Number: 200014034 *February 8, 2000*
Release Date: 4/7/2000 *CC:EL:GL:B2*
JANUARY 2000 *UIL: 9999.98-00* *BULLETIN NO. 472*

GENERAL LITIGATION BULLETIN

Department of the Treasury **Office of Chief Counsel** **Internal Revenue Service**

FACTS AND CIRCUMSTANCES
Fifth Circuit Declines to Adopt Universal Tolling Rule

In a case involving whether successive bankruptcies toll the statute of limitations for collection, the Fifth Circuit found not clearly erroneous the bankruptcy court's factual determination that the debtor's filing of three bankruptcy petitions in three years was not done in bad faith. **Internal Revenue Service v. Stern, 85 AFTR2d ¶ 2000-335 (5th Cir. Dec. 16, 1999) *(unpublished).***

The debtor filed his first Chapter 13 petition in January 1991, but it was dismissed in July for failure to make payments. A second petition followed in January 1992, which was dismissed in December. The Service assessed 1989 and 1990 taxes in early 1993, and the debtor entered into an installment agreement. After he defaulted, he filed for Chapter 7 relief in September 1994, receiving a discharge in 1995. Because the Service did not qualify for any of the exceptions under B.C. § 507(a)(8) or § 523(a)(1)(B)(ii), the taxes were dischargeable. The bankruptcy court declined to find that equitable tolling applied under section 105 because it determined the evidence did not support a finding of bad faith filings. The district court disagreed, and permitted tolling.

However, the Fifth Circuit reversed. Under its previous decision In re Quenzer, 19 F.3d 163 (5th Cir. 1993), the court indicated that equitable tolling, though not permitted under B.C. § 108, might be allowed under section 105(a) if circumstances warranted. Reviewing the facts here, the Fifth Circuit found the bankruptcy court did not abuse its discretion in failing to find that equitable tolling was warranted. Although the district court viewed the facts differently, this was insufficient to reverse the bankruptcy court's ruling, the Fifth Circuit determined.

BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code

CASES

1. BANKRUPTCY CODE CASES: Automatic Stay (§ 362): Contempt for Violation

In re Cohen, 1999 Bankr. LEXIS 1708 (Bankr. S.D. Fla. Dec. 28, 1999) - The bankruptcy court fined the Service ten million dollars for repeated violations of the automatic stay, but permitted the Government to purge its contempt by immediately releasing all tax liens against the debtor. The Service argued that the court's order of discharge did not specifically provide for release of liens, and that its liens still attach to any abandoned or exempt pre-petition property. The court found the debtor had no remaining pre-petition assets, that the Service knew its liens attached to nothing, and that the court had entered earlier orders which required the Service release its liens. Reciting a list of stay violations including failure to release liens and levies, seizing tax refunds and sending collection notices on discharged taxes, the court found the Service had not acted in good faith and so was subject to contempt and damages.

2. BANKRUPTCY CODE CASES: Chapter 11: Confirmation of Plan (§ 1129): Administrative & "Gap" Taxes; Secured & General Unsecured Taxes ("Cram-down")
BANKRUPTCY CODE CASES: Determination of Tax Liability (§ 505): Res Judicata Determination by Another Court
In re Minkoff, 1999 Bankr. LEXIS 1721 (D. Kan. Dec. 6, 1999) - Debtor owed 1992 taxes, and entered into a plea agreement where he was found guilty of filing a false tax return. The Government, pursuing civil remedies, did not request restitution. In 1998, the debtor filed for Chapter 11 bankruptcy, disagreeing in his plan with the Service's classification of tax claims. The bankruptcy court first determined that the judgment of criminal conviction for filing a false tax return could not be given res judicata or preclusive effect, because it was not the same cause of action as an allowance of a claim in bankruptcy. Therefore the Government was not limited to the amount claimed in the criminal trial for purposes of its proof of claim. The court found the Service entitled to gap interest on its unsecured priority claims, including the priority unsecured portion of any undersecured secured claim after bifurcation (if the property to which the Service's secured tax claim attaches is insufficient in value, the court will bifurcate the claim into secured and unsecured portions. If the unsecured portion is entitled to priority treatment under B.C. § 507, such priority unsecured claim is also entitled to gap interest, which is nondischargeable). As to whether the plan could be confirmed over the Service's objections, the court discussed several requirements under B.C. § 1129(b), and decided that an evidentiary hearing was necessary to resolve this issue.

3. BANKRUPTCY CODE CASES: Chapter 13: Confirmation of Plan (§ 1325)
In re Whitus, 240 B.R. 705 (Bankr. W.D. Tex. 1999) - Debtor filed for Chapter 13 bankruptcy. Her spouse, who did not file, owed Trust Fund Recovery Penalty taxes under I.R.C. § 6672, and the Service filed a proof of claim in her bankruptcy based on the community property in her bankruptcy estate. The bankruptcy court found that the Service had a claim against the community property (as well as a nondischargeable lien against their homestead). However, although the court found the Service had a claim against the debtor's post-petition income (as community

property), the court further found that under B.C. § 726(c) the debtor could legitimately place the community claim of the Service in a separate class of her Chapter 13 plan and provide that such a class receive no distribution.

4. BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523): No, late or fraudulent returns

McDonald v. United States, 1999 Bankr. LEXIS 1704 (Bankr. E.D. Mo. Dec. 2, 1999) - Debtor failed to file income tax returns for 1988-1992 until after the Service prepared substitute returns and garnished his wages. Between 1988 and the time he filed bankruptcy in October 1996, the debtor claimed between eight and fourteen exemptions on his W-4, anticipating tax deductions for his mortgage and medical expenses. The Government argued that his taxes should not be discharged because he willfully attempted to evade or defeat those taxes. The bankruptcy court disagreed, finding the debtor errors in completing his W-4s were due to ignorance and bad estimates rather than wilfulness. Unlike In re Ketchum, 177 B.R. 628 (E.D. Mo. 1995), the debtor here did not file false W-4s to avoid withholding. Nor was the debtor guilty of violating any tax laws. Absent such conduct, the court found the Government had not met its burden of proof, and the taxes were discharged.

5. BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523): Nonpecuniary Loss Penalties

In re Rinker, 240 B.R. 917 (Bankr. S.D. Ga. 1999) - Tax debts owed pursuant to a restitution order resulting from criminal convictions for tax evasion are nondischargeable as fines under B.C. § 523(a)(7), and, because they are not tax penalties, such debts are not subject to the limitations of sections 523(a)(7)(A) & (B).

6. BANKRUPTCY CODE CASES: Interest: Present Value Computation in Plan

In re Lambert, 194 F.3d 679 (5th Cir. 1999) - In this state tax case, the Fifth Circuit held that post-petition interest on a tax liability under B.C. § 1129(a)(9)(C) accrues at the current market rate, rather than the statutory rate set by the taxing authority. In dicta, the appellate court indicated that this decision also would apply to federal taxes.

7. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code

In re Tarullo, 1999 Bankr. LEXIS 1738 (Bankr. N.D.N.Y. Dec. 28, 1999) - The bankruptcy court found it clear from the language of the statute that B.C. § 108(c) does not toll the running of the three year period provided by B.C. § 507(a)8)(A)(i). Examining dicta from Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993), the court disagreed with the Service that the appellate court favorably viewed suspension of the statute of limitations and resulting tolling of the priority period calculation of a debtor's tax liabilities under the Bankruptcy Code. However, the

court found that B.C. § 105 could be used to toll the priority period calculation, and ordered the parties to provide any additional facts to support their equitable position.

8. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code

Louisiana Dept. of Revenue & Taxation v. Lewis, Jr., 2000 U.S. App. LEXIS 149 (5th Cir. Jan. 7, 2000) - This case discusses when a state tax is "assessed" for purposes of tolling and discharge under B.C. § 523(a)(1)(A). The Fifth Circuit , following King v. Franchise Tax Board, 961 F.2d 1423 (9th Cir. 1992), agrees that a tax is "assessed" when a taxing authority's determination of tax liability becomes final. For a federal tax, this occurs when the Service makes a notation in the records of the Secretary (this also is when the "secret" tax lien arises). In this case, the Louisiana taxing authority selected one of three assessment procedures (in error, it should have selected a different process under the facts) which became subject to collection by distraint and sale, and so was final, within 240 days prior to the debtor's filing bankruptcy. The tax thus was not dischargeable. The debtor argued that the court should have considered the correct assessment process (which would have occurred beyond the 240 day window), but the appellate court found the process actually used by the State gave the taxpayer additional rights and due process. Because the taxpayer was not prejudiced by the assessment process, and controlled the timing of filing his bankruptcy, the procedure actually followed by the State was dispositive.

9. DAMAGES, SUITS FOR: Against U.S.: Unauthorized Collection (§ 7433)
SUITS: Against the U.S. or Employees: Tort Suits

Ludtke v. United States, 1999 U.S. Dist. LEXIS 20297 (D. Conn. Dec. 16, 1999) - Taxpayer was assessed with unpaid corporate taxes under the Trust Fund Recovery Penalty, I.R.C. § 6672. In turn, the taxpayer brought suit against the Service under I.R.C. § 7433, claiming that the Service did not maximize revenues in selling corporate property, and wrongfully assessed the responsible person taxes against him. The district court dismissed the suit, finding that section 7433 confers jurisdiction only to the taxpayer against whom collection efforts were directed. Although acknowledging that the Service's collection efforts harmed the taxpayer personally, the court was constrained by the plain language of the statute, judicial precedent, and the narrow exceptions to sovereign immunity to find that because the collection activity was directed at the corporate assets, and because the taxpayer did not allege that the Service intentionally or recklessly violated the Code or the regulations, the taxpayer's suit did not fall within the scope of section 7433.

10. DECEDENT'S ESTATES: Collection Procedures: Liability of Fiduciary: Notice PRIORITY: Insolvency (31 U.S.C. § 3713)

Little v. United States, 113 T.C. 31, 1999 U.S. Tax Ct. LEXIS 59 (T.C. Dec. 29, 1999) - Decedent's friend agreed to act as personal representative, and relied on estate's attorney that no estate taxes were due. He paid other creditors and distributed most of the remaining assets to decedent's beneficiaries. When an accountant reviewed the estate's administration, it was discovered that no tax returns had been filed. The personal representative then tried to submit an offer in compromise, but it was rejected, and the Service imposed liability against the representative under the Insolvency Act, 31 U.S.C. § 3713(b). The court held that because the personal representative, who had no previous experience in estate administration, had reasonably relied in good faith on erroneous legal advice that no taxes were due, he would not be liable under section 3713(b).

11. SUMMONSES: Defenses to Compliance: Privileges: Attorney-Client

United States v. Ackert, 1999 U.S. Dist. LEXIS 18644 (D. Conn. Dec. 2, 1999) - On remand from United States v. Ackert, 169 F.3d 136 (2d Cir. 1999) (the lead case of the March, 1999 GL Bulletin), the Government sought release of the *in camera* deposition transcript of Ackert, a principal in an investment banking firm which pitched a tax shelter to the taxpayer. Although the court found there was a presumption towards release of judicial documents, such as the deposition transcript here, the court still refused to release the transcript. The court found more persuasive the taxpayer's argument that the Government sought to use the transcript in a related Tax Court proceeding, and could not obtain the transcript under Tax Court Rule 74(a). The court did order that the Government could enforce its summons against Ackert, but intimated that the taxpayer could still raise an objection of attorney-client privilege, although not of work-product doctrine (because no litigation was pending at the time Ackert and the taxpayer spoke).

12. SUMMONSES: Third Party Summonses: Right to Intervene or Proceeding to Quash

Shisler v. United States, 1999 U.S. App. LEXIS 33933 (6th Cir. Dec. 28, 1999) - Sixth Circuit dismisses taxpayer's petition to quash third-party recordkeeper summonses because the petition was not filed within 20 days after notice. The Service issued summonses to the taxpayers' bank on May 7 and 8, and sent notice of this to the taxpayers the same day by certified mail. The taxpayers did not file their petition to quash until May 30. The Sixth Circuit first found that submission of the certified mailing receipts into evidence was sufficient to prove the dates of mailing, rejecting the taxpayers' contention that the Service also produce a statement by the person that actually mailed the notices and the Postal Service's date stamp. The appeals court next rejected taxpayers' request for equitable tolling. Since the taxpayers did not allege a defective summons or trickery by the Service induced them to miss the deadline, no factual basis existed for equitable relief. Finally, the Sixth Circuit rejected the taxpayer's argument that Fed. R. Civ. P. 6(e) gave them an additional three days to file.

13. TRANSFEREES & FRAUDULENT CONVEYANCES: Fraud: Actual

United States v. Green, 2000 U.S. App. LEXIS 364 (3rd Cir. Jan. 11, 2000) - Affirming the district court, the Third Circuit found the taxpayer fraudulent conveyed real estate to his wife, without adequate consideration. The taxpayer argued that under the Pennsylvania Uniform Fraudulent Conveyance Act, evidence of solvency rebuts the presumption of actual fraud. Although the appellate court agreed that Pennsylvania law was not uniform, it found the clear trend was towards evaluating all of the circumstances surrounding a potentially fraudulent transfer. Where there is clear and convincing evidence of inadequate consideration, as in this case, solvency is not a consequential factor.

The following material was released previously under I.R.C. § 6110

CHIEF COUNSEL ADVICE

Revocation of Release and Reinstatement of Tax Liens

August 18, 1999

CC:EL:GL:Br1
GL-604191-99
UILC: 04.01.00-00
09.15.02-00 & 51.49.03-05

MEMORANDUM FORDELAWARE-MARYLAND ASSOCIATE DISTRICT COUNSEL

FROM: Alan C. Levine
Chief, Branch 1, (General Litigation)

This responds to your request for advice dated June 7, 1999. This document is not to be cited as precedent.

ISSUE:

Whether the Internal Revenue Service (the "Service") could revoke a release of notices of federal tax lien such that the liens are reinstated and reattach to the prepetition property of the above-named debtor in a Chapter 7 bankruptcy case where, following the release, abatements were made of the underlying tax assessments.

CONCLUSION:

The abatements made in this case were made pursuant to the authority of I.R.C. § 6404(c). Accordingly, the tax liability may only be reestablished on the books of the

Service through the statutory and regulatory procedures for making a new assessment. Because the taxes at issue were discharged in bankruptcy, however, new assessments would be prohibited by the discharge injunction. Without valid assessments the release of liens in this case cannot be revoked and the liens cannot be reinstated.

FACTS:

The facts as you have provided them are as follows. The debtor filed a Chapter 7 bankruptcy petition on The debtor filed an adversary proceeding to determine whether certain tax liabilities were dischargeable. On Date B, an Agreed Order was entered that provided, in part, that the debtor's income tax liabilities for the Year A and Year B tax years were dischargeable, but that the Service's tax liens for those years remained attached to any prepetition exempt or abandoned property of the debtor.

Following the entry of the agreed order, the Service took the following actions: Date C, the lien was released; Date D, the liabilities for Year A and Year B were abated; Date E, the abated assessments were "reinstated", Date F, the release of lien was revoked; Date G, a new lien was filed.

