BANKRUPTCY AND WORKOUTS

Submitted by the Committee on Bankruptcy and Workouts
Kenneth C. Weil,[1] Committee Chair

Regulations

Treas. Reg. § 1.1001-(3)(f)(7)(ii)(A) was finalized. It provides that, in determining whether a debt instrument has been converted to equity and a taxable event triggered, the change in value of the instrument caused by the deterioration of the debtor’s financial condition after the date of issuance will generally be disregarded.

Prop. Treas. Reg. § 1.108-9 provides that the bankruptcy and insolvency portion of the discharge of indebtedness rules apply to the owners of disregarded entities and grantor trusts. The Bankruptcy and Workouts Committee drafted a response to those proposed regulations, and, the response can be viewed on the Committee’s web page.

IRS Guidance

In IR-2011-20, the IRS announced prospective changes to the collection process to help struggling taxpayers. The threshold for filing a notice of federal tax lien (NFTL) was increased from $5,000 to $10,000. The IRS is now willing to withdraw liens upon full payment of the tax, if the taxpayer makes that request. The

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IRS will also withdraw its NFTL if the taxpayer enters a direct debit installment agreement (DDIA) and makes several payments. This offer is only open to taxpayers with assessments of $25,000 or less. If the taxpayer is currently in a "regular" installment agreement, the taxpayer can switch to DDIA and qualify for the lien withdrawal.

The ceiling on streamlined installment agreement for small business debtors has been increased from $10,000 to $25,000. To qualify, the debt must be paid with 24 months and paid through a DDIA. The IR-2011-20 announcement seems to include trust fund taxes.

While the legal parameters for acceptance of offers in compromise are not being changed, IR-2011-11 indicates that the streamlined offer process will be applied to taxpayers with tax debt of up to $50,000 and income of up to $100,000.

New IRM 5.8.10.2 (September 27, 2011) provides that the IRS is to consider the consequences of a potential bankruptcy filing on an offer. If the taxpayer mentions a potential bankruptcy filing, this will trigger consideration by the IRS whether a NFTL should be filed to protect the government's interest.
IRM 5.8.10.2.2(1) (September 27, 2011). The person working the offer is to contact insolvency if help is needed in evaluating such things as whether the applicable taxes will be discharged in bankruptcy. *See*, IRM 5.8.10.2.2.1(2) (September 27, 2011).

Dischargeability

Cannon v. United States (In re Cannon), 451 B.R. 204 (N.D. Ga. 2011) illustrates that life remains in *McCoy v. Miss. Tax Comm'n (In re McCoy*), 2009 W.L. 2835258 (Bankr. S.D. Miss. 2009), *Creekmore v. IRS (In re Creekmore)*, 401 B.R. 748 (Bankr. N.D. Miss. 2008), and *Links v. United States (In re Links)*, 2009 W.L. 2966162 (Bankr. N.D. Ohio 2009) despite the IRS's disavowal of the holdings of those cases. Chief Counsel Notice 2010-016 stated that the tax on late-filed returns can be discharged. Bankruptcy and Workouts Developments Report 2010. In finding for the government, the *Cannon* court cited *McCoy*, *Creekmore*, and *Links* with approval. The citation is *dicta* because *Cannon* involved substitute-for-return assessments, which are covered by a different set of rules. *See*, Bankruptcy and Workouts Developments Report 2006.

On January 4, 2012, the Fifth Circuit affirmed *McCoy* in *McCoy v. Miss. Tax Comm'n (In re McCoy)*, 2012 W.L. 19376 (5th Cir. 2012). Perhaps in recognition of the IRS's position in Chief Counsel Notice 2010-016, the Fifth Circuit limited its holding to state income tax returns. The Fifth Circuit made a literal reading of § 523(a)(*)[2] and found that a late-filed return did not meet applicable filing requirements.

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[2]The asterisk designation is used by the Fifth Circuit to denote flush language provisions. That designation is adopted here.

