

**Office of Chief Counsel  
Internal Revenue Service**

**Memorandum**

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date: April 06, 2005

to: Associate Area Counsel (Salt Lake City)  
(Small Business/Self-Employed)

from: Chief, Branch 2  
(Collection, Bankruptcy & Summonses)

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subject: Bankruptcy Extension of Time Under I.R.C. § 6213(f)

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

**ISSUE**

You have requested advice on how to calculate the assessment statute expiration date (ASED) in a situation where the taxpayer has filed successive bankruptcies. Specifically, you have asked how the ASED should be determined when the Service issues a statutory notice of deficiency while the automatic stay of a bankruptcy case is in effect, the case is dismissed, and the taxpayer commences another bankruptcy case before the expiration of the suspension period provided for by I.R.C. § 6213(f)(1).

**CONCLUSION**

The Service cannot assess a tax until after the taxpayer is given an appropriate opportunity to file a petition with the Tax Court for redetermination of the deficiency, pursuant to I.R.C. § 6213(a). The running of the 90-day period for filing a Tax Court petition is, pursuant to I.R.C. § 6213(f)(1), suspended while the taxpayer is prohibited by reason of the bankruptcy case from filing a petition, plus for 60 days thereafter. Pursuant to B.C. § 362(a)(8), the automatic stay prohibits the commencement or continuation of a Tax Court case. The 90-day period begins or resumes running 60 days after the automatic stay terminates. If the taxpayer files a subsequent bankruptcy case within such 60-day period, the portion of the 60-day period that has not yet run is not "tacked on" to the period for filing a Tax Court petition. If the taxpayer files

a subsequent bankruptcy once the 60-day period has run, but before the entire 90-day period has run, the portion of the 90-day period that has not yet run begins to run 60 days after the second bankruptcy ends. Once the period for filing a Tax Court petition has run and the taxpayer defaults, the suspension of the assessment period ends 60 days later, pursuant to I.R.C. § 6503(a)(1).

### LAW AND ANALYSIS

Determination of the ASED where a statutory notice of deficiency is filed either before or during a bankruptcy case is addressed in Rev. Rul. 2003-80, 2003-2 C.B. 83.

As the revenue ruling states, section 362(a) of the Bankruptcy Code provides that certain acts are automatically stayed upon the filing of a bankruptcy petition. Section 362(a) does not stay either the issuance of a notice of deficiency or the assessment of a tax by the Service. See B.C. § 362(b)(9)(B), (D). Section 362(a) does, however, stay the commencement or continuation of a Tax Court proceeding concerning the debtor. B.C. § 362(a)(8). Pursuant to section 362(c)(2), the stay of any act under subsection (a), except an act against property of the estate, terminates upon the earliest of the time that the bankruptcy case is closed, the time the case is dismissed, or the time a discharge is granted or denied.

Section 6501(a) of the Internal Revenue Code generally affords the Service three years from the time a return is filed to assess the tax for the return period. Under section 6503(a)(1), the running of the section 6501(a) assessment period is suspended for any period during which the Service is prohibited from making an assessment, including the period during which a Tax Court proceeding is pending, and for 60 days thereafter.<sup>1</sup>

Section 6213(a) generally affords the taxpayer 90 days from the time a notice of deficiency is issued to file a petition with the Tax Court for redetermination of the

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<sup>1</sup> Section 6503(h)(1) of the Internal Revenue Code provides that the running of the period of limitations on assessment is suspended while the Service is prohibited by a bankruptcy case from making an assessment, and for 60 days thereafter. Prior to 1994, section 362(a)(6) of the Bankruptcy Code, which prohibits assessment of claims against a debtor, generally operated to prevent the Service from making assessments while the automatic stay was in effect. Section 362(b)(9)(D), which provides that the filing of a bankruptcy petition does not stay the making of tax assessments, was added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994 and is effective with regard to bankruptcy cases commenced on or after October 22, 1994. With the addition of section 362(b)(9)(D), the Service is no longer directly precluded by the automatic stay from assessing taxes during the pendency of bankruptcies. Thus, section 6503(h)(1) no longer has any impact on the running of the assessment period. We would note that the Service is still prohibited pursuant to section 6213(a) from assessing a deficiency during the 90-day period after the mailing of the notice of deficiency and if a Tax Court petition is filed, then until the time expires for appealing the decision or if a bond is posted, until that decision becomes final.

deficiency. Section 6213(a) prohibits the Service from assessing the deficiency during the 90-day period. Section 6213(f)(1) states that, in any bankruptcy case:

the running of the time prescribed in subsection (a) for filing a [Tax Court petition] shall be suspended for the period during which the debtor is prohibited by reason of [the bankruptcy case] from filing [a Tax Court petition], and for 60 days thereafter.

