BANKRUPTCY AND WORKOUTS

Submitted by the Committee on Bankruptcy and Workouts
Mark S. Wallace, Committee Chair;
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on Important Developments

Legislation

The Pension Protection Act of 2006 (PPA), P.L. 109-280, 120 Stat. 780,[2] amended § 6330(d)(1) to provide that all appeals of collection due process (CDP) determinations shall be made to the Tax Court. Under prior law, the place of appeal depended upon the type of tax involved. *See*, *Gorospe v. Comm'r*, 446 F.3d 1014 (9th Cir. 2006) (Tax Court lacked subject matter jurisdiction to hear a couple's appeal pertaining to a CDP determination involving the trust fund recovery penalty). The new rule consolidates all appeals of CDP determinations in the Tax Court, and it is effective for appeals of determinations made after October 16, 2006. The PPA did not change the time computations for distributions of inherited IRAs. Thus, it did not change cases like *In re Kirchen*, 344 B.R. 908 (Bankr. D. Wisc. 2006), which hold that inherited IRAs do not qualify for an exemption under

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[2]Section 831 of PPA has a special provision, which is apparently tailored for employees of Enron (employer must have been in bankruptcy in the preceding year and had persons in the company subject to indictment or conviction), to make additional IRA contributions of $3,000 for the years 2007-2009.

state exemption rules. State retirement exemptions generally apply to payments made under a plan or by contract "by reason of age." With inherited IRAs, the commencement of distribution is determined by the age of the decedent. Thus, the distribution is not determined by reason of the age of the debtor.[3]

The Tax Relief and Health Care Act of 2006, P.L. 109-432, 12_ Stat. ___, amended § 6015(e) to provide that a taxpayer who is denied equitable innocent spouse relief can appeal to the Tax Court, and the appeal is not dependent upon the previous assertion of a deficiency against the taxpayer. The new rule is effective for any liabilities arising or outstanding on or after December 20, 2006. This legislation overrules *Ewing v. Comm'r*, 439 F.3d 1009 (9th Cir. 2006), which had vacated a Tax Court decision granting equitable innocent spouse relief. The Ninth Circuit ruled that the Tax Court did not have jurisdiction to hear an equitable innocent spouse appeal. This was because old § 6015(e) only granted the right to appeal to taxpayers who had a deficiency asserted against them and had sought relief under either § 6015(b) (understatement innocent spouse relief) or (c) (deficiency innocent spouse relief). The taxpayer in *Ewing* had only sought equitable relief under § 6015(f), and the IRS had not asserted a deficiency against her.

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[3]Although not discussed in *Kirchen*, it is clear that courts are looking at the commencement of the distribution and not the size of the distribution, which is determined by the designated beneficiary's age.

Regulations

The IRS published amendments to the CDP regulations, which are found in Treas. Reg. §§ 301.6320-1 and 301.6330-1. As a part of this process, the IRS also amended Form 12153 to add examples of the most common reasons taxpayers give for requesting a hearing. Changes to the regulations reflected ongoing court activity, so that there were minor changes to the rules concerning the administrative record, prior involvement of the hearing officer, and the fact that self-reported tax liabilities may be disputed in a CDP hearing. *See*, *Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006) (review of CDP determination limited to administrative record); *Moore v. Comm'r*, T.C. Memo 2006-171 (*ex parte* contacts resulted in § 6320 case being remanded to appeals for reconsideration); and *Montgomery v. Comm'r*, 122 T.C. 1 (2004) (IRS could review self-assessed liability).

Cases and Rulings

Dischargeability

Colsen v. United States (In re Colsen), 446 F.3d 836 (8th Cir. 2006) continued the long-running battle[4] between taxpayers and the IRS over whether returns filed after the IRS makes a substitute-for-return (SFR) assessment can ever be considered valid returns for the purpose of determining discharge under

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[4] *See, e.g., Moroney v. United States (In re Moroney)*, 352 F.3d 902 (4th Cir. 2003), which is discussed in the 2003 new developments article and *In re Payne*, 431 F.3d 1055 (7th Cir. 2005), which is discussed in the 2005 new developments article.