Maryland v. Ciotti (In re Ciotti), 638 F.3d 276 (4th Cir. 2011) is the first appellate case confirming the operation of the "equivalent report or notice" provisions of § 523(a)(1)(B), as added to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), P.L. 109-8, 119 Stat. 23. The equivalent report or notice rules make a state tax nondischargeable if a required report is not made to state taxing authorities by the taxpayer. In *Ciotti* the audit-change information was given to Maryland by the IRS and not by the taxpayer. The court held the state tax nondischargeable.

In *United States v. Storey (In re Storey)*, 640 F.3d 739 (6th Cir. 2011), the case's unusual procedural posture resulted in a bad outcome for the government. After a telephonic conference, the district court found it had jurisdiction to determine dischargeability and ordered briefing without responses on the issue of dischargeability. Upon receipt of the briefs, and without allowing further briefing or an evidentiary hearing, the Court found that the debtor had acted willfully and denied discharge. The Sixth Circuit reversed, finding among other things, that the United States "failed to offer sufficient evidence to rebut the presumption that the tax obligations were discharged in Storey's bankruptcy proceedings, or that she is anything other than the honest but unfortunate debtor." *Id*. at 747. Because the IRS argued that the district court had given it a fair opportunity to present its position, the Court found no reason to remand to present further evidence.

In re Montgomery, 446 B.R. 475 (Bankr. D. Kan. 2011) held there was only one 90-day add-on under § 507(a)(8)(*) even though there were multiple bankruptcy filings. The applicable tax year in question was 2001, and, the 2001 return due date was August 15, 2002. Except for the end of the first applicable bankruptcy on October 1, 2004 and the start of the second applicable bankruptcy on October 15, 2004, the debtor was in bankruptcy continuously from August 15, 2002 to January 4, 2007. There were two bankruptcy filings, and, dischargeability turned on whether the court made one 90-day add-on or two. Because only one 90-day period was added on, the taxpayer won. The government has appealed.

Of greater every day importance was the counting rule announced by the Court: "the Court begins with the day after Debtors' tax return was due and excludes all days when the IRS could not have undertaken enforcement during any part of the day." The first applicable bankruptcy ended October 1, 2004. The IRS could not collect on part of October 1, 2004. The second applicable bankruptcy started October 15, 2004. The IRS could not collect on part of October 15, 2004. This means there were 13 "collection" days available. Note, in a later docket entry, the Court acknowledged that it had mistakenly found 14 “collection” days instead of 13.

Because days and years are mixed, practitioners are well-advised to give themselves breathing space between the calculated end of the period and the filing date. Practitioners would also be well-advised to use the most conservative counting rule.

In *Loving v. United States (In re Loving)*, 2011 W.L. 3800042 (Bankr. S.D. Ala. 2010) the taxpayer/debtor misapplied the three-year rule for computing discharge. The applicable tax year was 2007; the tax return was filed February 29, 2008; the bankruptcy petition was filed April 8, 2011; and the due date of the 2007 return was April 15, 2011. The three-year period for determining dischargeability under § 507(a)(8)(A)(i) runs from the due date of the return and not the file date. The 2007 taxes were not discharged.

DDC and Assocs v. White (In re White), 455 B.R. 141 (Bankr. N.D. Ind. 2011), *Chase Bank v. Mueller (In re Mueller)*, 455 B.R. 151 (Bankr. W.D. Wis. 2011), and *The Bank of Kaukauna v. VanDynHoven (In re VanDynHoven)*, 460 B.R. 214 (Bankr. E.D. Wis. 2011) illustrate the uncertainty of the scope of § 523(a)(14). That section makes nondischargeable debt incurred to pay a tax that would otherwise be nondischargeable under § 523(a)(1). In *White*, the third party paid all trust fund taxes before any responsible person penalty was assessed against the debtor. The court found that the creditor’s loan did not qualify for relief because the debtor’s liability had not been established. In *Mueller*, the debtor used funds to make a deposit with the IRS. There was no evidence that the debtor ever had a liability for the applicable tax year. Because there was no proof of tax due, the creditor’s loan did not qualify for relief. In *VanDynHoven*, the debtor guaranteed payment of bank overdrafts on a corporate account; the corporate funds were used to pay employment taxes; and, the debtor was a responsible person. The court found the debt to the bank nondischargeable.

