



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

OFFICE OF
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MEMORANDUM FOR SBSE ASSOCIATE AREA COUNSEL (RICHMOND)

FROM: Mitchel S. Hyman
Senior Technician Reviewer, Branch 1
(Collection, Bankruptcy & Summonses)

SUBJECT: Taxpayer X

This memorandum responds to your May 9, 2002 request for advice. This document may not be used or cited as precedent. I.R.C. § 6110(k)(3).

LEGEND:

Taxpayer X
Number A
Amount A \$
Date A
Date B
Date C
Date D
Date E

ISSUE:

When a taxpayer files for bankruptcy after property has been seized but before the scheduled sale, should the Internal Revenue Service (Service) release the property when the automatic stay precludes conducting the sale within the time period set forth in I.R.C. §§ 6335(d) and 6335(e)(2)(F)?

CONCLUSION:

Although there is no authority in either the Internal Revenue Code or Bankruptcy Code for tolling this period, this period is inapplicable because the sale is precluded as a matter of law. As soon as possible after the bankruptcy petition is filed, the Service

must make a determination whether to release the subject property or protect its interest in such property in the bankruptcy proceeding, such as by seeking relief from the automatic stay to continue the sale. If the Service obtains relief from the automatic stay, it may issue a new notice of sale and conduct the sale when there is no longer a bankruptcy preclusion.

FACTS:

The facts which you have provided are as follows: On Date A, the Service seized Number A parcels of unimproved real estate belonging to the taxpayer for nonpayment of income taxes totaling approximately \$Amount A. Notice of sale was given to the taxpayer on Date B, and public notice was given by publication on Date C. The sale was scheduled for Date D, at 10:30 a.m. On Date E, the taxpayer filed a petition for relief under Chapter 11 of the Bankruptcy Code. The Service could not then proceed with the sale because the filing of a bankruptcy petition operates as a stay “of any act to collect, assess or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case.” 11 U.S.C. § 362(a)(6). Instead, the sale was adjourned pursuant to I.R.C. § 6335(e)(2)(F) and the regulations thereunder.

You determined that there would be insufficient time to obtain an order from the bankruptcy court granting relief from the automatic stay in order to permit the sale to continue within the section 6335(e)(2)(F) adjournment period. You requested our office’s advice in order to determine whether the seizure should be released. We informally agreed with your office’s determination to release the seizure in your case, as the subject property could simply be resealed and resold once the automatic stay had been lifted with minimum additional harm or cost to the Service.

LAW AND ANALYSIS:

The provisions governing administrative sale of seized property are found in I.R.C. § 6335. In particular, section 6335(d) provides that “[t]he time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b).”

Section 6335(e)(2)(F) provides that the Secretary by regulations shall prescribe the manner and conditions of sale of property, including “[u]nder what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).” The applicable regulation merely reiterates this statutory language and provides that “... the date of the [adjourned] sale shall not be later than one month after the date fixed in the original notice of sale.” Treas. Reg. § 301.6335-1(c)(2). Section 6335(e)(1)(D) further provides that if, at the sale, the property is not sold to the highest bidder or deemed sold to the United States, it “shall be released” to the owner.

There is no provision in either the Internal Revenue Code, Treasury Regulations, or Bankruptcy Code for tolling of the time periods in sections 6335(d) and 6335(e)(2)(F). We initially considered whether section 108 of the Bankruptcy Code might provide authority for tolling the period for administrative sale or adjournment while the automatic stay is in effect, but concluded that it was inapplicable. Section 108 of the Bankruptcy Code operates to toll certain nonbankruptcy limitations periods while a bankruptcy case is pending. Specifically, section 108 provides:

[e]xcept as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of -

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362 . . . with respect to such claim.

B.C. § 108(c). The plain language of section 108(c) applies to time frames for commencing or continuing civil actions in court. Generally, courts agree that this section does not apply to non-litigation matters. See Hazen First Street Bank v. Speight, 888 F.2d 574, 577 (8th Cir. 1989) (holding that 108(c) cannot toll the expiration of a contractual subordination agreement); In re Vassilowitch, 72 B.R. 803, 807 (Bankr. D. Mass. 1987) (holding that 108(c) cannot toll the period for exercising a purchase option). The Supreme Court has recently determined that limitations periods can be tolled by courts applying their equitable powers in cases where a claimant has actively pursued his or her judicial remedies or where a party's misconduct causes the claimant to miss a deadline. Young v. United States, 122 S. Ct. 1036, 1041 (2002). Even if those factors were applicable to the present case, however, the Court's analysis in Young would still not support equitable tolling as the period for administrative sale is not a limitations period.

Although we have been unable to find any authority for tolling the subject provisions, we conclude that, even without such tolling, the Service was not required to release the property seized in your case. It is our position that where the sale may not be conducted as a matter of law due to the taxpayer's bankruptcy, the sale may be cancelled, rather than adjourned. As there is no adjournment of sale, the limitations in section 6335(e)(2)(F) do not apply. Furthermore, as the sale never takes place, section 6335(e)(1)(D) does not require the seized property to be released.