11 U.S.C. § 523(a)(1)(B). That section provides that a discharge is denied for taxes with respect to which a return was nonfiled or filed late within two years of the petition date. *Colsen* is significant because the Eighth Circuit is the first court of appeals to rule for the taxpayer. In October 2006, the United States appeared ready to appeal, as it was granted an extension of time to file a petition for *writ of certiorari*. *United States v. Colsen*, U.S. Supreme Court Docket No. 06A373 (October 13, 2006) (Alito, J.). Thereafter, the due date for filing the *writ* passed without the United States filing its petition.

To determine whether a return has been filed, courts use the four-part test of *Beard v. Comm'r*, 82 T.C. 766, 775-778 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986). The return must (i) purport to be a return; (ii) be filed under penalty of perjury; (iii) provide sufficient information to allow for computation of tax; and (iv) represent an honest and reasonable attempt to comply with the law. The pressure point has been what constitutes an honest and reasonable attempt to comply with the law. The Eight Circuit held that whether the taxpayer had made an honest and reasonable attempt to comply with the law should be determined from the face of the form itself. The court held that *Beard* does not contain a temporal requirement, and the IRS should not consider the taxpayer's delinquency or the reasons for it.

In *Mlincek v. United States (In re Mlincek)*, 350 B.R. 764 (Bankr. N.D. Ohio 2006), the bankruptcy court dismissed a complaint to determine dischargeability of taxes for prudential reasons where the debtor had not alleged any collection activity by the IRS and the IRS had not alleged any intent to engage in such. *Mlincek* is a troubling case for Chapter 7 tax debtors who are seeking certainty that their tax problems have been resolved by the bankruptcy filing. Under 11 U.S.C. § 523(c)(1), the IRS need not take any action to assert that its claim is not discharged in a bankruptcy. Furthermore, if the Chapter 7 debtor takes no action, there is no direct contact from the IRS as to whether it considers the claim discharged. The debtor can wait 120 to 180 days after discharge and order a copy of the tax history. This should tell whether the IRS Special Procedures Unit made an entry into the computer system discharging the debt. If not, the taxpayer can consider making inquiry to the applicable Special Procedures Unit. The only way for debtors to accelerate this process is to file a complaint to determine dischargeability. *Mlincek* implies that courts may stop hearing such cases.

Swanson v. IRS (In re Swanson), 343 B.R. 678, 682 (Bankr. D. Kan. 2006) also dealt with how a debtor determines dischargeability of a tax. The court held that in Chapter 12 a law suit in the nature of a declaratory judgment is allowed to determine dischargeability of tax so the debtor can determine whether the Chapter 12 plan needs to be modified to provide for the tax. With the evisceration of the superdischarge by the

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), P.L. 109-8, 119 Stat. 23, this procedure should also be available in Chapter 13.

McDaniel v. United States (In re McDaniel), 350 B.R. 616 (Bankr. M.D. Fla. 2006) is the first published opinion to allow a debtor to dismiss a case where the three-year time period for computing dischargeability was miscalculated. *Contra*, *Leach v. United States (In re Leach)*, 130 B.R. 855 (9th Cir. B.A.P. 1991) (miscalculation of the three-year period does not provide grounds for voluntary dismissal by debtor, who would like three-year period to run so tax is dischargeable). The court in *McDaniel* stated that the additional two years would be sufficient time for the IRS to collect, so it would not be prejudiced by the dismissal. The court did not mention that the IRS otherwise would have had eight years to collect under 11 U.S.C. § 727(a)(8).

<u>Chapter 12</u>

In re Knudsen, __ B.R. __, 2006 W.L. 3477987 (Bankr. N.D. Iowa 2006) is the first published opinion to deal with the special rule added to Chapter 12 by BAPCPA that allows priority tax debt arising from the sale of assets used in farming operations to be granted nonpriority status. 11 U.S.C. § 1222(a)(2)(A). *Knudsen* deals with four important issues. First, is the sale of hogs (or any other product produced on the farm, *e.g.*, eggs or milk) the sale of an asset used in the farming operation? The court said no. While the court reached the correct answer, the reasoning was faulty. The court linked the word "used," which is found in both 11 U.S.C. § 1222(a)(2)(A) and § 1231, and it said that the word "used" should be given the same meaning in both code sections. With this linkage, the court implied that the sale of § 1231 assets do not qualify for nonpriority treatment. This would mean that depreciable farm equipment, which is § 1231 property, does not qualify for nonpriority treatment when clearly it should.[5] The court would have done better to simply say that hogs or eggs are not assets used in the farm operation in the way that barns and equipment are. The more difficult, unanswered question is whether the sale of chickens and cows, on a farm that sells primarily eggs and milk, will qualify as the sale of assets used in the farming operation.