Quiroz v. Mich Dep't of Treasury (In re Quiroz), 450 B.R. 699 (Bankr. E.D. Mich. 2011) illustrates a developing tax trap. More and more states impose personal liability on corporate officers for nonpayment of corporate taxes (and not just trust fund taxes). For example, Washington state assesses personal liability for nonpayment of worker's compensation, RCW 51.48.055, and unemployment compensation, RCW 50.24.230. Michigan assesses personal liability for nonpayment of its single business tax, which is an excise tax assessed against businesses for the privilege of doing business in Michigan. The Michigan court found the principal officer's liability nondischargeable as § 507(a)(8)(E), which is incorporated into the nondischargeability rules by § 523(a)(1)(A), makes the debt itself nondischargeable. Dischargeability does not turn on who first incurred the debt.

Ilko v. Cal. State Bd. of Eq. (In re Ilko), 651 F.3d 1049 (9th Cir. 2011) (not for publication) also involved a corporate officer's personal liability for nonpayment of a corporate tax. In *Ilko*, the applicable tax was California sales tax, which was treated as a tax on gross receipts. Under the California rule, personal liability arises only after the corporation ceases business. At the time Ilko filed for bankruptcy, the corporation was still operating. Ilko contested the postpetition assessment on the grounds that it was untimely, as the taxes were more than three years old when his bankruptcy was filed. Ilko lost because the taxes were not assessed but still assessable when his bankruptcy petition was filed.

Sovereign Immunity

Fla. Dep't of Rev. v. Diaz (In re Diaz), 647 F.3d 1073 (11th Cir. 2011) contains an excellent discussion of the *in rem* rules first announced in *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) and *Central Va. Community College v. Katz*, 546 U.S. 356 (2006) that determine whether a bankruptcy court can exercise jurisdiction over a state. The three critical *in rem* functions of the bankruptcy court are (i) exercise of jurisdiction over a debtor's property; (ii) distribution of debtor's property among creditors; and (iii) dischargeability of claims against the debtor. In *Diaz*, the Court found that sovereign immunity did not prevent the determination of whether Florida should be held in contempt for violating the discharge injunction after the conclusion of a Chapter 13 case because of its attempt to collect past-due child support. Ultimately, the Eleventh Circuit found that the bankruptcy court had not determined either the amount or the dischargeability of the child-support debt when the court resolved the debtor’s objection to state’s proof of claim in the bankruptcy. The only issue resolved by the bankruptcy court was the amount of the child support debt that would be paid through the bankruptcy. Therefore, the state was not in contempt of court.

Continuity of Interest

In *Ralphs Grocery Co. & Subsidiaries f.k.a. Ralphs Supermarkets, Inc., & Subsidiaries v. Comm’r*, T.C. Memo 2011-25, the Tax Court found that the creditors of the reorganized debtor should not be treated as equity owners under the *Alabama Asphaltic* doctrine. As a result, there was no continuity of interest, and, the court did not find a § 368(g) reorg. Instead, there was an asset sale and basis step up under § 338. The Court distinguished this case from *Alabama Asphaltic* because this was not an involuntary bankruptcy filing and the creditors did not propose the plan of reorganization.

