



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

OFFICE OF
CHIEF COUNSEL

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May 22, 2001

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE)

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

SUBJECT: Advisory Opinion—Claims in Escrow / Violation of Stay

This memorandum responds to a request for advice received from your office on February 22, 2001. You have asked us to consider whether the Service violates the automatic stay when it issues a Form 10492 Notice of Federal Taxes Due to an escrow company involved with a taxpayer's refinancing of non-estate property during a Chapter 13 bankruptcy. 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

In a Chapter 13 case, does the Service violate the debtor's automatic stay when it issues a Form 10492 Notice of Federal Taxes Due to an escrow company refinancing the debtor's non-estate property?

CONCLUSION

No. Because Form 10492 is informational, rather than coercive or threatening, and the debtor initiated the communication from the Service in order to refinance non-estate property, the Service does not violate the stay when it provides Form 10492.

BACKGROUND

You state that this issue frequently arises in the context of a Chapter 13 debtor operating under a confirmed plan. The debtor wishes to refinance property (which is not a part of the bankruptcy estate), usually in order to obtain funds to complete the plan early or to secure a more favorable interest rate. In cases where the debtor intends to use the refinancing proceeds to buy out future plan obligations,

both the Chapter 13 Trustee and the debtor's counsel usually know about the transaction. In other cases, however, the debtor's counsel may not be involved.

The escrow company performing the transaction requests a lien payoff amount from the Service, and the Service responds by providing a Form 10492 Notice of Federal Taxes Due. Form 10492 is informational in nature. It contains the identity of the taxpayer and the sums due for taxes secured by lien on the property, and it includes calculations for interest and penalties. Form 10492 further states that the Service will file a certificate of release of Federal Tax Lien upon payment of the amount due. Because the property being refinanced is legally vested in the debtor, not the Bankruptcy estate, court approval has not been requested.

DISCUSSION

Bankruptcy Code § 362(a)(5) provides that the automatic stay arises immediately upon filing of the bankruptcy petition, prohibiting "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien arose before the commencement of the case" Section 362(a)(6) further prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. . . ." The stay extends to property of the estate until it is no longer property of the estate, and with respect to other acts, it continues until the case is closed or dismissed, or a discharge is granted or denied. B.C. § 362(c). When a Chapter 13 plan is confirmed, B.C. § 1327 (b) states that all estate property vests in the debtor, unless the plan or confirmation order provides otherwise.

The automatic stay has three dimensions: it protects the debtor, it protects the debtor's property, and it protects the property of the bankruptcy estate. In re Chugach Forest Products, 23 F.3d 241, 246 (9th Cir. 1994). The purposes of the automatic stay are to facilitate the debtor's rehabilitation by protecting the debtor from collection and other harassing actions by creditors, and to provide for orderly liquidation of the debtor's assets in order to assure that all creditors are treated equally. Morgan Guaranty Trust Co. v. American Savings & Loan Ass'n, 804 F.2d 1487, 1491 (9th Cir. 1986), cert. denied 482 U.S. 929 (1987). Although the language "any act" is broad, courts limit the scope of the stay in reference to its purposes. See Checkers Drive-in Restaurants v. Commissioner, 51 F.3d 1078, 1082 (D.C. Cir.), cert. denied, 516 U.S. 866 (1995); Chugach, 23 F.3d 241, 245 (9th Cir. 1994) ("Thus, while seemingly broad in scope, the automatic stay provisions should be construed no more expansively than is necessary to effectuate legislative purpose."). In Rett White Motor Sales Co. v. Wells Fargo Bank, 99 B.R. 12, 15 (N.D. Cal. 1989), the court found "simply no language in Section 362(a) designed to stay actions initiated by the debtor."

Courts have further allowed creditors to send letters offering to continue conducting business with the debtors if they reaffirm their debt. See In re Brown, 851 F.2d 81

(3d Cir. 1988); In re Duke, 79 F.3d 43 (7th Cir. 1996). In these cases, the courts have determined such communications do not violate the stay, provided they are not threatening or coercive. As the court described in Brown, “[t]he respite is not from communication with creditors, but from the threat of immediate action by creditors, such as foreclosure or a lawsuit.” Brown, 851 F.2d at 86. See also, In re Spaulding, 116 B.R. 567, 570-71 (S.D. Ohio 1990) (“Letters that are isolated and informational are less likely to result in violations of the automatic stay. . . .”).

In Morgan Guaranty, 804 F.2d at 1491, the court considered whether presentation of a note to the debtor’s bank violated the automatic stay. After considering the legislative purpose for the stay, the court concluded:

The mere act of presentment does not interfere with orderly administration of the estate, the debtor’s “breathing spell,” or the status quo. Presentment cannot be characterized as harassment, particularly where the creditor presents its notes to the payor bank, rather than to the debtor We conclude that the language and purposes of section 362(a) do not bar mere requests for payment unless some element of coercion or harassment is involved.

Thus, case law clearly indicates that communications from creditors do not violate the stay in the absence of threats or coercion. Therefore, responding to an escrow company’s request for a lien payoff amount with a Form 10492, consisting merely of a factual statement of the amount the debtor owes the Service, the method to calculate interest, and the property to which the lien has attached, does not violate the stay.

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