Federal Bar Association – Los Angeles
Fifteenth Annual
Bankruptcy Ethics Symposium

November 16, 2018

How Not to be Befuddled by Bankruptcy Tax

Honorable Robert N. Kwan | U.S. Bankruptcy Court
Jolene Tanner | U.S. Attorney's Office
Elmer Dean Martin III | Elmer Dean Martin III, a P.C.

Honorable Robert N. Kwan

http://www.cacb.uscourts.gov/judges/honorable-robert-n-kwan

Robert Kwan has served as a judge of the United States Bankruptcy Court for the Central District of California since 2007. Judge Kwan's background as a tax practitioner includes a Master of Laws in Taxation degree from Georgetown University Law Center and 21 years of practice as a government tax attorney for the U.S. Department of Justice (DOJ) as an Assistant United States Attorney (AUSA) in the Tax Division of the U.S. Attorney's Office (USAO) in Los Angeles and as a DOJ trial attorney in the DOJ Tax Division in Washington, D.C. For the government, he handled civil and criminal tax cases and bankruptcy tax matters in the federal district courts and bankruptcy courts and state trial courts. As Deputy Chief of the USAO Tax Division in Los Angeles, he supervised IRS attorneys under the so-called Houston Plan allowing them to serve as Special Assistant United States Attorneys representing the IRS in bankruptcy tax controversies in the bankruptcy court.

Jolene Tanner

Jolene Tanner is an Assistant United States Attorney at the U.S. Attorney's Office, Tax Division in Los Angeles California, where she handles tax litigation in the Central District of California, including bankruptcy tax litigation. Previously, Ms. Tanner was a judicial law clerk and extern for Bankruptcy Judges in the Central District of California. Ms. Tanner's law review article *Stern v. Marshall: The Earthquake That Hit the Bankruptcy Courts and the Aftershocks That Followed*, 45 Loy. L.A. L. Rev. 587 (2012), is cited in multiple publications including amicus curiae to the Ninth Circuit and Supreme Court.

Elmer Dean Martin III

Education:

- University of Notre Dame, B.B.A. (CPA Accountancy), 1965
- University of Wisconsin Law School, J.D., 1968
- New York University Graduate School of Law, LL.M (Taxation), 1971
- California State Polytechnic University, B.S. (Engineering), 2004

Career Record:

- Summer 1968: Goodrich, Dalton, Little & Riquelme, Mexico City, Mexico
- 1968 – 1969: Law Clerk to Justice David Zenoff, Nevada Supreme Court
- 1969 – 1970: Law Clerk to U.S. District Judge Bruce R. Thompson, Reno, Nevada
- 1970 – 1971: Graduate Fellow, New York University Graduate School of Law
- 1970 – 1977: LaFollette, Sinykin, Anderson & Abrahamson, Madison, Wisconsin
- 1977 – 1981: Gendel, Raskoff, Shapiro & Quittner, Los Angeles, California
- 1981 – 1984: Weisberg & Aronson, Los Angeles, California
- 1984 – 2018: Elmer Dean Martin III, A Professional Corporation, Diamond Bar, California
- Admitted to the Wisconsin Bar 1968, Nevada 1969, and California 1977
- Licensed as a Certified Public Accountant, Wisconsin, 1974

Professional Memberships:

- Beta Gamma Sigma (Business) (top 10%)
- Beta Alpha Psi (Accounting) (top 10%)
- Order of the Coif (Law) (top 10%)(University of Wisconsin Law School Law Review)
- Tau Alpha Pi (Engineering Technology) (top 4%)
- Golden Key Society (Engineering) (top 8%)
- First Editor in Chief, and present Editor, California Bankruptcy Journal

TOPIC: How Not to be Befuddled by Bankruptcy Tax

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re AB Liquidation Corp., 9th Cir.BAP (Cal.), December 22, 2006

363 F.3d 999
United States Court of Appeals,
Ninth Circuit.

William M. MILLER, Reorganized Debtor, Plaintiff–Appellant,
v.
UNITED STATES of America, through its Department of Treasury, Internal Revenue Service; State of California, through its State Board of Equalization, Defendants–Appellees.

No. 02–17073.
|
Argued and Submitted March 12, 2004.
|
Filed April 13, 2004.

Synopsis
Background: Chapter 11 debtor sought to prevent taxing authority from collecting "gap period" interest on his otherwise nondischargeable tax debts, on ground that his confirmed Chapter 11 plan provided for discharge of these debts. The United States Bankruptcy Court for the Northern District of California, Thomas E. Carlson, J., 253 B.R. 455, denied debtor's motion for summary judgment and entered judgment in favor of the Internal Revenue Service (IRS), and appeal was taken. The District Court, Conti, J., 284 B.R. 121, affirmed.

Holdings: On further appeal, the Court of Appeals, Cynthia Holcomb Hall, Senior Circuit Judge, held that:

[1] debtor's confirmed Chapter 11 plan was ambiguous as to whether confirmation of plan operated to discharge debtor's obligation for "gap period" interest on nondischargeable tax debt;

[2] ambiguity in plan would be interpreted against debtor as party who had drafted plan; and

[3] debtor's obligation, as responsible party, for "gap period" interest accruing on trust fund recovery penalty assessed against him was excepted from discharge, as interest accruing on otherwise nondischargeable debt for any "tax required to be collected or withheld."

Affirmed.

West Headnotes (16)

[1] **Bankruptcy**
Conclusions of law; de novo review

Bankruptcy court's conclusions of law are reviewed de novo.

24 Cases that cite this headnote

[2] **Contracts**
Ambiguity in general

Whether contract is ambiguous is question of law for court.

5 Cases that cite this headnote

[3] **Bankruptcy**
Clear error

Bankruptcy court's findings of fact are reviewed for clear error. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

10 Cases that cite this headnote

[4] **Bankruptcy**
Conclusions of law; de novo review

Question as to dischargeability of debt is mixed question of fact and law, which appellate court considers de novo on appeal in bankruptcy case. Bankr.Code, 11 U.S.C.A. § 523(a).

24 Cases that cite this headnote

COPY

RECEIVED
2001
U.S. ATTORNEY OFFICE
TAX DIVISION

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

--o0o--

In Re: WILLIAM M. MILLER, Debtors.	Case No. 3-89-04281-TC San Francisco, California Wednesday, December 5, 2001 8:56 A.M.
WILLIAM M. MILLER, reorganized debtor, Plaintiff, vs. UNITED STATES OF AMERICA, through its DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE; and STATE OF CALIFORNIA through its STATE BOARD OF EQUALIZATION, Defendant.	Chapter 11 Adversary No. 00-3077-TC

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS E. CARLSON
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtor: IAIN A. MACDONALD
MacDonald and Associates
Two Embarcadero Center, Suite 1670
San Francisco, CA 94111
(415) 362-0449

For Assistant U.S. Attorney: JAY R. WEILL
Chief, Tax Division
450 Golden Gate Ave., 10th Floor
San Francisco, CA 94102
(415) 744-9228

Court Recorder: JANE L. GALVANI
U.S. Bankruptcy Court
235 Pine Street, 23rd Floor
San Francisco, CA 94104
(415) 268-2366

Transcription Service: V/ARS, Inc.
6905 Vicksburg Place
Stockton, CA 95207
(209) 472-2433

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

SAN FRANCISCO, CALIFORNIA, WED., DECEMBER 5, 2001, 8:56 A.M.

THE COURT: Okay. I'll give you my decision here. I'm going to find for the defendant and I do so for the following reasons.

First of all let me note an introduction that the previous ruling determined that the language of Article 11 of the plan read without parole evidence, but with the benefit of applicable rules of interpretation. Under such construction, Article 11 did not provide for the discharge of the otherwise non-dischargeable debt to the IRS for post-petition, pre-confirmation interest on the Government's priority tax claim.

Following the prior two rulings, on defendant's motions for summary judgment, the Court left open whether there was parole evidence that would indicate a different interpretation of Article 11 of the plan was appropriate. And this present trial was convened for the purpose of receiving any such evidence. Consideration of the evidence presented reenforces the prior determination that the plan did not operate to discharge the debt in question here.

The main question before us is the interpretation of Article 11 of the plan. The parole evidence indicates that the ambiguity in the plan noted previously should be resolved in favor of the interpretation that the plan does not work to discharge this otherwise non-dischargeable debt.

On February 10th, 1994, at the time when the debtor's plan was under consideration, Tom Mackinson of the IRS wrote Larry Fallon, debtor's counsel, stating that the IRS considered the post-petition, pre-confirmation interest to survive both confirmation of the plan and full performance of the plan, and stating clearly that the IRS would come after the debtor for such interest after the plan was fully performed.

The letter went on to suggest that the debtor addressed this issue because it would pose potential problems for the debtor down the line. Mr. Fallon, debtor's counsel, responded in a letter of March 7th, 1994, stating that the debtor would not address this issue in the plan, that the question of payment of post-petition, pre-confirmation interest was "outside the scope of the plan." Debtor's counsel never told Mr. Mackinson that the plan addressed this question through Article 11 of the plan.

The language of Mr. Fallon's letter can only be interpreted to mean that the plan does not address these claims. It is fundamentally inconsistent for the debtor to respond to Mr. Mackinson's February 10th, 1994 letter by stating that the post-petition, pre-confirmation interest claims are outside the scope of the plan and then assert that those debts have been discharged by the plan.

Thus, I find that the parole evidence shows that the ambiguity in the plan should be resolved in favor of an interpretation that the plan did not discharge these otherwise non-dischargeable debts. This is also the interpretation most consistent with the ordinary meaning of the plan language and with the position taken by the debtor in response to Mr. Mackinson's February 10th letter.

I note here that there is some evidence that the parties negotiated the treatment of the IRS under this plan. And that several of the provisions of the plan were modified pursuant to requests and questions raised by the IRS although there is no evidence that Article 11 of the plan was addressed by the parties and negotiated.

Thus, it may very well be inappropriate in this instance to resolve the ambiguity in the plan on the basis that it should be construed against the drafter. But even if that is the case, the plan here should be construed not to affect a discharge of these debts because although the convention of resolving ambiguity against the drafter may not be applicable, the consideration of parole evidence supports the interpretation that this debt was not discharged.

Similarly, even if any subsequent court should determine that Cathay Bank does not supply the standard here for overriding a statutory right, even if a court should determine that these clear and conspicuous waiver, knowing an intelligent waiver is not necessary, the case comes out the same even without reference to that standard of construction.

Because, again, even if one takes this as a normal contract ambiguity without using the Cathay Bank's standard, the parole evidence here suggests that the parties objective conduct should -- supports the interpretation that this debt was not discharged under Article 11.

There are a couple of other issues which I believe warrants some brief mention. First, there is no evidence whatsoever that the IRS waived its claim for post-petition, pre-confirmation interest.

Second, the evidence does not support the theory that the IRS agreed to accept the plan payments in full satisfaction of all elements of its debt, including post-petition, pre-confirmation interest.

In this regard, I again note Mr. Mackinson's February 10th, 1994 letter which states exactly the opposite, that the IRS will come after the debtor for that claim. The third -- the words in that third paragraph is what I refer to which state that the IRS will come after the debtor, will pursue the debtor "upon completion of the instant bankruptcy case." I think that can only be reasonably interpreted to mean upon full performance of the plan. There is no evidence of any later communication in which the IRS alters this position.

I also note here, this is somewhat of a separate issue, that the debtor has not been unfairly surprised that the IRS came after him after the plan was confirmed. They've only done what they -- exactly what they said they would do in the February 10th, 1994 letter.

In conclusion, I will sum up this situation in the following way. I find for the defendant. The debtor's obligation to pay post-petition, pre-confirmation interest has not been discharged under Section 1141, or under the confirmed plan; has not been waived by the IRS; has not been satisfied through performance of the plan; and the IRS is not estopped from attempting to collect this debt.

More generally, I'd like to say that I think what the debtor has tried to do is get rid of this debt through a form of trickery. If this plan had stated in a forthright way that this otherwise non-dischargeable debt would be discharged, the IRS would have objected, the objection clearly would have been sustained. There's no basis for including such a provision in a plan without the consent of the Government.

The debtor tried to finesse this situation with plan language that didn't broadcast the effect that debtor now claims the plan has. If the IRS had engaged in this sort of finesse or deception, you'd be screaming bloody murder. The debtor would be screaming bloody murder. And I think that would be appropriate.

I'm not saying that the standard is exactly the same here. I think we probably do expect more of the Government. But what we expect of the Government is an extra degree of care, of forthrightness and honesty. I think the Government has satisfied that here with its very clear warning.

The difference in the standard between what we expect of the Government and individuals does not in anyway condone anything less than totally forthright conduct by the taxpayer.

The ultimate result of this case is the debtor is exactly where the debtor should be. This claim which is not dischargeable under law, under Section 1141(d)(2), I believe it is, will not be discharged here. The only wrinkle in this outcome is that there's been a substantial amount of litigation to get to that end.

I know the debtor has incurred a very substantial amount of fees in the process. That is not the fault of the Government. The only qualm I might have about this result of the fees is if debtor's counsel did not advise the debtor about the risk of this particular lawsuit.

Mr. MacDonald, I don't think you've enhanced your reputation in this case by taking the position you have in this lawsuit after filing and confirming the plan you did and after the letter you sent in response to Mr. Mackinson's letter. The position taken here is not the kind of position taken by a person who is entirely direct and forthright in his dealings with others.

Mr. Weill, would you prepare a form of judgment and serve it on Mr. MacDonald?

MR. WEILL: Yes, Your Honor.

THE COURT: Okay. Thank you.

(Whereupon, the proceedings in the above-entitled matter were adjourned.)

--oOo--

CERTIFICATE

I certify that the foregoing is a correct transcript, from the electronic sound recording of the proceedings in the above-entitled matter.

Susan Holcomb, Transcriber

December 18, 2001

U.S. Bankruptcy Court
Central District of California (Los Angeles)
Bankruptcy Petition #: 2:92-bk-39039-PC

Assigned to: Peter Carroll	*Date filed:* 07/27/1992
Chapter 7	*Date converted:* 09/14/1994
Previous chapter 11	*Date terminated:* 12/14/2011
Voluntary	*Deadline for filing claims:* 11/01/1993
Asset	*Deadline for objecting to discharge:* 12/27/1994
Show Associated Cases	
Claims Register	

Debtor disposition: Discharge Denied
Joint debtor disposition: Discharge Denied

Debtor
Gary Lazar
12739 Lakewood Blvd.
Downey, CA 90242
LOS ANGELES-CA
SSN / ITIN: xxx-xx-6377

Joint Debtor
Divine Grace Lazar
12739 Lakewood Blvd.
Downey, CA 90242
LOS ANGELES-CA
SSN / ITIN: xxx-xx-4815

05/23/1995	160	Application for allowance of compensation and/or expenses [Amended second & Final]. Filed by Bruce A. Greenberg. RE: Item# 158[Disposed] [SG] Original NIBS Entry Number: 1402 [MOOT] RE: Item# 158 Original NIBS Entry Number: 1402 [DISPOSED] [JK] Original NIBS Entry Number: 1402 (Entered: 05/30/1995)
01/31/2000	1802	Motion to approve compromise of controversy between George E. Schulman, trustee and the trustee of the Blevans and Greenberg estate and debtor Bruce Greenberg hearing on 02/23/2000 at 11:00 a.m. at 255 E. Temple St., Courtroom 1575, Los Angeles, CA 90012[Disposed] [ELG] Original NI BS Entry Number: 2371 (Entered: 02/01/2000)

U.S. Bankruptcy Court
Central District of California (Los Angeles)
Adversary Proceeding #: 2:94-ap-03165-SB

Assigned to: Samuel L. Bufford
Lead BK Case: 92-39039
Lead BK Title: Gary Lazar and Divine Grace Lazar
Lead BK Chapter: 7
Show Associated Cases

Date Filed: 07/25/94
Date Terminated: 03/09/99

Nature[s] of Suit: 454 Recover Money/Property

12/17/1996	207	JUDGMENT - IN FAVOR OF PLAINTIFF GEORGE E. SCHULMAN Objection to prejudgment interest is overruled. RE: Item# 13 [MD2] Original NIBS Entry Number: 130 (Entered: 12/17/1996)

U.S. Bankruptcy Court
Central District of California (Los Angeles)
Bankruptcy Petition #: 2:97-bk-45274-SB

Assigned to: Samuel L. Bufford
Chapter 7
Previous chapter 11
Voluntary
Asset

Date filed: 06/18/1997
Date converted: 11/19/1997
Date terminated: 11/26/2003
Deadline for filing claims: 04/02/1998

Debtor
Blevans & Greenberg A Partnershiip
200 Oceangate, Suite 400
Long Beach, CA 90802-4330
LOS ANGELES-CA
SSN / ITIN:
Tax ID / EIN: 95-3716864
***aka* BLEVANS GREENBERG & YARC**

represented by **David N Chandler**
1747 Fourth St
Santa Rosa, CA 95404
707-528-4331

11/05/1999	155	Motion to approve compromise of controversy between Heide Kurtz, the chapter 7 trustee of the Blevens and Greenberg Estate, the Bruce Greenberg Estate and George Schulman, chapter 7 trustee of the Lazar Estates; declaration of Heide Kurtz, filed by Leslie A. Cohen and notice of motion hearing on 12/01/1999 at 10:00 a.m. at 255 E. Temple St., Courtroom 1575, Los Angeles, CA 90012[Disposed] [MD2] Original NIBS Entry Number: 115 (Entered: 11/09/1999)

Advertisement

Print Place

Full Color Brochures
Starting at
$52.50
Order Now!

IN THE NEWS

Gary Lazar

FEATURED ARTICLES

NEWS

O.C. Couple Arrested in Hazardous Material Case : Pollution: The gas-station owners and two others face charges of contaminating soil and ground water with gasoline from leaky storage tanks.

May 22, 1992 | From Times Staff and Wire Reports

An Anaheim Hills couple, owners of 150 Southern California gas stations, were jailed with two associates Thursday on charges of contaminating soil and ground water with gasoline from leaky storage tanks. The district attorney's office said the grand jury indictment unsealed at a hearing represents the first felony case in the United States involving illegal underground storage of hazardous material.

ARTICLES BY DATE

BUSINESS

Adulterated-Gas Dealer Sentenced in Finance Fraud

September 3, 1997 | JAMES S. GRANELLI, TIMES STAFF WRITER

An Anaheim Hills man, already imprisoned for selling adulterated gasoline and violating California pollution and tax laws, was sentenced Tuesday to 51 months in federal prison for bankruptcy fraud. Gary Lazar, 49, who would have been eligible for parole from a state prison in February, will instead be transferred to a federal penitentiary to serve the additional time, under an order by U.S. District Judge Dickran Tevrizian. Lazar pleaded guilty in December to two counts of fraud for hiding $6.

