

COLLECTION, BANKRUPTCY AND SUMMONSES BULLETIN



Department of the Treasury

Office of Chief Counsel

Internal Revenue Service

Supreme Court Grants Certiorari in Craft and Young

On September 25, 2001, the United States Supreme Court agreed to hear two cases of interest to the Service: United States v. Craft and Young v. United States.

The first case, United States v. Craft, 130 F.3d 638 (6th Cir. 1998), and 233 F.3d 358 (6th Cir. 2000), cert. granted, Sup. Ct. No. 00-1831, presents the issue whether a federal tax lien arising from the tax debt of one spouse attaches to the rights of the spouse in property held in a tenancy by the entirety. Many states recognize tenancies by the entirety. In most of those states (Michigan, for example), creditors of one spouse may not reach property held by both spouses as tenants by the entirety. The property is considered to be owned by the marital unit, the entirety, not by the individual spouses. Only debts incurred by the marital unit may be satisfied from entireties property. The Sixth Circuit held in Craft that neither tenant by the entirety has an interest in the property to which the federal tax lien arising from the debt of only one spouse can attach. The result of decisions such as Craft is disparate treatment of taxpayers, since a taxpayer's interest in property held in any other form of joint ownership is subject to the federal tax lien. On appeal, the Service argued that in light of the Supreme Court's decisions in Drye v. United States, 528 U.S. 49 (1999), as well as United States v. Irvine, 511 U.S. 224 (1994), United States v. National Bank of Commerce, 472 U.S. 713 (1985), and United States v. Rodgers, 461 U.S. 677 (1983), older circuit authority holding that entireties property could not be reached by a the federal tax lien arising from the debt of one spouse should not be followed. The Sixth Circuit disagreed, however, finding that the Supreme Court decisions did not directly reject such cases and "had not so fundamentally changed the legal landscape." The Service subsequently petitioned for Supreme Court review.

The second case, Young v. United States, 233 F.3d 56 (1st Cir. 2000), cert. granted, Sup. Ct. No. 00-1567, raises the issue of whether the priority and discharge periods for taxes are tolled during the pendency of prior bankruptcy cases. The First Circuit found that the three year look-back period of B.C. § 507(a)(8)(A)(i) was tolled while the automatic stay was in effect during the Chapter 7 debtors' prior Chapter 13 case. This

made the taxpayers' tax liabilities nondischargeable pursuant to B.C. § 523(a)(1)(A). The taxpayers petitioned for certiorari and the Government acquiesced in the petition. The Supreme Court will resolve a longstanding split in the circuits on whether priority periods are automatically tolled during prior bankruptcy cases. The First Circuit and five other circuits support automatic tolling. Waugh v. IRS, 109 F.3d 489 (8th Cir. 1997), cert. denied, 522 U.S. 823 (1997); In re Taylor, 81 F.3d 20 (3rd Cir. 1996); In re West, 5 F. 3d 423 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994); In re Richards, 994 F.2d 763 (10th Cir. 1993); In re Montoya, 965 F.2d 554 (7th Cir. 1992). Three other circuits reject automatic tolling but hold that the bankruptcy court has equitable authority to toll priority periods on a case-by-case basis. Palmer v. United States, 219 F.3d 580 (6th Cir. 2000); Morgan v. United States, 182 F.3d 775 (11th Cir. 1999); In re Quenzer, 19 F.3d 163 (5th Cir. 1993). The bankruptcy legislation passed by both houses of Congress in 2001 would resolve this issue by amending section 507 of the Bankruptcy Code to expressly provide for automatic tolling, but the legislation is currently being held up in conference with no certainty of passage.

***Even where overpayment results from erroneous levy,
Service must offset overpayment against other outstanding federal debt***

In Significant Service Center advice issued August 1, 2001, the Office of Chief Counsel has stated that where an overpayment exists, I.R.C. § 6402(d) affords the Service no discretion to decide whether or not to offset the overpayment against an outstanding federal debt owed to another federal agency. This is true regardless of the fact that the funds constituting the overpayment were wrongfully obtained.

The Service levied on a taxpayer's wages; it was later determined that the levy was erroneous, as the taxpayer had no outstanding tax liability. Rather than refunding to the taxpayer the amount obtained by levy, the Service offset the amount against a debt that the taxpayer owed to another federal agency.

I.R.C. § 6402(a) states that the Service may credit, in the case of an overpayment, the amount of the overpayment and any interest allowed on the overpayment against any outstanding tax liability, and shall, subject to Section 6402(c), (d), and (e), refund any balance to the taxpayer. At issue in this case was whether Section 6402(d) affords the Service discretionary authority similar to that provided by Section 6402(a). Section 6402(d) requires the Service, upon receiving appropriate notice from another federal agency, to reduce the amount of any overpayment refundable to a taxpayer by the amount which constitutes a past-due legally enforceable debt to that agency. Because this provision uses the word "shall," the Service possesses no authority to exercise discretion when offsetting an overpayment against an outstanding federal debt; i.e., the offset is mandatory. If the taxpayer's overpayment exceeds the amount required to be offset under Section 6402(d), the balance may be refunded to the taxpayer (if not also subject to offset under Section 6402(c) or (e)).

CASES

1. **ASSESSMENTS: Deficiency notice**

Sklar v. Commissioner, T.C. Memo. 2001-251 (September 21, 2001) – Since a Notice of Deficiency was issued to the taxpayer in a timely fashion within the period for assessment, the running of the time for the Service to make an assessment was suspended during the period afforded the taxpayer to file a Tax Court petition. The Service's adjustment to the deficiency during this period was, accordingly, allowable.

