



GENERAL LITIGATION BULLETIN

Department of the Treasury

Office of Chief Counsel

Internal Revenue Service

DON'T EVEN CONSIDER IT
First Circuit Sets New Limit to Responsible Person Penalty

The First Circuit, in ***Vinick v. United States***, 2000 U.S. App. LEXIS 3593 (1st Cir. March 8, 2000), held as a matter of law that in deciding whether a person qualified as a responsible individual for imposition of the Trust Fund Recovery Penalty, I.R.C. § 6672, a court could not consider evidence for any period other than that when taxes were unpaid.

In 1981, Arnold Vinick, a CPA and former IRS employee, founded a corporation with Letterman, an attorney, and Mayer to purchase a foundry. Each owned 1/3 of the corporation's stock, and each guaranteed the SBA loan that provided start-up capital. Vinick prepared the corporation's tax returns, and was a co-signatory on the corporation's checking accounts (although he did not sign checks at the time). In 1983, the foundry experienced financial problems, prompting Vinick and Letterman to buy out Mayer and hire a new manager for the foundry. Vinick continued to prepare the quarterly tax returns and discuss the corporation's finances with the new manager. In 1988, Letterman increased his participation in the firm's daily activities and refinanced the SBA loan. Both Letterman and Vinick met with bank officials, and both signed personal guarantees for the loan. When the loan payments went delinquent a year later, both Vinick and Letterman met with bank officials to discuss the financial future of the corporation.

However, the foundry was not profitable, and the corporation filed for Chapter 11 bankruptcy in July, 1990. After filing, the corporation opened two new checking accounts: a debtor in possession account and a tax account. Both accounts required both Letterman's and Vinick's signatures. At this time, Vinick began signing corporate checks.

By the end of 1991, the corporation had dissolved, leaving unpaid withholding taxes for the last three quarters of 1989 and the first two quarters of 1990. The Service assessed Trust Fund Recovery Penalties for these periods against both Letterman and Vinick. Vinick paid one quarter and filed an administrative claim for refund. When that was denied, he filed with the district court, which granted summary judgment as a matter of law for the Government on the issue of whether Vinick was a responsible officer of the corporation. On appeal, the First Circuit decided that was an issue of fact, and remanded for trial. On remand, the district court held a hearing, and found by a preponderance of the evidence and testimony that Vinick was a responsible person under I.R.C. § 6672. The district court found Vinick was the treasurer, prepared the tax returns, negotiated with the Service on behalf of the corporation, pledged personal assets, had authority to participate in employment decisions, and possessed check-signing authority. Vinick appealed this decision to the First Circuit, which reversed the trial court.

The First Circuit held the trial court failed to apply the correct legal standard in determining whether Vinick was a responsible person, thus turning its analysis from a review of the district court's factual findings (which would be reviewed for clear error) into a question of law, which the appellate court reviews *de novo*. The First Circuit agreed that the district court properly examined the seven nonexclusive factors for a determination of responsible person status set out in, among other cases, Fiataruolo v. United States, 8 F.3d 930, 939 (2^d Cir. 1993). The first two factors, whether Vinick was an officer or director and whether he was a shareholder, contemplate the taxpayer's status within the corporate structure. The First Circuit found these two factors, which Vinick met, were not predicates to finding responsibility. Turning to the next two factors, involvement in day-to-day business and ability to hire and fire, the court held that Vinick's occasional involvement in the business was insufficient for liability.

Finally, the appellate court looked at the last three factors, whether Vinick could make decisions about what debts to pay, whether he had daily financial control, and whether he had check-signing authority. The court found these last three factors to be key in determining who in the corporation had the ability to pay the taxes. The trial court erred, according to the appellate court, by considering evidence of Vinick's authority during the life of the corporation. The trial court should have limited its inquiry to Vinick's role during the last three quarters of 1989 and the first two quarters of 1990, when the taxes were not paid. His authority for any other period of time was irrelevant.

During the relevant period, the First Circuit found, Vinick did not exercise decision-making authority over the daily operations of the corporation. In effect, the trial court erred by considering what Vinick as treasurer could have done, rather than what he actually did. The appeals court saw Vinick's work as nothing more than he would have done as a CPA for any business client. Without a finding that Vinick possessed actual, exercised authority over the corporation's financial matters, the First Circuit held, he could not as a matter of law be a responsible person.

In a lengthy dissent, Judge Lynch argued that the trial court's factual findings should be given proper weight in supporting the conclusion that Vinick, as a matter of fact, was a responsible person. Judge Lynch found the majority created a new, and unsupported, legal standard: that evidence of responsibility is limited to the unpaid tax periods in question. The judge points out that not only did Vinick not object to evidence from outside the tax periods, he introduced much of it himself. Further, Judge Lynch argues, the majority fails to place the burden of proof on the taxpayer, but instead weighs the facts against a finding of responsibility, particularly by determining certain factors of the seven controlled over others. Judge Lynch believed the facts clearly supported the trial court's decision, and would have affirmed that Vinick was a responsible person.

PENALTIES: Failure to Collect, Withhold or Pay Over: Responsible Officer

INTERESTING

Post-petition Interest on Nondischargeable Taxes Also is Nondischargeable

The Ninth Circuit, agreeing with the pre-Bankruptcy Code decision Bruning v. United States, 376 U.S. 358 (1964), held that post-petition interest on a nondischargeable tax debt under B.C. § 523(a)(1)(A) is also nondischargeable. **Ward v. Board of Equalization of California (In re Artisan Woodworkers), 204 F.3d 888 (9th Cir. 2000)**. The court of appeals considered two separate cases in reaching its conclusion. The first, Ward, was an individual Chapter 11 case. The second, Bossert, was a Chapter 12 case involving federal taxes. In both cases, although the debtors acknowledged that the taxes in question were nondischargeable, they argued post-petition interest was dischargeable. The Ninth Circuit disagreed.

In Bruning, the Supreme Court found interest to be the cost of the use of money, and so an integral part of the nondischarged debt. The Ninth Circuit found no functional difference between Bankruptcy Act § 17 and the current B.C. § 523(a)(1)(A). Interest remains an integral part of a tax debt, and is not discharged.

The debtors made three arguments, which the court briefly considered and dismissed. The first was that Bruning was only applicable to cases in which the creditor's claim was not paid in full from the bankruptcy estate (in other words, the tax would be paid, but not the interest). The court did not read Bruning this way. Second, Bossert argued that Bruning does not apply to Chapter 12, citing B.C. § 1222. The court found that section did not affect the exception of tax debts from discharge or the debtor's personal liability for such debts. Finally, the debtors argued that the court's ruling would deny them a "fresh start," thus frustrating the purpose of bankruptcy. The court was no more convinced than by the previous arguments, holding that congressional judgment favors the needs of the Government over a totally fresh start to debtors.

The court did not decide whether post-petition penalties also would be nondischargeable.

