



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Small Business/Self-Employed Division

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IRM 5.9.18.4
IRM 5.9.18.5.1

MEMORANDUM FOR DIRECTOR, CAMPUS FILING AND PAYMENT COMPLIANCE
DIRECTOR, ADVISORY AND INSOLVENCY

FROM: Scott D. Reisher /s/ **Scott D. Reisher**
Director, Collection Policy

SUBJECT: Determining Dischargeability of Late Filed Returns in Which a
Substitute for Return was Prepared under IRC § 6020(b)

The purpose of this memorandum is to reissue interim guidance dated October 1, 2010, with control number SBSE-05-1010-052, Determining Dischargeability of Late Filed Returns in Which a Substitute for Return was Prepared under IRC § 6020(b). Please disseminate this information to all affected personnel within your organization.

This memorandum is to provide guidance on determining dischargeability of a Form 1040 Individual Income Tax liability when a return was filed late and after the assessment of a Substitute for Return (SFR) under Section 6020(b) of the Internal Revenue Code (IRC) or during the assessment of the SFR. These procedures will be incorporated into Internal Revenue Manual (IRM) 5.9.2.9.1.2, IRM 5.9.17.7, IRM 5.9.18.4 and IRM 5.9.18.5.1. The procedures should be adhered to in all locations, except the 8th Circuit, which includes North Dakota, South Dakota, Nebraska, Iowa, Missouri, Minnesota and Arkansas.

Background

Section 523(a)(1)(B)(i) of the Bankruptcy Code provides that a bankruptcy discharge does not discharge a tax debt for which no return was filed. On September 2, 2010, the Office of Chief Counsel issued Chief Counsel Notice CC-2010-016, *Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities on Late Filed Returns*

and Returns filed After Assessment, to set forth the official position of the Service when a delinquent Form 1040 has been received either prior to or after an SFR assessment under IRC § 6020(b). The Notice makes clear that not every tax for which a return was filed late is non-dischargeable. Rather, dischargeability of a late filed return is determined based on the date the return was filed or the date of the assessment.

When the debtor submits a Form 1040 after the assessment under IRC § 6020(b), only the portion of the tax that was not previously assessed would be subject to discharge.

If the Form 1040 filed after the assessment reported no additional tax, or a tax decrease, no portion of the tax would be dischargeable. Thus, a specific tax year may have a portion of the liability that is subject to discharge and a portion that is excepted from discharge under section 523(a)(1)(B)(i).

Procedures

When there has been a substitute for return assessment made by Examination or the SFR Unit, the caseworker must determine if the outstanding liability is subject to discharge based on the attached tables.

In order to determine if the outstanding liability is subject to discharge, the caseworker must first determine if outstanding assessments are due to an SFR assessment under IRC § Section 6020(b) or from a tax return received by the Service. A transaction code (TC) 599 closing code (cc) 89 can indicate an "agreed SFR" or a "return secured." To determine if the TC 599 cc 89 is an "agreed SFR" or "return secured," the caseworker must consider the following:

- Is there a TC 976, TC 977 or TC 610 present? Generally, when a return has been received, a TC 976, TC 977 or TC 610 will be present on the module on Integrated Data Retrieval System (IDRS). The transaction date of the TC 976, TC 977 or TC 610 indicates the Service received date.
- If there is no TC 976, TC 977 or TC 610 present that clearly indicate that the Service has received a Form 1040, additional research must be conducted:
 - a) TXMODA must be reviewed for history items that indicate receipt of the tax return.
 - b) Account Management Services (AMS) may contain entries that indicate that the tax return has been filed or received, or may clearly state that no return was received and the IRC § 6020(b) was due to the receipt of a signed waiver agreeing to the assessment.
 - c) When the SFR was prepared by the Examination function, as indicated by the presence of a TC 300 on the TXMOD, there may be information present on IDRS through cc: AMDISA that indicates if a return was received or if a waiver was secured agreeing to the SFR assessment.

When the TC 599 cc 89 is present, and electronic research does not support that the debtor has submitted a tax return, the caseworker should treat the TC 599 cc 89 as an

"agreed SFR" and the assessments will be non-dischargeable as no return has been filed. In the event that the debtor has initiated a complaint to determine dischargeability or any other adversarial action, the specialist or advisor must order the assessment package including attachments. If the package cannot be secured, the TC 599 cc 89 will be treated as a filed return and applicable discharge rules will be applied. The caseworker should be aware that there are instances when the tax may be non-dischargeable but the penalties are dischargeable. Specifically, when the return due date, including extensions, is more than 3 years prior to the petition date, the penalties will be subject to discharge.

Conclusion

Effective immediately, Insolvency Specialists and Advisors, as well as CIO Tax Examiners, must determine dischargeability based on Chief Counsel Notice 2010-016. All complaints to determine dischargeability in which a substitute for return has been prepared by the Service under IRC § 6020(b) must be assigned to Field Insolvency for a referral to Area Counsel. These cases should not be referred directly to the U.S. Attorney or Department of Justice. The assessment package should be ordered upon receipt of the adversary proceeding; however, it is not necessary to wait for receipt of the assessment package before referring the case to Area Counsel. The package can be forwarded upon receipt. Contact Area Counsel with any questions regarding application of the discharge exception under section 523(a)(1)(B)(i), involving a Form 1040 filed during or after assessment of a SFR return.

If you have any questions regarding this Interim Guidance Memorandum, please contact me, or a member of your staff may contact Deborah Fowler, Insolvency Program Analyst, or Gae Canal, Insolvency Program Analyst.