2. **ASSESSMENTS: Validity**

Nicklaus v. Commissioner, 117 T.C. No. 10 (September 14, 2001) – Form 4340, Certificate of Assessments and Payments, need not be signed by an assessment officer of the Service for the assessment to be valid. Under Treas. Reg. 301.6203-1, only Form 23C, Assessment Certificate – Summary Record of Assessments, must be signed by an assessment officer.

3. **BANKRUPTCY CODE CASES: Allowance of Claims: Objections**
United States v. Johnston, 2001 U.S. Dist. LEXIS 13314 (N.D. Tex., August 16, 2001) – Debtor in Chapter 13 bankruptcy listed real property heavily encumbered by lien, so Service limited its secured claim to the debtor's equity (\$1,000), classifying the remaining \$39,000 of its claim as unsecured. The debtor also listed, as "personal property," a 1/3 interest in her deceased father's estate. When the Service learned, post-confirmation, that the estate included real property, it amended its secured claim to \$24,000, and the debtor objected. The bankruptcy court found the Service had adequate notice of the property, but the district court reversed. The court found the Service's amendment re-classifying its claim satisfied the requirements of Rule 7015. Further, the debtor's failure to properly schedule her interest in all of her real property required the bankruptcy court to equitably allow the Service to amend its claim.

4. **BANKRUPTCY CODE CASES: Appeals: Appeal to appellate panel, district court or court of appeals**

In re Northeast Management Services Inc., No. 99-CIV-191(LEK) (N.D.N.Y., August 6, 2001) – Ten-day period for appealing bankruptcy court's decision to district court runs from date of bankruptcy judge's initial decision, rather than date judge issued a clerical correction to the decision.

5. **BANKRUPTCY CODE CASES: Automatic Stay: Creation, perfection or enforcement of liens against property of debtor or estate**

Nordbrock v. United States, 2001 U.S. Dist. LEXIS 13135 (D. Ariz., July 30, 2001)(Order on reconsideration) – Where Service issued Notice of Seizure prepetition and did not take action on the Notice during the bankruptcy itself, Notice continued to be valid once automatic stay terminated and bankruptcy was over.

6. **BANKRUPTCY CODE CASES: Chapter 7 (Liquidation): Distribution of Property of the Estate: Priority Claims**
In re Weiner, No. 93-00889 (Bankr. D. Hawaii, August 21, 2001) – Since under Ninth Circuit law federal income taxes are “incurred” on the last day of the applicable taxable period, the post-petition taxes at issue in this case were incurred after the date of conversion to Chapter 7 and were, accordingly, properly treated as administrative expenses of the Chapter 7, rather than the Chapter 11, estate, payable pro rata with other Chapter 7 administrative expenses.
7. **BANKRUPTCY CODE CASES: Chapter 7 (Liquidation): Treatment of Certain Liens**
Barstow v. IRS, No. A00-0206 CV (JKS) (August 3, 2001) – Service’s lien which is contractual and judicial, rather than statutory, in nature is not subject to subordination pursuant to B.C. § 724(b).
8. **BANKRUPTCY CODE CASES: Chapter 13**
In re Bell, 2001 Bankr. LEXIS 1123 (Bankr. E.D. Cal., July 31, 2001) – Dismissal of Chapter 13 case was warranted where evidence showed that debtors filed five bankruptcy petitions over a ten-year period in order to thwart the Government in its legitimate efforts to collect taxes from the debtors.
9. **BANKRUPTCY CODE CASES: Collection of tax: Injunction against: Discharged Taxes**
LIENS: State law, effect of
In re Ready, No. 99-7964-8G7 (Bankr. M.D. Fla., September 7, 2001) – Where debtors lived on and assumed all expenses of real property for many years, and where they clearly intended to ultimately purchase the property, debtors were the equitable owners of the property under applicable state law as of the time they filed a Chapter 7 petition. Accordingly, federal tax liens filed prior to the bankruptcy continued to attach to the property after the underlying tax liabilities were discharged, and the Service could pursue collection against the property at that time, regardless of the fact that the debtors did not acquire legal title to the property until after the discharge.
10. **BANKRUPTCY CODE CASES: Exceptions to discharge**
In re Simone, 2001 Bankr. LEXIS 1091 (Bankr. E.D. Pa., August 9, 2001) – Applying the test established in In re Fegeley, 118 F.3d 979 (3d Cir. 1997), bankruptcy court determined that taxpayer’s decision to spend large amounts on luxury items during a particular tax year was tantamount to “intentionally and willfully” attempting to evade or defeat tax debts for a longer period, rendering the debts for that period excepted from discharge pursuant to B.C. § 523(a)(1)(C).