Advertisement

CALIFORNIA | LOCAL

Gas Station Owners Plead No Contest to 54 Charges : Crime: Prosecutor says couple sold tainted fuel, failed to pay $24 million in taxes, illegally dumped waste and ignored contamination from leaking tanks.

September 27, 1994 | RENE LYNCH, TIMES STAFF WRITER

An Anaheim Hills couple who owned and operated more than 200 gas stations in Southern California pleaded no contest Monday to failing to pay $24 million in state taxes, illegally disposing of hazardous waste and selling gas that was so bad it made engines die. Gary Lazar, 46, and his

BUSINESS

Couple Face Prison, Massive Fines in Gas Station Fraud : Crime: They'll be sentenced today on 54 counts involving tax cheating, doctored fuel and other offenses.

February 10, 1995 | MICHAEL PARRISH, TIMES STAFF WRITER

An Anaheim Hills couple who once ran gas stations throughout Southern California are to be sentenced in Los Angeles today for a series of frauds that damaged thousands of cars with doctored gasoline, threatened ground water with leaking fuel tanks and cheated the state out of millions of dollars in taxes.

BUSINESS

Woman Receives 21-Month Sentence for Fraud

November 7, 1997 | JAMES S. GRANELLI, TIMES STAFF WRITER

An Anaheim Hills woman, already imprisoned for selling adulterated gasoline and violating California pollution and tax laws, has been sentenced to 21 months in prison on a separate federal conviction for bankruptcy fraud. Divine Grace Lazar had pleaded guilty last December to two counts of fraud for hiding $6.6 million worth of assets during her and her former husband's personal and corporate bankruptcy cases in 1991.

BUSINESS

Ford Aerospace Will Pay $250,000 in Pollution Case

December 28, 1989 | DAVID OLMOS, TIMES STAFF WRITER

Defense contractor Ford Aerospace has agreed to pay $250,000 to settle charges that it violated air pollution control regulations at its plants in Newport Beach and Irvine during 1987 and 1988. Ford Aerospace agreed to pay the fine but admitted no wrongdoing after a year of negotiations with the South Coast Air Quality Management District. The penalty is the second largest imposed this year by the regional pollution-control agency.

CALIFORNIA | LOCAL

Lockheed to Pay Fine for Air Pollution : Emissions: The $1-million penalty is the largest in the AQMD's history. It settles 6,750 alleged violations.

February 16, 1990 | JAMES F. PELTZ, TIMES STAFF WRITER

Lockheed Corp. agreed Thursday to pay a record $1-million fine to settle allegations by air quality officials that Lockheed's paint-spraying activities at its Los Angeles area plants violated anti-smog rules. The South Coast Air Quality Management District said it was the biggest penalty in the 10-year history of the El Monte-based agency. The fine came seven months after Lockheed paid a record $1.5-million penalty to the U.S.

1 | 2 | Next

Los Angeles Times Copyright 2018 Los Angeles Times

Privacy Policy | Terms of Service

JENNER & BLOCK LLP
Kenneth K. Lee (Cal. Bar No. 264296)
633 West 5th Street, Suite 3500
Los Angeles, CA 90071-2054
Telephone: 213-239-5100
Facsimile: 213-239-5199
klee@jenner.com

JENNER & BLOCK LLP
Marc B. Hankin (admitted *pro hac vice*)
919 Third Avenue, 37th Floor
New York, NY 10022-3908
Telephone: 212-891-1600
Facsimile: 212-891-1699
mhankin@jenner.com

RON ORR & PROFESSIONALS, INC.
Ronald S. Orr (Cal. Bar No. 54257)
578 Washington Blvd., #389
Marina Del Rey, CA 90292
Telephone: 310-301-4849
Facsimile: 310-301-6549
ronorresq@aol.com

RODIGER LAW OFFICE
Georgiana G. Rodiger, (Cal. Bar No. 94416)
272 South Los Robles Avenue
Pasadena, California 91101
Telephone: 626-793-7264
Facsimile: 626-793-7592
crodiger@rodigerlaw.com

Attorneys for Equity Committee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

IN RE: **MERUELO MADDUX PROPERTIES, INC., et al.**[1] **Debtors and Debtors-in-Possession.** **AFFECTS ALL DEBTORS**	CASE NO. 09-bk-13356-VK Chapter 11 **MOTION TO RECONSIDER ORDER APPROVING SETTLEMENT WITH CATHAY BANK** DATE: TBD TIME: TBD DEPT: Courtroom 301 21041 Burbank Blvd. Woodland Hills, CA

[1] This case is jointly administered with chapter 11 cases filed with the Court by numerous affiliated entities. The Debtors and debtors-in-possession and their respective tax identification numbers are identified in the *Order Directing The Joint Administration Of Related Cases* entered by the Court on April 7, 2009 (docket entry no. 30).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In its objection to the Charlestown Plan (as defined herein), Cathay Bank asserts that the Court has already granted it the unilateral authority to derail the Charlestown Plan. Cathay Bank bases its argument on a provision found deep within the supporting documents to a settlement between it and the Debtors. This provision – which was not brought to the Court's attention – purports to require Cathay Bank's prior approval of any transfer of MMPI equity other than those transfers that would allow Richard Meruelo and John Maddux to remain majority shareholders and senior managers of MMPI. As only the Debtors' Plan would satisfy this requirement, Cathay Bank asserts that any other plan proponent must either seek Cathay Bank's blessing or be subject to risk that Cathay Bank will declare a default immediately upon such plan becoming effective. Given that such declaration would obligate the reorganized Debtors to pay over $60 million to Cathay Bank immediately upon exiting bankruptcy, Cathay Bank asserts that it holds an effective veto over confirmation of the Charlestown Plan as a direct result of this Court's prior approval of this settlement provision.

While the Court did previously approve (through Bankruptcy Judge Thompson) the overall settlement between Cathay Bank and the Debtors, the settling parties never brought this extraordinary provision to the Court's attention. Accordingly, in light of this failure to properly advise the Court of a material term of the proposed settlement, this Court should reconsider its prior ruling to approve the settlement. With respect to the merits of this provision, it directly contravenes numerous provisions of the Bankruptcy Code and, therefore, is unenforceable. Given that this provision is unenforceable, the Equity Committee respectfully submits that this Court should revise its prior order to make clear that this Court does not approve of a provision that would cede substantial authority over the confirmation process from this Court to Cathay Bank.

JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

Cathay Bank extended prepetition loans to debtor Alameda Produce, which loans MMPI guarantied. Alameda Produce defaulted, and the settling parties reached a compromise that would, among other things, (i) restructure the terms of the loans and guaranties, and (ii) require Cathay Bank to support the Debtors' plan of reorganization. The Debtors sought approval of the compromise by filing a motion on May 12, 2010 (*see* Hankin Decl. at Ex. 1, the "Settlement Motion"). The Settlement Motion described the terms of the restructured loan, Cathay Bank's obligation to support the Debtors' plan and certain other settlement details not pertinent here. The Debtors attached to the Settlement Motion the proposed settlement agreement and a bevy of additional agreements and other documents referenced by or related to the Settlement Agreement (Settlement Motion at Ex. 1, the "Settlement Agreement").[2] The Official Committee of Unsecured Creditors (the "OCC") filed a limited objection to the Settlement Motion and requested that the Court clarify that the Settlement Agreement's provision stating that Cathay Bank's secured claim against Alameda Produce "shall be deemed impaired" would not bar other parties from arguing that Cathay Bank, in fact, was not impaired. (Hankin Decl. at Ex. 2.) No other party objected. The Court approved the Settlement Agreement subject to the reservation of rights suggested by the OCC. (Hankin Decl. at Ex. 3.)

Cathay Bank now objects (docket entry 2481, the "Objection") to the plan of reorganization proposed by Charlestown Capital Advisors, LLC and Hartland Asset Management Corporation (the "Charlestown Plan") and invokes a previously unmentioned provision of an agreement attached to the Settlement Agreement that purports to grant Cathay Bank an effective veto power over all proposed plans other than the Debtors'. Cathay Bank asserts that the Third Modification and Extension Agreement among Alameda Produce, MMPI and Cathay Bank (*see* Settlement Motion at Ex. 1, the "Extension Agreement") grants Cathay Bank the right to declare an event of default should the Charlestown Plan be confirmed and become effective.[3] Such declaration would result in the

---

[2] Because Cathay Bank made two separate loans to Alameda Produce, the settling parties structured their settlement as two separate settlement agreements with substantially similar terms. (*Compare* Settlement Motion at Ex. 1 *with* Settlement Motion at Ex. 2.) For ease of reference, the Equity Committee will refer to both settlement agreements collectively as the "Settlement Agreement."

[3] For the reasons set forth in the preceding footnote, there are two separate extension agreements with substantially similar terms. (*Compare* Settlement Motion at Ex. 1 (Third Modification And Extension Agreement) *with* Settlement

acceleration of over $60 million of debt due solely to this Court's decision to confirm the Charlestown Plan and the operation of such plan.

The Extension Agreement is one of several supporting documents attached to the Settlement Agreement. (*See* Ex. 1 to Settlement Motion.) Paragraph 11 of the Extension Agreement, titled "Permitted Transfers," states that "any transfer, conveyance, or sale of the equity interests in [MMPI or Alameda Produce] … shall require [Cathay Bank's] prior written consent." Paragraph 11 exempts from its sweeping prohibition any transfer "so long as, following any such transfer, Richard Meruelo, an individual, and/or John Maddux, an individual (i) maintain a significant ownership interest, directly or indirectly, in [MMPI or Alameda Produce], (ii) remain in a senior management position within [MMPI or Alameda Produce]." By its Objection, Cathay Bank argues that among the plans pending confirmation, only the Debtors' Plan "would seem to satisfy the exception to the Permitted Transfers prohibition." (Objection at 2.) Cathay Bank then asserts that, should the Court approve a plan other than the Debtors', Cathay Bank will have the unfettered right to declare a default under the Settlement Agreement and demand the immediate payment of over $60 million. (Objection at 3.)

No part of the Settlement Motion described the Extension Agreement's Permitted Transfers clause let alone explained how that clause, which purports to give Cathay Bank effective veto power over any plan other than the Debtors', could square with the provisions of the Bankruptcy Code. Although this clause directly relates to treatment of MMPI's shareholders under a plan of reorganization and thereby purports to bind all equity holders of MMPI, the Settlement Motion's proof of service does not suggest that the Debtors served the Settlement Motion upon any of MMPI's non-insider equity holders.[4] No party objected to the Permitted Transfers clause, and the Order makes no mention of it. These facts suggest that the interested parties to these cases and the Court were unaware of the Permitted Transfer clause's inclusion among the dozens of pages attached to the Settlement Motion.

Motion at Ex. 2 (Sixth Modification And Extension Agreement).) For ease of reference, the Equity Committee will refer to both extension agreements collectively as the "Extension Agreement."

[4] The Equity Committee had not yet been appointed at the time of service or when the Court entered the Order.

RELIEF REQUESTED

This Court should reconsider the Order, pursuant to Federal Rule 60(b)(3), made applicable to this matter by Bankruptcy Rule 9024, to the extent that the Order approves the Permitted Transfers clause. *See In re Lenox*, 902 F.2d 737, 739-40 (9th Cir. 1990) (holding that bankruptcy courts may reconsider, modify or vacate their previous orders where equity so requires). Rule 60(b)(3) provides that a court may reconsider a final order where that order was procured by fraud, misrepresentation or misconduct. The Debtors' failure to disclose the Permitted Transfers clause in its Settlement Motion constitutes misconduct for purposes of Rule 60(b)(3). The Debtors' failure to disclose the Permitted Transfers clause in the Settlement Motion and that the Permitted Transfers clause is contrary to the provisions of the Bankruptcy Code justify reconsideration. The Equity Committee respectfully requests that this Court enter an order striking the Permitted Transfers clause from the scope of the Court's approval of the Settlement Agreement or grant other appropriate relief.

DISCUSSION

1. Even Accidental Omissions Can Constitute "Misconduct" For Purposes Of Rule 60(b)(3).

To prevail in a motion to reconsider pursuant to Rule 60(b)(3), the movant need establish "fraud … misrepresentation or misconduct by an opposing party." Fed.R.Civ.P. 60(b)(3). Courts have interpreted the term "misconduct" to include "even accidental omissions" and to not require "proof of nefarious intent or purpose as a prerequisite to redress." *Anderson v. Cryvac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988); *see also Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990). Instead, the focus is on whether the misconduct complained of "foreclosed full and fair preparation or presentation" of competing arguments. *Id*. As set forth in detail *supra*, the Debtors' omission of any mention of the extraordinary Permitted Transfers clause from the Settlement Motion prevented the parties and the Court from evaluating or challenging that clause on the merits.

Regarding the timing of this Motion, the Equity Committee first became aware of the Permitted Transfers clause when Cathay Bank filed its Objection. Notably, Cathay Bank did not previously raise a confirmation objection based on operation of this clause despite the Court's order stating that "parties intending to filed objections to confirmation … shall file a bullet-point list of

JENNER & BLOCK LLP
Kenneth K. Lee (Cal. Bar No. 264296)
633 West 5th Street, Suite 3500
Los Angeles, CA 90071-2054
Telephone: 213-239-5100
Facsimile: 213-239-5199
klee@jenner.com

JENNER & BLOCK LLP
Marc B. Hankin (admitted *pro hac vice*)
919 Third Avenue, 37th Floor
New York, NY 10022-3908
Telephone: 212-891-1600
Facsimile: 212-891-1699
mhankin@jenner.com

RON ORR & PROFESSIONALS, INC.
Ronald S. Orr (Cal. Bar No. 54257)
578 Washington Blvd., #389
Marina Del Rey, CA 90292
Telephone: 310-301-4839
Facsimile: 310-301-6549
ronorresq@aol.com

RODIGER LAW OFFICE
Georgiana G. Rodiger, (Cal. Bar No. 94416)
272 South Los Robles Avenue
Pasadena, California 91101
Telephone: 626-793-7264
Facsimile: 626-793-7592
crodiger@rodigerlaw.com

Attorneys for Equity Committee

FILED & ENTERED

APR 20 2011

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY pgarcia DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION

In re	Case No. 1:09-bk-13356-KT
MERUELO MADDUX PROPERTIES, INC., et al.,[1]	Chapter 11 (Jointly Administered)
Debtors and Debtors-in-Possession.	**ORDER GRANTING EQUITY COMMITTEE'S MOTION TO RECONSIDER ORDER APPROVING SETTLEMENT WITH CATHAY BANK**
☑ Affects all Debtors	Date: February 9, 2011 Time: 9:30 a.m. Place: Courtroom 301 21041 Burbank Blvd. Woodland Hills, California
☐ Affects the following Debtor(s):	

[1] This case is jointly administered with chapter 11 cases filed with the Court by numerous affiliated entities. The Debtors and debtors-in-possession and their respective tax identification numbers are identified in the *Order Directing The Joint Administration Of Related Cases* entered by the Court on April 7, 2009 (docket entry no. 30).

On February 9, 2011 (the "Hearing"), this Court considered the Equity Committee's motion (docket entry no. 2669, the "Motion") to reconsider this Court's Order On Debtors' Motion For Approval Of Settlements With Cathay Bank And Authorizing Debtors To Perform Thereunder (docket entry no. 1527). Ron Orr of Ron Orr & Professionals, Inc. appeared on behalf of the Equity Committee at the Hearing. Other appearances were as noted in the record.

The Court, having considered the relief requested by the Equity Committee in the Motion; having considered all papers filed in this matter and the arguments and representations of counsel presented at the Hearing; and good cause appearing therefor, it is hereby:

ORDERED THAT:

1. The Motion is GRANTED.

2. The Order On Debtors' Motion For Approval Of Settlements With Cathay Bank And Authorizing Debtors To Perform Thereunder (docket entry no. 1527) is vacated.

3. The following agreements are rendered void: (i) the Settlement Agreement among Meruelo Maddux Properties, Inc. ("MMPI"), Alameda Produce Market, LLC ("Alameda Produce") and Cathay Bank dated as of April 29, 2010; (ii) the Third Modification And Extension Agreement among Alameda Produce, MMPI and Cathay Bank dated as of April 29, 2010; and (iii) the Memorandum of Third Modification and Extension Agreement among Alameda Produce, MMPI and Cathay Bank dated as of April 29, 2010.

###

Victoria S. Kaufman

DATED: April 20, 2011

United States Bankruptcy Judge

JOHN J. BINGHAM, JR. (State Bar No. 075842)
JBingham@DGDK.com
JOHN N. TEDFORD, IV (State Bar No. 205537)
JTedford@DGDK.com
DANNING, GILL, DIAMOND & KOLLITZ, LLP
2029 Century Park East, Third Floor
Los Angeles, California 90067-2904
Telephone: (310) 277-0077
Facsimile: (310) 277-5735

Attorneys for Meruelo Maddux Properties, Inc., and affiliated Debtors and Debtors-in-Possession

FILED & ENTERED

JUN 17 2010

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY harraway DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re MERUELO MADDUX PROPERTIES, INC., et al.[1] Debtors and Debtors-in-Possession.	Case No. 1:09-bk-13356-KT Chapter 11 (Jointly Administered) **ORDER ON DEBTORS' MOTION FOR APPROVAL OF SETTLEMENTS WITH CATHAY BANK AND AUTHORIZING DEBTORS TO PERFORM THEREUNDER**
☐ Affects all Debtors ☑ Affects the following Debtor(s): Meruelo Maddux Properties, Inc. (1:09-bk-13356-KT) Alameda Produce Market, LLC (1:09-bk-13394-KT)	Date: June 7, 2010 Time: 9:30 a.m. Place: Courtroom 301 21041 Burbank Blvd. Woodland Hills, California

[1] Pursuant to an order of the Court, this case is being jointly administered with 53 chapter 11 cases filed by affiliated entities. The affiliated case numbers are as follows: 1:09-bk-13338-KT; 1:09-bk-13358-KT; 1:09-bk-13359-KT; 1:09-bk-13360-KT; 1:09-bk-13361-KT; 1:09-bk-13362-KT; 1:09-bk-13363-KT; 1:09-bk-13364-KT; 1:09-bk-13365-KT; 1:09-bk-13366-KT; 1:09-bk-13367-KT; 1:09-bk-13368-KT; 1:09-bk-13369-KT; 1:09-bk-13370-KT; 1:09-bk-13371-KT; 1:09-bk-13372-KT; 1:09-bk-13373-KT; 1:09-bk-13374-KT; 1:09-bk-13375-KT; 1:09-bk-13376-KT; 1:09-bk-13377-KT; 1:09-bk-13378-KT; 1:09-bk-13379-KT; 1:09-bk-13380-KT; 1:09-bk-13381-KT; 1:09-bk-13382-KT; 1:09-bk-13383-KT; 1:09-bk-13384-KT; 1:09-bk-13385-KT; 1:09-bk-13386-KT; 1:09-bk-13387-KT; 1:09-bk-13388-KT; 1:09-bk-13389-KT; 1:09-bk-13390-KT; 1:09-bk-13391-KT; 1:09-bk-13392-KT; 1:09-bk-13393-KT; 1:09-bk-13394-KT; 1:09-bk-13395-KT; 1:09-bk-13396-KT; 1:09-bk-13397-KT; 1:09-bk-13398-KT; 1:09-bk-13399-KT; 1:09-bk-13400-KT; 1:09-bk-13401-KT; 1:09-bk-13402-KT; 1:09-bk-13403-KT; 1:09-bk-13404-KT; 1:09-bk-13405-KT; 1:09-bk-13406-KT; 1:09-bk-13407-KT; 1:09-bk-13434-KT; and 1:09-bk-13439-KT.