MARCH 2000

BULLETIN NO. 474

BANKRUPTCY CODE CASES: Interest: Administrative and “Gap” Expenses

CASES

1. **BANKRUPTCY CODE CASES: Assessment**
In re O'Connell, 2000 U.S. App. LEXIS 4327 (B.A.P. 8 March 21, 2000) - To determine whether state taxes were assessed within 240 days of Chapter 13 bankruptcy filing, and so entitled to priority status under B.C. § 507(a)(8)(A)(ii), the Bankruptcy Appellate Panel looked to the Internal Revenue Code definition of assessment. Under the I.R.C., a tax is assessed when the Service signs a summary record of assignment. Since, in this case, the taxpayer/debtor filed his return just prior to filing bankruptcy, but before the state could make a summary assessment, the taxes in question were non-priority.
2. **BANKRUPTCY CODE CASES: Chapter 13**
In re Barbieri, 199 F.3d 616 (2^d Cir. 1999) - Debtor has absolute right to dismiss Chapter 13 bankruptcy, so long as the case has not been converted to another Chapter.
3. **BANKRUPTCY CODE CASES: Determination of Tax Liability (§ 505): Amount or Legality of Any Tax Liability**
In re Palmer, 2000 U. S. App. LEXIS 4269 (9th Cir. March 20, 2000) - Affirming the decision of the Bankruptcy Appellate Panel, the Ninth Circuit held that the bankruptcy court could determine whether the debtor's taxes were nondischargeable due to fraud, as that issue was not "actually litigated" in the prior Tax Court proceeding. After the Service sent a Notice of Deficiency, the taxpayer petitioned the Tax Court for redetermination. However, the taxpayer did not participate further in the Tax Court proceeding, and the Tax Court granted the Government's Motion for Summary Judgment on the basis of fraud. The taxpayer then filed for Chapter 7 bankruptcy. In reviewing whether the Government was entitled to collateral estoppel on the issue of fraud, the Ninth Circuit found that even though the debtor initiated the Tax Court proceedings, essentially the debtor rolled over without presenting any challenge to the Government's allegations. Because there was no actual litigation of the fraud issue, the appellate court decided, there could be no right to collateral estoppel on that issue.
4. **BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523): No, Late or Fraudulent Returns**
In re Crawley, 244 B.R. 121 (Bankr. N.D. Ill. 2000) - Debtors filed 1985 - 1994 tax returns in July, 1996, without making payment. After the debtors filed for Chapter 7 bankruptcy in November, 1998, the Service argued that the taxes were nondischargeable. The court found the returns, which the debtors argued were inaccurate, were proper returns filed more than two years prior to the bankruptcy, and thus the taxes were dischargeable under B.C. § 523(a)(1)(B)(ii). Further, although the debtors' returns were filed after the Service assessed the taxes, the court declined to follow the rationale of In re Hindenlang, 164 F.3d 1029 (6th Cir.

1999)(debtor must file return prior to assessment) finding the debtors' returns valid and so the taxes dischargeable under B.C. § 523(a)(1)(B)(ii). However, the court then found the taxes were nondischargeable under section 523(a)(1)(C) because the debtors willfully attempted to evade paying their taxes knowing they had a duty to file and pay taxes, yet failing to do so. The court dismissed the debtor's reliance on their accountant's advice, finding the law must be adhered to despite bad advice from a professional to the contrary.

5. BANKRUPTCY CODE CASES: Refunds: Bankruptcy Court Determination: Claim for Refund

United States v. Neary (In re Armstrong), 2000 U.S. App. LEXIS 3545 (5th Cir. March 8, 2000) - Faced with an unusual factual situation, the Fifth Circuit held that the trustee could not request a tax refund in this case because the statute of limitations under I.R.C. § 6511 expired. The debtor filed his 1984 tax return in September, 1985, signing an extension of the assessment statute of limitations. After filing for Chapter 11 bankruptcy, the debtor had until July 2, 1991, to file for a refund. The Government filed a proof of claim for the 1984 taxes, which ultimately was denied in March, 1995. Meanwhile, the bankruptcy was converted to Chapter 7, and although the debtor was discharged in 1990, the bankruptcy continued. In 1993, the debtor filed an adversary proceeding for a refund of 1984 taxes, based on carryback losses. The debtor also filed an administrative claim for refund in March, 1995. The Government stipulated to the amount of the refund, but refused to pay. In 1997, the Chapter 7 trustee filed an adversary proceeding for the refund, arguing that the automatic stay in bankruptcy trumped the statute of limitations under I.R.C. § 6511. The Fifth Circuit disagreed. It found that no implied equitable tolling provision could be read into section 6511. Further, the trustee acquired only the same right to a refund that the debtor had. Neither the general language of B.C. § 542(a) nor the Government's stipulation as to the amount of the refund override the specific statutory limitations of section 6511. Finally, the Fifth Circuit determined that the trustee's claim was not a compulsory counterclaim, because the Government's proof of claim had been denied before the trustee filed for a refund.

6. BURDEN OF PROOF: Collection

Cook v. United States, 2000 U.S. Claims LEXIS 23 (Fed. Cl. February 25, 2000) - Generally, in refund suits the Service enjoys a presumption that its assessment is correct. Does this presumption shift where the Service admits it lost the taxpayer's administrative file? The court concluded that the burden of proof in a "naked" assessment case remains on the taxpayer, who is best situated to bring forward evidence of his entitlement to the refund. Similarly, the burden of proof in the Government's counterclaim for the unpaid portion of federal taxes remains on the Government, unless shifted by proof of an appropriate foundation for the assessment.

7. ERRONEOUS REFUNDS: Suits For

United States v. McGrath, 2000 U.S. Dist. LEXIS 1876 (S.D.N.Y. Feb. 23, 2000) - Taxpayers, granted extensions to October 15, 1992, finally filed their 1991 return on October 15, 1995, which return was received by the Service on October 19. The Service issued a refund, then filed suit to recover the refund under I.R.C. § 7405(a) and § 6511(b)(2)(A), arguing that the taxpayers filed three days past the statute of limitations. The district court discounted this argument, finding that the plain language of section 6511(a) allows taxpayers to request refunds within three years from the time the return was filed. Section 6511(b)(2)(A), the court said, limits only the amount of the refund, not the time in which it can be requested.

8. REFUNDS: Offset

United States v. Szopa, 2000 U.S. App. LEXIS 3353 (7th Cir. March 1, 2000) (*unpublished*) - The Seventh Circuit held that taxpayers who waited until 1998 to file returns for tax years 1983-86 could not offset overpayments from 1984-85 against tax liabilities for 1983 and 1986. The taxpayers stipulated to tax liability in a suit brought by the Government in 1997, and so filed tax returns in 1998 for tax years 1984 & 85. The taxpayers first claimed that they were entitled to refunds for 1984 & 85 under I.R.C. § 6511(a). The court of appeals disagreed, finding that under section 6513(b)(1), the taxpayer's returns for the years in question were deemed paid on April 15 of 1985 & 86, respectively. As the taxpayer's 1998 refund suit was later than the three years permitted by I.R.C. § 6511(b)(2)(A), the taxpayers were precluded from receiving offsets of amounts paid for 1984 & 85. Next, the taxpayers argued that under I.R.C. § 6407 their taxes should be deemed paid in 1998 when the Service entered into the tax liability stipulation. However, the Seventh Circuit found Treas. Reg. § 301.6407-1 establishes the procedure for authorizing a refund (by completing Form 2188), and as that was not done, section 6407 provides no basis for a refund or credit. Finally, the appellate court rejected the taxpayer's equitable recoupment argument, finding that since there was no single transaction or occurrence here subject to inconsistent theories of taxation, that the equitable doctrine did not apply.