The history notes maintained by Special Procedures clearly state that the periods at issue are dischargeable but that the tax lien remains attached to any exempt or abandoned prepetition property. Apparently, the technician who carried out the abatement and lien release did not understand the implications of such actions given the law as restated in the agreed order.

LAW AND ANALYSIS:

Bankruptcy Code section 522(c)(2)(B) provides that exempt property is generally not liable for a prepetition debt, except where such debt is secured by a properly filed tax lien. Accordingly, where a Notice of Federal Tax Lien is on file before the petition is filed, it may be possible to collect the dischargeable tax liabilities from prepetition assets that were exempted or abandoned in the bankruptcy. See In re Isom, 901 F.2d 744 (9th Cir. 1990).

In the present case however, the lien from which this in rem post-discharge collection authority is derived was released and the associated assessments were abated. You opine that the Service employee who took these actions misunderstood the legal authority to take further collection action with respect to the discharged liabilities. The assessments were subsequently "reinstated" and the release of the lien was revoked, pursuant to the authority of I.R.C. § 6325(f)(2). You now question whether, by taking these actions, the Service has revived its ability in this case to effectuate post-discharge collection from the debtor's exempt property.

As you note, the authority to revoke a release of lien under section 6325(f)(2) presupposes the existence of a valid assessment to support the reinstated lien.

Accordingly, the validity of the revocation of release in the present case is contingent upon whether or not the abated assessments could be reinstated. In a prior memorandum from this office, dated January 22, 1999, a copy of which is attached, we concluded that where the Service reduces the assessed balance on tax modules for discharged taxes to zero, such as was done in the present case, such action generally constitutes an abatement pursuant to the authority of I.R.C. § 6404(c). Section 6404(c) provides that "[t]he Secretary is authorized to abate the unpaid portion of the assessment of any tax, or any liability in respect thereof, if the Secretary determines under uniform rules prescribed by the Secretary that the administration and collection costs involved would not warrant collection of the amount due."

The January 22, 1999, memorandum further provides this office's position that once an abatement has been made pursuant to the authority of section 6404, the taxpayer's liability may only be reestablished on the books of the Service by making a new assessment. In cases of taxes discharged in bankruptcy, however, such as in the present case, the making of a new assessment is prohibited by the discharge injunction.

Courts have recognized that an attempted abatement made due to employee error is not a valid abatement, such that the assessment may be revived or reinstated without the necessity for a new assessment. In In re Bugge, 99 F.3d 740 (5th Cir. 1996), the court noted that, as a general rule, if the Service decides to reimpose a validly abated assessment, it must make a new assessment within the relevant statutory period. Under the facts of Bugge, the tax was abated in full because the revenue officer erroneously thought that the tax had been double counted in the computer and requested abatement of the duplicative tax. The court held, therefore, that no valid abatement occurred because abatement was not authorized under section 6404.

In concluding that the purported abatement was ineffective, the court in Bugge emphasized that there was no statutory authority to make an abatement. This was a purely accidental and unintended processing error. The court also distinguished the facts of Bugge from cases in which an error in judgment was made and there was a conscious decision to abate the tax liability. Id. at 745. See also Range v. United States, 99-1 U.S.T.C. ¶ 50,457 (S.D. Tex. 1999) (court, in dicta, limited Bugge to its facts, citing its holding as based upon lack of statutory authority); Crompton-Richmond Co. v. United States, 311 F. Supp. 1184 (S.D.N.Y. 1979)(abated assessment can be reinstated if abatement was ordinary clerical or bookkeeping error; distinction made where the abatement is based upon a substantive reconsideration of the tax liability).

We do not consider the Bugge opinion to provide support for an argument that the assessments in the present case may be reinstated. We do not think that the technician's error in abating the assessments constitutes the type of error contemplated by Bugge. Primarily, as previously discussed, the abatement was made pursuant to the statutory authority in section 6404(c). Furthermore, this was not an accidental or unintended error but a conscious decision to abate the taxes, albeit one based upon bad judgment and a misunderstanding of the law. The fact that the Agreed Order entered by

the court expressly provides that the liens for Year A and Year B remained attached to certain prepetition property does not provide separate authority for reinstatement of the assessments. As you note, this provision merely restates the law. We consider the Bugge opinion to be a narrow opinion which should be limited to its facts.

Accordingly, we conclude that the abatements made in this case should not have been reinstated. The release of the liens for the Year A and Year B tax years should not have been revoked. Thus, there is no authority for the Service to take post-discharge collection action against the debtor's prepetition property in this case.

Revocation of Releases of Self-Releasing Notices of Federal Tax Lien

September 7, 1999

CC:EL:GL:Br1
GL-805204-99
UILC:51.49.03-05

MEMORANDUM FOR ROCKY MOUNTAIN DISTRICT COUNSEL

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation) CC:EL:GL:Br1

SUBJECT: Revocation of Releases of Self-Releasing Notices of Federal Tax Lien

This responds to your request for advice dated June 23, 1999. This document is not to be cited as precedent.

ISSUES:

1. Whether the release of a federal tax lien, pursuant to I.R.C. § 6325(a), extinguishes the underlying tax liability.

2. Under what circumstances can a certificate of release of lien be revoked and the lien reinstated?

CONCLUSIONS:

1. The release of lien extinguishes the federal tax lien but does not, in and of itself, extinguish the underlying tax liability.

2. A certificate of release of lien may be revoked when "issued erroneously or improvidently." The "self-releasing lien" is a long-utilized device, and the automatic release provision has been treated by the Internal Revenue Service, and recognized by the courts, as the equivalent of the issuance of a certificate of release. Accordingly, the

automatic release of a "self-releasing lien" has the same conclusive effect described in I.R.C. § 6325(f)(1)(A). The automatic release may also, therefore, be deemed to be "issued erroneously or improvidently" under circumstances further described below and may be reinstated under those circumstances pursuant to I.R.C. § 6325(f)(2).

LAW AND ANALYSIS:

I.R.C. section 6321 provides that "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal belonging to such person." The federal tax lien arises upon the date of assessment and continues "until the liability for the amount so assessed ... is satisfied or becomes unenforceable by reason of lapse of time." I.R.C. § 6322.

I.R.C. section 6325(a) provides that the Secretary shall issue a certificate of release of any lien when the liability for the amount assessed is fully satisfied or legally unenforceable or when a bond is accepted conditioned upon payment of the amount assessed. Section 6325(a) is, therefore, the counterpart to section 6322–when the duration of the lien has run, that lien must be released.

I.R.C. section 6325(f)(1)(A) further provides that where a certificate of release is "issued" pursuant to "this section" and is filed in the same office as the notice of federal tax lien to which it relates, such certificate is "conclusive that the lien referred to in such certificate is extinguished ... ." Thus, third parties may rely upon a filed certificate of release as evidence that a particular lien no longer exists.

I.R.C. section 6325(f)(2) additionally provides that where a certificate of release is "issued erroneously or improvidently", the Secretary may revoke such certificate and reinstate the lien. The reinstated lien "shall have the same force and effect (as of such date) ... as a lien imposed by section 6321 ... ." I.R.C. § 6325(f)(2)(B). The filing of a notice of revocation does not reinstate the lien retroactively. Rather, the priority of the lien dates from that filing. See Treas. Reg. § 301.6325-1(f)(2)(iii)(b); Treas. Reg. § 301.6325-1(b)(1)(ii), Example. See also United States v. Winchell, 793 F. Supp. 994 (D. Col. 1992).