11. **BANKRUPTCY CODE CASES: Exceptions to discharge: Prepetition priority taxes**
COMPROMISE AND SETTLEMENT: Administrative procedures
United States v. Romagnolo, 2001 U.S. Dist. LEXIS 14666 (M.D. Fla., August 28, 2001) – Period offer in compromise was “pending” began when waiver of statute of limitations was accepted and offer was accepted for consideration, despite later discovery that offer was not in fact then processable. Accordingly, running of the 240-day period provided in B.C. § 507(a)(8)(A)(ii) was tolled from that time, rendering the taxes at issue excepted from discharge pursuant to B.C. § 523(a)(1)(A).
12. **BANKRUPTCY CODE CASES: Property of the estate**
In re Morris, 2001 U.S. App. LEXIS 18266 (6th Cir., August 13, 2001) – Where applicable state law imposes a constructive trust on a property interest, legal title to which is held by the debtor, the interest is properly excluded from the bankruptcy estate pursuant to B.C. § 541(d).
13. **BANKRUPTCY CODE CASES: Setoff (§ 553): Refunds: Taxes**
BANKRUPTCY CODE CASES: Statute of limitations on collection after assessment: Suspension under Bankruptcy Code § 108(c)
In re Crawford, No. 00-3190-13 (Bankr. W.D. Wisc., July 23, 2001) – Where Service effects a proper setoff pursuant to I.R.C. § 6402(a), voluntary payment rule is inapplicable, and Service is not required to offset a prepetition refund against a prepetition priority tax debt, but may offset the refund against a prepetition general unsecured tax debt. Also, the running of the priority period for a separate tax liability was tolled, pursuant to controlling case of In re Montoya, 965 F.2d 554 (7th Cir. 1992).
14. **BANKRUPTCY CODE CASES: Subordination**
In re Eufaula Industrial Authority, 2001 Bankr. LEXIS 1005 (BAP 10th Cir., August 21, 2001) – Where no evidence existed that bank engaged in conduct sufficiently egregious to meet the heightened standard of gross misconduct imposed by controlling Tenth Circuit case law on those who are not “insiders” of the debtor, bankruptcy court did not err in determining that bank’s claim should not be equitably subordinated to those of other creditors pursuant to B.C. § 510(c).
15. **COLLECTION DUE PROCESS**
Kintzler v. IRS, No. CV-S-01-0148-PMP (D. Nev., August 13, 2001) – Taxpayer was not improperly denied a collection due process hearing for the purpose of addressing the propriety of the Service’s assessment of a penalty for filing a frivolous return, where the taxpayer had a previous opportunity to initially contest the assessment but failed to do so at that time.

16. **LIENS: Notice: Filing**
COMPROMISE AND SETTLEMENT: Informal settlements
SUITS: Against the U.S. or employees: Other
Opdahl v. United States, 2001 U.S. Dist. LEXIS 14098 (D.D.C., August 16, 2001)
 – Service’s notices of federal tax lien were valid under I.R.C. § 6323(f) regardless of the fact that they were not “certified” under state law. Also, any settlement agreement entered into between the taxpayer and the Service was not a valid offer in compromise since it was not reduced to a writing, as is required by Treas. Reg. 301.7122-1. Finally, the taxpayer’s suit based on unauthorized collection pursuant to I.R.C. § 7433 was untimely since it was not brought within two years of the time the taxpayer had a “reasonable opportunity” to discover the alleged act of unauthorized collection.
17. **LIENS: State law, effect of**
Cooper Industries, Inc. v. Compagnoni, No. H-00-0702 (S.D.Tex., August 29, 2001) – Interest of former spouse in taxpayer’s ERISA plan primed that of the Service, since former spouse constituted a judgment lien creditor whose interest was perfected upon the issuance of the initial divorce court order awarding her the right to the ERISA benefits; whether or not she perfected her interest under applicable state law was irrelevant since ERISA provides its own prerequisites to distribution, and since the former spouse satisfied ERISA’s prerequisites.
18. **PENALTIES: Failure to collect, withhold or pay over: Responsible officer**
SUITS: Sovereign immunity
United States v. Bolus, No. 3:99-0484 (M.D. Pa., August 29, 2001) – Facts of record, particularly fact that named taxpayer had authority to instruct his managers to pay any taxing authorities, established that he was a person responsible for paying trust-fund taxes. Moreover, taxpayer’s counterclaim for setoff was dismissed, based on the doctrine of sovereign immunity, where taxpayer failed to show the existence of any statutory authority which unequivocally relinquished the Government’s immunity to a lawsuit of this nature.

The following material was released previously under I.R.C. § 6110. Portions may be redacted from the original advice.

CHIEF COUNSEL ADVICE

BANKRUPTCY CODE CASES: Allowance of Administrative Expenses

U.I.L. # 9.03.00-00

May 17, 2001

CC:PA:CBS:Br2
GL - 101092-01

MEMORANDUM FOR ASSOCIATE AREA COUNSEL
(SMALL BUSINESS / SELF-EMPLOYED) CC:SB:1:BRK

FROM: LAWRENCE H. SCHATTNER
Chief, Branch 2
(Collection, Bankruptcy & Summonses)

SUBJECT: Estate of [REDACTED]:
Deductibility of Administrative Expenses of Bankruptcy Estate

On March 21, 2001, you requested our advice on whether expenses of administering a Chapter 7 bankruptcy estate are properly deducted "above the line," or whether they should instead be deducted as an itemized deduction. As is discussed below, we believe that these administrative expenses can be deducted from gross income, "above the line."

ISSUE: Is the trustee of a Chapter 7 bankruptcy estate entitled to deduct expenses of administering the estate "above the line," as a deduction from gross income pursuant to I.R.C. § 67(e), or is he or she limited to deducting the expenses as an itemized deduction subject to the two-percent "floor" imposed on miscellaneous deductions pursuant to I.R.C. § 67(a)?

CONCLUSION: Section 67(e) applies to the administrative expenses of an individual debtor's estate in bankruptcy. Therefore, deductions for expenses that would not have been incurred if the property were not held by the bankrupt estate are allowable in arriving at adjusted gross income.

LAW AND ANALYSIS: I.R.C. § 1398 allows for special tax treatment for individuals who are in bankruptcy pursuant to Chapter 7 or Chapter 11 of the Bankruptcy Code. Section 1398(c)(1) sets forth the general rule that the taxable income of the bankruptcy estate is computed in the same manner as it is computed for an individual. Section 1398(e)(3) states that, except as otherwise provided in this section, the determination of whether any amount paid or incurred by the estate is allowable as a deduction shall be made as if the amount were paid or incurred by the debtor.

Section 1398(h)(1) provides, in pertinent part:

Any administrative expense allowed under section 503 of title 11 of the United States Code, ... to the extent not disallowed under any other provision of this title, shall be allowed as a deduction.