9. SUITS: Jurisdiction: Contest of Merits of Tax

Goza v. Commissioner, 114 T.C. 12 (T.C. March 17, 2000) - Service issued Notice of Deficiency and Notice of Intent to Levy, to which taxpayer responded with frivolous constitutional arguments. Appeals then issued a Notice of Determination, stating that the taxpayer failed to raise any valid issues that could be considered under I.R.C. § 6330, so upholding the Notice of Intent to Levy. The taxpayer then filed suit in Tax Court. The Tax Court determined it had jurisdiction under section 6330(d), but held the taxpayer failed to raise a valid challenge to the Service's proposed levy before Appeals. Consequently, the Tax Court dismissed the petition.

10. SUITS: Jurisdiction: Subject Matter

Moore v. Commissioner, 114 T.C. 11 (T.C. March 17, 2000) - Following Collection Due Process hearing with Appeals, taxpayer appealed decision regarding imposition of Trust Fund Recovery Penalty under I.R.C. § 6672 to the Tax Court. The Tax

Court held, under I.R.C. § 6330(d)(1), that it lacked subject matter jurisdiction to hear the appeal. Under that section, the Tax Court may entertain CDP appeals only if it otherwise has jurisdiction over the underlying taxes.

11. SUMMONSES: Intervention by Taxpayer: Right to Notice

Ip v. United States, 203 F.3d 627 (9th Cir. 2000) - Service issued third-party summons requesting bank records for foreign import/export company and several individuals believed to be involved with the company. No notice was sent to those individuals regarding the summonses. The taxpayer, who claimed no connection with the business, filed suit to quash the summons, and the Ninth Circuit agreed. Under I.R.C. 7609(a), the general rule is that notice of a third-party summons must be provided to persons, such as the taxpayer, identified in the summons. The appellate court did not accept the Government's argument that no notice was required under the section 7609(c)(2)(B) exception for summons issued in aid of collection. Although admitting that a literal reading of that exception supported the Government's position, the Ninth Circuit found such a reading would effectively gut the general rule and ignore Congressional intent to provide notice to third parties. Supporting the intent, if not the wording, of section 7609, the Ninth Circuit ordered the summons be quashed.

12. TAX RETURN PREPARERS

TAX SYSTEMS MODERNIZATION: Electronic Filing of Tax Returns:

Brenner Income Tax Centers, Inc. v. Director of Practice, IRS, 2000 U.S. Dist. LEXIS 3116 (S.D.N.Y. March 1, 2000) - The taxpayer, a tax return preparer participating in the Service's electronic return filing (ELF) program, failed to timely file its own tax returns. Suspended from participating under the ELF rules, the taxpayer unsuccessfully appealed administratively before going to court. The district court found the taxpayer would suffer irreparable harm by being excluded from the ELF program, but still refused to grant relief. The court upheld the right of the Service to set and enforce guidelines for "the exercise of the privilege of participating in the ELF program," and also the right of the Service's Director of Practice to refuse to lift the suspension.

13. TAX RETURN PREPARERS

TAX SYSTEMS MODERNIZATION: Electronic Filing of Tax Returns:

Compro-Tax, Inc. v. IRS, Civil No. H-98-2471 (S.D. Tex. March 29, 2000) - Compro-Tax is a multi-level marketing program which trains people (brokers) to set up tax preparation practices, then collects a commission for each prepared return. Because its principals failed to file personal tax returns in prior years, the Service suspended Compro-Tax from the Service's electronic tax return filing (ELF) program. The two-year suspension was upheld on administrative appeal, while Compro-Tax's brokers were told that they too would be suspended from the ELF program if they associated with, or forwarded commissions to, Compro-Tax. In its decision, the court upheld the ELF rules against constitutional and Administrative Procedure Act (APA) challenges. Because there was no waiver of sovereign

immunity, the court dismissed the plaintiff's constitutional claims. The ELF Director of Practice, sued individually, was entitled to qualified immunity because she acted within her authority by enforcing the program's rules, which granted sufficient due process to the Compro-Tax plaintiffs. Finally, there was no violation of the APA because the ELF rules provide a rational relationship between the fact of the plaintiffs' failure to file tax returns and the Service's act of suspending them from the ELF, and because the Service articulated a rational reason to suspend a broker from the ELF, due to her violation of the ELF association rules.

- 14. TRANSFEREES & FRAUDULENT CONVEYANCES: Uniform Fraudulent Transfer Act**
Espinoza v. Commissioner, T.C. Memo 2000-66 (T.C. March 1, 2000) - Taxpayer, who had not filed returns for years, transferred substantial stock holdings to his wife without consideration, then became unemployed. The court found that the transfer met the four elements of the Uniform Fraudulent Transfer Act, and further that the statute of limitations for the Government was under I.R.C. § 6901 rather than the shorter state period. The court disagreed with the taxpayer that the failure of the Service to issue deficiency notices to the taxpayer's correct address prohibited the Service from collecting the liability.

**The Following material was released
previously under I.R.C. Sec 6110
Portions may be redacted from the
original advice**

CHIEF COUNSEL ADVICE

Offers in Compromise & Bankruptcy

January 4, 2000

GL-117272-99

UILC: 17.00.00-00

MEMORANDUM FOR ASSISTANT REGIONAL COUNSELS (GENERAL LITIGATION)

FROM: Gary D. Gray
Assistant Chief Counsel (General Litigation)

SUBJECT: Offers in Compromise and Bankruptcy

The purpose of this memorandum is to advise you of the decision of the National Director, Collection Field Operations ("Collection"), regarding the treatment of offers in compromise received prior to January 1, 2000, from taxpayers who have filed bankruptcy petitions, and to provide guidance to Counsel in processing these offers. The Memorandum For Regional Chief Compliance Officers Assistant Commissioner (International), dated December 10, 1999, is attached.

Earlier this year Collection allowed the processing of offers in compromise from taxpayers in bankruptcy.¹ That position was reflected in Form 656A, which was made available to the public in September 1999. The form stated that taxpayers in bankruptcy could submit offers in compromise if documentation were supplied to the Internal Revenue Service ("Service") showing that the bankruptcy court lifted the automatic stay to allow the Service to research the offer.

As you are aware, Collection has rescinded its allowance of offers in compromise from taxpayers in bankruptcy. After January 1, 2000, when Form 656A becomes obsolete,

¹ This decision primarily related to offers involving doubt as to collectibility, and did not relate to doubt as to liability offers based on litigating hazards. Doubt as to liability offers have always been considered by the Service during taxpayers' bankruptcy cases, prior to objection to the proof of claim. See IRM 34.10.1.6(6).

the Service will no longer consider such offers. Until that time offers will be considered if the taxpayer has the automatic stay lifted for that purpose.

Collection's memorandum states the grounds for consideration of offers received pursuant to the obsolete Form 656A prior to January 1, 2000. First, it provides that if the offer involves a post-bankruptcy collection issue, the case will be worked based on the merits of collectibility assuming the discharge would be granted. The primary purpose of this directive is to allow the Service to consider offers from taxpayers in Chapter 7 cases who wish to compromise nondischargeable liabilities before the discharge has been granted and the automatic stay is terminated. These offers should normally not be referred to Counsel for review unless the total amount of the liability is \$50,000 or more. I.R.C. § 7122(b).

Collection's memorandum also directs that if the offer "pertains to or is relevant to the bankruptcy proceeding," the minimum amount to be considered acceptable is the amount that is required to be provided under the Bankruptcy Code. However, if it appears that the offered amount is the best alternative, a recommendation to accept the offer can be made, but only with District Counsel concurrence, and provided that other creditors do not benefit from the Service receiving lesser treatment.