The Internal Revenue Service (the "Service") generally uses a "self-releasing" lien to effectuate a certificate of release. All federal tax lien notices filed after December 31, 1982, are "self-releasing." In addition to serving the function of protecting the government's priority against other creditors of the taxpayer, a self-releasing lien serves as a certificate of release after the expiration of the statutory period for collection. The form used by the Service to file a notice of federal tax lien provides that "... unless notice of lien is refiled by the date [specified], this notice shall, on the day following such date operate as a certificate of release as defined in I.R.C. § 6325(a)." Courts have recognized the authority of the Service to utilize the self-releasing lien as an effective certificate of release. See Municipal Trust and Savings Bank v. United States, 114 F.3d

99, 102 (7th Cir. 1997), reh'g denied, 1997 U.S.App. LEXIS 16535 (7th Cir. 1997); Griswold v. United States, 59 F.3d 1571, 1579 n.18 (11th Cir. 1995); In re Cole, 205 B.R. 668, 673 (Bankr. D. Mass. 1997).

1. Effect of Release of Lien upon Underlying Liability

It has always been the position of this office that the effect of a certificate of release, whether by self-releasing lien or otherwise, is to extinguish the tax lien itself and not merely to rescind the notice of tax lien. We have not previously addressed the issue of the effect of a certificate of release upon the underlying tax liability. The distinction may be illustrated in the following hypothetical: a self-releasing lien is filed which states that it will operate as a certificate of release if notice of lien is not refiled by the date of the running of the 10-year statutory collection period. An event occurs, such as the taxpayer's bankruptcy, which tolls the 10-year period. The Service fails to refile, however, a new notice of lien which reflects the new date for expiration of the collection period and the lien self-releases on the original date provided. Accordingly, the notice on file operates as a certificate of release, which may be relied upon by third parties as conclusive evidence that the lien has been extinguished. However, the collection period remains open and the tax liability has not been satisfied.

We conclude that the release of the lien, in and of itself, does not extinguish the taxpayer's personal liability for the tax. We have found no authority for the position that the release of a lien has any impact on the liability. To the contrary, there is specific authority for the position that a certificate of release, while conclusive that the lien is extinguished, does not conclusively establish that the underlying tax liability is not owed or has been paid. See Urwyler v. United States, 95-1 USTC ¶ 50,238 at 87,862 (E.D. Cal. 1995); Miller v. Commissioner, 23 T.C. 565 (1954), aff'd, 231 F.2d 8 (5th Cir. 1956); Commissioner v. Angier Corporation, 50 F.2d 887, 892 (1st Cir. 1931), cert. denied, 284 U.S. 673 (1931). See also In re Goldston, 104 F.3d 1198 (10th Cir. 1997) (distinguishing the liability for tax from the assessment); Rev. Rul. 85-67, 1985-1 C.B. 364 (same); In re Doerge, 181 B.R. 358, 362 (Bankr. S.D. Ill. 1995) (distinguishes determination of the tax liability and collection of the tax as two distinct steps in the taxation process).

The argument that the release of a lien extinguishes the tax liability is also inconsistent with other aspects of section 6325. Section 6325(a)(2) provides that, in addition to when the liability is satisfied or unenforceable, the Service is authorized to release the lien upon acceptance of a bond. Clearly, in this scenario, the lien may be released, but the liability remains until paid or unenforceable. It would be incongruous to assert that a release of lien under section 6325(a)(1) extinguishes the underlying liability, but a release of lien under section 6325(a)(2) does not. In addition, 6325(f)(2) provides the Service with the authority to revoke a certificate of release and reinstate the lien in certain circumstances by mailing and filing notice of the revocation. Conceptually, the argument that the liability is extinguished upon issuance of a certificate of release seems inconsistent with our authority to make such a revocation without having to reassess the

liability. See also William D. Elliot, Federal Tax Collection, Liens and Levies at 6-13 (Prentice Hall 1988) (citing Treas. Reg. § 301.6325-1(a)(1) for the statement that "[w]hen a lien is released, however, the underlying tax liability is not extinguished until (1) the tax has been paid in full or (2) the statutory period for collection of the tax expires.").

Accordingly, we conclude that the release of a lien does not necessarily establish that the tax liability has been extinguished. The fact that the Service uses self-releasing liens inherently means that, in certain cases, liens will be extinguished prematurely. Under the facts of the hypothetical, for example, the self-releasing lien operates as a certificate of release and conclusively extinguishes the lien; but because the tax liability has not been satisfied and has not become unenforceable by lapse of time, the tax liability is not extinguished. We next address whether the prematurely extinguished lien can be reinstated.

2. Revocation of Certificate of Release

As previously discussed, the Service has utilized the "self-releasing lien" since 1982, and courts have recognized the validity of this device to operate as a certificate of release. In other words, the operation of the "self-release" mechanism equates with the "issuance" of a certificate of release for purposes of I.R.C. § 6325(f)(1). See, e.g., Municipal Trust and Savings Bank v. United States, supra. Accordingly, the operation of the "self-release" mechanism is conclusive that the underlying lien is extinguished, pursuant to section 6325(f)(1)(A).

Also as previously discussed, the statutory authority to revoke a certificate of release is found in I.R.C. 6325(f)(2). Section 6325(f)(2) authorizes the Service to revoke a certificate of release and reinstate the lien where the certificate of release was "issued erroneously or improvidently." We recognize that, in one sense, a self-releasing lien which self-releases under facts such as those described in the hypothetical was not issued erroneously or improvidently because the mechanism for automatic release was "issued" simultaneously with the filing of the notice of lien.

This interpretation is inconsistent with the position previously described, however, that the self-release of a lien itself operates as the "issuance" of a certificate of release for purposes of section 6325(f)(1), and is conclusive that the underlying lien is extinguished. It would be inconsistent to assert that the self-release of a lien operates as the issuance of a certificate of release for purposes of determining the conclusive effect of such certificate under section 6325(f)(1), but does not constitute the issuance of a certificate of release for purposes of revocation of such certificate under section 6325(f)(2).

The question remains whether the issuance of the certificate of release, pursuant to a self-release, can be considered "erroneous or improvident." More specifically, under the facts of the hypothetical, may the Service's acts of negligent omission in failing to timely refile the notice of the lien with the correct extended collection period date be considered the erroneous or improvident issuance of a certificate of release?

We consider the terms "erroneously or improvidently" to cover the universe of possible errors, both of omission and commission. A wrongful release of a self-releasing lien does not occur simply because time elapses; it is the result of some failure to act properly and timely. The Third College Edition of Webster's New World Dictionary defines improvident as "failing to provide for the future." The failure to act properly and timely to refile a lien so as to preserve the future efficacy of the lien is thus erroneous and improvident.

There is little guidance from the courts on what constitutes the sort of "error" or "improvidence" permitting the government to revoke a release under section 6325(f)(2). However, courts have generally not focused upon whether a premature filing of a certificate of release is "erroneous or improvident" but have just looked at whether or not the lien should have been released. See O'Bryant v. United States, 839 F. Supp. 1321, 1324 n. 5 (C.D. Ill. 1993), aff'd without discussion of this point, 49 F.3d 340 (7th Cir. 1995) (release of lien for liability already paid in erroneous refund case was not erroneous because the Service had to sue to collect such refund rather than treat the originally assessed liability as unpaid); United States v. Peterson, 93-1 U.S.T.C. ¶ 50,230 (W.D. Wash. 1993) (lien erroneously released where the Service determined that taxes were discharged in bankruptcy without considering whether the taxes were still collectible from certain assets); United States v. Winchell, 793 F. Supp. 994, 996 (D. Colo. 1992) (court acknowledged that lien was released prematurely and that such release could be revoked without discussing whether such release was "erroneous or improvident").