In order to properly calculate the period for which the time to file a Tax Court petition is suspended under section 6213(f)(1), we need to determine whether the 60-day period runs before counting time from the prohibition period of section 6213(a). The Tax Court has indicated on several occasions that the 60-day period is counted first before beginning the count of the prohibited 90-day period under section 6213(a). In Howard v. Commissioner, T.C. Memo. 1998-300, the taxpayer filed a Chapter 13 bankruptcy on June 14, 1991, imposing an automatic stay on any Tax Court proceedings. A notice of deficiency was issued on February 21, 1992, for the 1989 tax year. A notice of deficiency was issued on June 23, 1993, for the 1990 and 1991 tax years. The Chapter 13 case was dismissed on July 24, 1996, lifting the automatic stay. The taxpayer filed a Chapter 7 bankruptcy on December 6, 1996, imposing a new automatic stay on Tax Court proceedings. The Tax Court found at the time of the imposition of the new automatic stay that the taxpayer had 15 days left of the 150-day period under section 6213(f)(1). The Tax Court derived this calculation by counting the 60-day period first. Upon the dismissal of the Chapter 7 case on April 7, 1997, and termination of the automatic stay, the court found the taxpayer had a total of 75 days to file a timely petition. This calculation consisted of a new 60-day suspension period prescribed in section 6213(f)(1), plus 15 days representing the unexpired portion of the filing period that remained prior to the date that the taxpayer filed his second bankruptcy petition. The Court has consistently indicated, at least in dicta, that the 60-day period runs before you begin to count any portion of the prohibited period of section 6213(a). See Zimmerman v. Commissioner, 105 T.C. 220 (1995); Smith v. Commissioner, 96 T.C. 10 (1991); McClamma v. Commissioner, 76 T.C. 754 (1981); Clevenger v. Commissioner, T.C. Memo. 1998-37; Sicari v. Commissioner, T.C. Memo. 1997-104; see also Rev. Rul. 2003-80, supra.

This is consistent with a reading of section 6213(f)(1) which provides that the running of the 90-day period for filing a Tax Court petition is suspended for the time the debtor is prohibited by reason of the bankruptcy case (the automatic stay) from filing a Tax Court petition and for 60 days after lifting of the stay. The wording of section 6213(f)(1) suggests that the 60-day “grace period” afforded by section 6213(f)(1) applies to each bankruptcy case a taxpayer files, with the result that a new 60-day period begins running each time the automatic stay terminates in a bankruptcy case.<sup>2</sup>

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<sup>2</sup> In contrast, the taxpayer is afforded only one 90-day period for filing a Tax Court petition; i.e., the 90-day period does not “reset” each time a bankruptcy or other event occurs. This is because, in contrast to the 60-day suspension period afforded by section 6213(f)(1), the onset of the 90-day period for filing a Tax Court petition is

The issue presented by your request for advice may be illustrated by the following example set forth therein.

The taxpayer filed a timely tax return. Thus, the ASED normally would have been

However, the taxpayer filed a bankruptcy petition on

On , while the automatic stay was still in effect, the Service issued a notice of deficiency for

The bankruptcy petition was dismissed on . The automatic stay had not terminated prior to this date.

On , the taxpayer filed a second bankruptcy petition.

The second bankruptcy case was dismissed . The automatic stay had not terminated prior to this date.

On , the taxpayer filed a third bankruptcy petition. The third bankruptcy case remains open and the automatic stay is still in effect.

The Service's issuance of a notice of deficiency on , normally would have triggered the running of the 90-day period for the taxpayer to file a petition with the Tax Court for redetermination of the deficiency pursuant to section 6213(a). The automatic stay, however, was in effect at the time of issuance and the taxpayer was prohibited by B.C. § 362(a)(8) from filing a Tax Court petition. Thus, the running of the 90-day period was suspended pursuant to section 6213(f)(1). The first bankruptcy case was dismissed on , terminating the automatic stay as of that date pursuant to B.C. § 362(c)(2), and ending the prohibition on filing a Tax Court petition. The suspension of the running of the 90-day period for filing a Tax Court petition, however, continued for another 60 days pursuant to section 6213(f)(1). The suspension continued until 60 days after the automatic stay terminated, that is, until . The counting of the 90-day period began on , and ran to , the commencement of the second bankruptcy case. Thus, as of the commencement of the second bankruptcy case, 75 (90-15) days remained of the

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triggered by issuance of the notice of deficiency, rather than by anything connected to a bankruptcy. Thus, while the running of the 90-day period may be suspended, pursuant to statute, because of events related to bankruptcy, it is not "reset" by these events. See I.R.C. § 6213(a).

<sup>3</sup> It is assumed throughout this memorandum that all dates occur on days other than Saturdays, Sundays, or holidays.

90-day period for filing a Tax Court petition.