The primary purpose of this directive is to provide for the treatment of offers from taxpayers in Chapter 11, 12, and 13 cases. This directive indicates that the Service should not compromise its claim to the extent that the compromise allows taxpayers to make payments to lower priority creditors or increased payments to creditors of equal priority (e.g., state tax authorities). Our understanding of the policy behind this position is (1) that the Service does not generally allow for the payment of such creditors when it considers offers in compromise outside of bankruptcy, and should not do so for taxpayers in bankruptcy, and (2) that if the taxpayer has elected to use the bankruptcy process to handle the taxpayer's obligations, the taxpayer should abide by the bankruptcy priority scheme.

We make the following recommendations as to the role of Counsel in reviewing offers in Chapter 11, 12 or 13 cases. First, review the offer under normal criteria, e.g., whether the offer meets the standard of doubt as to collectibility. Second, review the Service's determination as to the amount it is entitled to receive under the Bankruptcy Code, e.g., the amounts it would be entitled to receive on its secured, priority, and general unsecured claims in the Chapter 11, 12, or 13 case. Third, review the Service's determination that the amount offered, though less than the amount the Service is entitled to under the Bankruptcy Code, is the best alternative. There are many factors that could affect whether the amount offered is the Service's best alternative. Such factors include the effect that conversion or dismissal would have on the Service's claim, and whether accepting the offer would result in an abuse of the Bankruptcy Code. Fourth, Counsel should review the Service's determination that compromising the Service's claim will not enhance the return to creditors of junior or equal priority.

Fifth, Counsel should ensure that the offer is properly reflected in the terms of any Chapter 11, 12, or 13 plan.

Please contact us with any questions you may have. We are interested in feedback as to how this works to assist us in giving Collection advice for future cases.

Bankruptcy - Extension of Collections Statute of Limitations

February 23, 2000

CC:EL:GL:Br2
GL-604798-99
UIL 6503.09-00

MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL
DELAWARE-MARYLAND CC:SER:DEM:BAL

FROM: Mitchel S. Hyman
Senior Technician Reviewer, Branch 2 (General Litigation)

SUBJECT: Chapter 11 Plans Extending Beyond the
Ordinary Statute of Limitations for Collection

This responds to your request for advice concerning the above matter and confirms the oral advice previously given to the referring attorney and Special Procedures advisor. Pursuant to I.R.C. § 6502(a), as amended by the IRS Restructuring and Reform Act of 1998 (RRA 98), after December 31, 1999, the Service may no longer obtain waivers of the statute of limitations for collection except with respect to installment agreements. As you have correctly noted, a confirmed Chapter 11 bankruptcy plan is not an “installment agreement” for purposes of section 6502(a)(2)(A). See the NRC website answer to Question 692. Since waivers of the period of limitation on collection can no longer be obtained with respect to Chapter 11 plans, you have asked several questions regarding the Service’s ability to accept Chapter 11 plan payments where such payments may extend beyond the normal collection limitation period without any extensions. For the reasons discussed in this memorandum, we conclude that the Service may generally rely on the I.R.C. § 6503(h)(2) suspension of the limitation period in order to collect tax payments after confirmation of Chapter 11 plans.

Issue #1: Is the statute of limitations on collecting a tax provided for by a confirmed Chapter 11 plan usually extended automatically, via I.R.C § 6503(h)(2), while the taxpayer is current on Chapter 11 plan payments for the tax, up until the time the taxpayer is in substantial default on the plan payments for the tax?

Answer #1: Generally, yes. While the automatic stay is the most commonly cited bankruptcy case “reason” why the Service may be prohibited from collecting a tax, within the meaning of I.R.C. § 6503(h), it is not the only bankruptcy case reason recognized by the courts and the Service for suspending the Service’s limitation period

for collecting a tax from a former bankruptcy debtor. See United States v. Wright, 57 F.3d 561 (7th Cir. 1995) (suspension while confirmed Chapter 11 plan was in effect, until default, plus six months); In re Montoya, 965 F.2d 554, 557 (7th Cir. 1992) (dicta regarding suspension not being limited to automatic stay circumstances, where a Chapter 11 plan was in effect before default and where the Service's claim had been disallowed and later was reinstated) ; United States v. McCarthy, 21 F.Supp.2d 888 (S.D. Ind. 1998) (suspension while a confirmed Chapter 11 plan was in effect until the default exceeded 30 days, plus six months); Nelson v. United States, 94-1 U.S.T.C. ¶ 50,206 (E.D. Mich. 1994) (suspension between the dates the taxpayer received a Chapter 7 discharge and the discharge was revoked, plus six months). If payment of a tax is provided for by a confirmed Chapter 11 plan and plan payments of the tax are not in default, then the Service is generally prohibited from attempting to collect the tax (outside of receiving payments provided for by the plan) from the debtor or the debtor's property, pursuant to the plan injunction arising pursuant to the terms of most Chapter 11 plans and B.C. §§ 1141(a) and (c).

The conclusion that a confirmed Chapter 11 plan enjoins the Service from collecting preconfirmation taxes (outside of the plan) from the debtor or the debtor's property, unless or until the taxpayer defaults on tax payments under the plan, cleanly follows in the case of corporate, partnership, and other non-individual debtors (which together make up the overwhelming majority of Chapter 11 debtors) from the fact that these non-individual debtors receive a discharge of all of their preconfirmation taxes and other debts except as provided for in their confirmed plans, pursuant to B.C. §§ 1141(d)(1) and (d)(1)(A).² Non-individual Chapter 11 debtors also have no prepetition property that could have been excluded or exempted from their bankruptcy estates, to which a perfected, prepetition federal tax lien may still attach after the debt itself is discharged. In addition, the Service should not generally attempt to setoff post-confirmation tax refunds against the unpaid, prepetition tax debts that are provided for or discharged by a non-individual debtor's Chapter 11 plan.³

² While liquidating, non-individual Chapter 11 debtors may be denied an automatic discharge arising from plan confirmation, under B.C. § 1141(d)(3), we understand that most liquidating debtors provide otherwise in their plans. When a liquidating, non-individual debtor is denied a discharge arising from Chapter 11 plan confirmation, the absence of a discharge may simply mean the automatic stay remains in effect until the Chapter 11 case is closed, pursuant to B.C. § 362(c)(2). In either case, the limitation period for the Service to collect the preconfirmation tax from the liquidating debtor should be suspended until plan default by I.R.C. § 6503(h)(2).

³ A recent district court decision did allow what the court characterized as a tax refund arising post-confirmation (but for mostly prepetition periods) to be offset against prepetition taxes that were provided for in the confirmed Chapter 11 plan of a corporate debtor but were never paid. See In re Gordon Sel-Way, Inc., 239 B.R. 741 (E.D. Mich. 1999).

It is our office's position in the case of Chapter 11 corporate debtors with confirmed plans that the Service should not resort to use of its administrative remedies to collect a tax provided for by a confirmed plan until there is a default. The Seventh Circuit's decision in Wright, *supra*, approved the Service's position that the limitation period on collecting employment taxes from a partnership debtor remained (after the stay was lifted) suspended following confirmation of the partnership's Chapter 11 plan until the partnership "turned turtle" (defaulted on its plan payments). See also United States v. Colvin, 203 B.R. 930 (N.D. Tex. 1996), following remand, 222 B.R. 799 (N.D. Tex. 1998) (considering equitable tolling of the 240-day period for priority income tax claim purposes during the time that a serial Chapter 11 corporate debtor was not in default on its first confirmed plan).