It has always been the business practice of the Service to file a notice of revocation in the case of a self-releasing lien which prematurely releases under facts such as those in the hypothetical. See IRM 5.12.2.19, Revocation of Certificates (CCH 1999). This practice has been expressly approved by this office. In addition, the ability of the Service to revoke self-releasing liens has been recognized by the courts. See Municipal Trust and Savings Bank v. United States, supra, at 102; In re Cole, supra, at 673.

The self-releasing lien program has long been recognized as valuable and cost-effective for the Service. The effectiveness of self-releasing liens would be undermined if the premature release of those liens could never be revoked. We would not reverse the long-standing business practice of the Service (endorsed by this office) that self-releasing liens that release prematurely may be reinstated by filing notices of revocation.

To summarize, the fact that a certificate of release has been filed does not establish that the underlying tax liability is extinguished. A notice of revocation of the certificate of release can and should be filed whenever the certificate of release was issued erroneously or improvidently. A self-releasing lien that self-releases while the collection period remains open, is "issued erroneously or improvidently."

Bankruptcy Court Jurisdiction over Relief from Joint and Several Liability under I.R.C. § 6015

October 8, 1999

CC:EL:GL:Br2
GL-607811-97
UILC: 09.24.00-00

MEMORANDUM FOR DISTRICT COUNSEL, NORTH FLORIDA DISTRICT (JACKSONVILLE)

FROM: Gary D. Gray
Assistant Chief Counsel (General Litigation)

SUBJECT: Bankruptcy Court Jurisdiction over Relief from Joint and Several Liability under I.R.C. § 6015

This memorandum responds to your request for advice dated October 14, 1998. This document is not to be cited as precedent.

ISSUE: Does a bankruptcy court have jurisdiction over relief from joint and several liability under I.R.C. § 6015?

CONCLUSION: The bankruptcy court has jurisdiction to consider relief from joint and several liability under subsections (b) and (c) of section 6015, even if the taxpayer has not filed an administrative request for relief with the Service. The bankruptcy court does not have jurisdiction to consider equitable relief under subsection (f), since this is within the sole discretion of the Service and is not reviewable by any court.

FACTS: Taxpayer, a debtor in a bankruptcy case, has asserted she is entitled to relief from joint and several liability under section 6015. The taxpayer has not previously raised section 6015 administratively with the Service. You have questioned whether the bankruptcy court has jurisdiction to consider this matter. The argument can be made that section 6015 requires that a taxpayer first request relief administratively from the Service, and that section 6015 only permits review of Service administrative determinations in the Tax Court or in the district court or court of claims if refund suits are filed. Arguably, this scheme does not provide the bankruptcy court with jurisdiction to consider relief under section 6015.

LAW AND ANALYSIS:

I. Background

A. Relief from Joint and Several Liability

Section 3201 of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA) added section 6015, which offers individuals three options for relief from liability for taxes for which they are jointly and severally liable under I.R.C. § 6013(d)(3). Section 6015(b) (referred to as innocent spouse relief), which is an expanded version of the innocent spouse relief available prior to the RRA under I.R.C. § 6013(e), permits an individual to elect relief from liability with respect to understatements of tax on the joint return that are attributable to the non-electing spouse. Relief is available if the individual establishes that he or she did not know and had no reason to know of the understatement, and it is inequitable to hold such individual liable for the deficiency attributable to the understatement.

Section 6015(c) (referred to as allocation of liability) provides an alternative ground for obtaining relief from joint and several liability. This provision permits an individual, if the spouses are no longer married, are legally separated or have not lived together for the entire 12 month-period prior to the election, to elect to have that individual's liability for a deficiency limited to items which would be allocable to that individual if the spouses had filed separate returns.

Section 6015(f) (referred to as equitable relief) permits the Secretary to relieve an individual of liability for any unpaid tax or any deficiency, pursuant to procedures prescribed by the Secretary, if relief is not available under subsections (b) or (c) and it is inequitable to hold the individual liable. Subsection (f) is the only provision of section 6015 which permits relief in the case of an underpayment of tax which is not a deficiency (e.g., the correct amount is reported on the return, but the tax is not fully paid). The Service has issued interim guidance for equitable relief under subsection (f) effective December 7, 1998. Notice 98-61, 1998-51 I.R.B. 13. Section 3.01 contains the threshold conditions for equitable relief, which includes the condition that relief is not available to the individual under sections 6015(b) or (c). Section 3.02 lists the circumstances under which equitable relief will ordinarily be granted. These circumstances include an unpaid liability on a joint return, the individual is no longer married, is legally separated, or has not lived with the other spouse for 12 months, the individual did not know and had no reason to know that the tax would not be paid, and the individual would suffer undue hardship if relief were not granted. Section 3.03 applies to individuals who meet the threshold conditions of section 3.01 but who do not qualify for relief under section 3.02. These individuals may qualify for relief if taking into account all facts and circumstances, it is inequitable to hold the individual liable for the unpaid liability or deficiency. Section 3.03 contains a non-exhaustive list of factors to be considered in granting relief under section 3.03. [1]

---

[1] Factors weighing in favor of relief include: (1) the individual requesting relief is separated, (2) the individual will suffer hardship if relief is not granted, (3) the individual was abused by the other spouse, and (4) the other spouse has a legal obligation to pay the liability pursuant to a divorce decree or agreement. Factors weighing against relief include that (1) the liability is attributable to the individual, (2) the individual had

Relief from liability under subsections (b) and (c) is only available if an individual makes an election not later than two years after the commencement of collection activities occurring after July 22, 1998, with respect to the individual making the election. I.R.C. §§ 6015(b)(1)(E), 6015(c)(3)(B); RRA 3201(g)(2). Section 6015 does not specify any period for filing for equitable relief under subsection (f). However, the Service has imposed a two-year time limitation for filing requests for equitable relief under section 6015(f). See Notice 98-61.

Section 3201(c) of the RRA requires the Secretary to develop a separate form for applying for relief under section 6015. The Service has developed Form 8857 which permits the taxpayer to elect relief under each of the three subsections of section 6015. Announcement 98-95.

Section 6015(e) provides for Tax Court review of requests for relief under subsections (b) or (c), if the electing spouse files a petition during the 90-day period beginning on the date that the Secretary mails by certified or registered mail a notice to the electing spouse of the Secretary's determination. If a notice of determination is not mailed within 6 months after the election is filed, the spouse may file a Tax Court petition at any time after the 6-month period and before the close of the 90-day period. If the taxpayer brings a suit for refund, [2] the Tax Court loses jurisdiction to the extent the District Court or Court of Federal Claims acquires jurisdiction over the taxable years, and the District Court or Court of Federal Claims acquires jurisdiction over the innocent spouse issues. I.R.C. § 6015(e)(3)(C).

Section 6015 does not provide for any Tax Court review of the Service's determinations as to equitable relief under section 6015(f).

B. Bankruptcy Court Jurisdiction

Section 505 of the Bankruptcy Code gives a bankruptcy court jurisdiction to determine the amount and validity of a debtor's taxes. See Baker v. IRS, 74 F.3d 906 (9th Cir. 1996), cert. denied, 517 U.S. 1192 (1996); Michigan Employment Sec. Comm. v. Wolverine Radio Co., 930 F.2d 1132, 1138-40 (6th Cir. 1991); Quattrone Accountants, Inc. v. IRS, 895 F.2d 921, 924-25 (3d Cir. 1990). Section 505(a)(1) states:

---

knowledge or had reason to know of the liability, (3) the individual has significantly benefitted from the unpaid liability beyond normal support, and (4) the individual has a legal obligation pursuant to a divorce decree or agreement to pay the liability. Id. at 3.03.