On June 7, 2010, the Court heard and considered the *Motion for Approval of Settlements with Cathay Bank and Authorizing Debtor to Perform Thereunder* (the "Motion") filed by Meruelo Maddux Properties, Inc. ("MMPI"), and Alameda Produce Market, LLC ("Alameda Produce" and, together with MMPI, the "Settling Debtors"), the Honorable Kathleen Thompson, United States Bankruptcy Judge, presiding. All appearances were as noted on the record at the hearing.

The Court having considered the Motion (*docket entry no. 1376*) and the Settling Debtors' separate request for judicial notice (*docket entry no. 1377*), the Committee's response (*docket entry no. 1434*), and the reply of Cathay Bank in support of the Motion (*docket entry no. 1470*), having found that notice of the hearing and the Motion was adequate and proper, having heard the statements of counsel at the hearing, for the reasons stated by the Court on the record,

IT IS ORDERED THAT:

1. The Motion is granted.

2. The Settling Debtors are authorized to enter into the settlement agreements between the Settling Debtors and Cathay Bank, copies of which were attached as Exhibits "1" and "2" to the Declaration of Richard Meruelo appended to the Motion (the "Settlements"), and all agreements to implement the settlements contained therein, which Settlements are hereby approved. The Court's approval of the Settlements does not constitute a determination as to whether or not the classes consisting of Cathay Bank's claims against the Settling Debtors' estates are impaired.

3. The Settling Debtors are authorized to use cash collateral to perform their obligations under the Settlements.

4. As of the date of entry of this order, pursuant to and subject to any limitations set forth in the Settlements, Cathay Bank is granted relief from the automatic stay of 11 U.S.C. § 362 in Alameda Produce's bankruptcy case for any Defaults (as defined in the Settlements) in any obligation for the payment of money to Cathay Bank ("Payment Default"). If any such Payment Default is not cured within the Cure Period (as defined in the Settlements), Cathay Bank shall be entitled immediately upon expiration of the Cure Period to enforce all of its rights under the "Loan Documents" (as defined in the Settlements), the "Loan Reinstatement Agreements" (as defined in the Settlements), the Settlements, or applicable law, as against Alameda Produce and property of

Alameda Produce's estate. The automatic stay of 11 U.S.C. § 362 shall not apply to, and is deemed modified, amended, annulled, and terminated in Alameda Produce's bankruptcy case as to Payment Defaults and Cathay Bank and with respect to Cathay Bank's enforcement of any and all rights and remedies granted to Cathay Bank under the Loan Documents as modified by the Loan Reinstatement Agreements, under the Settlement Agreements, and under applicable state and federal law, with respect to such Payment Defaults, including without limitation enforcement by Cathay Bank of any and all liens granted to Cathay Bank to secure payment and performance of the obligations of Alameda Produce under the Loan Documents as modified by the Loan Reinstatement Agreement, all without further order of this Court.

5. The Settling Debtors are authorized to take such further actions and execute such documents as they believe to be required in order to implement the terms of the Settlements.

#####

Kathleen Thompson

DATED: June 17, 2010

United States Bankruptcy Judge

STEVEN M. SPECTOR (SBN: 51623)
BENJAMIN S. SEIGEL (SBN: 59992)
J. ALEXANDRA RHIM (SBN: 180636)
BUCHALTER NEMER
A Professional Corporation
1000 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017-2457
Telephone: (213) 891-0700
Facsimile: (213) 896-0400
Email: bseigel@buchalter.com

Special Counsel to Reorganized Debtor Meruelo Maddux Properties, Inc. and affiliated debtors

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SAN FERNANDO VALLEY DIVISION

In re MERUELO MADDUX PROPERTIES, INC., et al., Reorganized Debtors. ALLDEBTORS	Case No. 1:09-bk-13356-VK Chapter 11 **OBJECTION TO FIFTH AND FINAL APPLICATION FOR APPROVAL AND PAYMENT OF COMPENSATION AND REIMBURSEMENT OF EXPENSES BY DANNING, GILL, DIAMOND & KOLLITZ, LLP, AS REORGANIZATION COUNSEL TO DEBTORS AND DEBTORS-IN-POSSESSION; AND REQUEST FOR DISGORGEMENT** [DECLARATIONS OF FRED SKAGGS AND DEBBIE SALGAROLO; REQUEST FOR JUDICIAL NOTICE FILED SEPARATELY AND CONCURRENTLY HEREWITH] Date: August 24, 2012 Time: 9:30 a.m. Ctrm: Courtroom 301 21041 Burbank Blvd. Woodland Hills, California
☒ Affects all Debtors ☐ Affects the following Debtor(s):	

TO THE HONORABLE VICTORIA KAUFMAN, UNITED STATES BANKRUPTCY JUDGE AND ALL OTHER PARTIES IN INTEREST:

EVOQ Properties, Inc., formerly known as Meruelo Maddux Properties, Inc., the reorganized debtor in the above captioned bankruptcy proceeding together with its affiliated debtors (collectively, the "Reorganized Debtors") hereby files its objection ("Objection")[1] to the Fifth and Final Fee Application (the "Final Fee Application") of Danning, Gill, Diamond & Kollitz ("DGDK") as counsel to the Debtors (defined below). In support of its Objection, the Reorganized Debtors represent as follows:

I. INTRODUCTION

At a hearing held on March 1, 2012, this Court already foreshadowed that "Danning, Gill is looking at millions of dollars that they may be out, because they didn't comply with their obligations."[2] The Court also previously determined that DGDK breached its fiduciary duty in the 845 S. Flower case. Not only does this Objection reveal that DGDK similarly breached its fiduciary duty in these cases, its breaches were far more pervasive in that it engaged in a systematic pattern of taking action designed to exclusively benefit certain insiders to the peril of the estates. The circumstances mandate the disallowance and disgorgement of fees to ensure the integrity of the bankruptcy process.[3]

As the Court is aware, DGDK took direction from the debtors' two principals, Richard Meruelo ("Meruelo") and John Maddux ("Maddux"),[4] who used the bankruptcy process to engage in a battle over their ownership interests in the debtors rather than to deal fairly with

[1] On May 7, 2012, this Court entered an order authorizing the Reorganized Debtors to file an Objection up to 120 pages in length. While the Reorganized Debtors attempt to respond to the 200+ single-spaced narrative exhibit appended to the Final Fee Application, they have endeavored to keep this Objection as brief as possible.

[2] See March 1, 2012 Transcript, at p. 21, ll. 24-25, p. 22, ll. 1-2. Docket No. 3676.

[3] The Reorganized Debtors do not lightly present this Objection. As discussed in detail below, there is an undeniable and pervasive domination of the Debtors by certain insiders for their exclusive benefit. Unfortunately, DGDK not only condoned this improper control, it facilitated it and did nothing to correct the situation. In doing so, DGDK also breached a number of additional duties it owed to the estates and this Court.

[4] Meruelo and Maddux shall be referred to collectively as either "Meruelo/Maddux" or the "Principals." It is important to note that DGDK previously represented Meruelo in various matters for a seven year period prior to the commencement of these cases.

creditors and other constituents. Accordingly, creditors and other shareholders voiced vigorous objection to these tactics. As a consequence, while these bankruptcy cases were difficult at times – fueled by much acrimony and gamesmanship – these circumstances do not excuse DGDK's conduct. DGDK failed to satisfy the high standard of conduct imposed on counsel for a debtor-in-possession. DGDK failed to conduct reasonable investigation of the debtors' affairs and when confronted with its client's questionable conduct, it failed to alert the Court or resign. DGDK ultimately failed to exercise the requisite client control and behaved as a mere hired gun or mouthpiece to advance Meruelo/Maddux's personal agenda.

In hindsight, it is apparent that the repeating theme in these cases is the improper domination of the debtors by Meruelo/Maddux and DGDK's affirmative assistance or reckless disregard of these insiders' actions. By no means hypberbole, the events that transpired are incredible. DGDK assisted the debtors to initially propose plans containing improper provisions rendering them unconfirmable, but then, in the face of a well-supported competing plan, advanced an inferior plan facing overwhelming objection by creditors and other shareholders. DGDK then aggressively objected to the competing plans which, as a key feature, would divest Meruelo/Maddux of their ownership and control. DGDK also implemented Meruelo/Maddux's self-interested agenda by enabling the debtors to engage in misconduct, such as committee tampering, engaging in improper solicitation through the release of a false press release, destruction and failure to maintain corporate records, and suppression of documents revealing their self-dealing. At times, DGDK even made false representations to the Court and assisted Meruelo/Maddux to conceal their self-dealing.

The totality of circumstances now reveals that DGDK acted as *de facto* counsel for the Principals. Due to the spoliation of corporate records, there is no evidence to substantiate that DGDK pursued actions that were duly authorized by the debtors rather than unilateral directives by Meruelo/Maddux. Thus, DGDK's representation was riddled with multiple breaches of its professional and ethical responsibilities. By the events described below, DGDK breached its fiduciary duty, was not disinterested, and breached its duties of candor and fairness to the Court and other parties. Accordingly, DGDK's legal services were substantially unreasonable, unnecessary and did not confer a benefit to the estates concomitant to the amount of fees sought.

As noted in the *In re Perez* decision, counsel who fails to live up to its responsibility faces disallowance of fees and other sanctions regardless of actual damage to the estates. DGDK's multiple breaches and derogations of duty require disallowance of the fees sought and substantial disgorgement of fees already received. Given the magnitude of DGDK's breaches and the damage suffered, however, disallowance and disgorgement of fees is necessary not only to ameliorate any loss but to uphold the integrity of the bankruptcy process.

II. FACTUAL BACKGROUND

A. General Background[5]

Meruelo Maddux Properties, Inc. ("MMPI") was a publicly traded company formed and existing under the laws of the state of Delaware. MMPI and its affiliates and related entities were a self-managed real estate enterprise engaged in the business of owning and developing various parcels of real properties in southern California. Prior to plan confirmation, the Company's management team was led by Meruelo, who served as Chief Executive Officer and Chairman of MMPI's Board of Directors, and Maddux, who served as MMPI's President and Chief Operating Officer and member of MMPI's Board of Directors. Prior to plan confirmation, Todd Neilsen (the "Prior General Counsel") was the Company's then in-house general counsel.

On or about March 27, 2009 (the "Petition Date"), MMPI and certain of its affiliates (collectively, the "Debtors") each filed voluntarily petitions for relief under chapter 11 of title 11[6] of the United States Code (the "Bankruptcy Code").[7] MMPI is the ultimate parent of the 53 related debtors and each of those cases were jointly administered under MMPI's case.

---

[5] Throughout these cases, numerous parties in interest raised concerns regarding DGDK's various breaches of professional, ethical and fiduciary duties. Given the voluminous nature of these objections, this Objection makes reference to and quotes liberally from these pleadings. As will be discussed below, on more than one occasion, this Court has also expressed its own concerns, as did the Honorable Kathleen Thompson before her retirement.

[6] Unless otherwise noted, all code references are to the Bankruptcy Code.

[7] Pursuant to the Administrative Order 10-11 entered on November 29, 2010, the Debtors' cases were reassigned from the Honorable Kathleen Thompson to the Honorable Victoria Kaufman. Docket No. 2304.

Treasury Department
Circular No. 230
(Rev. 6-2014)
Catalog Number 16586R
www.irs.gov

Regulations Governing Practice before the Internal Revenue Service

---

Department
of the
Treasury

Internal
Revenue
Service

Title 31 Code of Federal Regulations,
Subtitle A, Part 10,
published (June 12, 2014)

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.20 Information to be furnished.

(a) *To the Internal Revenue Service.*

(1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

(2) Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner's client, the practitioner must promptly notify the requesting Internal Revenue Service officer or employee and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information. The practitioner must make reasonable inquiry of his or her client regarding the identity of any person who may have possession or control of the requested records or information, but the practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner's client regarding the identity of such persons.

(3) When a proper and lawful request is made by a duly authorized officer or employee of the Internal Revenue Service, concerning an inquiry into an alleged violation of the regulations in this part, a practitioner must provide any information the practitioner has concerning the alleged violation and testify regarding this information in any proceeding instituted under this part, unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

(b) *Interference with a proper and lawful request for records or information.* A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, its officers or employees, to obtain any record or information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.

(c) *Effective/applicability date.* This section is applicable beginning August 2, 2011.

§ 10.21 Knowledge of client's omission.

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§ 10.22 Diligence as to accuracy.

(a) *In general.* A practitioner must exercise due diligence —

(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.

(b) *Reliance on others.* Except as modified by §§10.34 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 months from the date of the last transmission or use.

(d) *Improper associations.* A practitioner may not, in matters related to the Internal Revenue Service, assist, or accept assistance from, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section.

(e) *Effective/applicability date.* This section is applicable beginning August 2, 2011.

(Approved by the Office of Management and Budget under Control No. 1545-1726)

§ 10.31 Negotiation of taxpayer checks.

(a) A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

(b) *Effective/applicability date.* This section is applicable beginning June 12, 2014.

§ 10.32 Practice of law.

Nothing in the regulations in this part may be construed as authorizing persons not members of the bar to practice law.

§ 10.33 Best practices for tax advisors.

(a) *Best practices.* Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

(1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

(3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

(4) Acting fairly and with integrity in practice before the Internal Revenue Service.

(b) *Procedures to ensure best practices for tax advisors.* Tax advisors with responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue Service should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

(c) *Applicability date.* This section is effective after June 20, 2005.

§ 10.34 Standards with respect to tax returns and documents, affidavits and other papers.

(a) *Tax returns.*

(1) A practitioner may not willfully, recklessly, or through gross incompetence —

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that —

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) *Documents, affidavits and other papers* —

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) *Advising clients on potential penalties* —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

(d) *Relying on information furnished by clients.* A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

(e) *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits, and other papers filed on or after September 26, 2007.

§ 10.35 Competence.

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.

(b) *Effective/applicability date.* This section is applicable beginning June 12, 2014.

§ 10.36 Procedures to ensure compliance.

(a) Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

(b) Any such individual who has (or such individuals who have or share) principal authority as described in paragraph (a) of this section will be subject to discipline for failing to comply with the requirements of this section if—

(1) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with this part, as applicable, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable;

(2) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that firm procedures in effect are properly followed, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable; or

(3) The individual knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with this part, as applicable, and the individual, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.

(c) *Effective/applicability date.* This section is applicable beginning June 12, 2014.

§ 10.37 Requirements for written advice.

(a) *Requirements.*

(1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

(2) The practitioner must—

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;

(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(b) *Reliance on advice of others.* A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when—

(1) The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

(3) The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) *Standard of review.*

(1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether a practitioner has failed to comply with this section.

(d) *Federal tax matter.* A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of---

(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.

(e) *Effective/applicability date.* This section is applicable to written advice rendered after June 12, 2014.

§ 10.38 Establishment of advisory committees.

(a) *Advisory committees.* To promote and maintain the public's confidence in tax advisors, the Internal Revenue Service is authorized to establish one or more advisory committees composed of at least six individuals authorized to practice before the Internal Revenue Service. Membership of an advisory committee must be balanced among those who practice as attorneys, accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and registered tax return preparers. Under procedures prescribed by the Internal Revenue Service, an advisory committee may review and make general recommendations regarding the practices, procedures, and policies of the offices described in §10.1.

(b) *Effective date.* This section is applicable beginning August 2, 2011.

15 Mertens Law of Fed. Income Tax'n § 56:74

Mertens Law of Federal Income Taxation September 2018 Update
Chapter 56. Return Preparers' Liabilities
Revised by Art Boelter, Esq.

VII. Ethics
C. Preparation of Tax Returns

§ 56:74. Duty Owed to Third Parties, Courts and Service (Attorneys)

References

Although an attorney's principal duty is to the client, the attorney also has certain obligations to third persons and to the court. An attorney is obligated to seek only the lawful objectives of his client, by only lawful means. An attorney may not take action on behalf of a client that is intended merely to harass or maliciously injure another person or is otherwise frivolous or without merit.An attorney may not advise or assist a client to engage in illegal or fraudulent conduct. In addition, in representing a client, an attorney may not make material misrepresentations to a court or to third parties who the lawyer expects will rely on his legal opinion.[1]

Circular 230 provides that an attorney must exercise due diligence in determining the correctness of oral or written representations made by him to the Department of the Treasury.[2] However, Circular 230 also provides that an attorney is not required to disclose privileged information.[3]

Duty When Illegal Act of Client Is Continuing

A lawyer is forbidden from counseling a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.[4] However, when the client's criminal or fraudulent course of action has already begun and is continuing, the lawyer may not reveal the client's conduct except as permitted by the rules of confidentiality.[5] A lawyer may not reveal information relating to the representation of the client without the client's consent, except:

(1) to the extent that the disclosures are impliedly authorized to permit the representation to be carried out; or

(2) where the lawyer reasonably believes disclosure is necessary to prevent the client from committing a criminal act that the lawyer believes likely to result in imminent death or substantial bodily harm.[6]

Lawyer as Advocate

A lawyer may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.[7] However, he must decline or withdraw from representation of a client if the representation will result in the violation of the rules of professional conduct or any laws.[8] The lawyer may withdraw if:

(1) the client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud; or

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

Attorney-Client Privilege

Courts generally hold that no attorney-client privilege extends to the preparation of tax returns, either based on the conclusion that tax return preparation is not the performance of a legal service, even when performed by an attorney,[9] or on the grounds that the client waives the privilege of confidentiality because the information is intended to be reported to the Government in a tax return.[10] However, some courts have disagreed with the majority holding about performance of legal service and have held that the preparation of tax returns by an attorney constitutes legal services rather than accounting services (although they adopted the waiver theory thereby reaching the same result).[11]

Candor to Tribunal

A lawyer must show candor toward a tribunal.[12] He may not make false statements of material fact or law, fail to disclose a material fact to a tribunal or the Service when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, offer evidence that the client knows to be false, or fail to take remedial measures where he discovers that previously offered material evidence is false.[13] The attorney must exhibit candor to the tribunal even if compliance requires disclosure of information otherwise protected by the confidentiality rule, for example, where the client commits perjury.[14]

Candor to Third Parties and Service

In the course of representing a client, a lawyer must not knowingly make a false statement of material fact or law to a third person (for example, a Service employee) or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by the confidentiality rule.[15]

Further, a lawyer must make disclosure of a prior statement which can be construed as being materially misleading as to construe misrepresentation. A similar disclosure duty arises when a lawyer has made a statement believed to be true at the time it was made, but which is subsequently discovered to be false or become false through a change in circumstances. Since remaining silent would be the equivalent of misrepresentation, the lawyer has an affirmative obligation to disclose the new facts or new matters to persons who may act in reliance on the original statement.[16] It is professional misconduct for a lawyer to engage in dishonesty, fraud, deceit, or misrepresentation.[17]

Westlaw. © 2018 Thomson Reuters. No Claim to Orig. U.S. Govt. Works.