Thus, in corporate and other non-individual debtor cases, the Service may generally rely on the section 6503(h) suspension, and so the inability to obtain waivers will not impact on the Service's ability to accept payments under long-term payout plans. We similarly conclude that in individual debtor cases, the Service may generally rely on the section 6503(h) suspension with respect to taxes provided for by the plan. However, the Service will not generally be able to rely upon a suspension with respect to taxes which are still owed by an individual debtor but are not provided for by full payment under the debtor's plan.

The general position we recommend the Service take for an individual taxpayer with a confirmed Chapter 11 plan (before substantial default) is that the collection limitation period remains suspended from confirmation until substantial default for tax debts the plan provides to pay in full, considering the Service's allowed claims in the case. However, both for non-dischargeable tax claims of an individual taxpayer that a confirmed Chapter 11 plan does not provide for by a promise of full payment and for surviving federal tax liens not provided for full payment by a confirmed plan, the Service should not argue that the collection limitation period will automatically be suspended while the Chapter 11 plan is in effect before a substantial default.

The Service's position regarding collection of non-dischargeable tax debts from an individual debtor with a confirmed Chapter 11 plan is stated in IRM 5.9.9.5:(1), as follows:

Confirmation of the plan binds the debtor and creditors to the terms of the plan. Although confirmation does not discharge an individual debtor from taxes excepted from discharge under B.C. § 523(a), the IRS will not attempt to collect nondischarged pre-petition taxes outside of the plan unless there is substantial default, the non-dischargeable tax is not fully provided for by the plan, or circumstances allowing collection through setoff arise.

Notwithstanding the survival of certain tax debts as non-dischargeable for an individual with a confirmed Chapter 11 plan, we believe the collection limitation period is suspended for such debts, pursuant to I.R.C. § 6503(h)(2), as long as

(1) the Service's claim for the debt is allowed, (2) the plan provides for full payment of the tax debt, and (3) the plan is not in substantial default (considering any period provided to the debtor in the plan for curing a default).⁴ This was the situation and result in United States v. McCarthy, *supra*. The Government also made an argument along these lines in Montoya, *supra*, but the Seventh Circuit did not address the argument because the Service's claim also was disallowed, before being reinstated, for a period long enough to achieve the Service's desired suspension of the priority claim calculation periods at issue in that case. Although the Service may still use setoff opportunities to collect these non-dischargeable tax debts outside of the plan before the plan is in substantial default, this ability to continue to make setoffs has not stopped the Service from arguing nor the courts from finding that the Service is prohibited from "collecting" by reason of the bankruptcy case, for purposes of I.R.C. § 6502(h)(2). *See Montoya*, *supra*, at 558 (specifically addressing and dismissing the taxpayers' argument that the Service's ability to perform offsets after plan confirmation meant the Service was not barred from collecting the taxes owed).⁵

Similarly, if the confirmed Chapter 11 plan of an individual taxpayer provides for full payment through the plan of a dischargeable tax debt that is secured by a perfected federal tax lien, then we believe the Service will ordinarily be required to refrain from collecting the tax other than through the plan and that the collection limitation period for the Service using the perfected tax lien for collection (other than through the plan) should be suspended by I.R.C. § 6503(h)(2) until the plan is in substantial default. We are not aware of any case law to date involving these specific circumstances, but our conclusion logically follows the reasoning of the previously explained cases which involve the tax debts of non-individual taxpayers provided for by a plan or the non-

⁴ The General Litigation User Guide to Chief Counsel's Macros, Document 9765 (9-96), recommends at page 1129-6 that Chapter 11 plans contain default language that allows the Service to collect tax debts provided for by a confirmed plan 14 days after the Service has made a written demand for the debtor to cure the default, if the default is not cured.

⁵ *See also* I.R.C. § 6330(e)(1), which suspends the collection limitation period while the Service is prohibited by the new collection due process procedures from using a "levy" to collect a tax debt, even though "setoff" to obtain payment of the same debt would not be prohibited while the collection due process procedures are pending. In some districts, local bankruptcy rules or general orders now allow the Service to make setoffs of prepetition tax debts against prepetition tax refunds while the automatic stay is still in effect, without the Service moving to lift the stay. In these districts, we conclude that the Service's ability to obtain setoff in this manner, while the automatic stay otherwise prevents the Service from attempting to collect the tax, does not remove the suspension of the collection limitation period, under I.R.C. § 6503(h)(2), for the tax left unpaid after the setoff is made.

dischargeable tax debts of individual debtors provided for by a plan.⁶ However, as we understand this may be a circumstance of some concern to the Service at this time, we discuss further below a potential “judgment” fix for these situations.

While the majority of non-dischargeable or non-discharged federal tax debts of an individual Chapter 11 debtor may be covered by the two circumstances described above, where the plan provides for payment of the federal tax debt in full, there are also a number of common circumstances for individuals where a confirmed Chapter 11 plan does not usually provide for full payment of the surviving tax debt or lien. When the plan does not provide for full payment of the tax debt, the Service may not safely assume that the collection limitation period is suspended with respect to these tax debts while the Chapter 11 plan is in effect and before substantial default. A partial list of circumstances for an individual Chapter 11 debtor where the Service may not safely rely on a suspension of the collection limitation period during the plan payout period appears below:

- (1) The tax is prepetition and non-dischargeable but the Service was not aware of the tax soon enough to file a timely bankruptcy proof of claim, usually because the tax was not assessed or the tax period was not under audit by the Service before the claim bar date. Consequently, the confirmed Chapter 11 plan was not required to provide for full payment of these unclaimed or late-claimed prepetition tax debts through the plan. The Service ordinarily takes the position that these non-dischargeable prepetition taxes are immediately collectible from the individual debtor outside of the plan. See In re Gurwitch, 794 F.2d 584 (11th

⁶ In at least one pre-RRA 98 enactment case which involved secured federal tax debts of an individual debtor and a proposed 30 year payout period under a Chapter 11 plan, the bankruptcy court required the debtor to sign waivers of the collection limitation period for the length of the proposed plan payout period as a way of addressing the Service’s plan feasibility concerns. See In re Haas, 195 B.R. 933, 940 (Bankr. S.D. Ala. 1996), rev’d, 162 F.3d 1087 (11th Cir. 1998) (where the Eleventh Circuit ultimately found the plan infeasible, without addressing the collection limitation issue). While the collection limitation period waivers in that case may have provided the Government with a slightly higher comfort level with the proposed plan, we do not believe the waivers were necessary to suspend the limitation period while the plan was in effect until substantial default. The Government remained dissatisfied with the bankruptcy court’s solution to its plan feasibility concerns, prompting it to appeal that case successfully to the Eleventh Circuit. In other open cases where the Service may have been satisfied by waivers that now will expire by their own terms or by law before the Chapter 11 payout period in a case is due to expire, the suspension of the collection limitation period while the automatic stay is in effect and while a confirmed Chapter 11 providing fully for the tax is in effect, should not be shortened by these outstanding collection limitation waivers that now will expire at an earlier date certain by agreement or by law. See In re Klingshirn, 147 F.3d 526 (6th Cir. 1998)

Cir. 1986); In re Grynberg, 986 F.2d 367 (10th Cir. 1993). Accordingly, the Service should not rely on a suspension of the collection limitation period in these circumstances.