I.R.C. § 1398(h)(1).¹

Gross income is defined in I.R.C. § 61(a) as all income from whatever source derived, except as otherwise provided. Section 62(a) defines adjusted gross income as gross income minus the deductions listed in that subsection. Section 63(d) provides that itemized deductions are the deductions allowed under this chapter, other than the deductions allowed in arriving at adjusted gross income (i.e., those listed in Section 62(a)) and personal exemptions.

Section 67(a) provides that, for an individual taxpayer, miscellaneous itemized deductions are allowed only to the extent that the aggregate of such deductions exceeds two percent of gross income. Section 67(b) lists the itemized deductions that are not miscellaneous itemized deductions and thus not subject to the two-percent floor. Administrative expenses are not specifically listed in Section 62(a) or Section 67(b). Therefore, absent another provision, such expenses would be treated as miscellaneous itemized deductions and would be subject to the two-percent floor. However, Section 67(e) provides that deductions for costs paid or incurred in connection with the administration of an estate or trust that would not have been incurred if the property were not held in such trust or estate shall be treated as allowable in arriving at adjusted gross income.

In In re Miller, 252 B.R. 110 (Bankr. E.D. Tex. 2000), a bankruptcy court decided the issue you present in favor of the trustee, holding that no reason exists to render the Section

¹ B.C. § 503 specifies certain types of expenditures associated with the administration of a bankruptcy estate which are "allowed" in, or payable through, the bankruptcy case itself.

67(e) exception inapplicable to administrative expenses associated with bankruptcy estates. In Miller, the Service argued that bankruptcy estates are not encompassed by the “estates and trusts” contemplated by Section 67(e) and that, accordingly, the Section 67(e) exception should be viewed as inapplicable to bankruptcy estates. The court rejected this argument, however, reasoning that the Service’s interpretation of the statute was inconsistent with a plain reading of its language. The court, in addition, noted that including costs incurred by bankruptcy estates among those deductible under Section 67(e), by effectively reducing the amount on which trustees are required to pay income taxes, actually is consistent with Congress’s stated objective “to maximize distributions to creditors whose rights have been altered as a result of the filing of a bankruptcy case.”²

Other decisions have upheld the Service’s position that administrative expenses constitute itemized deductions. See, e.g., In re Sturgill, 217 B.R. 291 (Bankr. D. Oregon 1998)(court determined that administrative expenses were miscellaneous itemized deductions rather than business expenses of the estate, but did not address Section 67(e)). See also Pettigrew v. United States, 1999 Bankr. LEXIS 1797 (Bankr. N.D. Georgia 1999)(parties did not dispute deductibility of administrative expenses as itemized deductions). However, none of these decisions has addressed the applicability of Section 67(e) to these expenses. Moreover, the legislative history of Section 1398, which was added to the Internal Revenue Code by the Bankruptcy Tax Act Of 1980, is of no assistance in this regard. Thus, our opinion is that Section 67(e) applies to the administrative expenses of an individual debtor’s estate in bankruptcy so that the deductions for expenses that would not have been incurred if the property were not held by the bankruptcy estate are allowable in arriving at adjusted gross income.³

² In Miller, the Service also argued that deductibility under Section 1398(h) should be viewed as limited by Section 1398(e)(3), maintaining that since administrative expenses could not have been deducted by the debtor (since they would not have existed before the bankruptcy petition was filed), they should not be deductible by the bankruptcy trustee. The bankruptcy court held that Section 1398(h), and not Section 1398(e)(3), applies when the amount at issue constitutes an administrative expense of a bankruptcy estate.

³ In Mellon Bank v. United States, 47 Fed. Cl. 186 (Cl. Ct. 2000), the court held that fees for investment advice paid by trusts were subject to Section 67(a), and that Section 67(e) did not apply because the taxpayers could not establish that the fees would not have been incurred if the property were not held in trust. However, in O’Neill v. Commissioner, 994 F.2d 302 (6th Cir.1993), the Sixth Circuit held that because the trustee lacked experience in investment matters and was required to meet fiduciary duties imposed by state law, the investment advisory fees would not have been incurred if the property were not held in trust. Thus, according to the Sixth Circuit, a trust or estate may deduct payments of investment advisory fees in full under Section 67(e).

Thank you for requesting our advice on this matter. Our response has been coordinated with the Office of Associate Chief Counsel (Income Tax & Accounting). If you require further assistance, please call 202-622-3620.

cc: Associate Chief Counsel (Income Tax & Accounting)
Attention: Sean M. Dwyer

LIENS: Filing

July 31, 2001

CC:PA:CBS:Br2
GL-107824-01

ULIC: 51.07.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE) AREA 3

FROM: Joseph W. Clark
Senior Technician Reviewer, Branch 2
(Collection, Bankruptcy and Summonses)

SUBJECT: Joint Notice of Federal Tax Lien and Tenancy by the Entirety

This Chief Counsel Advice responds to your memorandum dated June 18, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

Whether our previous advice recommending against the use of a joint notice of federal tax lien ("joint notice") when spouses who own property as tenants by the entirety are jointly and severally liable on a tax debt, bars the filing of joint notices.

CONCLUSIONS

Although we agree with our previous recommendation, there is no legal reason why Florida Collection cannot continue its long standing practice of issuing both individual and joint notices of federal tax lien.

FACTS

Previously, we addressed a hypothetical situation where separate but identical trust fund recovery penalties (“TFRP” or “penalty”) assessments under section 6672 of the Internal Revenue Code are made against a husband and a wife who are sole officers of a corporation. In this hypothetical the husband and wife own real property as tenants by the entirety in a jurisdiction where the liens arising from the separate TFRP assessments attach to the entireties property. For reasons discussed below, we concluded that although a joint notice may be sufficient to provide constructive notice to third-party creditors, joint notices are not necessary.