Attachments (2)

cc: www.irs.gov

Chapter 13 Debtors (Post-BAPCPA)
Discharge Upon Completion of the Plan - Section 1328(a)

IF ...	THEN ...
1040 due within 3 years of petition date,	the 3 year rule is not applicable if provided for under the plan and debtor receives a discharge.
unagreed SFR,	the tax is non-dischargeable ; however, penalties may be dischargeable.
agreed SFR on or after 9/12/2005	tax is non-dischargeable ; however, penalties may be dischargeable.
No tax return has been filed by the debtor,	the tax is non-dischargeable ; however, penalties may be dischargeable.
1040 filed before the SFR assessment date and the filing date is within 2 years of the petition date,	the tax is non-dischargeable ; however, penalties may be dischargeable.
1040 filed before the SFR assessment date and the filing date is more than 2 years before the petition date,	the tax is dischargeable if provided for by the plan and all required payments were made.
1040 filed after the SFR assessment date, the filing date is within than 2 years of the petition date and there is a subsequent TC290 or TC300 with an additional tax assessment,	the caseworker must consider the original SFR assessment (TC290/TC300) and subsequent TC290/300 assessment separately. <ul style="list-style-type: none"> • The original assessment will be non-dischargeable. • The subsequent assessment will be non-dischargeable. Penalties may be dischargeable.
1040 filed after the SFR assessment date, the filing date is more than 2 years before the petition date and there is a subsequent TC290 or TC300 with an additional tax assessment,	the caseworker must consider the original SFR assessment (TC290/TC300) and subsequent TC290/TC300 assessment separately. <ul style="list-style-type: none"> • The original assessment will be non-dischargeable; however, penalties may be dischargeable. • Subsequent assessment will be dischargeable if provided for under the plan.
1040 filed after the SFR assessment date, the filing date is within 2 years of the petition date, and there is a subsequent TC290 or TC300 for \$.00, a TC291 or a TC301 with a tax decrease,	the total outstanding tax liability is non-dischargeable ; however, penalties may be dischargeable.
1040 filed after the SFR assessment date, the filing date is more than 2 years before the petition date and there is a subsequent TC290 or TC300 for \$.00, a TC291 or TC301 with a tax decrease,	the total outstanding tax liability is non-dischargeable ; however, penalties may be dischargeable.

**Chapter 11 and Chapter 7 Individuals
Chapter 13 Hardship Discharges under 1328(b)**

IF ...	THEN ...
the tax return is due, including extensions, within 3 years of the petition date,	the tax is non-dischargeable .
unagreed SFR,	the tax is non-dischargeable ; however, penalties may be dischargeable.
agreed SFR prior to 9/12/2005,	determine the date of the agreement (TC599cc89). <ul style="list-style-type: none"> • If within 2 years of the petition date, non-dischargeable • If more than 2 years of the petition date, dischargeable Penalties may be dischargeable.
agreed SFR on or after 9/12/2005,	tax is non-dischargeable ; however, penalties may be dischargeable.
no tax return has been filed by the debtor,	the tax is non-dischargeable ; however, penalties may be dischargeable.
1040 filed before the SFR assessment date and the filing date is within 2 years of the petition date,	tax is non-dischargeable ; however, penalties may be dischargeable.
1040 filed before the SFR assessment date and the filing date is more than 2 years before the petition date,	tax is dischargeable .
1040 filed before the SFR assessment date and the assessment date is within 240 days of the petition date,	tax is non-dischargeable ; however, penalties may be dischargeable.
1040 filed after the SFR assessment date, the filing date is within 2 years of the petition date and there is a subsequent TC290 or TC300 with an additional tax assessment,	the caseworker must consider the original SFR assessment (TC290/TC300) and subsequent TC290/TC300 assessment separately. <ul style="list-style-type: none"> • The original assessment will be non-dischargeable. • The subsequent assessment will be non-dischargeable Penalties may be dischargeable.
1040 filed after the SFR assessment date, and the subsequent TC290 or TC300 with an additional tax assessment was within 240 days of the petition date,	the caseworker must consider the original SFR assessment (TC290/TC300) and subsequent TC290/TC300 assessment separately. <ul style="list-style-type: none"> • The original assessment will be non-dischargeable. • The subsequent assessment within 240 days of the petition will be non-dischargeable. Penalties may be dischargeable.
1040 filed after the SFR assessment date, the filing date is more than 2 years before the petition date and there is a subsequent TC290 or TC300 with an additional tax assessment,	The caseworker must consider the original SFR assessment (TC290/TC300) separately. <ul style="list-style-type: none"> • Original assessment will be non-dischargeable. • Subsequent assessment will be dischargeable. Penalties may be dischargeable.
1040 filed after the SFR assessment date, the filing date is within 2 years of the petition date, and there is a subsequent TC290 or TC300 for \$.00, a TC291 or a TC301 with a tax decrease,	the total outstanding liability is non-dischargeable ; however, penalties may be dischargeable.
1040 filed after the SFR assessment date, the filing date is more than 2 years before the petition date and there is a subsequent TC290 or TC300 for \$.00, a TC291 or TC301 with a tax decrease,	the total outstanding tax liability is non-dischargeable ; however, penalties may be dischargeable.
1040 filed after the SFR assessment date, there is a subsequent TC290 or TC300 for \$.00, a TC291 or TC301 with a tax decrease, and the assessment date was within 240 days of the petition date,	the total outstanding tax liability is non-dischargeable ; however, penalties may be dischargeable