- (2) The prepetition tax or prepetition tax penalty is non-dischargeable but is not entitled to priority claim treatment (i.e., non-priority taxes and tax penalties described in B.C. §§ 523(a)(1)(B), (a)(1)(C), or (a)(7)), the Service filed a general unsecured claim for these non-dischargeable taxes or penalties, and the confirmed Chapter 11 plan provides for less than full payment of these taxes or penalties. As the confirmed plan is not required to and does not provide for full payment of these prepetition, non-dischargeable taxes and penalties, the Service would not ordinarily argue that it is prohibited by the confirmed plan from attempting to collect these taxes outside of the plan. The Service should not rely on a suspension of the collection limitation period in these circumstances.
- (3) The post-petition, preconfirmation interest for a non-dischargeable prepetition tax is also non-dischargeable, but this post-petition interest may not ordinarily be claimed by the Service or paid through the confirmed plan. See Bruning v. United States, 376 U.S. 358 (1964); Hanna v. United States, 872 F.2d 829 (8th Cir. 1989).⁷ As the confirmed plan is once again not required to and does not provide for full payment of the post-petition, preconfirmation interest component of this tax debt, the Service would not ordinarily argue that it is prohibited by the confirmed plan from attempting to collect these tax debts outside of the plan. The Service should not rely on a suspension of the collection limitation period for the post-petition interest in these circumstances, even though it may rely on such a suspension with respect to the underlying tax debt that is fully provided for by the confirmed plan.
- (4) The prepetition tax itself is discharged by the individual debtor's confirmed Chapter 11 plan becoming effective, but the tax was secured before the petition date by perfected federal tax liens which attached to the individual debtor's excluded, exempted, or abandoned property (property that is not generally dealt with by the plan for purposes of B.C. § 1141(c)). The confirmed plan also does not provide for full payment of the secured tax debt from bankruptcy estate property or from non-estate property otherwise dealt with by the plan. The

⁷ For secured taxes of the kind and for the periods specified in B.C. § 507(a)(8), the circuits are presently split on whether the taxes and post-petition interest thereon are excepted from discharge by B.C. § 523(a)(1)(A). See In re Gust, 1999 U.S. App. LEXIS 32154 (11th Cir. 12-9-99) (secured taxes of this type excepted from discharge); In re Victor, 121 F.3d 1383 (10th Cir. 1997) (post-petition, preconfirmation interest on secured taxes of the kind and periods described in B.C. § 507(a)(8) not excepted from discharge). Our position is that the Eleventh Circuit has the better reasoned view on this matter.

Service ordinarily would take the position that its prepetition, perfected federal tax liens remain enforceable against the debtor's excluded, exempted, or abandoned property outside of the plan. See In re Isom, 901 F.2d 744 (9th Cir. 1990) (decided in a Chapter 7 context). Since the confirmed Chapter 11 plan assumed in this scenario does not provide for full payment of the surviving secured tax debt, the Service would again argue that it is not prohibited by the confirmed plan from attempting to collect the tax outside of the plan from the individual debtor's excluded, exempted, or abandoned property. The Service should not rely on a suspension of the collection limitation period while the plan is in effect with respect to this secured tax, at least for any amount of secured tax in excess of the amount the plan promises to pay.

- (5) A post-petition income tax is incurred by the individual debtor (rather than by the individual debtor's I.R.C. § 1398 estate) before plan confirmation. The Service may not ordinarily file a bankruptcy proof of claim for this post-petition tax of the individual debtor, but the Service takes the position that the post-petition income tax is not discharged by confirmation of the debtor's Chapter 11 plan. See In re Johnson, 190 B.R. 724, 727 (Bankr. D. Mass. 1995); In re Wood, 240 B.R. 609 (C.D. Cal. 1999). The Service has successfully resisted efforts by individual debtors in these circumstances to enjoin the Service from collecting the debtor's post-petition tax while the individual debtor's Chapter 11 plan is in effect and not in default. In these circumstances, the Service should not ordinarily rely on any suspension of the collection limitation period for the individual debtor's post-petition tax liability while the plan is in effect.

There may be exceptions to the above conclusions. The Chapter 11 plans of individual debtors may provide different treatment than that occurring if the issue is not specifically addressed in the plan. Some individual Chapter 11 debtors or the bankruptcy courts considering confirmation of these debtors' plans may choose to provide for full payment through the plan of these types of surviving tax debts or liens that are otherwise not required to be paid through a confirmed Chapter 11 plan. For this reason, the Service should examine the terms of an individual debtor's confirmed Chapter 11 plan before determining whether the federal tax debt or a portion of the federal tax debt may be collected outside of the plan and whether the Service may safely rely on a suspension of the collection limitation period with respect to the particular tax debt while the plan is in effect.

Issue #2: What alternatives (to reliance on our above answer to question #1) should the Service consider to ensure that the collection limitation period is either suspended or extended during a proposed, lengthy Chapter 11 plan payout period?

Answer #2: Discussed below are three alternative strategies that the Service may wish to consider pursuing with Chapter 11 debtors in the process of confirming Chapter 11 plans whenever there is a long payout period proposed under a plan. First, the Service should insist that it be paid by Chapter 11 plans in full within the time frames required

by the Bankruptcy Code. Second, the Service may ask that appropriate language be inserted in a Chapter 11 plan or in the order confirming a plan which specifies that the collection limitation period under the Internal Revenue Code will be suspended for particular tax debts for so long as the plan is in effect and not in substantial default, and for six months thereafter, specifically referencing I.R.C. § 6503(h)(2). Third, the Service may ask that the bankruptcy court enter a separate judgment in a contested matter proceeding while the plan is being confirmed, in order to reduce specific assessed federal tax debts to a judgment that extends the collection limitation period for so long as the judgment is enforceable, in accordance with the final sentence of I.R.C. § 6502(a) (which is unchanged by the RRA 98 revisions to other parts of section 6502(a)).

The Service's first alternative is to insist that the taxpayer's Chapter 11 plan conform with the debt payment requirements of the Bankruptcy Code. For prepetition tax debts that are entitled to priority treatment, B.C. § 1129(a)(9)(C) requires that a Chapter 11 plan provide for full payment of these taxes within six years of the date of assessment of such taxes. If a priority tax must be paid no later than within six years of the assessment date or by the plan effective date (if there is no deferral of payment), then the ordinary collection limitation period of 10 years, pursuant to I.R.C. § 6502(a)(1), will require no suspension or extension.⁸

With respect to prepetition tax debts that are genuinely entitled to secured claim treatment, a Chapter 11 plan should provide for full payment of the debt in a feasible manner, including a reasonable period of time for payment under the circumstances. See I.R.C. § 1129(a)(11); *In re Haas*, 162 F.3d 1087 (11th Cir. 1998). The Service should generally insist that a Chapter 11 plan provide for full payment of the Service's genuine secured tax claims before the collection limitation period for the debt is due to expire (not including any by law suspension period while the Chapter 11 plan payments are being made as required by the plan) or that the plan be modified to provide the Service with the specific assurances described below that the collection period will not expire for a reasonable period of time after the plan payments are either completed or the plan payments of the tax debt fall into substantial default.