Footnotes

1 ABA Model Rule 1.2(d) and 3.3. See also Circular 230, 31 C.F.R. § 10.22, which requires tax practitioners to exercise due diligence as to accuracy. See §§ 56:80 to 56:81 regarding audits.

2 Circular 230, 31 C.F.R. § 10.22, which requires tax practitioners to exercise due diligence as to accuracy. See §§ 56:80 to 56:81 regarding audits.

3 Circular 230, 31 C.F.R. § 10.22, which requires tax practitioners to exercise due diligence as to accuracy. See §§ 56:80 to 56:81 regarding audits.

4 ABA Model Rule 1.2(d).

5 Comment to ABA Model Rule 1.2; see Model Rule 1.6 for the rules on confidentiality. See also §§ 56:56 to 56:60 for a discussion on disclosure of confidential information.

6 ABA Model Rule 1.6(b)(3).

7 See ABA Model Rules, Preamble(2) and ABA Formal Op. 85-352.

8 ABA Model Rule 1.16(a)(1).

9 U.S. v. Abrahams, 905 F.2d 1276, 1283-84, 90-1 U.S. Tax Cas. (CCH) P 50310, 30 Fed. R. Evid. Serv. 570, 66 A.F.T.R.2d 90-5125 (9th Cir. 1990) (overruled on other grounds by, U.S. v. Jose, 131 F.3d 1325, 98-1 U.S. Tax Cas. (CCH) P 50119, 80 A.F.T.R.2d 97-8384 (9th Cir. 1997)) (communications with an accountant or lawyer for the

purpose of preparing a tax return involve accounting rather than legal services and are not privileged); U.S. v. Cote, 456 F.2d 142, 72-1 U.S. Tax Cas. (CCH) P 9268, 29 A.F.T.R.2d 72-637 (8th Cir. 1972); In re Sealed Case, 676 F.2d 793, Fed. Sec. L. Rep. (CCH) P 98647, 82-1 U.S. Tax Cas. (CCH) P 9335, 10 Fed. R. Evid. Serv. 490, 33 Fed. R. Serv. 2d 1778, 50 A.F.T.R.2d 82-5637 (D.C. Cir. 1982); U.S. v. Gurtner, 474 F.2d 297, 73-1 U.S. Tax Cas. (CCH) P 9228, 31 A.F.T.R.2d 73-888, 36 A.L.R. Fed. 681 (9th Cir. 1973); In re Grand Jury Investigation, 842 F.2d 1223, 88-1 U.S. Tax Cas. (CCH) P 9368, 24 Fed. R. Evid. Serv. 1067, 10 Fed. R. Serv. 3d 409, 61 A.F.T.R.2d 88-1091 (11th Cir. 1987).

10 U.S. v. Cote, 456 F.2d 142, 72-1 U.S. Tax Cas. (CCH) P 9268, 29 A.F.T.R.2d 72-637 (8th Cir. 1972); U.S. v. Lawless, 709 F.2d 485, 83-1 U.S. Tax Cas. (CCH) P 9414, 83-1 U.S. Tax Cas. (CCH) P 13527, 13 Fed. R. Evid. Serv. 726, 52 A.F.T.R.2d 83-5818 (7th Cir. 1983); Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records, 697 F.2d 277, 12 Fed. R. Evid. Serv. 460 (10th Cir. 1983).

11 Colton v. U.S., 306 F.2d 633, 62-2 U.S. Tax Cas. (CCH) P 9658, 10 A.F.T.R.2d 5311 (2d Cir. 1962); U.S. v. Merrell, 303 F. Supp. 490, 69-2 U.S. Tax Cas. (CCH) P 9565, 24 A.F.T.R.2d 69-5347 (N.D. N.Y. 1969). But see In re Grand Jury Investigation, 842 F.2d 1223, 88-1 U.S. Tax Cas. (CCH) P 9368, 24 Fed. R. Evid. Serv. 1067, 10 Fed. R. Serv. 3d 409, 61 A.F.T.R.2d 88-1091 (11th Cir. 1987) (citing Couch v. U.S., 1973-1 C.B. 609, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548, 73-1 U.S. Tax Cas. (CCH) P 9159, 31 A.F.T.R.2d 73-477 (1973)).

12 ABA Model Rule 3.3.

13 ABA Model Rule 3.3(a).

14 ABA Model Rule 3.3(b).

15 ABA Model Rule 4.1.

16 Dyke v. Zaiser, 80 Cal. App. 2d 639, 182 P.2d 344 (4th Dist. 1947); Riverside Finance Corp. v. Coniglio Builders, Inc., 73 A.D.2d 1039, 425 N.Y.S.2d 433 (4th Dep't 1980).

17 ABA Model Rule 8.4(a).

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Superseded by Statute as Stated in In re Moe, Bankr.D.Mont., March 28, 1995

112 S.Ct. 1644
Supreme Court of the United States

TAYLOR
v.
FREELAND & KRONZ et al.

No. 91–571.
|
Argued March 2, 1992.
|
Decided April 21, 1992.

Synopsis
Chapter 7 debtor claimed exemption in potential proceeds from pending employment discrimination suit, no formal objection was filed, and debtor then settled suit. The United States Bankruptcy Court for the Western District of Pennsylvania, 105 B.R. 288, ordered debtor and discrimination suit counsel to turn over proceeds to trustee, and appeal was taken. The District Court, Alan N. Bloch, J., 118 B.R. 272, affirmed, and further appeal was taken. The Court of Appeals for the Third Circuit, 938 F.2d 420, reversed, and certiorari review was sought. The Supreme Court, Justice Thomas, held that a Chapter 7 trustee could not contest the validity of claimed exemption after 30–day period for objecting had expired and no extension had been obtained, even though debtor had no colorable basis for claiming exemption.

Affirmed.

Justice Stevens dissented and filed opinion.

West Headnotes (2)

[1] **Bankruptcy**
Time

Chapter 7 trustee could not contest validity of claimed exemption after 30–day period for objecting had expired and no extension had been obtained, even though debtor had no colorable basis for claiming exemption. Bankr.Code, 11 U.S.C.A. § 522(*l*); Fed.Rules Bankr.Proc.Rule 4003(b), 11 U.S.C.A.

811 Cases that cite this headnote

[2] **Bankruptcy**
Presentation of grounds for review
Federal Courts
Presentation of Questions Below or on Review; Record; Waiver

Supreme Court would not consider argument raised for first time in opening brief on merits, which had not been raised or resolved in lower courts, absent showing of unusual circumstances. U.S.Sup.Ct.Rules 14.1(a), 24.1(a), 28 U.S.C.A.

263 Cases that cite this headnote

****1645** *Syllabus*

On the schedule she filed pursuant to § 522(*l*) of the Bankruptcy Code, debtor Davis listed as exempt property the expected proceeds from her pending employment discrimination suit. Petitioner Taylor, the trustee of Davis' bankruptcy estate, did not object to the claimed exemption within the 30–day period allowed by Federal Rule of Bankruptcy Procedure 4003(b). However, upon later learning that the discrimination suit had been settled for a substantial sum, Taylor filed a complaint in the Bankruptcy Court against respondents, Davis' attorneys in that suit, demanding that they turn over settlement proceeds as property of Davis' estate. Concluding that Davis had no statutory basis for claiming the proceeds as exempt, the court ordered respondents to "return" to Taylor a sum sufficient to pay off all of Davis' unpaid creditors, and the District Court affirmed. The Court of Appeals reversed, holding that the Bankruptcy Court had erred because Davis had claimed the money in question as exempt, and Taylor had failed to object to the claimed exemption in a timely manner.

*643 A

Taylor acknowledges that Rule 4003(b) establishes a 30–day period for objecting to exemptions and that § 522(*l*) states that "[u]nless a party in interest objects, the property claimed as exempt ... is exempt." He argues, nonetheless, that his failure to object does not preclude him from challenging the exemption at this time. In Taylor's view, § 522(*l*) and Rule 4003(b) serve only to narrow judicial inquiry into the validity of an exemption after 30 days, not to preclude judicial inquiry altogether. In particular, he maintains that courts may invalidate a claimed exemption after expiration of the 30–day period if the debtor did not have a good-faith or reasonably disputable basis for claiming it. In this case, Taylor asserts, Davis did not have a colorable basis for claiming all of the lawsuit proceeds as exempt and thus lacked good faith.

Taylor justifies his interpretation of § 522(*l*) by arguing that requiring debtors to file claims in good faith will discourage them from claiming meritless exemptions merely in hopes that no one will object. Taylor does not stand alone in this reading of § 522(b). Several Courts of Appeals have adopted the same position upon similar reasoning. See *In re Peterson,* 920 F.2d 1389, 1393–1394 (CA8 1990); *In re Dembs,* 757 F.2d 777, 780 (CA6 1985); *In re Sherk,* 918 F.2d 1170, 1174 (CA5 1990).

[1] We reject Taylor's argument. Davis claimed the lawsuit proceeds as exempt on a list filed with the Bankruptcy Court. Section 522(*l*), to repeat, says that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." Rule 4003(b) gives the trustee and creditors 30 days from the initial creditors' meeting to object. By negative implication, the Rule indicates that creditors may not object after 30 days "unless, within such period, further time is granted by the court." The Bankruptcy Court did not extend the 30–day period. Section 522(*l*) therefore has made the property exempt. Taylor cannot contest the exemption ***644** at this time whether or not Davis had a colorable statutory basis for claiming it.

Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality. In this case, despite what respondents repeatedly told him, Taylor did not object to the claimed exemption. If Taylor did not know the value of the potential proceeds of the lawsuit, he could have sought a hearing on the issue, see Rule 4003(c), or he could have asked the Bankruptcy Court for an extension of time to object, see Rule 4003(b). Having done neither, Taylor cannot now seek to deprive Davis and respondents of the exemption.

Taylor suggests that our holding will create improper incentives. He asserts that it will lead debtors to claim property exempt on the chance that the trustee and creditors, for whatever reason, will fail to object to the claimed exemption on time. He asserts that only a requirement of good faith can prevent what the Eighth Circuit has termed "exemption by declaration." *Peterson, supra,* at 1393. This concern, however, does not cause us to alter our interpretation of § 522(*l*).

Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings. See, *e.g.,* 11 U.S.C. § 727(a)(4)(B) (authorizing denial of discharge for presenting fraudulent claims); Rule 1008 (requiring filings to "be verified or contain an unsworn declaration" of truthfulness under penalty of perjury); Rule 9011 (authorizing sanctions for signing certain documents not "well grounded in fact and ... warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); 18 U.S.C. § 152 (imposing criminal penalties for fraud in bankruptcy cases). These provisions may limit bad-faith claims of exemptions by debtors. To the extent that they do not, Congress may enact comparable provisions ****1649** to address the difficulties that Taylor predicts will ***645** follow our decision. We have no authority to limit the application of § 522(*l*) to exemptions claimed in good faith.

B

Taylor also asserts that courts may consider the validity of the exemption under a different provision of the Bankruptcy Code, 11 U.S.C. § 105(a), despite his failure to object in a timely manner. That provision states:

> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. *No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action* or making any determination necessary or

 © 2018 Thomson Reuters. No claim to original U.S. Government Works

Caution
As of: October 12, 2018 7:00 PM Z

United Student Aid Funds, Inc. v. Espinosa

Supreme Court of the United States

December 1, 2009, Argued; March 23, 2010, Decided

No. 08-1134

Reporter

559 U.S. 260 *; 130 S. Ct. 1367 **; 176 L. Ed. 2d 158 ***; 2010 U.S. LEXIS 2750 ****; 78 U.S.L.W. 4207; 63 Collier Bankr. Cas. 2d (MB) 428; 52 Bankr. Ct. Dec. 254; Bankr. L. Rep. (CCH) P81,716; 76 Fed. R. Serv. 3d (Callaghan) 364; 22 Fla. L. Weekly Fed. S 173

UNITED STUDENT AID FUNDS, INC., Petitioner v. FRANCISCO J. ESPINOSA

Subsequent History: Sanctions allowed by *Espinosa v. United Student Aid Funds, Inc. (In re Espinosa), 2011 Bankr. LEXIS 2305 (Bankr. D. Ariz., June 8, 2011)*

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Espinosa v. United Student Aid Funds, 553 F.3d 1193, 2008 U.S. App. LEXIS 28103 (9th Cir. Ariz., 2008)

Disposition: *553 F.3d 1193*, affirmed.

Case Summary

Procedural Posture

The U.S. Court of Appeals for the Ninth Circuit held that confirming respondent Chapter 13 debtor's plan without finding undue hardship to discharge interest on a student loan under *11 U.S.C.S. § 523(a)(8)* in an adversary proceeding did not render the order void under *Fed. R. Civ. P. 60(b)(4)*, and that, although petitioner creditor was not served a summons, it had notice of the plan and failed to object. Certiorari was granted.

Overview

Rule 60(b)(4) applied only where a judgment was premised on certain jurisdictional errors or due process violations depriving notice or opportunity to be heard. The Bankruptcy Court's (BC) error was not jurisdictional. The failure to serve a summons violated *Fed. R. Bankr. P. 7004(b)(3)*'s procedural rights; it was not a violation of a constitutional right to due process. The creditor received actual notice of the filing and contents of the plan, satisfying due process. A failure to find undue hardship under *§ 523(a)(8)* was not a jurisdictional or notice failing that defined void judgments under *Rule 60(b)(4)*. Given the clear and self-executing requirement for an undue hardship determination, the failure to find undue hardship before confirming the plan was a legal error. But the order remained enforceable and binding because the creditor had notice of the error and failed to object or appeal. The creditor's proof of claim for the student loan submitted it to the BC's jurisdiction on that claim. But, an assertion that bankruptcy courts were not obliged to direct a debtor to conform his plan to the requirements of *11 U.S.C.S. §§ 523(a)(8), 1328(a)(2)*, went too far.

Outcome

A unanimous court affirmed the judgment of the Court of Appeals for the Ninth Circuit. 1 opinion.

LexisNexis® Headnotes

undue hardship, and neither prevents the creditor from waiving service of a summons and complaint. See *Fed. Rule Bkrtcy. Proc. 7004*; Fed. Rule Civ. Proc. 4(k). But, to comply with *§ 523(a)(8)*'s directive, the bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding. See supra, at 275, 176 L. Ed. 2d, at 171.

IV

United argues that our failure to declare the Bankruptcy Court's order void will encourage unscrupulous debtors to abuse the Chapter 13 process by filing plans proposing to dispense with the undue hardship requirement in the hopes the bankruptcy court will overlook the proposal and the creditor will not object. In the event the objectionable provision is discovered, **[**1382]** United claims, the debtor can withdraw the plan and file another without penalty.

We acknowledge the potential for bad-faith litigation tactics. But expanding the availability of relief **[****34]** under Rule 60(b)(4) is not an appropriate prophylaxis. As we stated in Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992), HN22[] LEdHN[22][] [22] "[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings," id., at 644, 112 S. Ct. 1644, 118 L. Ed. 2d 280; see Fed. Rule Bkrtcy. Proc. 9011. The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required. And to the extent existing sanctions **[*279]** prove inadequate to this task, Congress may enact additional provisions to address the difficulties United predicts will follow our decision.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

References

11 U.S.C.S. § 523(a)(8)

4 Collier on Bankruptcy P523.14 (Matthew Bender)

4 Federal Litigation Guide §§46.18, 46.19 (Matthew Bender)

L Ed Digest, Bankruptcy § 179; Judgment § 289

L Ed Index, Bankruptcy; Rules of Civil Procedure

Supreme Court's views as to validity, construction, and application of Federal Rules of Bankruptcy Procedure. 157 L. Ed. 2d 1273.

Supreme Court's construction and application of Rule 60(b) of Federal Rules of Civil Procedure, allowing relief from judgment or order. 116 L. Ed. 2d 1045.

End of Document

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Hansen, Jones & Leta, P.C. v. Segal, D.Utah, February 18, 1998

136 B.R. 830
United States Bankruptcy Court,
C.D. California.

In re WILDE HORSE ENTERPRISES, INC., a California corporation, etc., Debtor.

Bankruptcy No. SB 90–04906 LR.
|
Dec. 23, 1991.

Synopsis
Debtor's attorney filed application for payment of fees. The Bankruptcy Court, Lynne Riddle, J., held that attorney for Chapter 11 debtor would be denied any compensation, and would be required to disgorge any retainer which she had previously been paid.

So ordered.

West Headnotes (41)

[1] **Bankruptcy**
Evidence

Burden of proof is on fee applicant to establish the reasonableness and allowability of its requested fees.

Cases that cite this headnote

[2] **Bankruptcy**
Objections; Sua Sponte Determination

Bankruptcy judges have independent duty, regardless of whether objections are filed, to conduct examination into reasonableness of professional fees to be paid from estate, and to articulate principled reasons for granting or denying compensation.

1 Cases that cite this headnote

[3] **Bankruptcy**
Objections; Sua Sponte Determination

Bankruptcy court has duty to examine all aspects of attorney fee application, including a duty to root out impermissible conflicts of interest.

4 Cases that cite this headnote

[4] **Attorney and Client**
Nature of Attorney's Duty

Attorney for Chapter 11 debtor-in-possession, as officer of court charged with performing duties in administration of case, has a high fiduciary duty to estate represented.