Your memorandum asks us to further clarify the meaning of our previous advice. You note that the long standing practice in Florida has been to file both separate and joint notices in cases where both spouses are jointly and severally liable for a TFRP. According to your memorandum, Florida collection personnel feel that recording joint notices leads to increased collections and that innocent third-party creditors would be disadvantaged by a change in practice.

LAW AND ANALYSIS

In Brown v. United States, 591 F. Supp. 1136 (5th Cir. 1979) the court of appeals held that section 6672 creates a joint and several liability against all responsible officers subject to TFRP. Thus, each delinquent responsible officer is independently liable for the entire amount of the penalty.¹ In our view, joint notices are inconsistent with the idea that section 6672 imposes an individual liability subject to an individual assessment.

A notice of federal tax lien does not create a lien against property. Rather, a lien is created the moment a person required to pay taxes fails to do so. I.R.C. § 6321. The lien exists regardless of whether notice is filed. However, Congress has seen fit to provide protection to certain classes of creditors, thus a lien will not be valid against a purchaser of a security interest, a mechanic’s lienor, or a judgment lien creditor unless notice has been properly filed. I.R.C. § 6323(a).

A notice of federal tax lien is sufficient if it gives constructive notice of the existence of the government’s lien. 3 A.L.R. 3d 633, See United States v. Sirico, 247 F.Supp. 421, 422 (S.D.N.Y. 1965). Thus, individual notices filed against a husband and a wife will alert a reasonable third party to the possibility that the entireties property is encumbered by a joint liability. Augello v. United States, 93-2 U.S. Tax Cas. (CCH) ¶ 50, 391 (M.D. Pa. 1993). Yet, there is no legal imperative that only individual notices be filed. As long as the notice gives sufficient constructive notice of the existence of the government’s lien then it satisfies the requirements of section 6323(f) of the Internal Revenue Code.

¹However, it is the Service’s policy to collect the unpaid trust fund taxes only once. IRM 5.17.7.1.11(1).

If Florida Collection personnel wish to continue to file both individual and joint notices they may do so. Our previous advice was meant as a recommendation, which is evidenced by our discussion about what a joint notice should contain if one is filed. Nothing in that advice precludes continuation of the current Florida practice.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any further questions please contact the attorney assigned to this matter at (202) 622-3620.

LIENS: Filing: Place to file

August 1, 2001

CC:PA:CBS:BO1
GL-1384071-01
UIL: 51.07.06-01

MEMORANDUM FOR ASSOCIATE AREA COUNSEL-BOSTON

FROM: Alan C. Levine
Chief, Branch 1 Collection, Bankruptcy & Summonses
CC:PA:CBS:BO1

SUBJECT: Filing Notices of Federal Tax Lien

The Chief Counsel Advice responds to your Email dated July 24, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUE

Whether the Internal Revenue Service (“Service”) should continue to file Notices of Federal Tax Lien (“NFTL”) with the clerk of the United States District Court for Massachusetts (“District Court”)?

CONCLUSION

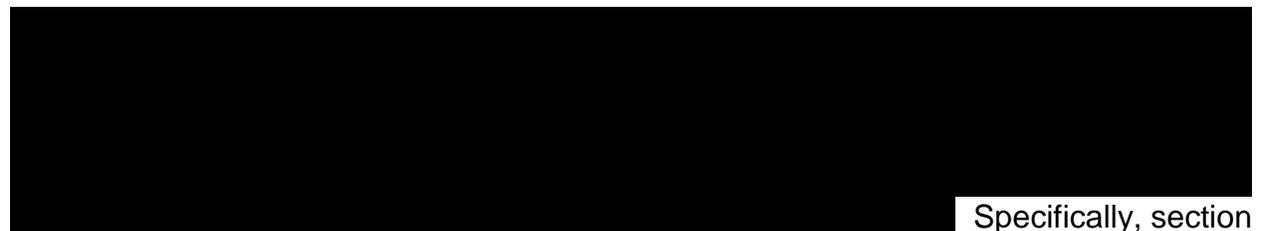
The Service should continue its practice of filing NFTLs encumbering personal property with the clerk of the District Court. Recent amendments to the Massachusetts state law have not designated one office for filing federal tax liens within the state for personal property. See I.R.C. § 6323(f)(1)(B).

LAW AND ANALYSIS

I.R.C. § 6323(f)(1)(A)(ii) provides that, in the case of personal property, a NFTL shall be filed in the one office within the state as designated by state law. Recognizing that some states had not designated one office for filing liens, Congress provided in section § 6323(f)(1)(B) that the Service must file its NFTL in the clerk's office of the District Court for the judicial district in which the property is situated.

In Rev. Rul. 84-148, 1984-2 C.B. 303, the Service responded to a change in Massachusetts law creating one office for the filing NFTLs on personal property, namely Mass. Ann. Law, ch. 255, § 39B. Rejecting the prior practice of filing a NFTL with the clerk of the District Court to encumber personal property, Rev. Rul. 84-148 held that “[n]otices of federal tax liens with respect to personal property in Massachusetts shall be filed in the office of the State Secretary, or in the case of persons other than estates, trusts, and corporations and partnerships having a principal executive office in Massachusetts, in the office of the clerk of the city or town where the person against whose interest the lien applies resides at the time of filing of the notice of the lien.”¹

The Massachusetts legislature, however, subsequently repealed section 39B, effective December 21, 1983. In response, the Service promulgated Rev. Rul 85-89, 1985-2 C.B. 326, revoking Rev. Rul. 84-148. In Rev. Rul. 85-89, the Service stated that due to the repeal of section 39B, it would continue to file NFTLs with respect to personal property only in the clerk's office of the District Court, and “[i]f state law is again amended to comply with section 6323(f), such liens will be filed only in the one office designated by state law.” Thus, in the present case, unless an amendment to Massachusetts law designates one office for the filing of a NFTL encumbering personal property, Rev. Rul. 85-89 is still effective and the Service should file NFTLs encumbering personal property with the clerk of the District Court.