Secured claims

The court in *In re Reeves*, 2011 W.L. 841238 (Bankr. E.D.N.C. 2011) approved a sale of property where the trustee took a portion of the proceeds of an IRS lien and paid it to unsecured creditors. In *Reeves*, the property was valued at $300,000, the first lien at $196,000, and the IRS lien covered the remaining value and then some. The court allowed the sale and a carve-out for the trustee of proceeds otherwise due to the IRS. This is becoming a more and more common practice. This practice is particularly troubling when it is a sale of the principal residence, which the IRS will otherwise have difficulty selling. *See*, I.R.C. § 6334(e).

In *Reeves*, it is unclear whether the IRS gave the debtor full credit for the sale proceeds or credit reduced by the carve-out. While the debtor cannot stop the sale, the debtor should be entitled to 100% credit on the tax debt, and, this might stop the sale as the IRS is not generally equipped to give credit for a payment larger than it received.

Collection due process hearings

In *Kreisler v. Comm'r*, T.C. Memo 2011-21, the taxpayer argued unsuccessfully in a collection due process hearing (CDP) that the underlying tax obligation would be paid in a Chapter 7 bankruptcy proceeding, and, the IRS ought not proceed to levy. The taxpayer did not propose an installment agreement or offer in compromise or challenge the underlying liability. The Court found it was within the IRS's discretion to continue its collection actions against the debtor. Would this *pro se* taxpayer have fared better if he had proposed an installment agreement with *de minimis* payments until the Chapter 7 trustee distributed assets from the Chapter 7 bankruptcy estate?

<u>Exemptions</u>

In re OBrien, 443 B.R. 117 (Bankr. W.D. Mich. 2011) provided guidance on when amendments to exemptions will be allowed so the debtor can claim a previously undisclosed tax refund. The debtors did not disclose their tax refunds with their January 2009 bankruptcy filing. The refunds were disclosed on a pre-341 meeting questionnaire and at the 341 meeting. The debtors had sufficient exemptions to fully exempt the refund. The debtors amended their exemptions 42 days after the 341 meeting, and, the trustee objected to the amendment as being too late. The court found that the debtors acted in good faith and allowed the amendments. The trustee also contested the exemption on the grounds that the refund had already been spent, and, there was nothing left to exempt. The court denied this objection. It found that the amendment related back to the petition date.

The inherited-IRA battle continued in *Chilton v. Moser*, 444 B.R. 548 (E.D. Tex. 2011). *See*, Bankruptcy and Workouts

Developments Report 2010. The district court reversed the bankruptcy court and allowed the exemption in an inherited IRA.

In re Thiem, 443 B.R. 832 (Bankr. D. Ariz. 2011); *In re Mathusa*, 446 B.R. 601 (Bankr. M.D. Fla. 2011); *In re Johnson*, 452 B.R. 804 (Bankr. W.D. Wash. 2011); *In re Cutignola*, 450 B.R. 445 (Bankr. S.D.N.Y. 2011); *In re Kalso*, 2011 W.L. 3678326 (Bankr. E.D. Mich. 2011); and *In re Stephenson*, 2011 W.L. 6152960 (Bankr. E.D. Mich. 2011) allowed the exemption. *In re Clark*, 450 B.R. 858 (Bankr. W.D. Wis. 2011) denied the exemption, but, the bankruptcy court was reversed by the district court. *Clark v. Rameker (In re Clark)*, 2012 W.L. 233990 (W.D. Wis. 2011).

The debtor in *In re Daley*, 459 B.R. 270 (Bankr. E.D. Tenn. 2011) lost the exemption in his IRA because when he opened the account Merrill Lynch required the debtor to give it a lien in the IRA. That is a prohibited transaction under the Tax Code IRA rules.

<u>Cancellation of indebtedness income</u>

Kleber v. Comm'r, 2011-233 T.C. Memo illustrates the 36-month rule of Treas. Reg. § 1.6050P-1(b)(2)(iv), which presumes a debt has been written off after 36 months of non-collection. In *Kleber*, the taxpayer failed to make payments on a government lease after August 1998. In December 1998, the taxpayer notified the government of her inability to make the lease payments. In January 1999, the government sent a letter of default to the taxpayer. Under the 36-month rule, the cancellation of debt income should have been recognized in 2002. The government did not issue its Form 1099-C until 2006, and, the IRS lost in its bid to include the cancellation of debt in income on the 2006 return.