2 Cases that cite this headnote

[5] **Attorney and Client**
Bankruptcy

Counsel for corporate debtor-in-possession owes fiduciary duty to corporate entity estate and represents its interests, not those of entity's principals.

13 Cases that cite this headnote

[6] **Attorney and Client**
Bankruptcy

Attorney for corporate debtor-in-possession is obligated to act, not in his or her own best the sale. *I merely sat back* and I apologize to the Court. I just plain sat back, and *I let everybody else take care of it* (the sale)—*the other attorneys involved* (the Court assumes she meant the attorneys for the buyer). My client was just not—*it just didn't matter—on the sale.* As far as Wilde Horse goes, as far as the principal of Wilde Horse, there was no hope of salvaging the principal's liability (the Court infers she meant to say 'equity'), there was no hope of salvaging the corporation, it was extremely frustrating case because we had such a good company, and the SBE, in my opinion, invented law to close them down." (Emphasis added).

Court: "I don't want to be side-tracked about the SBE—My question is what did you do or not do?"

Bernstein: "What *I did was let my frustration,* and—, take over and *I sat back and didn't do anything. I did not investigate, I didn't question.* I received a buy-sell agreement, and I noticed it. I should have taken a more active role. My only excuse was that I was so thoroughly frustrated and upset with loosing what should have been a good case." (Emphasis added).

APPLICABLE STATUTORY LAW

Bankruptcy Code § 330, Title 11, U.S.C. § 330.

(a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award ... to the debtor's attorney—

(1) reasonable compensation for actual, necessary services rendered by such ... attorney ... based upon the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

(2) reimbursement for actual, necessary expenses.

Bankruptcy Code § 328(c), Title 11, U.S.C. § 328(c).

(a) ....

***839** (b) ....

(c) ... [T]he court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, *at any time during* such professional person's *employment* under section 327 or 1103 of this title, such professional person is not a disinterested person, or *represents* or holds *an interest adverse* to the interest of the estate with respect to the matter on which such professional person is employed. (Emphasis added).

Local Bankruptcy Rule 102(5).
Any attorney who appears for any purpose submits to the discipline of the Court with respect to conduct of the case or proceeding and shall be subject to the standards of professional conduct as set forth in Local Rule 2.5 of the District Court.

Local District Court Rule 2.5.
Each attorney shall become familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. Those statutes, rules and decisions are hereby adopted as the standards of professional conduct of this Court.

Rules of Professional Conduct of the State Bar of California Rule 5–102(b).
Avoiding the representation of adverse interests.

(A) ...

(B) A member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned.

Rules of Professional Conduct of the State Bar of California Rule 6–101(2).
Failing to act competently.

> A member of the State Bar shall not wilfully *or* habitually
>
> (1) ...
>
> (2) Fail to use reasonable diligence and his [or her] best judgment in the exercise of his skill and in the application of his [or her] learning and effort to accomplish, with reasonable speed, the purpose for which he [or she] was employed. (Emphasis added).

DISCUSSION

BURDEN OF PROOF ON ATTORNEY'S FEES APPLICATION

[1] The burden of proof is upon the applicant to establish the reasonableness and allowability of its requested fees. *In re Wildman,* 72 B.R. 700, 708 (Bankr.N.D.Ill.1987); *In re Harman Supermarket, Inc.,* 44 B.R. 918, 920 (Bankr.W.D.Va.1984); *In re Four Star Terminals, Inc.,* 42 B.R. 419, 429 (Bankr.Alaska 1984).

COURT'S DUTY TO REVIEW FEE APPLICATION

[2] [3] Congress intended the Court to have the responsibility for the payment of attorney's fee from debtors' estates. *In re First Federal Corp.,* 43 B.R. 388 (Bankr.W.D.Va.1984). Bankruptcy Judges have an independent duty, regardless of whether or not objections are filed, to (1) conduct an examination into the reasonableness of professional fees to be paid from an estate, and (2) articulate principled reasons for granting or denying compensation. *Matter of Ross,* 94 B.R. 210 (M.D.Ga.1988); *In re Watson Seafood & Poultry Co., Inc.,* 40 B.R. 436 (Bankr.S.D.Fla.1984); *In re Crutcher Transfer Line, Inc.,* 20 B.R. 705 (Bankr.W.D.Ky.1982). In addition to a review for reasonableness, the Court has a duty examine all aspects of an attorney's fee application, *In re CVC, Inc.,* 120 B.R. 874, 876–7 (Bankr.N.D.Ohio 1990), citing *In re Liberal Market, Inc.,* 24 B.R. 653 (Bankr.S.D.Ohio 1982), including "... a duty ... [to] root out impermissible conflicts of interest...." *In re Martin,* 817 F.2d 175, 180 (1st Cir.1987) ["We hold unhesitatingly that § 327 remains hirsute"!]. The duty to "root out", however, does not impose upon the Court a duty to search the file for possible same surnames or other indicia of conflicts or adverse interests. ***840** *See In re Career Concepts, Inc.,* 76 B.R. 830, 834 (Bankr.Utah 1983).

FIDUCIARY DUTIES OF CHAPTER 11 DEBTOR'S ATTORNEY

[4] [5] [6] In a Chapter 11 proceeding, the attorney for debtor in possession, as an officer of the court charged to perform duties in the administration of the case, has a high fiduciary duty to the estate represented. *Matter of Evangeline Refining Co.,* 890 F.2d 1312, 1323 (5th Cir.1989); *Matter of Consol. Bancshares,* 785 F.2d 1249, 1255 (5th Cir.1986); *In re Doors and More, Inc.,* 126 B.R. 43, 45 (Bankr.E.D.Mich.1991), citing *In re Bohack Corp.,* 607 F.2d 258, 264 (2nd Cir.1979); *In re Consupak, Inc.,* 87 B.R. 529, 548–49 (Bankr.N.D.Ill.1988); *In re Grabill Corp.,* 113 B.R. 966 (Bankr.N.D.Ill.1990); *In re Coastal Equities, Inc.,* 39 B.R. 304, 309 (Bankr.S.D.Cal.1984). Moreover, counsel for a corporate Chapter 11 debtor in possession owes a fiduciary duty to the corporate entity estate—the client—and represents *its* interests, not those of the entity's principals. *In re Grabill Corp., supra,* 970; citing *In re Overmeyer Telecasting Co.,* 23 B.R. 823, 931 (Bankr.N.D.Ohio 1982), aff'd, 750 F.2d 31 (6th Cir.1984); and others omitted; *In re WPMK, Inc.* 42 B.R. 157 (Bankr.Hawaii 1984). And certainly, the attorney is obligated to act not in his or her own best interest, but in the best interest of all the creditors. *In re Doors and More, Inc.,* at 45, citing *Commodity Futures Trading Comm'n. v. Weintraub,* 471 U.S. 343, 105 S.Ct. 1986, 1194, 85 L.Ed.2d 372 (1985), and others omitted.

[7] [8] [9] An attorney's "client" is the person or entity on whose behalf the lawyer acts. In certain proceedings an attorney may have more than one client, and where this is so, they owe duties of loyalty to all the interests represented. The duty of loyalty includes a duty of

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

candor—candor to all the interests represented. "A lawyer like a trustee is bound to higher standards than the morals of the marketplace." *MGIC Indemnity Corporation v. Weisman,* 803 F.2d 500, 504 (9th Cir.1986). "Professional ethics requires of a lawyer a decent sense of responsibility to all those he [or she] serves." *Id,* at 504.

[10] [11] Because the attorney for debtor in possession is a fiduciary of the estate and an officer of the Court, the duty to advise the client goes beyond responding the client's requests for advice. It requires an *active* concern for the interests of the estate, and its beneficiaries, the unsecured creditors. Consequently, the attorney may not simply close his or her eyes to matters having a legal and practical consequence for the estate—especially where the consequences may have an adverse effect. The attorney has the duty to remind the debtor in possession, and its principals, of its duties under the Code, and to assist the debtor in fulfilling those duties. *See In re Consupak, Inc.,* 87 B.R. 529, 548–551 (Bankr.N.D.Ill.1988); *In re Sowers,* 97 B.R. 480, 488 (Bankr.N.D.Ind.1989). What's more, counsel has a duty to assist and advise debtor respecting the fulfilling of the requirements of the Office of the United States Trustee; unwillingness to do so disqualifies the attorney's representation of debtor. *In re Plaza Hotel Corp.,* 111 B.R. 882, 891 (Bankr.E.D.Cal.1990).

[12] An attorney retained by the trustee, or debtor in possession, who assists with the collection of the assets of the estate, must abide by the highest professional standards. "Not honesty alone, but the punctilio of an honor the most sensitive, is the standard of behavior." *In re Thompson,* 54 B.R. 311, 315 (Bankr.N.D.Ohio 1985), quoting Judge Cardozo in *Meinhard v. Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

[13] [14] An attorney's duty goes beyond not merely putting false evidence before the court; the duty is greater—the lawyer has a duty to not make misrepresentations to the court. *In re Disciplinary Action Curl,* 803 F.2d 1004, 1005–06 (9th Cir.1986). For disciplinary purposes in the Ninth Circuit, where an attorney has misrepresented the record on appeal to the Court, no finding of intentionally wrongful conduct is required to impose a sanction; a finding of a lack of diligence by the attorney is sufficient. ***841** *DCD Programs, Ltd. v. Leighton,* 846 F.2d 526 (9th Cir.1988).

ATTORNEY'S DUTY OF REASONABLE INQUIRY

[15] All attorneys before the federal court, including those representing the estate of a debtor in possession, have duties under F.R.C.P. 11 (incorporated into the Bankruptcy Code as Federal Rules of Bankruptcy Procedure Rule 9011). The Rule provides, among other things, that the signature of an attorney on a petition, pleading or motion constitutes a certificate that to the best of the attorney knowledge, information or belief "formed after reasonable inquiry", the content of the document is "well grounded in fact and is warranted by existing law...." The "well grounded in fact" requirement demands, at least, that the attorney not accept the client's (or the client's principal's) version of certain facts "on faith", but at a minimum the attorney has a duty to probe the client carefully for the facts before they are included in any document signed by the attorney or in any other way presented to the Court. See *Fleming Sales Co. v. Bailey,* 611 F.S. 507, 519 (D.C.Ill.1985).

CHAPTER 11 DEBTOR'S ATTORNEY'S DUTY RE: PROPOSED SALE OF ASSETS

[16] Under § 363(b), the debtor in possession may sell property of the estate, other than in the ordinary course of business, only after notice and hearing. In any sale of estate assets, the ultimate purpose is to obtain the highest price for the property sold. *Matter of Chung King, Inc.,* 753 F.2d 547 (7th Cir.1985); *In re Alpha Industries, Inc.,* 84 B.R. 703, 705 (Bankr.Mont.1988); 2 Collier on Bankruptcy, 15th ed. ¶ 363.03[1].

Under what circumstances should the debtor in possession be allowed to sale of all or virtually all of the estates property prior to the confirmation of debtor's plan? This was the fundamental question raised and discussed in *In re Lionel Corporation,* 722 F.2d 1063 (2nd Cir.1983). *Lionel,* stands for the notion, at least, that § 363(b) does not grant the bankruptcy judge *carte blanche* to approve any sale proposed by the debtor, but requires that "reasons be given for whatever determination is made", *Id.* at 1069, i.e. "[T]here must be some articulated business justification ... before the bankruptcy judge may order such disposition." *Id.* at 1070. The "notice and hearing" safeguard of § 363(b) would be meaningless if the court were not required to articulate some reasons why the sale is in the best interest of the estate.

Of course, the court and the creditors can only make an "articulated business" judgment regarding the prudence of the sale where there has been a full disclosure of the

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

details of the proposed sale by its proponent. "The key to the reorganization Chapter ... is *disclosure*...." *Id.* at 1070. The essential purpose served by disclosure is to ensure that parties in interest are not left entirely at the mercy of the debtor and others having special influence over debtor.

[17] [18] A sale of substantially all of debtor's property outside the ordinary course of business, and without a Chapter 11 disclosure statement and plan, must be closely scrutinized. *In re Channel One Communications, Inc.* 117 B.R. 493 (Bankr.E.D.Mo.1990). In proposing any such sale, the debtor has the burden of demonstrating that it is in the best interests of the estate. *Lionel,* at 1071; *Channel One,* at 496.

[19] In approving any sale outside the ordinary course of business, the court must not only articulate a sufficient business reason for the sale, it must further find it is in the best interest of the estate, i.e. it is fair and reasonable, that it has been given adequate marketing, that it has been negotiated and proposed in good faith, that the purchaser is proceeding in good faith, and that it is an "arms-length" transaction. *Matter of Phoenix Steel Corp.,* 82 B.R. 334, 335–36 (Bankr.Del.1987); *In re Alpha Industries, Inc.,* 84 B.R. 703, 705–06 (Bankr.Mont.1988); *In re Alves,* 52 B.R. 353 (Bankr.R.I.1985); *In re Delaware & Hudson Railway Co.,* 124 B.R. 169, 176–77 (D.Del.1991); ***842** *In re Planned Systems, Inc.,* 82 B.R. 919, 923 (Bankr.S.D.Ohio 1988). It is the proponents duty to produce evidence probative of these issues.

"Good faith" encompasses fair value, and further speaks to the integrity of the transaction. Typical "bad faith" or misconduct, would include collusion between the seller and buyer, or any attempt to take unfair advantage of other potential purchasers. *Alpha Industries,* at 706. And, with respect to making such determinations, the court and creditors must be provided with sufficient information to allow them to take a position on the proposed sale. *In re Structurlite Plastics Corp.,* 91 B.R. 813 (Bankr.S.D.Ohio 1988).

Finally, the court must determine that the debtor in possession has given all interested parties adequate and reasonable notice regarding the sale. *In re Delaware & Hudson Railway Co.,* 124 B.R. at 176.

[20] As set forth above, one of the factors in determining the *bona fides* of the proposed sale of debtor's assets is a determination that the transaction proposed has been negotiated at arms-length. A sale is fraudulent where, through personal as opposed to arms-length dealing, property of the estate is obtained at the lowest price as opposed to a higher price, and where the relationship between the seller and buyer has been concealed. *In re Tri–Cran, Inc.,* 98 B.R. 609, 618–619 (Bankr.Mass.1989). Typically, the misconduct that would destroy the *bona fides* of a proposed sale is fraud, collusion, or an attempt to take grossly unfair advantage. *In re Apex Oil Co.,* 92 B.R. 847, 869 (Bankr.E.D.Mo.1988).

[21] It is not bad faith *per se* for an insider to purchase property from an estate, even where the insider has a fiduciary duty to the estate. *Id.,* at 869–70, citing *In re Andy Frain Services, Inc.,* 798 F.2d 1113, 1125 (7th Cir.1986); *In re Naron & Wagner, Chartered,* 88 B.R. 85, 88 (Bankr.Md.1988); and *In re Ancor Exploration Co.,* 30 B.R. 802, 808 (Bankr.N.D.Okla.1983). The question of good faith, even under these circumstances however, turns on whether debtor breached its fiduciary duty of full disclosure. The court in *Apex* found no lack of good faith where the purchase and sale agreement was the product of "[V]igorous, arms-length, good faith negotiations ..." which took place in a "... 'fish bowl' under the watchful eyes of the Examiner and the Committee...." *Id.,* at 870.

Under § 101(30) an "insider" includes, if the debtor is a corporation, an officer of the debtor, the person in control of the debtor, or a relative of a person who is an officer or person in control of the debtor corporation. The word "includes" is intended to connote that the definitions under the section are not limiting. 11 U.S.C. § 101(3). "The true test of an 'insider' is one who has such a relationship with the debtor that their dealing with one another cannot be characterized as an arms-length transaction." *In re Montanino,* 15 B.R. 307, 310 (Bankr.N.J.1981); *In re Hollar,* 100 B.R. 892, 893 (Bankr.N.D.Ohio 1989).

[22] Clearly then, a debtor who proposes a sale of all of its assets to an insider must fully disclose to the court and creditors the relationship between the buyer and seller, as well as the circumstances under which the negotiations have taken place, any marketing efforts, and the factual basis upon which the debtor determined that the price was reasonable.

ATTORNEY'S DUTY TO DISCLOSE INSIDER PURCHASER OF DEBTOR'S ASSETS

CONDITIONS UNDER WHICH DEBTOR'S ATTORNEY'S FEES MAY BE DENIED

1. REPRESENTING AN INTEREST ADVERSE TO THE ESTATE

[23] Attorneys have a duty to exercise independent professional judgment, free from conflicting and compromising influences; the interests of no other person should affect the attorney's basic judgment and responsibility to the client. *In re WPMK, Inc.,* 42 B.R. 157 (Bankr.Haw.1984).

[24] ***843** Under § 328(c) the Court may deny attorney's fees where, during the appointment, the attorney has represented an interest adverse to the interest of the estate. "To 'represent an adverse interest' means to serve as agent or attorney for any individual or entity holding such adverse interest." *In re Roberts,* 46 B.R. 815, 827 (Bankr.Utah 1985). Through § 328(c) the Congress has expressly provided a penalty to be applied against attorneys who either have, or represent, interests in conflict with those of the estate. HR Rep No. 595, 95th Cong, 1st Sess 329 (1977); S.Rep No. 989, 95th Cong, 2d Sess 39 (1978), U.S.Code Cong. & Admin.News 5787 (1978).

[25] An Attorney who fails to remain free of conflicts, or one who serves conflicting interests during a case may be denied *all* compensation. *In re Land,* 116 B.R. 798, 803 (D.Col.1990); *BH & P, Inc.,* 103 B.R. 556 (Bankr.N.J.1989). A conflict exists where the attorney represents interests in a proceeding of both the debtor and a creditor. *In re Roberts,* 46 B.R. 815, 823 (Bankr.Utah 1985). "The interests of any other person should not affect an attorney's judgment and responsibility to his[or her] client." *In re 765 Associates,* 14 B.R. 449, 451 (Bankr.Haw.1981). Counsel for the debtor may represent only the debtor—he or she may not also represent the interests of a purchaser of assets of an estate. *In re Watson Seafood & Poultry Co., Inc.,* 40 B.R. 436, 442 (Bankr.S.D.Fla.1984).

In *In re CVC, Inc.,* 120 B.R. 874 (Bankr.N.D.Ohio 1990) an accounting firm, Ciuni & Panichi, Inc. ("Ciuni") was appointed by order of the court to perform accounting services for debtor in possession. About six months later, Ciuni was hired by William Gardner, a party interested in buying CVC's assets, to perform accounting services for him. At the time of Ciuni's acceptance of the Gardner engagement, CVC and Gardner were in negotiations regarding the prospective sale. Ultimately, Gardner purchased CVC's assets.