Specifically, section 9-501(a)(2) provides that a creditor can perfect his security interest by filing at the office of the state secretary.²

¹ Mass. Ann. Laws ch. 36, § 24 designates one office for filing a NFTL on any real property.

² Previously, Mass. Ann. Law ch. 106, § 9-401, provided, in part, that a creditor could perfect his security interest only by filing at both the office of the state secretary and the town clerk's office.

In our opinion, section 9-501 does not designate one office for the filing of a NFTL. The filing of a financing statement to perfect a state security interest or agricultural lien is not germane to determining whether state law has specifically designated one office for the filing of a NFTL. G.C.M. 39408, dated September 9, 1985, explains that NFTLs were filed with the clerk of the District Court because there was “no Massachusetts statutory provision prescribing where federal tax liens on personal property should be filed.” In other words, in 1985, the Service’s position was that the Commercial Code of Massachusetts was irrelevant for determining whether one office had been designated within the state for the filing of a NFTL encumbering personal property. Today, the Commercial Code of Massachusetts is equally irrelevant for resolving whether state law has designated one office for the filing of a NFTL. In short, that Massachusetts has adopted provisions of the Uniform Commercial Code for filing financing statements to perfect a security interests does not mean that state law designates one office for the filing of a NFTL on personal property.³ To meet the one office rule of section 6323(f), state law must address the NFTL, not a commercial security interest. See Mass. Ann. Law ch. 36, § 24 (designating one office for the filing of a NFTL on real property). Accordingly, Rev.Rul. 85-89 still applies, and NFTLs encumbering personal property should be filed with the clerk of the District Court.

Please call us if you have further questions.

³ In a memorandum dated May 16, 2001, to Kevin Brown, Division Counsel (SBSE), CBS similarly opined that revisions to the Uniform Commercial Code, including § 9-501, will not affect the location for filing a NFTL.

OFFER IN COMPROMISE

CC:PA:CBS:Br2
GL-127877-00

UILC: 17.00.00-00

April 12, 2001

MEMORANDUM FOR MICHAEL W. BITNER
ASSOCIATE AREA COUNSEL (SB/SE)

FROM: Joseph W. Clark, Senior Technician Reviewer
Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Advisory Opinion—Offers in Compromise / Processability

This memorandum responds to a request for advice received from your office on January 22, 2001. You have asked us to consider whether an in-business taxpayer may compel the Service to process an offer in compromise under a prior version of the processability rules which were in effect before January 1, 2000, and if not, whether the Service has the discretion to process the offer. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent. This writing may contain privileged information.

ISSUE

When an in-business taxpayer submits an offer, and the processability rules pertaining to deposit, payment, and filing of employment taxes for the previous two quarters, change before the offer is accepted for processing, may the taxpayer compel the Service to apply the former processability rules? If not, may the Service exercise its discretion to process the offer?

CONCLUSION

Although the taxpayer may not compel the Service to process the offer under the prior rules, the Service may exercise its discretion to process the offer.

BACKGROUND

Your correspondence with us indicates the taxpayer, an in-business corporation, entered into an installment agreement to pay its delinquent employment taxes. After making only one payment, the taxpayer defaulted on the agreement, and after being notified by the Service that the agreement would be terminated, the taxpayer filed a Form 911 Application for Taxpayer Assistance with the Office of the Taxpayer Advocate

on March 1, 1999, requesting to file an offer in compromise. Collection received the taxpayer's offer on June 1, 1999, and returned it on June 14, 1999, along with a letter characterizing the offer as non-processable, and informing the taxpayer that in order to process the offer, an in-business taxpayer must demonstrate compliance by filing and full paying employment taxes for the preceding two quarters. The caseworker for the Taxpayer Advocate then met with Collection and the taxpayer's power of attorney to discuss the offer requirements, and the caseworker advised the power of attorney that the taxpayer needed to become current for the preceding two quarters.

On November, 12, 1999, the power of attorney requested additional time to provide proof of compliance, and after a meeting on December 8, 1999, the caseworker set a deadline of December 31, 1999. The power of attorney provided some documentation on December 23, 1999. On January 4, 2000, the caseworker called to request the remainder of the documentation, and requested the taxpayer become current by January 18, 2000, and provide the rest of the documentation by January 24, 2000. The power of attorney provided the balance of the documentation on January 22, and January 25.

On January 25, 2000, the caseworker told the power of attorney that as of January 1, 2000, the rules for processing an offer in compromise from an in-business taxpayer had changed and that the new rule required the taxpayer to be "timely" rather than "current." The taxpayer advocate then asked the manager of the offer group to bypass the timeliness requirement, but he declined to do so. You have asked our advice on whether in this situation, the taxpayer may compel the Service to process his offer in compromise under the prior rule, and if not, may the Service exercise its discretion to process the offer.

DISCUSSION

The Secretary's authority to compromise cases is contained in section 7122 of the Code, which provides, "The Secretary *may* compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense." I.R.C. § 7122(a) (emphasis added). Treasury regulations pertaining to that provision likewise state, "The Secretary may exercise his discretion to compromise any civil or criminal liability arising under the internal revenue laws. . . ." Treas. Reg. § 301.7122-1T(a)(1). The Secretary's authority to compromise is, thus, discretionary. The Secretary has delegated this discretionary authority to the Commissioner, who has then re-delegated it to various officials throughout the Service. See Delegation Order No. 11.

