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CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR JOHN D. STEELE, JR.
DISTRICT COUNSEL, UPSTATE DISTRICT
CC:NER:UNY:BUF

FROM: Lawrence H. Schattner
Chief, Branch 3 CC:EL:GL:BR3

SUBJECT: The Effect of I.R.C. § 7811(d) on the discharge provisions of
the Bankruptcy Code

This is in response to your memorandum dated September 9, 1998. This document is not to be cited as precedent.

ISSUES:

- (1) Whether the filing of an application for a Taxpayer Assistance Order (TAO) under I. R.C. § 7811 suspends the periods for dischargeability of taxes in bankruptcy.
- (2) If so, whether the Service has a requirement to track such extensions on IDRS.
- (3) Whether the request for a hearing under I.R.C. § 6330 suspends the periods for dischargeability of taxes in bankruptcy.

CONCLUSION:

- (1) It is within the bankruptcy court's equitable authority under Bankruptcy Code section 105(a) to suspend the priority and corresponding dischargeability periods based on the debtor's having filed an application for a TAO under I.R.C. § 7811.
- (2) There is no law requiring the Service to track the extensions.

(3) It is also within the court's equitable authority under B.C. § 105(a) to suspend the priority and dischargeability periods based on the debtor's having requested a hearing under I.R.C. § 6330.

FACTS:

Your memorandum does not present facts particular to a given case, but seeks general advice on whether the filing of an application for a TAO or the request for a hearing under I.R.C. § 6330 affect the priority and dischargeability periods for taxes in bankruptcy.

LAW AND ANALYSIS

Issue 1

Relevant here, B.C. § 523(a)(1)(A) provides an exception from discharge for taxes of the kind and for the periods specified in section 507(a)(8), which provides an eighth priority for:

(A) a tax on or measured by income or gross receipts--

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after the commencement of the case;

There is no statutory provision in the Bankruptcy Code or elsewhere that expressly tolls or suspends the running of the three year priority period in B.C. § 507(a)(8)(A)(i), the 240 day period in § 507(A)(8)(A)(ii), or the corresponding dischargeability periods in § 523(a)(1)(A). Matter of Quenzer, 19 F.3d 163 (5th Cir. 1993). Despite this lack of statutory authority, the Government has argued that the periods are suspended during the pendency of a debtor's previous bankruptcies. Currently, the Government's position in this regard is based on two theories: (1) it is implicit within B.C. § 507 that the priority periods (and thus the dischargeability periods) are suspended by a debtor's previous

bankruptcies; (2) the priority and dischargeability periods may be suspended during previous bankruptcies by virtue of the bankruptcy court's equitable powers under B.C. § 105(a). The first of these theories, which relies heavily on legislative history in interpreting the statutory scheme involving B.C. §§ 108(c),¹ 507(a)(8), and I.R.C. § 6503(h),² is unique to cases involving previous bankruptcies. For the reasons set forth below, however, the second theory, under certain circumstances, may be applied to suspend the periods in cases where a taxpayer has applied for a TAO.

Bankruptcy Code section 105(a) provides:

The court may issue any order, process, or judgement that is

¹B.C. § 108(c) provides :

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, 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, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

(Emphasis added).

As is clear from its plain language, B.C. § 108(c) does not apply to periods established under bankruptcy law and, thus cannot be used to suspend the priority or dischargeability periods of the Bankruptcy Code. Matter of Quenzer, supra.

² I.R.C. § 6503(h) suspends the running of the statute of limitations on collection or assessment of federal taxes for the period in which collection or assessment is prohibited by reason of a bankruptcy proceeding, plus an additional 60 days (for assessment) or six months (for collection).

necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court order or rules, or to prevent an abuse of process.