Later, Ciuni filed a fee application in the bankruptcy case. The creditor's committee objected to the payment of fees on the ground that the services rendered were not a benefit to the estate, but benefited only Gardner. Among the work billed was for research on tax limitations on net operating loss carryforwards and unused business credit carryforwards as a result of a change in ownership. The committee further asserted that it was Ciuni associate Bradford Eldridge, who performed the most significant CVC work, that Gardner claimed was *his* accountant in the sale negotiation meetings.

Notwithstanding the committee's later withdrawal of its objection to the fee application, the court denied fees to Ciuni *in their entirety,* and in addition discharged Ciuni from its engagement to CVC. The court said:

> "The conflict of interest in dealings of this nature is obvious. While the objective of CVC would be to maximize profits for the Debtor's estate in a sale, Gardner, on the other hand, would attempt to purchase CVC at a price most advantageous to himself. While serving as the accountant for both parties, Ciuni would experience great difficulty in serving the best interest of either party." *Id.* at 877.

In a similar matter, *In re Freedom Solar Center, Inc.,* 776 F.2d 14 (1st Cir.1985), the First Circuit held that corporate debtor's attorney could not also represent the debtor's sole shareholder, where the shareholder was attempting to purchase assets from the debtor's Chapter 7 estate. To allow such representation would be a violation of the state code of professional conduct proscribing the representation of differing interests, unless each represented party consents to the representation *after full disclosure.* In this instance, said the Court, there were clearly differing interests being represented. On the one hand, the attorney's duty to the debtor would be to seek to sell debtor's property for the highest price possible, and on the other, the duty to seek to purchase the same property at the lowest possible price. This adversity alone, said the Court, was a *prima facie* showing of the violation of the code of conduct. "The Rule", said the First Circuit, "is meant to avoid the possibility that [the attorney] will succumb to temptation and ***844** give tainted advice. It is beside the point that the tainted advise may not have any effect on the debtor's conduct. Lawyer's should not give such advice." *Id.,* at 18. The Court thereafter held that the rule against representing adverse interests, even where the situation may be characterized as slight, should be strictly adhered to in order to prevent escalating conflicts. Debtor's attorney was found to be disqualified. Certainly, the representation by Debtor's attorney of an undisclosed adverse interest in a Chapter 11 debtor in possession sale of assets is deserving of much greater scrutiny than in a Chapter 7 case, because under Chapter 7 the proponent of the sale in generally the Trustee—a neutral party who has an independent fiduciary duty to the estate.

2. BREACH OF FIDUCIARY DUTY

[26] [27] The Court may deny an attorney for a Chapter 11 debtor all fees claimed as due and owing on account of such attorney's wrongdoing, negligence, or serious breaches of fiduciary obligations. *Red Carpet Corp. of Panama City Beach v. Miller,* 708 F.2d 1576 (11th Cir.1983); *Matter of Ranchero Motor Inn, Inc.,* 527 F.2d 1044 (9th Cir.1975); *Matter of Arlan's Dept. Stores, Inc.,* 615 F.2d 925 (2nd Cir.1979). "Improper conduct on the part of officers or attorneys has frequently been penalized by withholding compensation or reimbursement or both". *Matter of Ranchero Motor Inn, Inc.,* 527 F.2d 1044, 1047 (9th Cir.1975), citing 3A Collier on Bankruptcy par. 62.05[5], p. 1431. Moreover, the Court has the flexibility to tailor the relief necessary to remedy an attorneys misconduct. *In re Guy Apple Masonry Contractor, Inc.,* 45 B.R. 160, 168 (Bankr.Ariz.1984), citing *Matter of Ranchero Motor Inn, Inc.,* 527 F.2d 1044, 1047–48 (9th Cir.1975).

[28] [29] Violations of the Code or professional ethics or breaches of fiduciary duties can give rise to the reduction, denial or forfeiture of compensation or other sanctions. *In re Command Services Corp.,* 102 B.R. 905, 911 (Bankr.N.D.N.Y.1989), other cites omitted. Ethical violations are relevant to fee determinations for lawyers representing a Chapter 11 debtor in possession. *In re Global Marine, Inc.,* 108 B.R. 998, 1004 (Bankr.S.D.Tex.1987).

3. BREACH OF DUTY OF COMPETENCE

[30] While ethical violations are a factor to be considered by the court on fee applications, the *absence of competence* should be the *primary focus,* and where unethical conduct has lessened the value of the services rendered the fee should be reduced. *In re Devers,* 12 B.R. 140 (D.C.D.C.1981); *In re Coastal Equalities, Inc.,* 39 B.R. 304 (Bankr.S.D.Cal.1984).

[31] [32] Section 327 requires that prior to the employment of an attorney for the trustee, the bankruptcy court should determine whether there is any conflict of interest by that attorney, whether the attorney is competent and whether the services are needed. *In re Kroeger Properties and Development, Inc.,* 57 B.R. 821, 823 (9th Cir.BAP 1986); *In re Samoan Airlines, Inc.* 70 B.R. 352, 354 (Bankr.Haw.1987); *In re Johnson,* 21 B.R. 217, 218 (Bankr.D.C.1982). If the Court is required to determine that the attorney is "competent" prior to employment, then surely actual competence in performing services after employment must be a mandatory factor in awarding fees. It is axiomatic that where, prior to awarding professional fees under § 330(a)(1) the Court must make a finding of the value of the services rendered, the Court determines that the services were incompetently performed and therefore have no value, then such services cannot be compensated.

[33] [34] Competent representation of one's client is a part of an attorney's ethical responsibility to his or her client; failure to act competently wilfully *or* habitually, such as by the failure to use reasonable diligence and his or her best judgment and skill in the application of one's learning, is a breach of the attorney's fiduciary duty to the client. See Rules of Professional Conduct of the State Bar of California, Rule 6–101(2). Under California law, gross carelessness and negligence are violations of ***845** the attorney's oath to faithfully discharge one's duties to the best of his or her knowledge and ability; such gross violations involve moral turpitude because they are a breach of the fiduciary relationship that binds the attorney to the most conscientious fidelity to the client's interests. *Simmons v. State Bar of California,* 2 Cal.3d 719, 87 Cal.Rptr. 368, 470 P.2d 352 (1970).

Finally, as earlier stated, debtor in possession's attorney may be denied fees where he or she violates his or her fiduciary, ethical and professional responsibilities to the client.

4. BREACH OF DUTY OF REASONABLE INQUIRY

As set forth above, all attorney's before the federal court, have duties under F.R.C.P. 11. The failure by debtor's attorney to make a reasonable inquiry may be severe, because where the Court determines that a pleading or motion or document is signed in violation of Rule 9011, it "... *shall* impose upon the person who signed it, the represented party, or both, *an* appropriate *sanction* ..." i.e. the imposition of sanctions is mandatory.

[35] This court concludes that where the document or documents signed by debtor's attorney are such that they are false or misleading, or were signed in breach of an

attorney's fiduciary duty to the estate, an appropriate sanction under Rule 9011, among others, is the denial of attorney's fees either with respect to the fee relating to the preparation of, and hearing related to, if any, the "signed" document, or to such attorney's compensation *in toto* where the breach is substantial and goes to the heart of good faith and fair-dealing, i.e. to the heart of the attorney's fiduciary, ethical and professional responsibilities to debtor in possession's estate.

5. BREACH OF DUTY OF DISCLOSURE WHEN REPRESENTING ADVERSE INTERESTS

[36] [37] [38] There is nothing improper in representing more than one party to a transaction, so long as the attorney discloses the consequences of the joint representation. *E.F. Hutton & Co. v. Brown,* 305 F.Supp. 371 (S.D.Tex.1969). However, an attorney should not represent parties whose interests are adverse. *In re Briggs' Estate,* 139 Cal.App.2d 802, 294 P.2d 478 (1956). Adversity of, or divergent, interests between two clients requires the attorney who attempts to represent both, to exercise the highest duty to each to make full disclosure,—to disclose to each of the jointly represented clients whatever is necessary to enable each of them to make intelligent, informed decisions regarding the subject matter of the representation. *Spindle v. Chubb/Pacific Indem. Group,* 89 Cal.App.3d 706, 152 Cal.Rptr. 776 (1979); *Klemm v. Superior Court of Fresno County,* 75 Cal.App.3d 893, 142 Cal.Rptr. 509 (1977).

TOTAL FORFEITURE OF FEES IS WITHIN THE COURT'S DISCRETION

[39] A total forfeiture of compensation to the attorney for a debtor in possession is within the sound discretion of the court. *In re Warrior Drilling & Engineering Co. Inc.,* 18 B.R. 684 (D.C.Ala.1981); *In re Command Services Corp.,* 102 B.R. 905 (Bank.N.D.N.Y.1989); *Matter of Davidson,* 79 B.R. 859 (Bankr.W.D.Mo.1987); *In re Damon,* 40 B.R. 367 (Bankr.S.D.N.Y.1984).

ANALYSIS

[40] With respect to the proposed sale of Debtor's assets, Ms. Bernstein admitted to the Court and others on the record that she did nothing to investigate the *bona fides* of the transaction. Rather, she simply "sat back", "didn't do anything" and "let everybody else [meaning buyer's attorneys] take care of it" [meaning the negotiation, terms and conditions of the sale]. She summarized: "I did not investigate, I did not question".

Such conduct, given Counsel's fiduciary duty to the estate, was reprehensible. Ms. Bernstein has admitted that she wilfully breached her duty because she was "frustrated". These admitted violations of her ***846** fiduciary, ethical and professional duties is alone sufficient to deny her fees in this case. But, there is more.

By "signing" the application to sell Debtor's property Ms. Bernstein knowingly falsified her "certification" as an office of the Court that she performed her duties to her client. Moreover, when she "signed" at a time when she had no reason to believe the proposed sale was an "arms-length" transaction, she was, and in effect, "standing behind" a sale the terms and conditions of which were dictated by the proposed buyer—this when she should have known of the close relationship between Mr. Mitchell and Ms. Mitchell, and should have suspected collusion between the two for their own benefit to the detriment of the estate. In so doing, Ms. Bernstein herself "sponsored" and represented to the Court an interest at least potentially, if not actually, adverse to the estate without any disclosure whatsoever.

From the Court's experience, Ms. Bernstein's admission of "sitting back and doing nothing" describes her entire representation in this case and other cases she has handled, or mishandled, before this Court. While not licensed to practice medicine, this Court believes that Attorney Bernstein is "legally" blind—she never seems to see perfectly obvious "red flags".

Specifically, there were "red flags" throughout this case which should have, but apparently did not, capture Counsel's attention. The first, perhaps, was the substantial disparity between the first and later reports of the value of Debtor's liabilities and assets. Simple common sense would require closer questioning and review thereafter of the information reported to counsel by Debtor's principal.

Next, I believe, would be the question of who owned the shares of the deceased Charles A. Mitchell, Sr. Did Ms. Bernstein ask whether there was a will? Whether Mr. Mitchell Sr. died intestate? Who the decedent's survivors are? Why didn't she ask such questions?

Whose name was on the title to the vehicles? Did Ms. Bernstein know and willfully permit a misrepresentation of actual title by preparing bankruptcy schedules listing the ambiguous name "C. Mitchell"? Or did she just sit back and not make an inquiry regarding Debtor's property.

What questions were addressed, and to whom, and what steps were taken, if any, by Ms. Bernstein regarding the rental or lease agreement on the Wilde Horse premises? Why wasn't the landlord's apparent lack of activity in the case a "red flag"? If, as Mr. Mitchell reported in his declaration, his only prospect of saving his property was to "take over" Wilde Horse, why didn't he file an unlawful detainer proceedings against Wilde Horse prior to the bankruptcy when Wilde Horse was $48,000 in arrears on its rent? What early inquiries did Ms. Bernstein make of Mr. Mitchell regarding his intentions? Why did Ms. Bernstein not know of a written lease agreement? Why when she discovered there was a lease agreement, didn't she bring the matter of Ms. Mitchell's (and perhaps Mr. Mitchell's) misrepresentations to her, and in the bankruptcy case, to the attention of the Court?

It is this Court's experience that it is the landlord or mortgage holder in a Chapter 11 case that is generally the first either to "work out" something with the Debtor or run to Court for relief. When the landlord didn't take either of these steps, why didn't Ms. Bernstein make some probing inquiries? As was pointed out in *In re Doors and More, Inc.*, 126 B.R. 43 (Bankr.E.D.Mich.1991), a Chapter 11 case, an attorney's failure to deal with the landlord may well result in a disaster to the debtor, its owners and the creditors of the estate. This is so, of course, because under § 365(d)(4), where the debtor in possession has failed to assume the unexpired lease of its business premises within 60–days after the filing of the petition, the lease is deemed rejected, and the debtor must surrender possession to the landlord. In most cases, such an unplanned ejectment is catastrophic to the debtor's ability to continue business. Such a failure on the part of debtor's attorney can hardly aid the administration of the estate. *Id.* at p. 46.

***847** Wasn't the "boyfriend/girlfriend" relationship between Mr. Mitchell and Ms. Mitchell a "red flag"? Didn't it occur to Ms. Bernstein that Mr. Mitchell might actually be "in control" of Debtor? Especially where Mr. Mitchell was (1) the landlord who could have at any moment in the case "pulled the plug" with respect to the premises; (2) the son of the deceased shareholder (and perhaps his sole heir); and (3) the largest unsecured creditor? What did Ms. Bernstein make of the facts that (1) Mr. Mitchell was an employee of Wilde Horse during the case?, and (2) Ms. Mitchell would remain at "Wilde Horse" as an employee after all Debtor's assets were sold?

Did Ms. Bernstein make inquiries regarding Debtor's prior legal representation? And especially where two attorney's were paid for their services immediately prior to the filing of the bankruptcy?

Why did Ms. Bernstein not cry "foul" to the Court on behalf of the estate when she learned the proposed purchaser, Kingston Range, was represented Fullerton & Lemann when she knew Fullerton & Lemann had apparently consulted with the Debtor immediately prior to the filing?

There may in fact be answers to all these questions which can explain that this case was "legit"—but because Ms. Bernstein never provided the Court and creditors with "full disclosure", we will never know.

The Court finds from the evidence before it that Ms. Bernstein either (1) knew of the collusive and undisclosed relationships in this case and knowingly participated in misleading the Court and creditors; or (2) didn't know of the collusive and undisclosed relationships in this case, and is therefore wholly incompetent because she insisted on remaining ignorant of the facts and law applicable to her case notwithstanding the numerous indicia of questionable conduct along the way. Whether Ms. Bernstein's acts were wrongful, wilfully incompetent or grossly negligent is not important to the determination here. Under either case, the Court concludes her fees must be denied in their entirely, she should not be permitted to represent debtors in possession before any bankruptcy court, and her conduct in this case must be referred to the State Bar of California for disciplinary proceedings.

POST–SCRIPT

At a later hearing on another matter where the question of her representation in this matter was raised, Ms. Bernstein looked at the Court quizzically and seemed to ask—"But what could I have done? This case came to me as an 'emergency'—I didn't have time to ask the questions I would like to, and I can only put in the petition, schedules and statements the information given to me by the client."

The prepetition answer comes from our own Ninth Circuit Bankruptcy Appellate Panel in *In re Villa Madrid,* 110

B.R. 919 (9th BAP 1990) where the Court said:

> "The importunities of a desperate client do not relieve an attorney of the affirmative duty of reasonable inquiry imposed by Rule 9011. The evident warning flags and the inadequate time available to make such inquiry should have impelled [the attorney] to consider the ever-present option of declining a questionable engagement." *Id.* at p. 924.

[41] The post-petition answer is that on the very first hint or suspicion that the debtor or debtor's principal is not being honest, or is neglecting his/hers/its fiduciary duty to the estate, it is the attorney's duty to first ask *probing* questions and *demand full and reasonably corroborated responses,* and then if counsel is still unsatisfied or ethically uncomfortable, immediately bring the unresolved concerns to the Court's attention by way of a motion to be relieved as counsel of record or in some other way. The wholly unacceptable response is to do nothing and continue in the engagement "looking the other way". Counsel does so at his or her personal and professional peril.

CONCLUSION

For all the foregoing reasons, the application for fees and reimbursement of costs of Debtor's attorney, Naomi R. Bernstein, is denied in its entirety. Moreover, Ms. ***848** Bernstein will immediately be ordered to disgorge from her trust account and deliver to the Chapter 7 trustee, within 10 days of entry of this order, the full retainer sum of $6,500.00.

A separate order denying attorney's fees to Naomi R. Bernstein shall be filed concurrently herewith.

Finally, this memorandum will be referred to the State Bar of California and the Bar of the Central District of California with respect to the apparent breaches of duty to the Debtor herein, Wilde Horse Enterprises, Inc. by both Ms. Bernstein and the firm of Fullerton and Lemann, represented by Michael R. Schaefer, Esq.

All Citations

136 B.R. 830

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

526 Fed.Appx. 768
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

In re BLUE PINE GROUP, INC., Debtor,
David J. Winterton; David J. Winterton & Associates, Ltd., Appellants,
v.
Blue Pine Group, Inc.; Humitech of Northern Nevada California, LLC; John Pink; US Trustee, Appellees.

No. 11–60059.
|
Argued and Submitted May 7, 2013.
|
Filed May 20, 2013.

Synopsis
Background: After dismissal of Chapter 7 case filed on behalf of corporation without requisite authority, motion was filed for award of Rule 9011 sanctions against attorney who filed petition. The Bankruptcy Court, Bruce A. Markell, J., 448 B.R. 267, granted motion, and attorney appealed. The Bankruptcy Appellate Panel, Hollowell, J., 457 B.R. 64, affirmed and attorney appealed.

Holdings: The Court of Appeals held that

[1] imposition of sanctions was not an abuse of discretion, but that

[2] award of $109,528 would be reduced to $11,000 since attorney's culpability was limited by that of the debtor.

Affirmed and Vacated.

West Headnotes (2)

[1] **Bankruptcy**
Frivolity or bad faith; sanctions

Imposition of sanctions for frivolous filing in Chapter 7 case was not abuse of discretion where attorney filed and continued to pursue a bankruptcy petition without adequate investigation that it was legitimate, even after he was put on notice that his clients lacked authority to file. Fed. R. Bankr.P. 9011(b), (c)(1)(A).

Cases that cite this headnote

[2] **Bankruptcy**
Frivolity or bad faith; sanctions

Sanction of $109,528 imposed for frivolous filing, based on actual costs shown to be attributable to attorney's improper conduct in Chapter 7 case, would be reduced to $11,000 where attorney's error stemmed in part from his reliance on debtor and debtor's litigation and corporate counsel, and where sanction imposed was more than sufficient to deter similar conduct by others. Fed. R. Bankr.P. 9011(b), (c)(1)(A).