⁸ Even if B.C. § 1129(a)(9)(C) is amended, as proposed in bills still pending in Congress, to require full payment of priority taxes by a Chapter 11 plan within five years of the petition date, the Service still will not require any suspension or extension of the collection limitation period, except in the case of trust fund taxes or trust fund recovery penalties that were assessed at least five years before the taxpayer filed bankruptcy. This is because these are the only two types of priority federal taxes that could have been assessed more than five years before the debtor filed for bankruptcy which would still be entitled to priority claim treatment under B.C. § 507(a)(8), not including serial bankruptcy filings where the priority claim periods and the collection limitation periods should both have been suspended by the prior bankruptcy case.

The Service's second alternative is to insist that the taxpayer's Chapter 11 plan or the order confirming the plan specifically provide that the collection limitation period under the Internal Revenue Code will be suspended for particular tax debts for so long as the plan is in effect and not in substantial default, and for six months thereafter, specifically referencing I.R.C. § 6503(h)(2). Appropriate model plan or plan confirmation order language to accomplish this suspension result by a final order (in addition to the result arising by operation of law) could be worded along the following lines:

The period allowed to the Internal Revenue Service (IRS) under the Internal Revenue Code, 26 U.S.C. § 6502(a), to collect the assessed [income, employment, excise, and/or trust fund] taxes, plus interest, penalties, and any other additions thereon, which are still owed by the debtor(s) after the plan effective date for the periods specified in the [secured, priority, or general unsecured] allowed claim(s) of the IRS shall be suspended for the period of time that payment of these tax debts is made according to the plan, unless and until a substantial default of these plan payments for tax debts shall occur, and for six months thereafter, in accordance with 26 U.S.C. § 6503(h)(2). A substantial default regarding plan payments of a tax debt to the IRS shall have occurred when a payment of the tax debt required by the plan has not been timely made, the IRS has provided the reorganized debtor(s) with a written notice of the default, and the reorganized debtor(s) has/have failed to cure the default within [14, 30, or another specified number of] days of the IRS mailing the written notice of default to the reorganized debtor(s).

If possible, the Service should next detail in the plan its administrative remedies for collecting the debtor's unpaid taxes following a substantial default under the plan. We suggest model language along the following lines:

If the reorganized debtor(s) substantially default(s) on the payments of a tax debt due to the IRS under the plan, then the entire tax debts still owed to the IRS, shall become due and payable immediately and the IRS may collect these unpaid tax liabilities through the administrative collection provisions of the Internal Revenue Code.

Individual districts should feel free to modify the model plan or plan confirmation order language discussed above, as necessary or appropriate, to fit local practice or the circumstances of a particular case. However, if the collection limitation period is close to expiring (for a secured or trust fund priority tax claim) when the taxpayer files for bankruptcy, then the suspension period provided by law and/or by the model plan language suggested above may not provide the Service with much time after the taxpayer defaults on the plan to collect the tax at issue. In these circumstances, the Service may sometimes extend the collection limitation period for a sufficient additional time (indefinitely) by pursuing the third alternative described below.

A third alternative is to ask that the bankruptcy court enter a separate judgment in a contested matter proceeding at the same time the plan is being considered for confirmation, in order to reduce specific assessed federal tax debts to a “judgment” and thereby extend the collection limitation period for as long as the judgment remains enforceable, in accordance with the final sentence of I.R.C. § 6502(a). Once a federal tax is reduced to judgment, the lives of the judgment and of the tax lien are extended indefinitely and remain enforceable at any time, although refiling of a Notice of Federal Tax Lien (NFTL) for the debt will likely be required to maintain the NFTL’s priority against other liens under state law. See United States v. Overman, 424 F.2d 1142, 1146-7 (9th Cir. 1970).

The confirmation of a Chapter 11 plan is a “core” proceeding, for which bankruptcy judges are authorized to enter appropriate orders or judgments. See 28 U.S.C. §§ 157(b)(1) and (b)(2)(L); Official Bankruptcy Form 15 (Order Confirming Plan). Bankruptcy judges typically enter a simple “order” confirming a plan and the order ordinarily binds the debtor and the Service to the terms of the plan. However, a Chapter 11 plan or the order confirming the plan is not an appropriate vehicle or document for fixing the amount of a disputed tax claim against a debtor. See In re Taylor, 132 F.3d 256 (5th Cir. 1998); In re DePaolo, 45 F.3d 373 (10th Cir. 1995). On the other hand, bankruptcy judges are authorized to and often do enter core proceeding “judgments” with respect to a creditor’s bankruptcy claims which are contested as to amount or dischargeability, pursuant to 28 U.S.C. §§ 157(b)(1), (b)(2)(B), and (b)(2)(L). See In re Porges, 44 F.3d 159, 162-165 (2nd Cir. 1995); In re Kennedy, 108 F.3d 1015, 1017-8 (9th Cir. 1997); In re McLaren, 3 F.3d 958, 965-6 (6th Cir. 1993); In re Hallahan, 936 F.2d 1496, 1507-8 (7th Cir. 1991).

In order for a bankruptcy court ruling regarding the correct amount of a federal tax debt to represent a “judgment” that indefinitely suspends the collection limitation period applicable to the federal tax debt, we believe the court’s ruling should conform to B.R. 9021 (“Entry of Judgment”) and the other rules referenced therein. This means the judgment should result from an adversary or contested matter proceeding, with an identified “plaintiff” and “defendant.” The judgment should be set forth on a separate document. See Bankruptcy Procedural Form B 262, showing a sample “Notice of Entry of Judgment.” The judgment should be dated and entered on the bankruptcy court’s docket, and the Service should request that a copy of the judgment be indexed with the civil judgments of the district court. See B.R. 5003(a) and (c). The judgment should also state a sum certain due by the taxpayer for any tax years involved in the proceeding. See F.R.C.P. 58. Words along the following lines may be appropriate for the judgment document:

Ordered, Adjudged, and Decreed, that the indebtedness owed by the Debtor(s) to the Internal Revenue Service is (Non-Dischargeable or Not Discharged) and Judgment is entered in favor of the United States of America, against Debtor(s) [Name(s)] , in the amount of \$ (amount), representing a [tax year, type of tax (e.g., income, excise, trust fund), and type of claim, (e.g., secured or priority)]

_ tax debt, as well as accruing interest (“and penalties,” if applicable) from the date of (“the debtor’s bankruptcy petition” or “the debtor’s plan effective date,” depending on what the debtor will still owe the Service).⁹

The judgment alternative described above should extend the collection limitation period for a federal tax debt indefinitely. It may be appropriate for the Service to consider this alternative in at least two circumstances: (1) where the ordinary collection limitation period was close to expiring when the debtor filed bankruptcy, and six months following a substantial plan default will likely not be enough time to put the Service’s collection efforts back on the right track; and (2) when the motion for a judgment is coupled with a feasibility objection by the Service to a Chapter 11 plan that provides for an overly long payout period for the Service’s secured claim (in order to make the Service’s potential peril with respect to plan feasibility more clear to the debtor and to the court). In other circumstances, we understand that pursuing this potential judgment remedy may expend more of the Government’s limited resources than is cost effective.

Issue #3: As a back-up argument to the above positions, do we stand by our published advice in a prior case (involving an expired assessment statute after confirmation) that a confirmed Chapter 11 plan also generally provides the Service with contract rights that are superadded to (rather than substituted for) the tax debt collection rights that arise for the Service under the Internal Revenue Code?