[2] A taxpayer can only bring a suit for refund with respect to relief under subsection (b) since credits and refunds are only permitted with respect to subsections (b) and (f), I.R.C. § 6015(e)(3)(A), and as discussed in this memorandum, relief under (f) is not reviewable by a court.

> Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

B.C. § 505(a)(1). This provision is described in the legislative history as permitting a "determination by the bankruptcy court of any unpaid tax liability of the debtor." S. Rep. 989, 95th Cong., 2d Sess. 67, reprinted in 1978 U.S.C.C.&A.N. 5787, 5853. Section 505(a)(2), however, provides that the bankruptcy court has no jurisdiction where there has been a prior judicial determination as to the merits of the tax liability, or, with respect to the right of the estate to a tax refund, before the Government has the opportunity to administratively consider a request for a tax refund. [3] See Baker, supra, 74 F.3d at 909-910.

The automatic stay prohibits the commencement or continuation of a proceeding before the Tax Court concerning the debtor after the filing of a bankruptcy petition. B.C. § 362(b)(8). The filing of a bankruptcy petition has the effect of giving the bankruptcy court concurrent jurisdiction with the Tax Court over issues involving the debtor's tax liability. Because the bankruptcy court can lift the stay of Tax Court proceedings in its discretion, the bankruptcy court has the power to decide in which court the tax issues will be litigated. See United States v. Wilson, 974 F.2d 514 (4th Cir. 1992), cert. denied, 507 U.S. 945 (1993).

The purpose of this broad grant of jurisdiction to the bankruptcy court is to allow the bankruptcy court to resolve all tax disputes necessary for the efficient administration of the estate. Stevens v. United States, 210 BR 200 (Bankr. M.D. Fla. 1997); In re D'Alessio, 181 BR 756 (S.D. N.Y. 1995). "Congress wanted to provide a forum for the quick resolution of disputed tax claims in order to avoid any delay in the conclusion of

---

[3] This provision states:

> The court may not so determine –
>
> (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or
>
> (B) any right of the estate to a tax refund, before the earlier of –
>
> (i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or
>
> (ii) a determination by such governmental unit of such request.

B.C. § 505(a)(2).

the administration of the estate." Stevens, supra, 210 BR at 202; In re Diez, 45 BR 137, 139 (Bankr. S.D. Fla. 1984).

II. Legal Analysis

As previously discussed, section 6015 affords three types of relief: innocent spouse relief under subsection (b), allocation of liability under subsection (c), and equitable relief under subsection (f). We first discuss relief under subsections (b) and (c). If a debtor/taxpayer is entitled to relief from liability under subsections (b) or (c), then this will reduce the debtor's tax liability. We, thus, conclude that a bankruptcy court's determination as to relief under sections 6015(b) and (c), just like any other issue affecting the amount of the taxpayer's tax liability, is a determination regarding the "amount or legality of any tax" under section 505(a) and is within the bankruptcy court's jurisdiction.

The argument has been made, however, that because section 6015 specifically gives the Tax Court jurisdiction over section 6015(b) and (c) relief, but does not confer similar jurisdiction on the bankruptcy courts, this precludes bankruptcy courts from obtaining jurisdiction. This argument, however, ignores the fact that section 505 is a general grant of jurisdiction to bankruptcy courts of jurisdiction over all matters concerning the amount or legality of the debtor's tax liability. See, e.g., Wilson, supra; United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986). Bankruptcy court jurisdiction is not dependent on a specific grant of jurisdiction in the Internal Revenue Code. In contrast, the Tax Court is a court of limited jurisdiction, and it can exercise its jurisdiction only to the extent authorized by Congress. Halpern v. Comm., 96 T.C. 895 (1991); Naftel v. Comm., 85 T.C. 527 (1985). [4]

In order to deprive a bankruptcy court of jurisdiction, section 6015 would have to be interpreted as an implied partial repeal of section 505(a). However, it is a general rule of statutory construction that repeals by implication are not favored unless the intent to repeal is clear and express. Rodriguez v. United States, 480 U.S. 522, 524 (1987); 73 Am. Jur. 2d Statutes §§ 396, 397 (2d ed. 1974). There is no indication in section 6015 that Congress intended to withdraw jurisdiction from bankruptcy courts over relief from joint and several liability. The general rule of concurrent bankruptcy court and Tax Court jurisdiction over tax matters should apply with respect to section 6015 to the same extent as it would with any other Internal Revenue Code provision.

---

[4] For example, the Tax Court only acquires jurisdiction to determine the taxpayer's deficiency upon the filing of a proper Tax Court petition by the taxpayer after the Service issues a notice of deficiency, I.R.C. § 6213(a), and only acquires jurisdiction to review the Service's determination as to whether the taxpayer is entitled to section 6015 relief when the taxpayer files a proper petition from such determination under section 6015(e)(1)(A).

As previously discussed, the purpose of the broad grant of jurisdiction to bankruptcy courts is to permit bankruptcy courts to efficiently resolve all matters affecting the estate. Consistent with this purpose, if the debtor contests the Service's tax claim on the ground that she is entitled to relief pursuant to sections 6015(b) and (c), it is critical that the bankruptcy court have jurisdiction over subsections (b) and (c) in order to resolve all of the issues involving the debtor's tax liability. We, thus, cannot argue that the lack of an express grant of authority in section 6015 precludes the bankruptcy court from having jurisdiction over section 6015(b) and (c) relief.

The argument has also been made that section 6015 requires that the taxpayer exhaust administrative remedies within the Service before the bankruptcy court can have jurisdiction over any matter concerning section 6015 relief. While it is true that exhaustion of administrative remedies is a jurisdictional prerequisite to obtain Tax Court review of the Service's final determination as to relief under section 6015(e), see Tax Court Rule 320, this is merely a restriction on Tax Court review of the Service's final determination and does not affect bankruptcy court jurisdiction. [5]

In any case, our position is that the administrative request and issuance by the Service of a final determination under section 6015 (or failure to rule thereon) are not jurisdictional prerequisites for the Tax Court to consider relief from joint and several liability in a proceeding commenced in response to a notice of deficiency pursuant to I.R.C. § 6213. As was possible with pre-RRA innocent spouse issues raised under I.R.C. § 6013(e), a petitioner can raise section 6015 in a deficiency case. A petitioner can raise section 6015 in a deficiency case even if such case was filed before the enactment date, July 22, 1998, since section 6015 applies to unpaid liabilities for taxes arising on or before the date of enactment. While section 6015(b) and (c) require an "election" to be made, this can take any number of forms, including Tax Court pleadings or other writings, not necessarily a Form 8857. We conclude that a taxpayer can raise section 6015 relief in bankruptcy court without following the administrative procedures in section 6015 just as a taxpayer can raise section 6015 relief in a Tax Court deficiency

---

[5] As a general matter, limitations on Tax Court jurisdiction are not applicable in Bankruptcy Court. For example, the Tax Court cannot review a tax liability until the Service has first made an administrative determination by issuing a notice of deficiency. I.R.C. § 6213. In contrast, the bankruptcy court is under no such restriction; it can determine the "amount or legality of any tax" regardless of the administrative stage of the Service's consideration of the tax liability. The Service may estimate taxes on a proof of claim where no returns have been filed and an audit has not been commenced. See, e.g., United States v. Berger, 36 F.3d 996 (10th Cir. 1994). There is no question that the bankruptcy court has jurisdiction to determine such tax liabilities if a party objects to the proof of claim. See generally United States v. Wilson, 974 F.2d 514 (4th Cir. 1992).

proceeding commenced pursuant to section 6213 without following those administrative procedures.