Cases that cite this headnote

Attorneys and Law Firms

*768 David J. Winterton, David J. Winterton & Associates, Ltd., Las Vegas, NV, pro se.

David J. Winterton, David J. Winterton & Associates, Ltd., Las Vegas, NV, for Debtor/Appellee Blue Pine Group, Inc.

Natalie M. Cox, Esquire, Kolesar & Leatham, Las Vegas, NV, W. George Wailes, Esquire, Carr, McClellan, Ingersoll, Thompson & Horn a Professional Law Corporation, Burlingame, CA, for Appellees.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel, Hollowell, Jury, and Johnson, Bankruptcy Judges,

KeyCite Red Flag - Severe Negative Treatment
Affirmed in Part, Vacated in Part by In re Blue Pine Group, Inc., 9th Cir., May 20, 2013

448 B.R. 267
United States Bankruptcy Court, D. Nevada.

In re BLUE PINE GROUP, INC., Debtor.

No. BK-S-09-13274-BAM.
|
Oct. 7, 2010.

Synopsis
Background: After dismissal of joint venture's Chapter 7 case, joint venturer moved for attorney fees and costs.

Holdings: The Bankruptcy Court, Bruce A. Markell, J., held that:

[1] attorney lacked reasonable basis for filing petition, and

[2] release executed in related state court case did not apply to attorney.

Motion granted.

West Headnotes (6)

[1] **Bankruptcy**
Frivolity or bad faith; sanctions

In considering sanctions under bankruptcy rule prohibiting filings that are frivolous, legally unreasonable, or without factual foundation, or are brought for improper purpose, court measures attorney's conduct objectively against reasonableness standard, which consists of competent attorney admitted to practice before involved court. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Cases that cite this headnote

[2] **Bankruptcy**
Frivolity or bad faith; sanctions

Legal papers that attorney files in any case must be grounded in both nonfrivolous legal theory and well-founded factual contentions and/or denials that, at minimum, have reasonable possibility of having evidentiary support after further investigation and discovery. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Cases that cite this headnote

[3] **Bankruptcy**
Frivolity or bad faith; sanctions

Good faith alone is not enough to comply with frivolousness clauses of bankruptcy rule permitting sanctions for filings that are frivolous, legally unreasonable, or without factual foundation, or are brought for improper purpose. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

1 Cases that cite this headnote

[4] **Bankruptcy**
Frivolity or bad faith; sanctions

Bankruptcy rule permitting sanctions for filings that are frivolous, legally unreasonable, or without factual foundation, or are brought for improper purpose imposes affirmative obligation upon counsel to conduct reasonable inquiry into both law and facts before advancing particular position. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

1 Cases that cite this headnote

[5] Bankruptcy
Frivolity or bad faith; sanctions

Attorney lacked reasonable basis for filing Chapter 7 petition for joint venture, and thus attorney was liable pursuant to bankruptcy rule precluding improper filings for attorney fees incurred in procuring dismissal of bankruptcy petition, even if individuals who claimed control of joint venture insisted upon filing, and attorney initially relied upon representations made by those individuals and joint venture's litigation attorney, where attorney did not have copy of required notice of shareholders' meeting at which directors who opposed filing were purportedly removed or copy of board of directors' resolution directing bankruptcy filing, attorney filed Chapter 7 petition and opposed motion to dismiss after being placed on notice of deficiencies, and attorney's actions in bankruptcy proceeding directly caused directors to incur unnecessary expenses in related state court action. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Cases that cite this headnote

[6] Release
Joint Wrongdoers

Release signed by joint venturers in connection with state court dispute, in which joint venturers released their attorneys from any further liability, did not apply to attorney against whom sanctions were awarded following dismissal of Chapter 7 petition he purportedly filed on joint venture's behalf, where attorney claimed to represent joint venture, and joint venture was not party to release.

Cases that cite this headnote

Attorneys and Law Firms

***268** Hannah C. Irsfeld, Irsfeld & Associates, LLC, David J. Winterton, Las Vegas, NV, for Debtor.

MEMORANDUM IMPOSING SANCTIONS

BRUCE A. MARKELL, Bankruptcy Judge.

I. Introduction

Blue Pine Group, Inc. (Blue Pine), the chapter 7 debtor in this case, is a Nevada corporation. It was conceived as a 50/50 venture between Humitech of Northern California, LLC (Humitech) and M & G Group Enterprises, Inc. (M & G). Humitech, based in California, is owned by John Pink and Adam Sweeney. M & G, based in Las Vegas, is owned by John and Brenda Grose.

Blue Pine's board of directors originally consisted of these four individuals. As with any corporation, the approval of Blue Pine's board of directors was required for Blue Pine to take certain fundamental actions, such as filing any bankruptcy. For reasons explored below, Blue Pine's board never authorized its bankruptcy filing. Once this became apparent, on Humitech's motion, the court dismissed the case June 10, 2009, reserving jurisdiction to impose sanctions against the parties responsible for the unauthorized filing. The court now awards costs and attorneys' fees to Humitech.

II. Facts

Although initially the parties worked well together, soon after formation Blue Pine's owners found themselves in a dispute over Blue Pine's governance and operation. Each party believed in the purity of their actions. Money was diverted from some operations without notice or explanation. In an effort to break the logjam, in February of 2009 Humitech filed a lawsuit in California state court against John and Brenda Grose, M & G, and Blue Pine, alleging, among other things, conversion and fraud.

 © 2018 Thomson Reuters. No claim to original U.S. Government Works.

John Grose (Grose) retaliated by hiring David Winterton, a Las Vegas lawyer specializing in bankruptcy, to file bankruptcy for Blue Pine. Although Winterton and his law firm, David Winterton & Associates,[1] appears regularly in this court, the filing was fraught with error. Initially, on March 10, 2009, Winterton filed schedules and statements of financial affairs—but not an actual bankruptcy petition—for Blue Pine. Dkt. No. 1.[2] In partial explanation of his error and his haste, Winterton later declared he was told that Pink was "misappropriat[ing] ... some assets" and "it was important to file the bankruptcy as soon as possible to protect the assets of" Blue Pine. Dkt. No. 56, p. 2. However, Winterton never explained how alleged misappropriation was a proper basis for a bankruptcy filing.[3]

***269** Faulty filings were not Winterton's only problems. As it turned out, he also did not possess any evidence that Blue Pine had properly authorized any bankruptcy filing. In lieu of a signed and authenticated corporate resolution authorizing the filing, Winterton testified that on March 10, 2009, Hannah Irsfeld, a litigation attorney also working for Grose, told Winterton that Blue Pine had passed a corporate resolution authorizing the bankruptcy filing, and that Irsfeld had the resolution. Winterton relied on this statement, as well as Grose's assertion that Humitech did not own any shares of Blue Pine (and thus apparently did not need to be consulted). Absent from the information he had or that he asked for, however, was evidence of the notice leading to the board of directors' meeting authorizing the filing or any evidence of a shareholders' resolution regarding the bankruptcy or regarding the composition of the board of directors.

Winterton needed these documents for reasons beyond just general prudence. In this district, when a corporate debtor files for bankruptcy, Local Rule of Bankruptcy Practice 1002(b) requires the corporation to file a copy of the board of directors' resolution authorizing the filing. All Winterton filed, however, was a "Declaration re: Electronic Filing of Petition." Dkt. No. 3. In that document, Grose declared under the penalty of perjury that the filing of the petition was properly authorized.[4]

Word of the filing—even though no bankruptcy was commenced thereby—traveled quickly. On March 13, 2009, George Wailes, an attorney for Humitech, sent a letter to Winterton objecting to the filing. In this letter, Wailes included Blue Pine's articles of incorporation, which indicated that Pink, Sweeney, and the Groses were the initial directors. This letter also revealed that Humitech owned 50% of Blue Pine, a fact unequivocally contradictory to what Grose and Irsfeld had previously told Winterton, and called into serious question the filing of a bankruptcy on the Groses' authority alone.

Winterton did not immediately respond to Wailes. On March 16, 2009, however, he did receive a copy of a resolution purportedly "authorizing" the filing of Blue Pine's bankruptcy petition. The paper presented was signed only by John and Brenda Grose, and not by Humitech, or any of its shareholders or officers, or by Pink or Sweeney. Winterton then asked Grose and Irsfeld about this apparent contradiction. Winterton testified that he was told that Blue Pine had never formally issued any shares of common stock, and that this meant that Humitech was not a Blue Pine shareholder. In explanation of the lack of signatures of Pink or Sweeney, Grose and Irsfeld told Winterton that Sweeney and Pink had previously been removed as Blue Pine directors.[5] Winterton did not demand any written evidence of these assertions. Apparently, he believed that the oral discussions were sufficient for him to proceed without further investigation, notwithstanding Wailes' letter and its enclosures.

And proceed he did. Undeterred by Wailes' revelations, on March 16 and 17, 2009 Winterton filed amended schedules and statements of financial affairs for Blue Pine, as well as a Disclosure of Compensation of Attorney for Debtor form. Dkt. Nos. 5, 7. As a petition is required to ***270** commence a bankruptcy case, 11 U.S.C. § 301, however, he still had no bankruptcy case. But this was put to rest on March 17, 2009 when Winterton finally filed a chapter 7 bankruptcy petition. Grose signed the petition for Blue Pine, averring under the penalty of perjury that he had "been authorized to file this petition ...". Dkt. No. 7, p. 3. Winterton also signed the bankruptcy petition as Blue Pine's attorney.

In furtherance of Grose's additional instructions, on April 10, 2009, Winterton filed an adversary proceeding on Blue Pine's behalf against Pink and Humitech, containing many of the same allegations that Humitech had made against the Groses, M & G and Blue Pine in Humitech's California state court litigation. Winterton did not consult with the chapter 7 trustee before filing this adversary proceeding, and the complaint is silent as to any interest the trustee might have in the litigation.

After attempting to communicate with Winterton, Humitech filed a motion to dismiss the bankruptcy case on April 24, 2009, arguing that Blue Pine's board of directors had never authorized Blue Pine's filing. The motion detailed Wailes' numerous attempts to convey to Winterton that Winterton did not have the authority to file a case on behalf of Blue Pine, as well as Humitech's numerous requests to Winterton to dismiss the case, given the documents they had presented to Winterton showing Winterton's lack of authority to commence the case.

After needless discovery disputes, the court heard Humitech's motion on June 10, 2009. Winterton argued that Pink and Sweeney were not directors, and thus the petition had been validly authorized. The uncontroverted evidence showed, however, that Pink had never been sent, and never received, any notice of the shareholders' meeting at which he was supposed to have been removed as a director. As a consequence, without more, no actions taken at that shareholders' meeting were valid, especially the purported removal of Pink as a director. Pink thus remained as a director, and the resolution signed only by John and Brenda Grose without notice to Pink was ineffective to authorize Blue Pine's filing. This meant that the court had no choice but to grant Humitech's motion to dismiss, and it did so on June 29, 2009. The gap in the chain of authorization was also so patent that the court retained jurisdiction to hear any motion Humitech might bring under Federal Rule of Bankruptcy Procedure 9011 for Winterton's conduct in both filing and refusing to dismiss this matter. That dismissal order was never appealed, and thus the factual findings upon which it is premised cannot be challenged.

On September 16, 2009, Humitech filed a motion seeking sanctions against Winterton and Grose for their conduct in this case.[6] After some procedural wrangling and more discovery disputes, the court held a hearing on the motion for sanctions on February 4, 2010. At the hearing, the court heard testimony from Grose, Winterton, and Natalie Cox, an attorney at Kolesar & Leatham, the Nevada counsel for Humitech.

The court finds in favor of Humitech. It sanctions Winterton $109,528. This amount consists of Humitech's costs and attorneys' fees occasioned by Blue Pine's unauthorized filing.

*271 III. Applicable Law

Rule 9011 regulates an attorney's filings with the bankruptcy court. Of particular import to this case, Rule 9011 holds that:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;....
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;....

Fed. R. Bankr.P. 9011 (adopting Fed.R.Civ.P. 11) (emphasis supplied).

This rule, based upon Rule 11 of the Federal Rules of Civil Procedure, "provides for the imposition of sanctions when a filing is frivolous, legally unreasonable, or without factual foundation, or is brought for an improper purpose." *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1177 (9th Cir.1996) (citing *Warren v. Guelker*, 29 F.3d 1386, 1388 (9th Cir.1994)). *See also Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1415–16 (9th Cir.1990) (citing *Greenberg v. Sala*, 822 F.2d 882, 885 (9th Cir.1987)). As this court has stated before: "An attorney's signature on a [petition] is tantamount to a warranty that the [petition] is well grounded in fact and 'existing law' (or proposes a good faith extension of the existing law) and that it is not filed for an improper purpose." *In re Aston–Nevada Ltd. P'ship*, 391 B.R. 84, 100 (Bankr.D.Nev.2006) (quoting *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir.2002)).

[1] The attorney is not held to a subjective standard. "In considering sanctions under Rule 9011, the court measures the attorney's conduct 'objectively against a reasonableness standard, which consists of a competent attorney admitted to practice before the involved court.' " *Smyth v. City of Oakland (In re Brooks–Hamilton)*, 329 B.R. 270, 283 (9th Cir. BAP 2005) (quoting *Valley Nat'l Bank v. Needler (In re Grantham Bros.)*, 922 F.2d 1438, 1441 (9th Cir.1991)).

Humitech alleges that Winterton not only did not engage in sufficient independent investigation after he received Mr. Wailes's letter, he turned a blind eye to every signal that the petition was not authorized and filed in bad faith. If true, this sort of reckless behavior is frivolous within the meaning of Rule 9011. *See Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir.1997) (" 'Frivolous' filings are those that are 'both baseless and made without a reasonable and competent inquiry.' ") (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th

Cir.1990) (en banc)); *Aston–Nevada,* 391 B.R. at 100–103.

[2] [3] [4] The relevant inquiry into this type of frivolousness has two prongs: (1) whether the attorney made a reasonable inquiry into the facts; and (2) whether the attorney made a reasonable investigation of the law. *Baermann v. Ryan (In re Ryan),* 411 B.R. 609, 615–16 (Bankr.N.D.Ill.2009); *Home Savs. Ass'n of Kansas City, F.A. v. Woodstock Assocs. I, Inc. (In re Woodstock Assocs. I, Inc.),* 121 B.R. 238, 242 (Bankr.N.D.Ill.1990). "The legal papers an attorney files in any case must be grounded in both a nonfrivolous legal theory and well-founded factual contentions ***272** and/or denials that, at a minimum, have a reasonable possibility of having evidentiary support after further investigation and discovery." *In re Am. Telecom. Corp.,* 319 B.R. 857, 867 (Bankr.N.D.Ill.2004). Good faith alone is not enough to comply with the frivolousness clauses of Bankruptcy Rule 9011. *Id.* Indeed, "Rule 9011 imposes an affirmative obligation upon counsel to conduct a reasonable inquiry into both the law and the facts before advancing a particular position to the court." *In re Martin,* 350 B.R. 812, 817 (Bankr.N.D.Ind.2006).

Mr. Winterton defended in part on the assertion that the need for relief, as stated to him by the client, justified his continuing efforts to defend the initial petition. This justification may seem to be absolute, but the rules of professional responsibility, applicable to all lawyers, underscore that it is not: a client's demands cannot alone support taking unjustified and unjustifiable positions. Rule 3.1 of Nevada's Rules of Professional Conduct states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law....

This rule requires a lawyer to exercise independent judgment with respect to claims a client wishes to bring and to decline to pursue claims that are frivolous. As indicated in a leading treatise:

> [A] lawyer's duty to refrain from making frivolous contentions will result in conflict with the client if the client insists that the contentions nevertheless be made. When such conflicts arise, Model Rule 3.1 and practice rules such as Rule 11 of the Federal Rules of Civil Procedure dictate that the interests of the fair administration of justice must be given priority over the client's desires.

2 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 27.13, at p. 27–27 (3d ed. 2008) (hereinafter, "*Hazard, Hodes & Jarvis* ").

As a result, Mr. Winterton's opposition to the motion to dismiss, and all actions related to the existence of the case and the motion, effectively consisted of "later advocating" the propriety of the initial filing. This conduct ran afoul of Rule 9011, as it constitutes the presentation of a claim or contention within the meaning of Rule 9011. *See* GEORGENE M. VAIRO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES §§ 4.02[d], 4.02[e][5] (3d ed., Richard G. Johnson, ed. 2003). *See also Buster v. Greisen,* 104 F.3d 1186, 1190 n. 4 (9th Cir.1997) (violation of Rule 11 to advocate in federal court the propriety of baseless statements made in state court complaint that had been removed to federal court); *O'Brien v. Alexander,* 101 F.3d 1479, 1490 (2d Cir.1996) (violation of Rule 11 to make misleading statements in oral argument that relate directly to a particular representation contained in a prior document that lawyer was then advocating).

Bankruptcy Rule 9011(c)(2) further provides for sanctions "limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. BANKR.P. 9011(c)(2). "[T]he sanction may consist of[,] ... if ... warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id.* The Ninth Circuit has also stated that "[a] restitutionary award compensating the opposing party for unnecessary litigation expenses—as opposed to a punitive fine paid to the ***273** court—is a particularly appropriate sanction in cases involving manipulative petitions filed principally for purposes of delay and harassment." *Marsch v. Marsch (In re Marsch),* 36 F.3d 825, 831 (9th Cir.1994). *See also Aston–Nevada,* 391 B.R. at 108.

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

IV. Winterton's Conduct

[5] Winterton lacked a reasonably sufficient basis for positions that he "later advocated" in this matter, as proscribed by Bankruptcy Rule 9011. Winterton's conduct cost Humitech $109,528 in expenses. These expenses were incurred obtaining dismissal of the bankruptcy, protecting its interests in the California action, and in bringing this action for sanctions.[7] Winterton will therefore be sanctioned in that amount as restitutionary damages, payable to Humitech.

Winterton's decision to file this case was deficient in three respects. First, he did not have a copy of (and did not insist on seeing) the required notice of a shareholders' meeting of Blue Pine that would have been necessary to remove Pink and Sweeney as directors of Blue Pine, and which would then allow the Groses alone to vote to authorize filing for bankruptcy. Next, he did not have a copy of the required notice of the board of directors' meeting at which the bankruptcy was to be discussed. Finally and most seriously, Winterton filed without having a copy of the board of directors' resolution directing Blue Pine's bankruptcy filing, although Wailes had put him on notice that the filing was unauthorized. This type of valid resolution was necessary for any fundamental action, including the authorization to file for bankruptcy protection. Without these, and given what Wailes had provided Winterton after the first filing, Winterton did not have reasonable grounds to believe that he possessed the authority to file a bankruptcy on Blue Pine's behalf.

