

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

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AHCooper

date: January 24, 2006

to: Steve Price, TAS Group Manager, Los Angeles

from: ALAN H. COOPER, General Attorney (Small Business/Self-Employed)

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subject: **Collection After Assessment**

**Taxpayer:**  
**TIN:**

LEGEND:  
Year 1 =  
Year 2 =  
Year 3 =  
Year 4 =  
Year 5 =

This memorandum responds to your request for assistance dated June 28, 2005. This memorandum should not be cited as precedent. Our National Office has concurred with the advice rendered herein.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

QUESTIONS PRESENTED

1. Whether the Service should refund to Taxpayers the Year 3 and Year 4 overpayments that were offset to their Year 1 and Year 2 taxable years.

2. Whether the Service should refund to Taxpayers the payment received from the refinance of their residence that was applied to the Year 2 taxable year.

#### SHORT ANSWER

1. It is Counsel's opinion that the Service should refund to Taxpayers the Year 3 and Year 4 overpayments that were offset to their Year 1 and Year 2 taxable years.

2. It is Counsel's opinion that the Service should refund to Taxpayers the payment received from the refinance of their residence that was applied to the Year 2 taxable year.

#### FACTS

Taxpayers filed joint returns for taxable years Year 1 and Year 2. Taxpayers' Year 1 tax liability was assessed on June 8, . Taxpayers' Year 2 tax liability was assessed on June 7,

. On , the Service filed a Notice of Federal Tax Lien (NFTL) as to Taxpayers in the county where they reside for their Year 1 and Year 2 tax liabilities. The refile deadlines (expiration dates) for the NFTL were July 8, Year 3, and July 7, Year 4, for the Year 1 and Year 2 tax liabilities, respectively.

On , Taxpayer husband (separately) filed a Chapter 7 bankruptcy petition and received a discharge on

. Taxpayer husband's obligation to pay the joint Year 1 and Year 2 tax liabilities was discharged as a result of the bankruptcy. At the time of the bankruptcy petition, Taxpayers owned a personal residence which was held as community property and was disclosed on his bankruptcy schedule. On , due to the bankruptcy discharge, the Service released the NFTL for the Year 1 and Year 2 tax liabilities as to Taxpayer husband only.

Taxpayers filed joint returns for taxable years Year 3 and Year 4. On April 14, Year 4, Taxpayers' Year 3 refund of \$ was offset to taxable year Year 1. On April 15, Year 5, Taxpayers' Year 4 refund of \$ was offset to taxable year Year 2.

On May 26, Year 5, Taxpayers refinanced their residence. On May 27, Year 5, the Service received a payment of \$

, which was related to the refinance of the residence. Part of the payment was applied to Taxpayers' Year 2 taxable year.

Taxpayer wife timely contacted TAS requesting recovery of the Year 3 and Year 4 overpayments that were offset to the Year 1

and Year 2 taxable years as well as the portion of the payment relating to the refinance of the residence that was applied to the Year 2 tax liability. Taxpayer wife claims that her Year 1 and Year 2 tax liabilities were discharged as a result of her husband's bankruptcy discharge. Alternatively, Taxpayer wife requests recovery of these offsets and payment claiming that they occurred subsequent to the expiration of the collection period.

#### DISCUSSION

Pursuant to 11 U.S.C. § 524(a)(3) of the Bankruptcy Code, a bankruptcy discharge generally operates as an injunction against the commencement or continuation of an action to collect or recover from community property that is acquired after the commencement of the bankruptcy case. Thus, in community property states such as California, if one spouse has commenced a bankruptcy case in which all claims are discharged, then creditors of either spouse holding community claims on the date of bankruptcy are thereafter barred from asserting these claims against after-acquired community property. Collection on a debt by a creditor of the nondebtor spouse is limited to the nondebtor spouse's separate property and any nonexempt prebankruptcy community property not included in the bankruptcy estate.

In the present case, Taxpayers' overpayment for the Year 3 taxable year was offset to taxable year Year 1. Taxpayers' overpayment for the Year 4 taxable year was offset to taxable year Year 2. Since Taxpayers filed joint returns for taxable years Year 3 and Year 4, the overpayments for those years constitute after-acquired community property. See Rev. Rul. 2004-72; 11 U.S.C. § 541(a)(2). As such, the Service is barred from offsetting these amounts to taxable years Year 1 and Year 2 because the Service may not collect from after-acquired community property for tax liabilities discharged by Taxpayer husband's bankruptcy. Please also note that the Service should not offset any future joint overpayments to taxable years Year 1 and Year 2 so long as Taxpayers remain married.

Regarding Taxpayers' residence, the residence (owned as community property) was disclosed in Taxpayer husband's bankruptcy petition in . However, at the time of the bankruptcy filing, the residence was already encumbered by numerous liens, including a notice of federal tax lien (NFTL) filed by the Service in . Despite the fact that the Year 1 and Year 2 tax liabilities were discharged as to Taxpayer husband, federal tax liens pass through bankruptcy unaffected. Dewsnup v. Timm, 502 U.S. 410, 417 (1992); In Re Isom, 901 F.2d 744, 745 (9<sup>th</sup> Cir. 1990); 11 U.S.C. § 522(c)(2).

All NFTLs filed after December 31, 1982, are "self-releasing" liens. A self-releasing lien acts as a certificate of release pursuant to I.R.C. § 6325(a) upon the expiration of the NFTL (which date is ten years and thirty days from the date of

assessment of the particular tax involved). See I.R.C. § 6323(g)(3). A certificate of release is conclusive that the lien referred to in such certificate is extinguished. I.R.C. § 6325(f)(1); Treas. Reg. § 301.6325-1(f)(1).

Taxpayers' Year 1 and Year 2 tax liabilities were assessed on June 8, , and June 7, , respectively. On

, the Service filed an NFTL. The refile deadlines (expiration dates) for the NFTL were July 8, Year 3, and July 7, Year 4, for the Year 1 and Year 2 tax liabilities, respectively. The Service did not timely refile the NFTLs pursuant to I.R.C. § 6323(g). Thus, the NFTLs acted as certificates of release. When the refinance of the residence took place in May Year 5, the tax liens had already been released. Because the taxes were discharged and the liens were released, and because the Service did not revoke the release within the respective collection periods for Taxpayer husband and Taxpayer wife, the proceeds of the refinance may not be applied to the Year 2 liability even though the Service received the proceeds within the respective collection periods for Taxpayer husband and Taxpayer wife.

#### CONCLUSION

Based on the foregoing, it is Counsel's opinion that the Service should refund to Taxpayers the Year 3 and Year 4 overpayments that were offset to their Year 1 and Year 2 taxable years because the overpayments constitute after-acquired community property that the Service is barred from collecting due to Taxpayer husband's bankruptcy discharge. The Service also should refund to Taxpayers the payment received from the refinance of their residence that was applied to the Year 2 taxable year because the Service's liens on the residence were extinguished with the self-release of the NFTLs.

At this time, we are closing our file in this matter. If you have any questions, please contact

at

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By: \_\_\_\_\_  
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