Second, do postpetition sales qualify for nonpriority treatment? Section 1222 speaks of changing the treatment of claims granted priority under § 507, which includes administrative expenses. Chapter 12 does not create a separate taxable estate so it is difficult to understand how there could even be an administrative expense. I.R.C. §§ 1398 & 1399. Nonetheless, the court found that postpetition sales qualify for

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[5]It also appears that the court was unfamiliar with the concept of capital gain as deemed, *e.g.*, § 1231, and capital gain, as defined, § 1221. The court stated its agreement with the IRS position, which was that nonpriority treatment was limited to "the sale of capital assets." Yet, the court appeared to disqualify capital gain, as deemed, from nonpriority treatment.

nonpriority treatment. The court cited *Mo. Dep't of Rev. v. L.J. O'Neill Shoe Co. (In re L.J. O'Neill Shoe Co.)*, 64 F.3d 1146 (8th Cir. 1995), which bifurcated corporate tax years in the year of filing. BAPCPA overruled *L.J. O'Neill* by inserting language in §507(a)(8)(A) preventing bifurcation. The court would have done better to cite *In re Brensing*, 337 B.R. 376 (Bankr. D. Kan. 2006), which provides sound reasoning to support the administrative expense position (and is discussed below under Chapter 13).

Third, creditors in Chapter 12 must receive at least as much as they would have received in Chapter 7. 11 U.S.C. § 1225(a)(4). How can this test be passed if the priority claim would have been paid in full in Chapter 7 and it is not paid in full in Chapter 12 because of the special rule? The court held that the nonpriority portion of the IRS claim should be treated at least as favorably as nonpriority claims in Chapter 7. In other words, the court found that deemed nonpriority by § 1222 is deemed nonpriority for § 1225.

Fourth, what amount of tax is allocated to the nonpriority item? One method, not argued by either party, is simply to compute the capital gain and subtract that from the ultimate total tax due. This is in keeping with how capital gain tax on returns is currently calculated. Any payments could be allocated on a *pro rata* basis. Instead, the court prorated the tax on the return based on the percentages of income attributable to

(i) capital gain and (ii) everything else. It applied credits based on what type of income earned the credit. It applied all self-employment tax to priority treatment. It prorated payments based on net tax due for each type of income. This results in a higher priority balance because the standard deduction and personal exemptions are spread among both types of income.

Chapter 13

In re Brensing, 337 B.R. 376 (Bankr. D. Kan. 2006) is important because of its potential application to the issue of what taxes are administrative expenses in Chapter 13, although the case is actually about extending the time period for collecting tax because of a prior bankruptcy. See the discussion of *In re Knudsen*, above. *Brensing* dealt with whether the IRS had any power to collect on its postpetition 11 U.S.C. § 1305 claim while the bankruptcy was pending. Under 11 U.S.C. § 1306, property of the estate includes property and earnings obtained postpetition. The court then read 11 U.S.C. § 1327(b), which "vests all of the property of the estate in the debtor," to mean that the debtor does not have property separate and apart from the bankruptcy estate until the Chapter 13 plan is concluded. This means that the automatic stay is in effect as to this after-acquired property. The court then applied *Young v. Comm'r*, 535 U.S. 43 (2002) to toll the three-year time period during the first Chapter 13, and the applicable tax was a priority tax, even though more than three years had passed since the due date.[6]

The debtor in *In re Brown*, 2006 W.L. 3370867 (Bankr. D. Mass. 2006) forgot to make a set-aside for capital gain taxes when he amended his Chapter 13 plan to provide for payment to his creditors upon the sale of real property. After all the sales proceeds were transmitted to the Chapter 13 trustee, the debtor moved the court for an order to set aside funds to pay the tax. Once the entire proceeds were in the hands of the trustee, the court could find no basis for granting the motion and denied same. In particular, the court rejected the administrative expense argument as the Chapter 13 plan vested the real property in the debtor and the filing of a Chapter 13 plan does not create a separate taxable estate. The court did not discuss §§ 1306 & 1327(b) or cite *Brensing*.