The Secretary has set the threshold requirements for consideration of a proposed compromise, and all offers in compromise must be submitted according to the prescribed procedures. See Treas. Reg. § 301.7122-1T(c)(1). Further, a taxpayer may not compel the Service to accept an offer for processing. See United States v. Garden State National Bank, 607 F.2d 61, 73 (3d Cir. 1979) ("the refusal of the Service to enter into compromise negotiations, standing alone, does not amount to 'bad faith'"); United

States v. Smith, 1979 U.S. Dist. LEXIS 12471 (S.D.N.Y. 1979)(the decision whether to discuss settlement is discretionary and cannot be compelled by a court); Leonhard v. Mitchell, 473 F.2d 709, 713 (2^d Cir.) cert. denied, 412 U.S. 949 (1973)(mandamus cannot force a discretionary act).

In keeping with the twin policy goals of the offer in compromise program to obtain the amount potentially collectible at the earliest possible time and at the least cost to the government, IRM 5.8.3.1(2) now provides that Service personnel will “work with taxpayers to provide an opportunity to perfect . . . defects or errors . . . rather than returning the offers as unprocessable.” The manual provides that as soon as possible upon receipt, offers should be sorted into three categories: processable, non-processable, and those which need to be perfected (usually due to missing information). IRM 5.8.3.3. If it is processable, the offer becomes pending, and if the offer is not processable, then the Service returns it to the taxpayer along with a letter detailing the reason. Treas. Reg. § 301.7122-1T(c)(2); IRM 5.8.3.3(1).

In order for the Service to process an offer to compromise employment taxes from an in-business taxpayer, the manual requires the taxpayer “must have demonstrated compliance by having *timely* filed and *timely* deposited the preceding two quarters,” and “*timely* paid all federal tax deposits due in the quarter in which the offer was submitted.” IRM 5.8.3.3(4) (emphasis added). Prior to January 1, 2000, the manual required the taxpayer be “current” for the past two quarters. The manual further provides the Service may not deviate from the processability criteria without obtaining written approval from the National Office. IRM 5.8.3.3.1(1).

In the current case, the facts as you have presented them indicate the taxpayer first submitted the offer in compromise on June 14, 1999. When the Service sent its first letter to the taxpayer indicating non-processability, it requested the taxpayer demonstrate compliance by filing and full paying its employment taxes for the preceding two quarters. For several months, the caseworker worked with the taxpayer’s power of attorney to perfect errors in the offer so that it could be processed. On several occasions, the caseworker requested the taxpayer become “current,” and on January 25th, the power of attorney submitted documentation that the taxpayer had done so. Although the criteria changed before the taxpayer submitted documentation of compliance, nothing in the Code or the Regulations prevents the Service from exercising its discretion to process an offer in such a case based on the criteria existing when the offer was first submitted. Further, policy considerations favor such processing, because neither the Service nor the taxpayer would benefit from lengthening the process by requiring timeliness for the next two quarters before allowing the offer to be processed. Such a requirement in this case would have no practical effect on the taxpayer’s future compliance, because Form 656 requires as a condition to the offer that taxpayers agree to comply with future filing and payment requirements in order to avoid default of the compromise agreement.

Furthermore, once a taxpayer’s offer has been accepted for processing, the Service’s procedures do not establish a presumption that the offer will be accepted, nor do they

presume rejection as the likely result. Rather, each proposed compromise should be evaluated and considered on its own merits, in light of the facts and circumstances of the case. In each case, the Service has the discretion to decide whether to accept or reject the offer. Provided the Service exercises sound judgment and discretion when exercising its authority to compromise, we do not believe processing this offer undercuts the Service's overall compromise policy and objectives, and therefore, would not be an abuse of its discretion. Thus, provided the Service obtains the required written permission from the National Office pursuant to IRM 5.8.3.3.1(1), the Service has authority to process the offer.

If you have any further questions, please contact the attorney assigned to this matter at (202) 622-3620.

OFFER IN COMPROMISE: Default

June 12, 2001

CC:PA:CBS:Br2
GL-121378-01

UILC: 17.15.00-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE), AREA 1, BOSTON

FROM: Lawrence H. Schattner
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Offer in Compromise -

This Chief Counsel Advice responds to your memorandum dated March 14, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent. This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ISSUE:

Where a husband and wife compromise a joint and several income tax liability, does violation of the future compliance provisions of the compromise agreement by one spouse affect the other spouse's right to the continued benefits of the compromise agreement?

CONCLUSION:

No. Upon violation of the future compliance provision by one spouse, the compromise can be terminated only with respect to the non-compliant spouse. The compromise continues to be binding with respect to the spouse who remains in compliance with its terms.

BACKGROUND:

The taxpayer and her ex-husband reached a compromise with the Service for their 1990 and 1991 tax liabilities. Following payment of the agreed upon compromise amount, the taxpayer met her obligations under the compromise, including the obligation to comply with all of the filing and payment provisions of the Internal Revenue Code for five years after acceptance. The taxpayer's ex-husband, however, did not remain in compliance and, as a result, the compromise was terminated by the Service.

Following termination of the compromise, the taxpayer filed a request for relief from joint and several liability under the equitable relief procedures of section 6015(f). That request was denied. The taxpayer subsequently submitted the offer in compromise which gave rise to this request. The taxpayer offered a nominal sum in compromise of her liability for the years 1990 and 1991. The offer proposes compromise based on "effective tax administration,"¹ on the theory that it would be inequitable to hold her accountable for a liability resulting from her ex-husband's non-compliance.