We also note that, as previously discussed, section 505(a)(2)(B) contains an express exhaustion of administrative remedies requirement with respect to refunds. A similar provision in section 505 would be necessary to deprive the bankruptcy court of jurisdiction over section 6015 relief prior to a determination by the Service.

There are limitations to bankruptcy court jurisdiction over section 6015(b) and (c) relief. First, the requirement of sections 6015(b)(1)(E) and (c)(3)(B) that the taxpayer must file for relief no later than two years after the Secretary has begun collection activities with respect to the taxpayer must apply if the issue is raised for the first time in the bankruptcy case since the taxpayer is not entitled to section 6015 relief unless that requirement is met. The date that the taxpayer raises the section 6015 issue in the bankruptcy court should be considered the time the election is made for purposes of the two-year period. Our office's position is that collection activity does not commence for purposes of the two-year period until the Service makes an actual levy against property in which the electing spouse has an interest, or files a suit or a claim in a judicial proceeding (e.g., a proof of claim) against the electing spouse.

Second, the requirements of section 505(a)(2) apply. The debtor cannot raise relief from joint liability if the tax liability was previously contested and adjudicated pursuant to section 505(a)(2)(A). See Baker, supra. Note, however, that section 6015(e)(3)(B) provides that in the case of an election under subsection (b) or (c), a prior final Tax Court decision for the same taxable year for which relief is requested shall be conclusive except with respect to qualification for relief which was not an issue in the prior Tax Court proceeding. This exception to res judicata for relief from joint liability does not apply if the Tax Court determines that the individual participated meaningfully in the prior Tax Court proceeding. Although this provision appears to have been drafted with Tax Court jurisdiction in mind, when the bankruptcy court is considering relief from joint liability it is acting as an alternative forum to the Tax Court, and, thus, the same res judicata exception applicable in Tax Court should apply to the bankruptcy court. We, thus, conclude that the section 6015(e)(3)(B) exception permits a debtor to raise relief in bankruptcy court under subsections (b) or (c) despite a prior final Tax Court decision unless the bankruptcy court determines that the debtor participated meaningfully in the prior Tax Court proceeding.

While we conclude that the bankruptcy court has jurisdiction over relief under subsections (b) and (c), we conclude that the bankruptcy court does not have jurisdiction to consider equitable relief under subsection (f). Section 6015(f) states that "the Secretary may relieve such individual of such liability" (emphasis added), which indicates that equitable relief can only be granted by the Secretary. Since the word "may" rather than "shall" is used, this also indicates that the Secretary can decide whether or not to grant relief in the Secretary's sole discretion. In contrast section 6015(b) states that the individual "shall be relieved of liability" and section 6015(c)(1)

states that the individual's liability "shall not exceed the portion of such deficiency properly allocable to the individual under subsection (d)."

Section 6015(e) does not provide for any review of the Service's determination as to equitable relief under subsection (f). Section 6015(e) only permits a petition to be filed with the Tax Court in "the case of an individual who elects to have subsection (b) or (c) apply." We conclude that the fact that the Tax Court was not provided any jurisdiction over subsection (f) relief reflects Congressional intent that the Service's determination as to equitable relief is within its sole discretion and not reviewable by any court. When a bankruptcy court is determining the amount or legality of a tax under section 505(a), it is acting in place of the normal judicial forum for tax controversies, e.g., Tax Court. Since the Tax Court does not have jurisdiction over equitable relief, the bankruptcy court should be similarly precluded from considering equitable relief.

Although we conclude that the bankruptcy court has jurisdiction over section 6015(b) and (c) relief, to avoid unnecessary litigation and to ensure uniformity in granting relief, any debtor requesting relief in a bankruptcy case should be urged to file an administrative request for relief with the Service, and to agree to a postponement of any proceedings to permit the Service sufficient time to consider the request and make a determination. One major advantage of administrative consideration to the taxpayer is that the Service will have the opportunity to consider equitable relief under section 6015(f), which cannot be considered by the bankruptcy court. Additionally, administrative consideration will assist in the development of a record regarding entitlement to relief. Thus, when section 6015 is raised in bankruptcy court the Service should attempt to have the matter administratively resolved before the bankruptcy court considers the issue.

In conclusion, our position is that a bankruptcy court does have jurisdiction to consider relief under sections 6015(b) and (c), even in the absence of an administrative request for relief, although the Service should urge debtors to file administrative requests for relief and request bankruptcy courts to defer consideration of the issue until after the Service makes a determination. Our position is also that the bankruptcy court has no jurisdiction to consider equitable relief under section 6015(f) since the granting of such relief is within the sole discretion of the Service and is not reviewable by a court.

Finally, one additional issue which may arise in a bankruptcy court case in which the debtor raises section 6015 relief is the ability of the non-debtor spouse to participate, and the bankruptcy court's jurisdiction over the other spouse's tax liability. Section 6015 provides for notice to and participation by the other spouse in administrative and Tax Court proceedings. I.R.C. §§ 6015(e)(4), (g)(2). There is no comparable statutory authority which would permit a non-debtor spouse to have notice of and to participate in a bankruptcy case where the debtor seeks section 6015 relief. Arguably, unless the non-debtor spouse is a creditor of the debtor, the non-debtor spouse has no right to participate in the bankruptcy case.

Insofar as the bankruptcy court permits a non-debtor spouse to participate, the question arises whether the bankruptcy court has jurisdiction to determine the non-debtor spouse's entitlement to section 6015 relief. Our office's position is that a bankruptcy court has no jurisdiction over the tax liability of a non-debtor and, thus, has no jurisdiction to determine the entitlement of a non-debtor spouse to section 6015 relief. See American Principals Leasing Corp. v. United States, 904 F.2d 477 (9th Cir. 1990); In re Brandt Airflex Corp., 904 F.2d 477 (2d Cir. 1988); United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986).

Federal Tax Lien/Recission of Sale

January 4, 2000

CC:EL:GL:Br1
GL-809790-99
UILC: 50.30.10-00

MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL, SOUTHERN CALIFORNIA DISTRICT

FROM: Alan C. Levine, Chief, Branch 1 (General Litigation)

This responds to your request for advice regarding the above subject. This document is not to be cited as precedent.

ISSUE(S):

Whether the federal tax lien of I.R.C. § 6321 continues to attach to real property purchased by a taxpayer in Date A after a judgment against him in Date B in which the contract of sale was rescinded.

CONCLUSION:

The federal tax lien remained attached to the property even after rescission of a contract of sale of real property purchased by the taxpayer .

FACTS:

The taxpayer and a third party entered into a contract to purchase real property in Date C, from the sellers at a price of $Amount A. As part of the contract, the taxpayer agreed to either assume the existing trust deed that had a balance of $Amount B or

refinance. After a down payment of $Amount C, the sellers conveyed legal title to the taxpayer and a third party as joint tenants. [6]
The Internal Revenue Service filed a Notice of Federal Tax Lien against the taxpayer in the county where the real property was located on Date D, in the amount of $Amount D for Date A. The taxpayer never did assume the existing loan nor did he refinance. He made monthly payments of $Amount E to the sellers on the existing deed of trust from September Date A until early Date E. Since the sellers of the property were primarily liable on the loan, they made a total of 7 payments plus late fees totaling $Amount F after the taxpayer defaulted.

The sellers sued the taxpayer in state court on Date F, for breach of contract and rescission. On Date G, the sellers obtained a default judgment, the taxpayer was declared in breach, and the court ordered the contract rescinded.