<u>Taxation of the bankruptcy estate</u>

In Chief Counsel Advice 200630016, Chief Counsel's office announced that all bankruptcy estate administrative expenses shall be treated as above-the-line deductions. IRS Publication 908 is to be amended accordingly. This resolves a prior split in authority. *Cf*., Rev. Rul. 68-48, 1968-1 C.B. 301 (bankruptcy estate expenses of partnership below-the-line

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[6]After BAPCPA, the same result is reached by statute. 11 U.S.C. § 507(a)(8) (flush language) & § 507(a)(8)(A)(ii)(II) (each extending time periods because collection precluded by existence of a confirmed plan).

deductions); and *Sticka v. United States (In re Sturgill)*, 217 B.R. 291 (Bankr. D. Or. 1998) (expenses for professional services incurred by trustee below-the-line deductions), *with In re Miller*, 252 B.R. 110 (Bankr. E.D. Tex. 2000) (expenses for professional services incurred by trustee above-the-line deductions).

In Notice 2006-83, the IRS provided guidance on how individual Chapter 11 debtors should report income. Under BAPCPA, all the income of individual Chapter 11 debtors is part of the bankruptcy estate. This rule creates a tax accounting nightmare in trying to allocate the income between the bankruptcy estate and the debtor.

The new Chapter 11 bankruptcy estate must obtain an employee identification number. *Id*. at § 2.04. The EIN number should be provided to entities that must provide information returns with respect to the bankruptcy estate's gross income. *Id.* at § 3.03. The EIN is not provided to the debtor's employer or other person providing a W-2 because, from the employer's perspective, Federal income tax withholding, FICA and FUTA, are not impacted by the new rule in § 1115. *Id*. Query whether the withholding will be adequate if the taxpayer is the bankruptcy estate. *See*, *id.* at § 3.06 (debtor may need to file a new Form W-4 to increase the income withholding). Self-employment tax is also treated as owed by the debtor and not the bankruptcy estate, even though the income is attributable to the bankruptcy estate. *Id*. at § 4.02.

Otherwise, the tax would go unpaid. The individual debtor continues to file tax returns, if there is sufficient income, during the bankruptcy proceedings. *See*, *id.* at § 2.07.

The individual debtor's gross earnings from postpetition services and gross income from postpetition property are included in the bankruptcy estate's gross income. *Id.* at § 2.09.

Deductibility of any amount paid or incurred by the bankruptcy estate is determined as if the amount were paid or incurred by the debtor and as if the debtor were still engaged in business. *Id.* at § 2.06. If the debtor is paid by the bankruptcy estate to manage the business, then there is taxable miscellaneous income to the debtor and the bankruptcy estate may have a deductible administrative expense. *Id.* at 3.02. The bankruptcy estate is allowed a deduction for 11 U.S.C. § 503 administrative expenses it incurs and court fees. Notice 2006-83 at § 2.06.

Both the bankruptcy estate and the individual debtor must attach a statement to the tax return that explains the allocation of income between the bankruptcy estate and the individual debtor and describe the method used to make the allocation.
Notice 2006-83 at §§ 3.01 and 6.03; and *see*, *id.* at § 6.04 for a model statement. Notice 2006-83 asks for comments, and, in particular, asks how the debtor and the bankruptcy estate should be taxed if the bankruptcy estate allows the debtor to retain postpetition income for personal expenses. Is it income to both

the debtor and the bankruptcy estate, and, if so, is there any deduction allowed to the bankruptcy estate to prevent a double inclusion?