Your request for advice asks whether the standard compromise agreement, Form 656, can be altered prior to acceptance of this compromise. Specifically, you ask whether

¹ Temporary regulations issued July 19, 1999, expanded the Service's authority to compromise beyond the traditional bases of doubt as to collectibility or doubt as to liability. See Temp. Treas. Reg. § 301.7122-1T. Where there are no grounds for compromise on collectibility or liability grounds, a compromise may be entered into to promote effective tax administration, where: (1) collection of the full liability would create economic hardship within the meaning of section 301.6343-1 of the Treasury Regulations; or (2) exceptional circumstances exist such that collection of the full liability would be detrimental to voluntary compliance by taxpayers. Temp. Treas. Reg. § 301.7122-1T(b)(4). No such compromise may be entered into where it would undermine future compliance with the tax laws. Id.

the standard language waiving refunds for years up to and including the year of acceptance can be stricken from the form. See Form 656, Offer in Compromise, Item 8(g) (Rev. 1-2000). However, having reviewed the facts as you have presented them, we have concluded that the taxpayer was relieved of liability for the years in question upon completion of the terms of the compromise, notwithstanding the non-compliance by her ex-husband. Therefore, we recommend that the compromise at issue be returned to the taxpayer with the explanation that she has no liability to be compromised for those years.²

LAW & ANALYSIS:

Acceptance of an offer in compromise by the Service conclusively settles the liability of the taxpayer or taxpayers specified in the offer. Temp. Treas. Reg. § 301.7122-1T(d)(5). Following acceptance, neither the Service nor a taxpayer may reopen the case except where false information was submitted, the taxpayer's ability to pay was concealed, or there was a mutual mistake of material fact sufficient to set aside the compromise agreement. See id. at (d)(5)(i)-(iii). Thus, if the taxpayer has complied with her obligations under the compromise agreement, the years in question have been conclusively resolved and the taxpayer is no longer liable for any unpaid balance.

The Service apparently concluded that the future compliance provision of the compromise was violated. That provision reads, in part: "I/we will comply with all provisions of the Internal Revenue Code relating to filing my/our returns and paying my/our required taxes for 5 years or until the offered amount is paid in full, whichever is longer." Form 656, Item 8(d). The compromise was terminated upon the failure of the taxpayer's ex-husband to comply with this provision. The question, then, is whether the non-compliance by the taxpayer's ex-husband constituted breach of the agreement by the taxpayer. As is explained below, we do not believe that it did. We have concluded, therefore, that both the Service and the taxpayer remain bound by the prior compromise agreement.

Agreements to compromise federal tax liabilities have generally been interpreted by the courts by applying contract principles. See United States v. Feinberg, 372 F.2d 352 (3d Cir. 1967); United States v. Lane, 303 F.2d 1 (5th Cir. 1962). Where parties jointly agree to be bound to a contract or other legally operative document, there is a general

² With regard to whether a provision can be struck from the standard compromise agreement, the Service has a firm policy against the consideration of compromises where the pre-printed terms of the Form 656 have been altered. See IRM 5.8.3.3(6). Local deviation from processability criteria is not permitted without prior written approval from the Office of Compliance Policy, SB/SE, in the National Office. See IRM 5.8.3.3.1(1). In any event, whether a certain term must be included in a compromise is a policy matter, rather than a legal one. We recommend that the local offer group be directed through appropriate channels to their National Office contact for guidance on whether the terms of the Form 656 are subject to local variation.

presumption that they incur a single, jointly held, obligation. See 17A Am Jur 2d, Contracts § 430. However, whether an obligation is joint, joint and several, or several must ultimately be determined by reference to the intent of the parties, as evidenced by the language of the agreement and the subject matter to which it relates. See id. at § 427. The term at issue in the compromise incorporated into the agreement the filing and payment requirements of the Internal Revenue Code. Those requirements are not presumed to be joint and several as a general matter. There is no requirement that parties who filed jointly in the past continue to do so, nor that married taxpayers file jointly at all. See I.R.C. § 6013(a) (“A husband and wife may make a single return jointly.”) (emphasis added). Only if taxpayers choose to file a joint return is the obligation to pay joint and several. See I.R.C. § 6013(d)(3).

It would not be reasonable to assume that the Service and the taxpayer, when making continued compliance with the tax laws a condition of the compromise, intended to alter or expand her compliance obligations. Thus, we conclude that the compliance provision of the compromise agreement was several. The taxpayer and her ex-husband were each individually required to comply with the tax laws, just as they would have been in the absence of a compromise agreement. The taxpayer met her obligation to remain in compliance, therefore the Service is bound by the terms of the compromise and the taxpayer has no remaining liability for the taxes specified in the compromise agreement.

The IRS Restructuring and Reform Act of 1998 (RRA 1998) contains a non-Code provision supporting this conclusion. The Act required that the Secretary of the Treasury prepare a statement that would “provide notice to taxpayers that in the case of a compromise terminated due to the actions of 1 spouse or former spouse, the Internal Revenue Service will, upon application, reinstate such compromise with the spouse or former spouse who remains in compliance with such compromise.” RRA 1998, P.L. 105-206, § 3462(d)(2), 112 Stat. 685, 765-66 (1998). This requirement of notice does not appear to be limited to compromises made after the enactment of the statute. Rather, it appears Congress believed compromises terminated for this reason should be reinstated for the benefit of the compliant spouse even where the compromise was made prior to RRA 1998's enactment.

We hope that this response has been helpful. If you have any questions or need further assistance, please contact the attorney assigned to this matter at (202) 622-3620.