The court awarded the sellers $Amount F in compensatory damages for the loan payments they made, as well as attorney's fees and costs of $Amount G. The taxpayer refused to cooperate; therefore, the court appointed an "elisor" who executed a deed and conveyed the property back to the sellers on Date H. The sellers are now reselling the property for $Amount H and question the Service's demand in the amount of $Amount I, which is the current amount of the taxpayer's tax liability for Date A including interest and penalties.

LAW AND ANALYSIS

I.R.C. § 6321 provides that a lien for unpaid taxes attaches to "all property and rights to property" of the taxpayer. The federal tax lien in this case arose in Date J and a federal tax lien was recorded in Date K while the taxpayer was the owner of the property. The federal tax lien continues until satisfied or unenforceable due to lapse of time. I.R.C. § 6322. Treas. Reg. § 6331-1(a)(1) authorizes the Service to seize property "subject to a federal tax lien which has been sold or otherwise transferred by the taxpayer." The lien therefore, attached to the property and continued to attach regardless of any conveyance to a third party or a reconveyance back to the original seller. "[I]t is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere. . . .'* United States v. Bess, 357 U.S. 51 (1958). In addition, the federal tax lien is not limited to the value of the property at the time of the sale to a third party but may share in any appreciation of the property. Han v. United States, 944 F.2d 526 (9th Cir. 1991).

In this case, the property subject to the federal tax lien was transferred back to the sellers after a judgment in which the court held that the contract of sale was rescinded. The federal tax lien remained attached to the property at the time it was transferred

[6] The joint tenant died on Date I and the federal tax lien attached to the entire property at that time.

back to the sellers and had priority over the sellers' interest. The Government has the right to seize the property, sell it, and compensate the sellers for the value of their interest. United States v. Big Value Supermarkets, Inc., 898 F.2d 493 (6th Cir. 1990) (Government not limited to amount of taxpayer's down payment on installment real estate contract who immediately transferred it to a third party.) Alternatively, the Government could accept the amount due on the liability from the sellers and release the lien.

The only way the sellers could defeat a federal tax lien filed at least thirty days prior to the sale would be to notify the Government at least 25 days prior to the sale pursuant to I.R.C. § 7425(b). Otherwise the sale is made "subject to and without disturbing such lien." The Government was not notified about the sale.

Sanborn v. Ballanfonte, 277 P. 152 (Cal. 1929) provides that upon rescission of an executory contract in California, the parties should be restored to their former positions. In this case, as a matter of state law, the sellers should refund to the taxpayer his down payment and any mortgage payments made on the property. While it could be concluded from an analysis of Sanborn that the United States has a lien on the subject real property after the rescission because the taxpayer has an equitable interest in it at that time, this would be an inaccurate analysis. Even if a taxpayer has relinquished all rights to the property by a valid sale or transfer, the federal tax lien would still attach. United States v. Avila, 88 F.3d 229 (3d Cir. 1996) (taxpayer transferred to wife who later transferred to a third party. Federal tax lien remained attached with respect to his one-half interest.) Nor would it be accurate to limit the value of the federal tax lien to the down payment and mortgage payments made. "[F]ixing the value of the lien at the time the taxpayer transfers the property certainly 'affects the lien,' and therefore Bess prohibits it." Id. at 233.

We recommend advising the sellers' legal representative that if the sellers choose not to satisfy the lien, the United States will either seize and sell the property or file suit to reduce the tax claim to judgment and sell the property after the court awards judgment.

RRA 98, Section 3401 - Collection Due Process Issues

November 24, 1999

CC:EL:GL:Br1
GL-704952-99
UILC: 50.00.00-00
51.00.00-00

MEMORANDUM FOR NORTH CENTRAL DISTRICT COUNSEL

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation)

SUBJECT: Request for Advice: RRA 98, Section 3401 - Collection Due Process Issues - Supplemental Request

This advice is in response to your memorandum concerning the above subject. This document is advisory only and is not to be relied upon or otherwise cited as precedent.

ISSUES:

1. After receiving a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, can the taxpayer waive his right to a Collection Due Process (CDP) hearing before the 30-day period has run?

2. After waiving his right to a CDP hearing, can the taxpayer change his mind and request a CDP hearing before the 30-day period has run?

CONCLUSIONS:

1. After receiving a Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing, the taxpayer can waive his right to a CDP hearing before the 30-day period has run.

2. After waiving his right to a CDP hearing, we would generally not expect the taxpayer to change his mind and request a CDP hearing before the 30-day period has run. Theoretically, however, the taxpayer could make such request, for example, to raise collection alternatives with respect to the seizure of additional property. However, any property seized pursuant to his waiver would not have to be returned.

FACTS:

The RRA 98 Collection Coordinator for the North Central District requested in a memorandum dated July 12, 1999, advice from your office regarding a number of day to day collection issues. You have prepared a memorandum containing proposed responses to the issues, and you have requested our office to pre-review these responses. We agree with all of your proposed responses except for response six. Question six in the Collection Coordinator's memorandum reads as follows:

> 6(a). After we have sent Letter 1058, can the taxpayer waive his rights to a CDP hearing before the 30-day period has run? If so in what manner or form? Note: We have taxpayers who would find it advantageous for the IRS to levy prior to third party actions.
>
> 6(b). If the taxpayer waives his rights before 30 days have run, can he then change his mind and request a CDP hearing before 30 days have run?

Your proposed response to question 6 is as follows:

> 6(a). We are unaware of any provision in Sections 6320 or 6330 which allows the taxpayer to affirmatively waive their right to a CDP hearing prior to the expiration of the 30-day period.
>
> 6(b). See response to Question no. 6a.

LAW AND ANALYSIS:

While I.R.C. §§ 6320 and 6330 do not specificially permit a taxpayer to affirmatively waive a right to a CDP hearing before the 30-day period has run, those sections do not prohibit taxpayers from making such waivers. The temporary regulations promulgated under those sections permit waiver under certain circumstances. Accordingly, we

believe a waiver can be granted to a taxpayer on informal basis. [7] The Internal Revenue Service (Service) should not present the waiver option to the taxpayer unless the Service believes that such a waiver may be in the best interests of the taxpayer. If the taxpayer makes an unsolicited request for a waiver, Collection should then seek guidance from their local District Counsel.

Our office has reviewed and approved waiver language that is to be used when a taxpayer wishes to waive his right to a CDP hearing when such CDP hearing has not previously been requested in writing. The waiver language should provide that the taxpayer must have received and read the CDP Notice before signing the waiver. The language should also provide that by signing the waiver, the taxpayer understands that he has "knowingly and voluntarily" waived his rights to a CDP hearing and the 30-day waiting period before levy.

Once the taxpayer signs the waiver form, we would not expect that the taxpayer would change his mind and request a CDP hearing. However, there may be situations in which the taxpayer changes his mind and requests a hearing after waiver within the 30-day waiting period. For example, the taxpayer may realize the seizure he has agreed to will not generate sufficient assets to fully pay his liability. In such a case, the taxpayer may desire a hearing concerning possible collection alternatives. However, we believe that if the levy has already occurred, prior to his revocation of the waiver, that the seizure itself is proper and the property would not have to be returned.

---

[7] We are assuming in this situation that the taxpayer has not made an initial written request for a CDP hearing. If the taxpayer has already made an initial written request for a CDP hearing, then the taxpayer would have to submit a Form 12256, Withdrawal of Request for Collection Due Process Hearing, to waive his right to a CDP hearing. Treas. Reg. § § 301.6320-1T(e)(3)Q&A-E7(ii), 301.6330-1T(e)(3)A&Q-E7(iii).