the deficiency and penalty should be sustained solely based on Senyszyn’s stipulation in the criminal case. The Tax Court noted that the stipulation constituted “strong evidence of the deficiency amount,” but held that it did not estop Senyszyn from challenging the deficiency,¹⁸ and that it was not required to apply collateral estoppel since “the purposes of the doctrine would not be served by upholding a deficiency unsupported by the evidence presented.”¹⁹ Thus, notwithstanding his plea of guilty to having knowingly and willfully failed to report \$252,726 of taxable income for 2003, Senyszyn was not liable for any deficiency in his 2003 federal income taxes.

The 2010 Statute

The government’s inability to recoup unpaid taxes from Senyszyn is, at least in part, attributable to the absence of an order of restitution in his criminal sentence. In cases where a sentencing judge imposes restitution, a convicted defendant’s ability to challenge that tax loss figure was eliminated in 2010, when Congress amended section 6201 of the Internal Revenue Code. Pursuant to the amendment, the IRS is required to “assess and collect the amount of restitution under an order pursuant to section 3556 of title 18...for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.” The statute thus precludes a convicted defendant who is subject to the restitution order from challenging the assessment “on the basis of the existence or amount of the underlying tax liability in any proceeding.”²⁰

Moreover, while an order of restitution entered by the sentencing judge will provide a floor for the convicted defendant's civil liability in the aftermath of the 2010 statute, it does not preclude the government from pursuing unpaid taxes not addressed in the criminal case. "Where the terms of a plea agreement do not specifically preclude the IRS from assessing additional taxes, a civil assessment may follow satisfaction of the restitution order in the criminal case."²¹

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At a minimum, a civil assessment will include penalties and interest not captured by the restitution order. In cases where the government agrees to a restitution amount based on what it believes it can prove beyond a reasonable doubt, the civil assessment may also include additional tax deficiencies that the IRS finds for the same years. Indeed, the U.S. Attorney's Tax Resource Manual provides model language for plea agreements that specifically contemplates the possibility that a civil assessment will be greater than the restitution ordered.

While ensuring that the defendant "will receive proper credit, consistent with [the total amount of restitution], for the payments made pursuant to

this agreement," the model plea language specifies that "nothing in this agreement shall limit the IRS in its lawful examination, determination, assessment, or collection of any taxes, penalties or interest due from the defendant for the time period(s) covered by this agreement or any other time period."²²

Conclusion

While clients understandably focus on the impact the sentence will have on their liberty, practitioners should advise their clients of the potential for financial liability beyond what is set forth in an agreed-upon restitution order. Thus, practitioners negotiating plea agreements and representing defendants at sentencing should understand the one-sided restitution language that the government is likely to propose, as well as the impact section 6201(a)(4) will have on any court-ordered restitution.

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1. 146 T.C. No. 9 at 6 (March 31, 2016).
2. 18 U.S.C. §§3663, 3663A.
3. See *United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998).
4. See USAM §6-4.310 (tax cases generally resolved by plea agreement).
5. USAM Criminal Tax Case Procedures §6-4.360, 6-4.370.
6. See 18 U.S.C. §§3563(b)(2), 3583(d); see also U.S.S.G. §5E1.1(a)(2) ("In the case of an identifiable victim, the court shall...impose a term of probation or supervised release with a condition requiring restitution for the full amount of the victim's loss"); *United States v. Batson*, 608 F.3d 630, 635 (9th Cir. 2010) ("The Supervised Release Statute, together with the Probation Statute, unambiguously authorizes federal courts to order restitution...for any criminal offense, including one under Title 26"); *Bok*, 156 F.3d at 167 (upholding order of restitution imposed as a condition of supervised release).
7. *United States v. Helmsley*, 941 F.2d 71, 102 (2d Cir.1991).
8. See Chief Counsel Notice 2013-12 (IRS cannot collect restitution and civil tax liability for

same period); see also J. Tigue and J. Temkin, "How the IRS Recoups Unpaid Taxes in Criminal Tax Cases," NYLJ, Jan. 26, 2006.

9. *Muncy v. C.I.R.*, 108 T.C.M. 606 (T.C. 2014), vacated and remanded on other grounds, 637 F. App'x 276 (8th Cir. 2016).

10. *Senyszyn*, 146 T.C. No. 9 (March 31, 2016).

11. *Id.* at 8.

12. Plea Agreement in *U.S. v. Senyszyn*, 2:06-cr-00311 WJM (D.N.J.), document #42 at 2 (filed Sept. 20, 2007).

13. *Id.* at 4.

14. See Judgment in *U.S. v. Senyszyn*, 2:06-cr-00311 WJM (D.N.J.), document #62 (filed Feb. 25, 2008).

15. *Senyszyn*, 146 T.C. No. 9 at 9-10.

16. *Id.* at 11.

17. *Id.* at 12.

18. *Id.* at 14.

19. *Senyszyn*, 146 T.C. No. 9 at 27.

20. 26 U.S.C. §6201(a)(4).

21. *U.S. v. Rabkin*, 12-cr-515, *5 (E.D.N.Y. June 29, 2016). See also *Morse v. C.I.R.*, 419 F.3d 829, 834 (8th Cir. 2005) (government may pursue civil and a criminal cause of action based on same facts); *Creel v. C.I.R.*, 419 F.3d 1135, 1140 (11th Cir. 2005) (government can recover criminal penalties in criminal prosecution and additional civil penalties in civil proceeding); *Muncy*, T.C. Memo 2014-251 at 16 (tax liability assessed separately from restitution and may exceed restitution).

22. Tax Resource Manual Ch. 19 ¶9 (emphasis added). The U.S. Attorney's Manual further recommends that prosecutors include language in plea agreements expressly leaving open the possibility of additional assessments: "Defendant agrees that this agreement, or any judgment, order, release, or satisfaction issued in connection with this agreement, will not satisfy, settle, or compromise the defendant's obligation to pay the balance of any remaining civil liabilities, including tax, additional tax, additions to tax, interest, and penalties, owed to the IRS for the time period(s) covered by this agreement or any other time period." *Id.* ¶10.