



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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OFFICE OF
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MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SB/SE:5 (PHOENIX)

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

SUBJECT: Refiling a Notice of Federal Tax Lien and the Automatic Stay

This Chief Counsel Advice responds to your request for advice dated December 5, 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) violates the automatic stay by refiling a notice of federal tax lien after a bankruptcy petitioner has been filed in a jurisdiction different from where the original notice was filed when a taxpayer acquired real property in the new jurisdiction prior to the bankruptcy petition.

CONCLUSION

Although generally refiling a notice of federal tax lien during bankruptcy does not violate the automatic stay, to the extent the refiling constitutes an original filing against the newly acquired real property the Service does violate the stay.

FACTS

You have asked us to comment on the following scenario. Taxpayer has an outstanding tax liability for the 1990 tax year, which the Service assessed on December 1, 1991. Taxpayer resides in County A. In 1997, the Service filed a notice of federal tax lien (NFTL) in County A, perfects the Service's lien against all of Taxpayer's property in that county and all of Taxpayer's personal property where ever located. I.R.C. § 6323.

In June 1999, Taxpayer takes all of his personal property and moves to County B in another state. Taxpayer purchases a new home in County B and properly notifies

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the Service of its change in residence. The Service does not file an NFTL in County B.

In January 2001, Taxpayer files a Chapter 11 bankruptcy petition in the new state. The Service wants to refile its NFTL in both County A and County B in accordance with section 6323(g)(2)(B).

LAW AND ANALYSIS

When Taxpayer failed to pay his liability after notice and demand, a federal tax lien attached to all of Taxpayer's property and rights to property. I.R.C. § 6321. This includes property acquired after the lien came into existence, such as Taxpayer's new home. Glass City Bank v. United States, 326 U.S. 265 (1945). The Service does not need to file an NFTL in order for its lien to attach, however, filing protects the Service's interests against a certain class of creditors. I.R.C. § 6323(b). Once the Service properly files an NFTL for personal property it is effective against the personal property wherever it goes, including personal property acquired after a taxpayer moves to a new jurisdiction. I.R.C. § 6323(f)(2)(B); In re Eschenbauch, 267 B.R. 921 (2001). For real property, however, an NFTL must be filed at the property's physical location. I.R.C. § 6323(f)(2)(A). Thus, the NFTL filed in County A is not effective against the real property later acquired in County B.

You are concerned that refiling the NFTL in County B could be construed as perfecting the Service's lien interest in Taxpayer's new home in violation of the automatic stay. The automatic stay bars creditors from taking any act to create, perfect or enforce any lien against property of the estate or against property of the debtor to the extent the lien secures a pre-petition claim. B.C. § 362(a)(4), (5). The stay also bars any action to collect or recover a pre-petition debt against the debtor. B.C. § 362(a)(6).

Normally, refiling an NFTL, by itself, is not a violation of the automatic stay. United States v. Sayers, 43 B.R. 437, 439 (W.D.N.Y 1984). Refiling does not create, perfect or enforce a lien, "[r]ather, this purely ministerial act merely continue[s] a previously created and perfected lien and preserve[s] the status quo." Id. There is no indication in the statutory language or legislative history that the automatic stay prohibits acts to extend, continue or renew otherwise valid statutory liens. In re Morton, 866 F.2d 561, 564 (2d Cir. 1989). This is consistent with the purpose of the automatic stay. In re Larson, 979 F.2d 625, 627 (8 Cir. 1992); Morton, 866 F.2d at 564; Sayers, 43 B.R. at 439. The automatic stay is designed to maintain the status quo by preserving what remains of the debtor's solvent estate while providing for equitable distribution among the creditors. Sayers, 43 B.R. at 439. Refiling an NFTL does not harm the debtor and does not grant the Service any preference that it did not already have prior to the bankruptcy. Id.

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The problem in the scenario you have presented is that refiling the NFTL will give the Service a preference it did not have prior to the bankruptcy by perfecting its lien in Taxpayer's new home. In essence, the refiling will constitute an original filing of an NFTL against the real property, which is a violation of the automatic stay.



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 call the attorney assigned to this matter at (202) 622-3620.