<u>Refunds</u>

The court in *In re Donnell*, __ B.R. __, 2006 W.L. 3499423 (Bankr. W.D. Tex. 2006) refused to follow blindly the majority rule of pro rating tax refunds in the year of filing between the bankruptcy estate and the debtor. Instead, the court looked carefully at the underlying events that generated the refund and allocated accordingly. For example, because the debtor had no earned income before the bankruptcy petition was filed, all of the refund generated by the earned income credit was allocated to postpetition property, which benefitted the debtor.

<u>Priority</u>

In *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co. (In re Howard Delivery Serv. Inc.)*, 126 S.Ct. 2105 (2006), the Supreme Court examined whether the claim for unpaid premiums owed to a private insurance company that provided workers' compensation insurance qualified for priority under 11 U.S.C. § 507(a)(4) [now § 507(a)(5)] (priority for claims owed to an employee benefit plan for services rendered). It held that the claim did not qualify for priority, reasoning that workers' compensation protects the business from tort claims and covers its obligation to pay workers' compensation while other types of employee plans, such as health insurance, insure the employee.

Collection due process appeals

In *Robinette v. Comm'r*, 439 F.3d 455 (8th Cir. 2006), the court held that its review of CDP appeals was limited to the administrative record developed before the IRS. This means that representatives of taxpayers must treat the CDP process as a quasi-trial, as evidence and issues not presented there will also not be presented in the appellate court.

Innocent Spouse

In Rev. Rul. 2006-16, 2006-1 C.B. 694, the IRS clarified its position as to innocent spouse claims made after the IRS files a claim in bankruptcy. Under *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998), if a claim is filed and not contested in no-asset Chapter 7, *res judicata* is applied to the claim and to claim defenses brought in any subsequent law suit. This is because the debtor can object at the time of the claim hearing, and that opportunity to object is sufficient to invoke the doctrine of *res judicata*.

The IRS stated that a filed claim does not bar a subsequent innocent spouse claim, where the original claim was not discharged in a prior bankruptcy. Although the ruling does not cite *Siegel*,[7] it can be reconciled with *Siegel*. There is an exception to the *Siegel* rule for subsequent events that occurred

[7] The IRS cited *Hambrick v. Comm'r*, 118 T.C. 348 (2002) (nondischarge rule of § 523 controlled and IRS allowed to assert additional claims over and above those allowed in confirmed Chapter 11 plan).

after the bankruptcy. Presumably, a divorce that creates an innocent spouse would be such a subsequent event.

Installment Agreements

In re Batzkiel, 349 B.R. 581, 586 (Bankr. N.D. Iowa 2006) provides insight into how a taxpayer can increase necessary expenses under the IRS's payment plan rules. BAPCPA uses the IRS living standards to determine whether a Chapter 7 debtor should be pushed out of Chapter 7 and into Chapter 13. In *Bakzkiel*, the wife's commute began at 4:30 a.m. through a deer-infested area. The debtors were forced to pay for car repairs for multiple collisions with deer, as their insurance company would have otherwise cancelled their insurance if another claim for a deer collision had been submitted. Thus, they were able to document special circumstances, as required by 11 U.S.C. § 707(b)(2)(B) to increase allowable expenses. *Contra*, *In re Tranmer*, __ B.R. __, 2006 W.L. 3366458 (Bankr. D. Mont. 2006) (for purposes of determining ability to pay under Chapter 13, court held that extra-long commute was not a special circumstance; special circumstances do not include debtor's desire to remain living wherever they choose); and *see also*, Nat'l Taxpayer Advocate 2006 Annual Report to Congress, Volume I, Section 1, 111-112 (IRS allowable living expense standards meant to be guidelines and not minimum amounts taxpayers need to live).

In IRS News Release 2006-159 (October 16, 2006), the IRS announced technology for taxpayers to fill out installment agreements online or online payment agreements (OPA). Only taxpayers who qualify for streamlined installment agreements can use OPA. To apply for an OPA, a taxpayer needs a personal identification number, a printout of tax debt, and basic income and expense information for the past three months. If the taxpayer can provide the applicable information, the online computer will calculate the installment payment.

In IRS News Release 2006-176 (November 13, 2006), effective January 1, 2007, the IRS announced an increase in the fee for new installment agreements from $43 to $105. The fee for modified agreements increased from $24 to $45.

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