The timing of adjournments of sales has been addressed by the Ninth Circuit in Anderson v. United States, 44 F.3d 795 (9th Cir. 1995). In Anderson, a property owner brought an action to enjoin a sale of real property seized. A sale had been properly

scheduled for an earlier date. At that time, several bidders attended but none of them had the required 20 percent cash or equivalent down payment. Accordingly, the revenue officer decided to postpone the sale for approximately one month. On the date of the rescheduled sale, no bidders came. The revenue officer again postponed the sale. The Ninth Circuit held that, because the sale did not take place within 40 days of the public notice or a month thereafter, the Government was bound to release the property back to the owner, pursuant to I.R.C. § 6335(e)(1)(D).

The Government argued that there was a distinction between “adjournment” and “postponement” for purposes of section 6335. In Anderson, the Government argued that the sale was not adjourned but was postponed, which can be done without limitation. The court rejected this distinction.

The Ninth Circuit in Anderson was specifically criticizing decisions made by the Service to delay sales:

Congress did not adopt a policy of giving the IRS discretion to sell the property when, in its discretion, sale would be desirable. It adopted a different policy—“fish or cut bait”. Congress told the Secretary to provide for terms and conditions of sale by regulation, and told the Secretary that those regulations could not allow adjournments of a sale of more than one month. These express limitations are inconsistent with the IRS’s preferred interpretation, that it may delay sales indefinitely.

Anderson, 44 F.3d at 799. Anderson does not address the situation in which the Service is precluded from conducting the sale as a matter of law.

Thus, Anderson is distinguishable from the facts of the present case. Anderson does not provide explicit or controlling authority for the position that the Service must return seized property if a noticed sale of such property is barred by the automatic stay. The Ninth Circuit concluded in Anderson that I.R.C. § 6335(e)(1)(D) makes it mandatory for the Service to return property to the owner if the property is not sold to a bidder or purchased by the United States at the sale. If the automatic stay bars the Service from conducting the sale after the sale has been noticed, then section 6335(e)(1)(D) does not apply since that section can only be applicable if there has been a sale. ^{1/} Therefore, the Anderson decision is not controlling in situations where a sale is never held.

^{1/} The Anderson court indicated that for purposes of section 6335(e)(1)(D), a “sale” takes place on the date advertised in the notice of sale when an agent of the Service actually appears to conduct the sale. The Service argued that a “sale” does not take place until the employee actually starts the sale. However, if no sale is convened because of the automatic stay, there would be no “sale” under either definition.

In cases where an owner of seized property files a bankruptcy petition after the Service has noticed the sale of such property, the Service should make a determination as soon as possible whether to release the seizure. If the Service decides to retain the property, it should take immediate action in the bankruptcy proceeding to protect its interest in the subject property. Property seized prior to bankruptcy but not sold is part of the bankruptcy estate subject to turnover. B.C. § 541(a)(1); United States v. Whiting Pools, 462 U.S. 198 (1983). As a policy matter, it makes sense that creditors cannot, on their own, sell property of the estate that might be necessary for effective reorganization. See id. at 203. Therefore, the Bankruptcy Code provides secured creditors holding seized but unsold property alternative ways to protect their interests. For example, secured creditors can request adequate protection of their interests. B.C. § 363. The bankruptcy court can place restrictions on the trustee's ability to sell or use the property. Whiting Pools, 462 U.S. at 204. Creditors can also request the bankruptcy court to lift the automatic stay and allow sale of the seized property to continue. See B.C. § 362(d). It is the Service's practice to take advantage of these alternative remedies as soon as possible after the automatic stay takes effect. See IRM 25.17.4.1.

To summarize, we conclude that where a taxpayer files for bankruptcy protection after property has been seized and sale of that property noticed, but before the date of the sale, the Service is not required to release the property back to the petitioner. The provisions of I.R.C. §§ 6335(d) and 6335(e)(2)(F) are not tolled by the bankruptcy, but are inapplicable to the situation where the Service is precluded by the automatic stay from continuing the sale. It is our view that section 6335(d) was meant to delineate rules concerning the specific "time" and "place" of sale, not to make a sale mandatory once public notice has been issued. We believe Congressional intent was that the sale be conducted soon after the public notice, in order to attract the most potential bidders and generate maximum sale proceeds. Cancellation of a sale due to a bankruptcy filing, issuance of a new notice of sale after the automatic stay is lifted, and conducting the new sale within the statutory time period, is consistent with that intent. See IRM 5.10.5.3(5). This Chief Counsel advisory was coordinated with Branch 2, Collection, Bankruptcy and Summonses. If you have further questions, please call 202-622-3610

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



