

UNITED STATES TAX COURT
WASHINGTON, DC 20217

KVC

ZIPORA KLEIN, ET AL.,)
)
Petitioner(s),)
)
v.) Docket No. 24595-15 L, 24596-15 L.
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent)

ORDER

In these consolidated collection due process (CDP) cases, petitioners challenge respondent’s proposed collection action arising from restitution ordered at sentencing in separate criminal proceedings. The cases are now before the Court on respondent’s motions for summary judgment.

Following their convictions for tax crimes, the United States District Court for the Central District of California ordered each petitioner to pay a sum certain to the United States as restitution. These sentencing orders made no reference to interest and did not order petitioners to pay interest. Pursuant to its authority under I.R.C. § 6201(a)(4), the IRS assessed the amount of restitution that each petitioner had been ordered to pay. The IRS also assessed interest on these amounts, taking the position that “the assessment of interest with respect to restitution assessments under section 6201(a)(4) is proper.” In respondent’s view, whenever the IRS exercises its authority under section 6201(a)(4)(A) to make a restitution-based assessment, “underpayment interest under [s]ection 6601(a) is payable from the last date prescribed for payment * * * of the underlying liability, up to the date of payment.”

Petitioners have apparently paid most or all of the restitution that the district court ordered. However, they have not paid the assessed interest and have argued that they are not liable for such interest. At the CDP hearing the settlement officer rejected that contention, noting provisions of the Internal Revenue Manual (IRM) requiring interest to be assessed on restitution-based assessments. See IRM pt. 25.26.1.2 (March 24, 2014). Petitioners challenged his reliance on this IRM

SERVED Nov 22 2016

provision, which lacks the force of law, and contended that the SO failed to verify that the interest had been properly assessed. See I.R.C. § 6330(c)(1).

The Court would find it helpful to receive supplemental briefing from the parties addressing the question whether interest arises automatically under section 6601(a) on criminal restitution assessed under section 6201(a)(4)(A). The parties are free to discuss any points they believe relevant, but we would like them to address in the course of their discussion the following points:

Section 6201(a)(4)(A) provides that “[t]he Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of Title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.” (Emphasis added.) At least one court seems to have construed the phrase “as if such amount were such tax” to mean that a resulting restitution-based assessment would not actually constitute “a tax” imposed under Title 26. See United States v. Tilford, 810 F.3d 370, 372 (5th Cir. 2016) (“Criminal restitution, even as a penalty for a failure to pay taxes, is not a tax.”). If restitution is assessed and collected as if it were a tax, rather than as an actual tax, a question arises whether underpayment interest under section 6601(a) should apply.

In Muncy v. Commissioner, T.C. Memo. 2014-251, 108 T.C.M. (CCH) 606, vacated and remanded on other grounds, 637 Fed. Appx. 276 (8th Cir. 2016), we contrasted the language of section 6201(a)(4)(A) with that of section 6665(a)(1). The latter section provides that various penalties, additions to tax, and additional amounts “shall be assessed, collected, and paid in the same manner as taxes.” (Emphasis added). We noted in Muncy our belief “that the distinction between ‘as if’ and ‘as’ is significant.” 108 T.C.M. (CCH) at 609. It is well-established that interest under section 6601(a) arises on penalties, additional amounts, and additions to tax. Since restitution is assessed and collected “as if it were a tax,” rather than “in the same manner as a tax,” a question arises whether underpayment interest under section 6601(a) should apply.

We also noted in Muncy that the “as if” language in section 6201(a)(4)(A) “is almost identical to the language of section 6305(a),” which authorizes the Secretary to assess and collect a delinquent child or spousal support payment “as if such amount were a tax.” Notably, perhaps, section 6503(a)(1) provides that “no interest or penalties shall be assessed or collected” on amounts assessed under section 6503(a). We invite the parties’ views as to whether any inference should be drawn, with respect to liability for interest on amounts assessed under section

6401(a)(4)(A), from section 6305(a) or other Code provisions that refer to amounts assessed “as if” they were taxes.

The Court observes that neither of the judgments that ordered the restitution at issue here mentions interest. IRM pt. 25.26.1.2(8) provides that “[c]omments reflected on the Judgment and Commitment Order referring to Title 18 do not have any bearing on * * * Title 26 interest owed.” On the other hand, some courts have suggested that it may be significant whether the judgment ordering restitution explicitly addresses interest. See United States v. Del’Andrae, No. 2:11-CR-126-DAK, 2016 WL 183528, at *3 (D. Utah Jan. 14, 2016) (“During the sentencing, the court and the parties anticipated that the IRS would assess interest and penalties on the Defendant’s restitution payments.”). Cf. United States v. Rabkin, 315 F.R.D. 159, 162 (E.D.N.Y. 2016) (distinguishing “a criminal restitution order” under section 6201(a)(4) from a restitution “through Title 26, which authorizes the IRS to collect interest on unpaid taxes.”); In re Jara, No. 14–80057–G3–13, 2015 WL 542408 (Bankr. S.D. Tex. Feb. 5, 2015) (upholding assessment of section 6601 underpayment interest on a section 6201(a)(4)(A) restitution-based assessment when the underlying plea agreement recited the criminal defendant’s liability for interest as part of “her civil tax liabilities.”) We invite the parties’ views as to whether cases like these shed any light on the proper resolution of the question presented here.

Finally, IRM pt. 25.26.1.2(1) states that the amount of restitution ordered in a criminal proceeding creates two separate debts for the same liability: one that the Department of Justice Financial Litigation Unit (DOJ FLU) is responsible for collecting; and the other that the IRS can assess and collect under section 6201(a)(4). The IRM makes clear that these two separate debts merely provide “two different means for collection” of the same liability, which “cannot be collected twice.” If the judgment ordering restitution omits interest, then DOJ FLU would appear to be powerless to collect interest. If the IRS, upon assessing the restitution “as if it were a tax” under section 6201(a)(4), is also authorized to assess and collect interest under section 6601(a), a question arises whether there are in fact two different liabilities, rather than the same liability subject to two different methods of collection.

In consideration of the foregoing, it is

ORDERED that respondent shall file, on or before January 31, 2017, a memorandum supplementing respondent’s motion for summary judgment addressing the issues outlined above. It is further

ORDERED that petitioners shall file, on or before March 3, 2017, a reply to respondent's memorandum.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
November 22, 2016