

**Office of Chief Counsel
Internal Revenue Service
*memorandum***

CC:SB:LPLAFFERTY
GL-125465-11

date: August 31, 2012

to: Deborah Fowler
Analyst, Collection Policy, Insolvency
(Small Business/Self-Employed)

from: Lisa Lafferty
Attorney, Division Counsel
(Small Business/Self-Employed)

subject: Disclosure of Post-Petition Return Information
To Debtor's Attorney In Individual Chapter 11

INTRODUCTION

You indicated that a discussion of post-petition/post-confirmation monitoring actions brought to light issues regarding the guidance contained in IRM 5.9.8.11(3) and IRM Exhibit 5.9.19-1. As a result, you requested that we provide an opinion regarding the propriety of contacting the debtor's attorney with respect to certain post-petition taxes. You also requested that we suggest revised language if we determine that these IRM sections need to be changed.

BACKGROUND

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, commonly known as BAPCPA, changed the provisions of the Bankruptcy Code that govern individual Chapter 11 bankruptcies. Bankruptcy Code section 1141 modified the discharge provision for individual Chapter 11s. Prior to BAPCPA, an individual in Chapter 11 received a discharge when the plan was confirmed. BAPCPA modified section 1141 to delay the discharge until all the plan payments have been completed. As a result, the bankruptcy estate will continue to exist until all plan payments are completed, which will generally take several years.

Even though the Bankruptcy Code provisions governing individual Chapter 11s was changed, I.R.C. § 1398 was not changed. The bankruptcy estate of an individual Chapter 11 debtor is still a separate taxable entity under I.R.C. § 1398. As a result, the debtor-in-possession or the trustee, if one is appointed, must obtain a Taxpayer Identification Number for the estate and file a Form 1041 for the estate each year that the estate is in existence.

I.R.C. § 1398(e)(1) provides that the gross income of the estate includes the gross income of the debtor to which the estate is entitled under the Bankruptcy Code. Bankruptcy Code section 1115, which was added by BAPCPA, governs what income of the debtor to which the estate is entitled. Section 1115 provides that income of the estate includes post-petition earnings from services performed by the debtor and income from property the debtor acquired post-petition.¹ This means that the debtor's post-petition wages and self-employment income are income of the estate that is properly reported on Form 1041. Because the estate is not subject to self-employment tax, the self-employment tax on the income reported on the estate's 1041 must be reported by the debtor on the debtor's Form 1040.

Some examples of types of income properly reported on Form 1040 include income derived from excluded, exempt, or abandoned property. For more information on whether specific types of income should be reported by the estate or by the debtor, you should refer to Internal Revenue Bulletin 2006-83 and Publication 908.

Analysis

1. Exhibit 5.9.19-1

In a bankruptcy proceeding, the IRS may disclose to the attorney of record in the bankruptcy the debtor's return information that is relevant to the resolution of tax matters before the bankruptcy court. The requirement under IRC §6103(e)(6) that an attorney in fact be "duly authorized in writing to inspect the return or receive the information" is met by the attorney's entry of an appearance in the bankruptcy proceeding by signing the bankruptcy petition. The debtor's attorney is qualified to act on the debtor's behalf with respect to taxes subsumed by the bankruptcy proceeding. Therefore, under IRC §6103(e)(6), the attorney is entitled to receive return information that is relevant to the resolution of tax issues in the bankruptcy proceeding.

Exhibit 5.9.19-1 currently presumes that for a post-petition tax to be at issue before the bankruptcy court such that a disclosure may be made to the attorney of record, the IRS must file a claim in the bankruptcy case. The exhibit states that:

Attorneys are not allowed to receive information on any return due and owing after the petition date unless the debtor has given oral or written consent, or unless an issue arises regarding post-petition taxes before the bankruptcy court (e.g., a 1305 claim has been filed) and the attorney is representing the debtor with respect to post-petition tax issues. Additionally, once the bankruptcy is discharged, dismissed or closed by the court and ceases to be a matter of tax administration, the bankruptcy attorney ceases to be the attorney of record. He may not then receive information without the debtor's express oral or written

¹ BAPCPA made no changes with respect to pre-petition property. Income from pre-petition property continues to be property of the estate.

consent even if the information related to tax periods or matters clearly administered by the bankruptcy court.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. *IRM 5.9.8.11(3)*

Post-petition taxes include any employment taxes incurred by the bankruptcy estate. Employment taxes are paid by making timely federal tax deposits (FTDs). Where the business operations of debtor become property of the estate, the debtor-in-possession or trustee, if one is appointed, must timely make federal tax deposits and file employment tax returns. The federal tax deposits must be made and employment tax returns must be filed under the estate's Taxpayer Identification Number. The post-petition FTDs are an administrative expense entitled to payment through the bankruptcy

for which the IRS is not required to file a claim.² As a result, even if no claim is filed by the IRS, the FTDs are a tax at issue in the bankruptcy.

IRM 5.9.8.11(3) currently states:

Contact with Debtor. At any time the debtor is found to be delinquent in making FTDs, the caseworker must attempt to contact the debtor by phone. During the phone call the caseworker must advise the debtor the business has 10 calendar days to deposit all delinquent FTDs.

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██ Unless a trustee is appointed, the debtor will be acting as debtor-in-possession with respect to the FTDs and the attorney of record in the bankruptcy will be the debtor-in-possession's attorney. Because the employment taxes are at issue in the bankruptcy, the caseworker may contact either the debtor-in-possession or the debtor's attorney of record in the bankruptcy proceeding regarding the delinquent FTDs. The caseworker must, however, confirm the attorney's status as the debtor's bankruptcy attorney before making contact.

Conclusion

The estate's post-petition taxes are at issue in the bankruptcy whether or not the IRS has filed an administrative claim. As a result, the IRS may disclose return information related to the estate's post-petition taxes to the debtor-in-possession's attorney even when no claim has been filed. However, in a case where the bankruptcy estate does not incur a tax, such as in Chapter 13 or individual Chapter 12 cases, the debtor's post-petition taxes are only at issue in the bankruptcy case if the IRS has filed a 1305 claim or the IRS has filed a court action or filed a response to a court action regarding the debtor's post-petition tax liability.

Please call (202) 283-0047 if you have any further questions.

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² See 11 U.S.C. §§ 503(b)(1)(B) & 503(b)(1)(D).

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