Answer #3: Yes. In your request for advice, you noted our prior advisory opinion for GL:Br2-0605-93. See General Litigation Bulletin Advisory Opinion Summary (October 1993), GL:Br2-0605-93, answer #3 (publicly released on July 22, 1999, pursuant to I.R.C. § 6110 as amended by RRA 98 and reproduced at 1993 GLB LEXIS 3). The Service should not automatically concede that it must return to a taxpayer any Chapter 11 plan payments that it has received or is due to receive for a tax debt where the collection limitation period under the Internal Revenue Code is expired. If the collection

⁹ In a typical non-bankruptcy action in district court to reduce assessed taxes to judgment, the United States would compute the judgment amount to the date of judgment (e.g., including all prejudgment interest owed). In a bankruptcy case, the Service’s proof of claim for taxes being reduced to judgment would include interest and penalties only until the petition date. However, since post-petition interest is also non-dischargeable for underlying tax debts that are non-dischargeable in an individual’s debtor’s Chapter 11 case and such interest should also be paid when the Service’s claim is over-secured, the United States would want its judgment to reflect this post-petition interest still owed by the debtor to the Service from the petition date. On the other hand, for dischargeable or undersecured tax debts provided to be paid in installments by a Chapter 11 plan, the debtor’s liability for post-petition interest on the unpaid tax debt would not generally resume until the plan effective date (for interest after that date).

limitation period for the tax debt had not expired before the plan confirmation date,¹⁰ then we believe the confirmed Chapter 11 plan itself gives the Service “contract” remedies against the taxpayer that are separate from and “superadded” to (rather than substituted for) the remedies flowing from the debt’s continued character as a “tax.” As with other collection remedies or security instruments (such as bonds or mortgages) which the Service receives outside of the Internal Revenue Code to supplement the Service’s ability to collect a tax debt, the expiration of the collection limitation period for collecting the tax debt under the Internal Revenue Code does not terminate the Service’s ability to receive payment or collect the debt pursuant to its supplemental rights provided by the confirmed Chapter 11 plan. See United States v. John Barth Co., 279 U.S. 370 (1929) (involving a security bond); United States v. Martin Hotel Co., 59 F.2d 549 (8th Cir. 1932), cert. denied, 287 U.S. 651 (1932) (involving an escrow agreement) ; Golub v. United States, 74-2 U.S.T.C. ¶ 9566 (Ct. Cl. 1974) (involving a collateral agreement incident to an offer in compromise); Julicher v. IRS, 95-2 U.S.T.C. 50,379 (E.D. Pa. 1995), aff’d., 92 F.3d 1171 (3rd Cir. 1996) (involving a letter of credit); United States v. Citizens Bank, 50 F.Supp.2d 107 (Mag. Op. D.R.I. 1999), adopted, 83 A.F.T.R.2d 99-768 (D.R.I. 3-30-99) (involving a promissory note and mortgage).

Electronic Lien Filing

December 23, 1999
CC:EL:GL:Br1
GL-117390-99
UILC: 51.07.00-00

MEMORANDUM FOR DIRECTOR, OFFICE OF SPECIAL PROCEDURES
Attn: Michael L. Sollitto

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation)

SUBJECT: Electronic Lien Filing (ELF)

This advice is in response to your memorandum dated October 25, 1999, concerning the above subject. This document is advisory only and is not to be relied upon or otherwise cited as precedent.

ISSUE:

¹⁰ Testing whether the collection limitation period had expired by the “petition” date should ordinarily produce the same result as testing on the “confirmation” date, due to the undisputed suspension of the collection limitation period while the automatic stay is in effect.

Whether section 11-461 of the Arizona Revised Statutes is sufficient to permit electronic filing of notices of federal tax lien within the meaning of Treas. Reg. § 301.6323(f)-1(d)(2).¹¹

CONCLUSION:

Section 11-461 of the Arizona Revised Statutes is not sufficient to permit electronic filing of notices of federal tax lien within the meaning of Treas. Reg. § 301.6323(f)-1(d)(2).

FACTS:

In a memorandum dated October 25, 1999, you stated that the State of Arizona changed its legislation to include language that will allow the county recorders to accept electronic transmissions of the notices of federal tax lien.¹² You requested that our office review the language to determine if it is sufficient to allow Collection to proceed with plans to record tax liens with Maricopa County via electronic filing. We do not believe the language is sufficient to permit electronic filing of notices of federal tax lien within the meaning of Treas. Reg. § 301.6323(f)-1(d)(2). Accordingly, we suggest that additional legislation specifically authorizing such filings be sought.

LAW AND ANALYSIS:

The amended language of section 11-461, in relevant part, reads as follows:

11-461. Recording instruments; keeping records; identification;
location . . .

¹¹ Treas. Reg. § 301.6323(f)-1(d)(2) provides, in full, as follows:

Form 668 defined. The term "Form 668" generally means a paper form. However, if a state in which a notice referred to in § 301.6323(a)-1 is filed permits a notice of Federal tax lien to be filed by the use of an electronic or magnetic medium, the term "Form 668" includes a Form 668 filed by the use of any electronic or magnetic medium permitted by that state. A Form 668 must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose regardless of the method used to file the notice of Federal tax lien.

¹² Actually, in your memorandum you stated that the State of Colorado changed its legislation, however, the attached legislation you provided was for the State of Arizona.

C. The recorder may accept a digitized image of a recordable instrument for recording if it is submitted by a title insurer or by a title insurance agent as defined in section 20-1562, by a state chartered or federally chartered bank insured by the federal deposit insurance corporation, by an agency, branch or instrumentality of the federal government or by a governmental entity and the instrument from which the digitized image is taken conforms to all applicable laws relating to the recording of paper instruments.

The amended language above provides that a digitized image may be accepted for recording if “the instrument from which the digitized image is taken conforms to all applicable laws relating to the recording of paper instruments.” Section 11-469 of the Arizona Revised Statutes provides that “[a]n instrument shall be considered recorded from the time it is accepted for record, as provided by § § 11-461 and 11-480. In turn, section 11-480 provides that an instrument may be rejected for recordation if specific form and content requirements are not met. Although, section 11-480 uses the phrase “may be rejected”, we find the amended language of section 11-461(C) troublesome because, when read together with section 11-480, it is inconsistent with Treas. Reg. 301.6323(f)-1(d)(1) which provides that a notice of federal tax lien (NFTL) “is valid notwithstanding any other provision of law regarding the form or content of a notice of lien.” We recommend that section 11-461(C) be revised accordingly.

The Uniform Federal Lien Registration Act (Act) as adopted by Arizona is found in sections 33-1031 to 33-1035 of the Arizona Revised Statutes. The Arizona Act, which expressly authorizes the county recorders and the Secretary of State to file and record notices of federal tax lien and related certificates, may need to be revised to permit electronic lien filing. For instance, section 33-1034(C) requires that a NFTL and related certificates contain the information required by section 11-480. However, as previously discussed, this requirement is inconsistent with Treas. Reg. 301.6323(f)-1(d)(1).

We made changes to the Uniform Federal Lien Registration Act (1978) with 1982 amendments in order to make it a stand alone statutory authorization for electronic tax lien filings. We believe that the model language based on this Act will be of the greatest assistance for your purposes. However, before you proceed with ELF enabling legislation, we suggest you review the October 22, 1997, document, entitled Overview of the ELF Environment, as it introduces some of the various filing scenarios that you may want to consider.