This means that, in your example, once the second bankruptcy case was dismissed on 03, the days remaining to file a Tax Court petition would begin running 60 days after , or on . In your example, the taxpayer filed a third bankruptcy petition on , 21 days later. Thus, as of the filing of the third bankruptcy petition, there remains only days of the prohibition period for filing a Tax Court petition. The automatic stay imposed by the third bankruptcy case is still in effect. Once the automatic stay terminates in this bankruptcy case, the days will begin running 60 days after termination of the automatic stay. Assuming no further bankruptcies are filed within days of the termination of the automatic stay, and assuming the taxpayer does not file a Tax Court petition, the suspension of the assessment statute of limitations will end 60 days after that, pursuant to section 6503(a)(1). On the following day, whatever remained of the assessment statute as of the date the notice of deficiency was issued (approximately ) will begin running. If no other events occur that suspend the running of the statute of limitations on assessment, the ASED will occur once that period has fully run.

Although the issue is not presented either specifically by the example you provided or generally by your request for advice, we note that if a taxpayer files a second bankruptcy petition within 60 days after the automatic stay terminates in the first, the “unexpired” portion of the 60-day suspension afforded by section 6213(f)(1) is not “tacked on” to the suspension ultimately affecting determination of the ASED. In other words, if the taxpayer in your example had filed his second bankruptcy petition on , rather than , the days remaining of the section 6213(f)(1) 60-day period would not be added to the 60-day suspension afforded by section 6213(f)(1) for the second bankruptcy case. Our view is based on the fact that this situation involves suspension periods that overlap, rather than suspension periods that run consecutively. The periods overlap in that the section 6213(f)(1) suspension period resulting from the second bankruptcy case (for the duration of the automatic stay in the second bankruptcy case + 60 days) starts to run before the suspension period resulting from the first bankruptcy case has stopped running. The time during which the periods overlap should operate to suspend the running of the period for filing a Tax Court petition, and thus, the running of the assessment statute, only once.

This rationale is employed in case law addressing an analogous issue involving overlapping suspension periods of the collection statute of limitations when successive offers in compromise are submitted. In United States v. Morgan, 213 F. Supp. 137 (S.D. Tex. 1962), each offer in compromise form submitted by the taxpayer included an agreement to suspend the running of the collection statute for the period during which the offer was pending, the period during which any installment remained unpaid, and for one year thereafter. The taxpayer in Morgan submitted an offer in compromise for the Service’s consideration in April 1954. In June 1955, before the Service acted on the offer, the taxpayer submitted an amended offer. Both offers were rejected by the Service in August 1955. In January 1956, less than one year after the rejection, the

taxpayer submitted a second offer, which was amended in May 1956. This offer was accepted in September 1956. The Government maintained that the suspension of the running of the collection statute contained in each offer should be read as extending the limitations period for the number of days the Service held each offer under consideration, as well as for an additional 365 days for each offer. The district court observed that "... the net effect of the Government's contention is to calculate separately each period of the statute's interruption; and to tack one on to the other, thus treating them as though they were consecutive." 213 F. Supp. at 139-140. In rejecting this construction of the waivers, the court stated:

It seems sufficient answer to this argument to point out that this is not the way the waiver reads; and that it fails to distinguish between an agreement to extend the statutory period for a given number of days, on the one hand, and an agreement that the operation of the statute may be suspended or interrupted during an uncertain interval, on the other.

Id. at 140. In a later case presenting the same legal issue, United States v. Newman, 405 F.2d 189 (5<sup>th</sup> Cir. 1968), the United States Court of Appeals for the Fifth Circuit recognized, albeit in a footnote, that the Government had abandoned the position it had taken in Morgan, and again distinguished between a suspension of the running of the collection statute and an extension of the CSED. 405 F.2d at 194 n.6. See also United States v. Malkin, 317 F.Supp. 612, 614 n.4. (E.D.N.Y. 1970) (period of overlap of suspension periods resulting from multiple offers in compromise counted only once).

As was the case with the suspensions in Morgan, the section 6213(f)(1) suspensions under consideration do not have the effect of extending the period for filing a Tax Court petition (and ultimately the period for assessment) for a set number of days and, as in Morgan, any period of overlap of the suspension periods should be counted only once. Accordingly, the unused portion of the 60-day suspension period from the first bankruptcy case is not tacked on to the period for filing a Tax Court petition. Our conclusion is consistent with the apparent purpose of section 6213(f)(1) in that, even without the tacking, the taxpayer is afforded a full 60 days after the termination of the stay in the second bankruptcy case before the period for filing a Tax Court petition begins or resumes running, thus providing adequate time for the taxpayer to decide, in light of the outcome of the bankruptcy case or cases, whether petitioning for redetermination of the deficiency at issue is warranted.

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Please call (202) 622-3620 if you have any further questions.