

ACTION ON DECISION

SUBJECT: United States v. Roland Harry Macher (In re Macher),
91 AFTR2d 2003-2654, 2003-2 USTC ¶ 50,537
(Bankr. W.D. Va.), aff'd, 303 B.R. 798 (W.D. Va. 2003)

Issue:

Whether a bankruptcy court has the authority to order the United States to process and consider a debtor's plan of reorganization in accordance with procedures applicable to offers in compromise submitted by taxpayers who are not currently in bankruptcy.

Discussion:

Roland Harry Macher (the debtor) filed a Chapter 11 bankruptcy petition. The Service filed a proof of claim for tax liabilities in the total amount \$277,763.61, of which \$273,617.86 is an unsecured priority claim under section 507(a)(8) of the Bankruptcy Code. The debtor's second amended plan of reorganization provided for payment of \$54,723.57, representing twenty percent of the total amount of the priority claim, over a period of five years. This plan was deficient in that it did not provide for full payment of the Service's priority claim as required by section 1129(a)(9)(C).

The debtor then filed an adversary proceeding against the United States seeking a court order compelling the Service to consider the debtor's plan of reorganization as an offer in compromise. No formal Offer in Compromise, Form 656, was filed pursuant to the Service's administrative offer in compromise program. While the bankruptcy court rejected the debtor's discrimination argument under section 525, it concluded that the Service's refusal to process the debtor's deficient plan as an administrative offer in compromise conflicted with the "fresh start" policy of the Bankruptcy Code. The bankruptcy court ordered the United States to process and consider the debtor's deficient plan of reorganization as it would an offer in compromise submitted by a taxpayer who is not currently in bankruptcy. The district court affirmed the bankruptcy court's decision, concluding that the order was appropriate under section 105.

We disagree with the court's conclusion that it is appropriate for a bankruptcy court to order the United States to process and consider a debtor's plan of reorganization in accordance with procedures developed by the Service for processing administrative offers in compromise submitted by taxpayers who are not in bankruptcy. Before a case is referred to the Department of Justice, the decision to compromise tax liabilities,

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including whether to consider a compromise and how much to accept, is wholly within the Service's discretion. See I.R.C. § 7122(a); Treas. Reg. § 301.7122-1(a). In the exercise of that discretion, the Commissioner has determined that certain cases are not appropriate candidates for compromise under the administrative offer in compromise program and that offers submitted in these cases will not be accepted for processing, but rather will be returned to the taxpayer. See Rev. Proc. 2003-71, 2003-36 I.R.B. 517 and IRM 5.8 et seq. Included in the category of "nonprocessable" offers are offers submitted by taxpayers who are currently in bankruptcy.

While section 105 grants bankruptcy courts the authority to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," that authority is not unlimited. See Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); United States v. Noland, 517 U.S. 535, 543 (1996) (ruling that a bankruptcy court's desire to do equity may not override the specific provisions of the Bankruptcy Code). The Supreme Court recognized that "a bankruptcy court order might be inappropriate if it conflicted with another law that should have been taken into consideration in the exercise of the court's discretion." United Stated v. Energy Resources Co., Inc., 495 U.S. 545, 550 (1990).

The authority to compromise tax liabilities, and the manner in which the Service exercises that authority, is discretionary. See I.R.C. § 7122. By ordering the United States to process and consider the debtor's plan of reorganization in the same manner that Forms 656 are processed and considered under the Service's administrative offer in compromise program, the bankruptcy court in effect has issued a writ of mandamus under 28 U.S.C. § 1361. Court orders that dictate how the Service is to exercise its discretionary authority to compromise tax liabilities conflict with the law governing the issuance of writs of mandamus and exceed the authority granted to bankruptcy courts under section 105.

Offers in compromise submitted on Forms 656 by taxpayers who are currently in bankruptcy will continue to be returned as nonprocessable under the procedures set forth in Rev. Proc. 2003-71 and IRM 5.8 et seq. Payment proposals submitted by taxpayers in bankruptcy will be considered by Insolvency employees in the context of their review of proposed plans, subject to the time constraints and other factors that are

unique to bankruptcy litigation, and will be accepted when it is in the interest of the United States to do so.

Recommendation:

Nonacquiescence

Reviewers:

DELORES M. DILLMANN
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Approved:

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