<u>Refunds</u>

In re Smith, 2011-1 USTC ¶ 50,205 (Bankr. S.D. Ind. 2011) illustrates that the battle over the allocation of the tax refund in the year of filing between spouses continues unabated. In *Smith*, one spouse filed and the other did not. This Indiana court aligned with those courts that divide the refund 50/50. See, Bankruptcy and Workouts Developments Report 2009.

In re Palmer, 449 B.R. 621 (Bankr. D. Mont. 2011) adopted the formula used in the Internal Revenue Manual (IRM) to divide joint tax refunds between spouses. Of particular interest is the citation in footnote 1 to *Ransom v. FIA Card Services, N.A. fka MBNA America Bank, N.A.*, __ U.S. __, 2011 W.L. 66438 as authority for use of the IRM formula.

In re Evans, 449 B.R. 827, 831 (Bankr. N.D. Ga. 2010) also used the IRM method.

In re Malewicz, 457 B.R. 1 (Bankr. E.D.N.Y. 2010) dealt with how to interpret language in a Chapter 13 plan that required turn over of postpetition tax refunds to the Chapter 13 plan when only one spouse filed for bankruptcy. The court found for the nonfiling spouse and against the trustee in holding that the plan language only encompassed the filing spouse's share of the refund.

In CCA 201103020, the Service addressed its liability for a turnover action when a refund from the previous tax year (2008) is applied to tax due in the year of filing (2009). *See*, Bankruptcy and Developments Report 2007, 2008, and 2010. The Service took the position that it was immune from § 542 attack once the taxpayer's election under § 6402(b) becomes irrevocable, *i.e.*, once the refund was applied to the estimated tax liability for 2009. CCA 201103020 did not address what happens if the taxpayer has a refund in 2009, presumably because the trustee's right of action under *Weiman v. Graves (In re Graves)*, 609 F.3d 1153, 1159 (10th Cir. 2010) would be against the debtor.

Offers in compromise

In *Tucker v. Comm'r*, T.C. Memo 2011-67, the Tax Court upheld a CDP determination increasing the amount payable in an offer in compromise because the taxpayer had dissipated assets by day trading on margin with no prior experience in the field.

Chapter 12.

The Supreme Court granted *certiorari* in *Hall v. United States*, 131 S.Ct. 2989, 180 L.Ed.2d 820, 2011 W.L. 2297804 (2011) to determine whether a postpetition sale of farm assets is eligible for the special nonpriority rule of § 1222(a)(2)(A). *See*, Bankruptcy and Workouts Developments Report 2006-2010.

United States v. Dawes (In re Dawes), 652 F.3d 1236 (10th Cir. 2011) agreed with the Ninth Circuit position that there could be no priority strip.

Smith v. United States (In re Smith), 447 B.R. 435, 447 (Bankr. W.D. Pa. 2011) confirmed that the special treatment rule does not apply to all postpetition sales. The sale must be related to the plan of reorganization. In *Smith*, the property sold was not part of the bankruptcy estate and not used as part of a plan of reorganization as the debtors had stopped their farming operations.

Chapter 13

In *Cal. Franchise Tax Bd. v. Kendall (In re Jones)*, 657 F.3d 921 (9th Cir. 2011), the Ninth Circuit affirmed the BAP's use of the estate termination approach to hold that the IRS was not stayed from collecting on a postpetition tax. *See*, Bankruptcy and Workouts Developments Report 2009. This meant that the three-year period continued running during a prior Chapter 13 as the IRS was not stayed from collection.

Kolve v. IRS (In re Kolve), 459 B.R. 376 (Bankr. W.D. Wis. 2011) followed *Jones* and cited it with approval.

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