As previously indicated herein, the bankruptcy court's equitable authority under B.C. § 105(a) has been found broad enough to permit the tolling of the priority periods in cases of serial bankruptcy filings. See, In re Richards, 994 F.2d 763 (10th Cir. 1993); In re Miller, 199 B.R. 631 (Bankr. S.D. Tex. 1996); In re Clark, 184 B.R. 728 (Bankr. N.D. Tex. 1995). However, even in the case of serial bankruptcies, the tolling under B.C. § 105(a) is not automatic, but is based on equitable considerations, which are largely fact driven. Quenzer, supra, at 165; In re Nolan, 98-1 USTC ¶ 50, 362, 81 AFTR2d 1652 (M.D. Tenn. 1998); In re Gilmore, 198 B.R. 686 (Bankr. E.D. Tex. 1998). Factors the courts may look to in determining whether the priority or dischargeability periods should be suspended include whether the Service had sufficient collection opportunity and whether there was an abuse of process by the debtor. Thus, these factors should be considered in determining whether an application under I.R.C. § 7811(d) tolls the priority and dischargeability periods pursuant to B.C. § 105(a).³

Under I.R.C. § 7811(d), the running of any period of limitation with respect to any action described in I.R.C. § 7811(b) shall be suspended for --(1) the period beginning on the date of the taxpayer's application for a TAO under section 7811(a) and ending on the date of the National Taxpayer Advocate's decision, and (2) any period specified by the National Taxpayer Advocate in a TAO issued pursuant to the taxpayer's application. The actions described in I.R.C. § 7811(b) include those relating to collection under chapter 64 of the Internal Revenue Code. Thus, the statute of limitations on collection is suspended from the time the application for a TAO is filed until a decision is rendered. Notably, an application merely suspends the running of the period of limitations on collection. It does not immediately suspend collection activity. White v. CIR, 899 F.Supp. 767 (D.Mass. 1995). We find that this significantly distinguishes this type of case from those involving previous bankruptcies where the Government is prohibited as a matter of law by the automatic stay or confirmed plan from collection activity. However, there

³ Where the Service's only grounds for asserting that a tax was not discharged and, therefore, is still collectible is that due to an application under I.R.C. § 7811, the dischargeability period was suspended, the Service should have a court determination to that effect before proceeding to collect. As stated, the tolling is not automatic, but depends on the equities, which should be determined by the court. Moreover, as of this writing, the position taken herein has not been explored in the courts.

nevertheless may be instances where the Government may argue that B.C. § 105 tolls the priority period for the time period under I.R.C. § 7811(d). This conclusion is based largely on the fact that Internal Revenue Manual section 3.5.8(1) provides that the Service will suspend all enforcement actions until a final decision is made. However, given that the same section provides for situations where the Service may need to take enforcement action in order to protect the Government's interests, the Service may rely on I.R.C. § 7811(d) and B.C. § 105(a) to toll the periods only where, pursuant to its own internal procedures, the Service was prohibited from collecting the taxes it seeks to have declared priority or nondischargeable and actually made no attempt to collect those taxes. Additionally, courts may well require evidence of abuse of the system by the debtor, e.g., that the application was filed as a delaying tactic.

Issue 2

As concluded above, the priority and dischargeability periods are not automatically suspended by the filing of an application for a TAO. Accordingly, there should be no entry on IDRS that would show those periods to be suspended unless and until a court has made that determination. However, it is clear from I.R.C. § 7811(d) that an application suspends the collection statute, and, of course, the correct date should be so indicated on IDRS regardless of whether or not the taxes are nondischargeable.

Issue 3

Newly enacted I.R.C. § 6330(e)(1) suspends collection action and the statute of limitations on collection when a taxpayer requests a due process hearing regarding a proposed levy action. Whether the priority and dischargeability periods should be suspended during the time period set forth in this provision also may be analyzed under the B.C. § 105(a) theory. Under I.R.C. § 6330(e)(1), the collection action itself is prohibited during the pendency of the due process hearing and the appeals therefrom. Generally, this should make the equities more favorable to the Service. However, collection only as to the levy action at issue in the hearing is suspended. Thus, for the tax year(s) at issue in the bankruptcy, the Service may have had other modes of collecting the tax liability. This is simply a factor to be considered when determining the equities. Like the I.R.C. § 7811 situation, suspension is not automatic, and the Service should not assume it has the right to collect otherwise dischargeable taxes on this ground unless and until a court has rendered a determination to that effect. See, footnote 3, supra.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

We see no significant risks or hazards in asserting the positions stated above . The matter may need to be reconsidered, however, if our position is not well received by the bankruptcy courts.

If you have any further questions, please call us at (202) 622-3630.

cc: Assistant Regional Counsel (GL), Northeast Region