In his defense, Winterton argued that he reasonably relied on the assurance of Hannah Irsfeld—a litigation attorney—that Blue Pine had previously authorized the filing of Blue Pine's bankruptcy by approving the proper corporate resolutions. True enough; but this proposed defense ignores two crucial and interconnected questions. First, was Winterton's reliance on Irsfeld's advice reasonable after March 13, when Winterton received the letter and articles of incorporation of Blue Pine from Wailes and was confronted with evidence that Humitech, and thus Pink and Sweeney, owned 50% of Blue Pine? And second, was Winterton's continued presentation of his position and later advocacy of the propriety of the filings in reliance on Irsfeld's representations reasonable through the court's June 10, 2009 dismissal of Blue Pine's case? Plainly, the answer to each question is no. This "later advocating" of an untenable position (and the corresponding failure to take corrective action, such as removing his inaccurate filings from the docket) was Winterton's primary failing in this matter and forms the basis for the restitutionary award to Humitech.

To quote *Hazard, Hodes & Jarvis:*

> If the lawyer carries out the client's instruction after becoming aware of the frivolous nature of the contentions, both the lawyer and the client can be civilly liable for sanctions under ***274** FRCP Rule 11, as well as subject to the exercise of the court's inherent supervisory powers.

Id. As this court has previously stated:

> To act on such frivolous claims, then, without independent investigation, was to succumb to the so-called "butler-style" of representation, under which the sequaciously servile lawyer does whatever the client wants and then cites that client's command as a shield to the improper actions. This style of lawyering, however, has no place in bankruptcy court or, for that matter, in any court.

Aston–Nevada, 391 B.R. at 103.

Mr. Winterton's defense was also premised in part on the fact that he is not a corporate lawyer, and that he was relying on the advice of Hannah Irsfeld as to corporate authorization. Notwithstanding that Ms. Irsfeld is a litigator, and not a corporate attorney, Mr. Winterton cannot rely on another lawyer's advice with impunity.[8] *See Pavelic & LeFlore v. Marvel Entm't Group,* 493 U.S. 120, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989) (applying this standard to similar language found in Rule 11 of the Federal Rules of Civil Procedure and holding that an attorney cannot delegate his or her duty to validate the truth and legal reasonableness of papers filed with the court). *See also Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,* 498 U.S. 533, 546–47, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991); *Triad Sys. Corp. v. Southeastern Express Co.,* 64 F.3d 1330 (9th Cir.1995); Notes of Advisory Comm. on 1997 amendment to Fed. R. Bankr.P. 9011 and Notes of Advisory Comm. on 1993 amendments to Fed.R.Civ.P. 11 ("The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations should be sanctioned for a violation.").

Winterton's conduct in this case can be divided between his reliance on the representations of Irsfeld and Grose before he received notice from Wailes that Blue Pine was not authorized to file for bankruptcy, and the affirmative actions he took and failed to take after receiving the notice from Wailes. It was not unreasonable for Winterton to rely initially on Irsfeld's assurances. While Irsfeld was not a corporate attorney, and may not have fully understood the requirements which apply to a Nevada corporation, she was an officer of the court, and presumably vouchsafed matters before courts on a regular basis. But any reliance by Winterton on Irsfeld's representations was not reasonable after Winterton received notice on March 13, 2009 from Wailes, backed up by Blue Pine's organizational documents, that Irsfeld's earlier version of events was incorrect.

After Wailes's letter on March 13, 2009, Winterton knew, or should have known, Irsfeld's representations and assurances were at odds with Blue Pine's organizational documents, and that he did not have, and his clients and their other lawyers were not giving him, the complete picture behind Blue Pine's internal governance. Any further reliance by Winterton on Irsfeld's account without additional collaborating evidence was not reasonable.[9]

***275** Yet, despite this knowledge, Winterton stubbornly persisted in his previous course of action. Not only did he fail to remove the filings he knew were improperly filed from the court's docket, he also raised the stakes on his losing bet by filing the bankruptcy petition on March 17, 2009, opposing Humitech's motion to dismiss, and taking actions in the California state court action (as discussed below) as though this case was a proper bankruptcy filing.

Until the court actually dismissed the case, Winterton unwaveringly persisted in advocating the propriety of filings and positions he knew, or should have known, to be improper, and this conduct was a violation of FED. R. BANKR.P. 9011.[10] Thus, Winterton is responsible for all actions that Humitech took after March 13, 2009 to oppose his misguided handling of this matter and his advocation of meritless positions. These improper actions caused Humitech to incur $109,528 in expenses in attempting to have the bankruptcy dismissed and in protecting its rights in the California action. Wailes' California firm, and Humitech's local counsel submitted complete billing records concerning the time they spent working to get this improperly filed case dismissed.

The injuries Winterton caused after becoming aware, or after he should have been aware, he did not have the authority to file this case arise generally from putting Humitech into a position in which it was forced to oppose all of Winterton's actions and filings. These include not only Winterton's actions in the main case, but also the rogue adversary proceeding (for which Winterton did not have standing to file) Winterton filed against Pink and Humitech on April 10, 2009.

Additionally, Winterton's actions in the bankruptcy proceeding directly caused Humitech to incur unnecessary expenses in the California action. Winterton requested a stay in the California action due to the bankruptcy case filed in Las Vegas. That motion was scheduled to be heard around the time this court was to hear Humitech's motion to dismiss, and Humitech did not plan on filing papers in the California action, so confident were they this court would grant its motion to dismiss the case. However, Winterton told Humitech that he intended to seek an extension of this court's hearing on Humitech's motion to dismiss. Because of this continued, unjustifiable effort to preserve the improper petition, Humitech felt compelled to file a reply in the California ***276** action in order to protect its interests. Ultimately, Winterton did not actually seek an extension, and this court dismissed the case, as noted above. The dismissal rendered Humitech's reply to Winterton's motion to stay the California action moot, but unfortunately not before Winterton caused Humitech to incur the expense of writing and filing the opposition.

It was necessary for Humitech to oppose each and every one of Winterton's efforts to advance the improperly filed bankruptcy, and the fees incurred by Humitech are directly attributable to Winterton's actions. Had Humitech not taken these actions, this improper bankruptcy case would have continued, and Humitech's interests would have been damaged on the basis of Winterton's inaccurate pleadings and continued advocacy of meritless positions. This wasted activity and time was exclusively the fault of Winterton and his blithe failure to follow the Local Rules of Bankruptcy Practice and the Federal Rules of Bankruptcy Procedure. If at any point he had simply examined the evidence in the record, done even the minimal research into Nevada corporate law, and compared this with what his clients told him, he would have understood that he had no authority to file the petition and continue to advocate that it was proper.

Humitech has submitted billing records showing that their actual and reasonable costs directly attributable to Winterton's improper conduct was $109,528,[11] and they are awarded that amount from Winterton as compensation.[12]

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

V. Authority to Sanction

Rule 9011 authorizes this admittedly large sanction. That rules states that when sanctions are initiated by motion:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly ***277** responsible for violations committed by its partners, associates, and employees.

FED. R. BANKR.P. 9011.

Initially, in its first communication, Humitech requested that Winterton remove the improperly filed schedules, and instead of complying, he filed a petition on March 17, 2009. As discussed above, it was improper under Rule 9011 for Winterton to file Blue Pine's petition. Winterton similarly never filed the required corporate resolution, also as discussed above. On September 16, 2009, Humitech filed its motion for sanctions, detailing Winterton's conduct in the case that led it to request sanctions.[13] Service of the motion was proper under Bankruptcy Rule 7004. Because the improper filing was a bankruptcy petition, and all other procedural requirements of Rule 9011 have been complied with, Humitech's motion for sanctions is properly before this court.

As discussed above, the court has found that Winterton has violated FED. R. BANKR.P. 9011. This rule permits a bankruptcy court to "impose an appropriate sanction ... limited to what is sufficient to deter repetition" of improper conduct. *Brooks–Hamilton,* 400 B.R. at 247.

The Bankruptcy Appellate Panel for the Ninth Circuit has held that when a bankruptcy court disciplines an attorney, the discipline imposed must be guided by three criteria: 1) the disciplinary process must be fair; 2) the evidence must support the finding; and 3) the penalty imposed must be reasonable. *Brooks–Hamilton,* 400 B.R. at 247 (citing *Price v. Lehtinen (In re Lehtinen),* 332 B.R. 404 (9th Cir.BAP2005) and *Peugeot v. United States Trustee (In re Crayton),* 192 B.R. 970, 978 (9th Cir.BAP1996)).

In practice, the fairness criteria means that the attorney must receive notice and be given an opportunity to be heard before he or she is sanctioned. *Brooks–Hamilton,* 400 B.R. at 251. Here, Winterton received notice that Humitech intended to seek sanctions against him, was given notice of the hearing, attended the hearing, and presented evidence and testimony in his defense. Therefore, under *Brooks–Hamilton* Winterton had fair notice and an opportunity to participate in the disciplinary process.

Next, the evidence must support the finding. As it relates to Rule 9011, this means that "the bankruptcy court must find that [the attorney] filed papers that are frivolous ... A frivolous paper is one that is both baseless and made without a reasonable and competent inquiry. That ***278** is, it is [not] well-grounded in fact...." *Brooks–Hamilton,* 400 B.R. at 251–52 (citations omitted). Here, as discussed above, the court has found that Winterton both filed a petition and continued to advocate a position he should have known was not well grounded in fact, and as such, the court has ample evidence to support its finding that Winterton violated Rule 9011.

Finally, the sanctions must be reasonable. The Ninth Circuit Bankruptcy Appellate Panel has "adopted ABA standards as the means for determining reasonable sanctions," and "failure to consider such factors constitutes an abuse of discretion" upon an appeal directed to the Panel. *Brooks–Hamilton,* 400 B.R. at 251.[14] These ABA standards dictate that:

> To determine an appropriate sanction, the bankruptcy court should consider: (1) whether the duty violated was to a client, the public, the legal system or the profession; (2) whether the lawyer acted intentionally, knowingly or negligently; (3) whether the lawyer's misconduct caused a serious or potentially serious injury; and (4) whether aggravating factors or mitigating circumstances exist. Aggravating factors

> include considerations that justify an increase in the degree of discipline imposed, such as a prior disciplinary offense, multiple offenses, a pattern of misconduct, and refusal to acknowledge the wrongful nature of the conduct. Mitigating circumstances include considerations which justify a reduction in the degree of discipline, such as the absence of a prior disciplinary record, personal or emotional problems, inexperience in the practice of law, or a timely good faith effort to make restitution or to rectify the consequences of the misconduct.
>
> *Id.* (citations omitted).

Winterton has violated his duties to the legal system by filing and later advocating a position he should have known was not well grounded in fact; he acted, negligently at best, after Wailes' communications should have led him to doubt his assumptions; his conduct caused over $100,000 of damage to Humitech; he has steadfastly failed to acknowledge the wrongful nature of his conduct; he has presented no evidence of personal or emotional problems; and has extensive experience practicing before this court.[15] Therefore, the sanction is reasonable.

VI. Release

Winterton points out that Humitech, Pink, John Grose, Brenda Grose, and M & G all signed a release in the California litigation on December 18, 2009. ***279** Dkt. No. 88–1. In that release, Humitech and Pink agreed to release M & G's and the Grose's "attorneys." Blue Pine was not a party to this agreement, and so Winterton is not in the class of "attorneys" that receive the benefit of the release. He claims, however, that he filed at least one pleading indicating that he represented John Grose, and that this one pleading should be sufficient to bring him within the protective shade of the California release.

[6] Winterton is incorrect. At no point did he represent either John or Brenda Grose. His only evidence of such alleged representation is an incidental pleading late in the case; he introduced no testimony from the Groses, no retainer agreement, or any other evidence. Against the facts of this case, it is depressingly easy to hold that such a pleading was inaccurate and in line with Winterton's lack of care in practice.

But there is another, structural, reason that Winterton did not represent the Groses. It is elemental that an attorney who represents a corporate debtor is not presumed to represent its owners. *Waid v. Eighth Judicial Dist. Court ex rel. County of Clark*, 121 Nev. 605, 611 & n. 10, 119 P.3d 1219, 1223 & n. 10 (2005) ("Generally, a lawyer representing a corporate entity represents only the entity, not its officers, directors, or shareholders, and not any related entities such as parents, subsidiaries or sister companies."); *Moran v. Hurst*, 32 A.D.3d 909, 822 N.Y.S.2d 564 (2d Dep't 2006) (attorneys representing corporation did not have attorney-client relationship with corporation's principal); *Griffin v. Anslow*, 17 A.D.3d 889, 793 N.Y.S.2d 615 (3d Dep't 2005) ("corporate counsel is not in privity with the directors or shareholders of the corporation."). Although "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7," NEV. R. PROF. CONDUCT 1.13(g) (2010), counsel must obtain "informed consent, confirmed in writing" of such representation. NEV. R. PROF. CONDUCT 1.7 (2010); 11 U.S.C. § 327(a) (2010). *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 18 (2007) ("When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.").

Winterton has not demonstrated that Blue Pine, or more importantly, Blue Pine's bankruptcy trustee, was consulted with respect to or actually consented to any representation of the Groses. He has not shown any consultation with or consent of the Groses. Accordingly, this court finds that no such consultation occurred, and thus Winterton did not intend to represent, and therefore did not represent, either of the Groses in anything other than an unimportant ministerial capacity of facilitating one filing in their name.[16] Winterton has thus failed to demonstrate that he is within the protected class under the December 2009 settlement.

VII. Conclusion

Winterton's continued advocacy on behalf of positions he knew or should have known to be meritless cost Humitech $109,528. As explained above, the imposition of sanctions against Winterton is proper. Thus, Winterton is hereby ordered ***280** to pay to Humitech $109,528 in restitutionary sanctions.[17]

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works.

All Citations

448 B.R. 267, 64 Collier Bankr.Cas.2d 1289, 53 Bankr.Ct.Dec. 264

Footnotes

1 All references to Winterton refer also to his law firm, David Winterton & Associates, which is jointly and severally liable for this sanction. *See* FED. R. BANKR.P. 9011(c)(1)(A) ("[A] law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.").

2 For reasons not well explained, the clerk of the court accepted this electronic filing, and assigned it a case number.

3 As detailed below, Winterton never filed an actual petition in bankruptcy for Blue Pine until a week later.

4 As discussed below, Blue Pine never passed a valid resolution authorizing the filing.

5 Removing directors would have required a properly noticed meeting of the board of directors and enough directors to constitute a quorum. As it turns out, neither of these requirements were met.

6 Humitech did not ultimately seek sanctions against Grose because Humitech released him from liability in a settlement of the California state court action on December 18, 2009. As discussed below in Part VI, neither Blue Pine nor Winterton is a party to that settlement.

7 Bankruptcy Rule 9011(c)(1)(A) explicitly authorizes the court to award "to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting ... the motion." The court finds that the facts of this case, including the strong, if misguided, opposition presented by Winterton to the Rule 9011 motion make the award of attorneys' fees incurred in bringing and presenting the motion appropriate.

8 Nevada law is not particularly complex on the relevant points. The contrary signals he was receiving from Wailes, Irsfeld, and the Groses should have, at a minimum, led him to research the relevant Nevada corporate law so that he could have some basis upon which to assess who was telling the truth. Lawyers are not given the privilege of assuming that their clients or other lawyers are unfailingly truthful.

9 Winterton had actual knowledge that he was not authorized to file the case no later than April 15, 2009. On that day, Winterton attended the 341 meeting, and at that meeting, Grose acknowledged that Blue Pine had four directors, and that they had not all received notice of the purported meeting that removed Sweeney and Pink, and thus Blue Pine was not authorized to file.

10 His pettifoggery is demonstrated by this excerpt from his trial brief, attempting to explain his diligence in determining Blue Pine's authority to file:

> The Motion to Dismiss was filed. The court allowed the hearing to take place under a shorten [*sic*] time period. This gave counsel a limited time to investigate into the matter. Mr. Grose gave a book to Mr. Winterton with about 35 different exhibits. His client also came down with phenomena [*sic*]. This hindered the investigation into the matter. There were a number of issues that needed to be addressed.

Blue Pine Trial Brief, Dkt. No. 88, p. 11.

There are many problems with this explanation. First, the hearing on shortened time did not occur until well after the filing, by which time Winterton should have completed his investigation. Similarly, Grose's delivery of 35 exhibits at that late stage also indicates Winterton's ineffectiveness in eliciting the necessary facts before he filed the petition, and after he had taken steps to defend it. Finally, his vague assertion that "there were a number of issues that needed to be addressed" may be absolutely correct, but its interposition in a defense was absolutely useless: the issues were never comprehensively identified, let alone resolved.

11 The billing records submitted show that Carr, McClellan, Ingersoll, Thomson & Horn incurred $87,812 and Kolesar & Leatham incurred $21,716.

12 Winterton did not seriously contest the fees. Aside from his assertion that the fees were covered in the release, his entire complaint about the fees in his brief is as follows:

> The fees are not reasonable. There is a lot of duplicative work. The time spend [*sic*] on the issues is

WESTLAW © 2018 Thomson Reuters. No claim to original U.S. Government Works

unreasonable. The billing statement is not clear as to the fees relating to the state court action and the bankruptcy. Counsel for Mr. Pink and Humitech admit they are asking for fees for the state court litigation in California wherein they agreed to bear their own costs.

Blue Pine Trial Brief, Dkt. No. 88, p. 13.

If Winterton believed the fees were not reasonable or duplicative, it was his burden to point that out with specificity to the court. He did not do so, apparently hoping the court would do his work for him. The court will not, and will not take these vague and insufficient allegations as anything other than an unsupported, scattershot attempt to call into question the detailed timekeeping records produced by Humitech's counsel.

13 Because the improper filing was a petition, Humitech did not need to comply with the 21–day safe harbor provision of Rule 9011. *Dressler v. Seeley (In re Silberkraus),* 336 F.3d 864, 868 (9th Cir.2003) (considering Rule 9011(c)(1)(A) and finding that its "clear import ... is that the mandatory 21–day safe harbor does not apply to the filing of the initial petition"). This difference between the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure exists because "the filing of a petition has immediate serious consequences, among which is the imposition of the automatic stay of section 362 of the Code." 10 COLLIER ON BANKRUPTCY ¶ 9011.06 (Alan Resnick & Henry Sommer, eds. 15th ed. rev. 2010).

Even if the rule applied, the court also finds that Humitech complied with the 21–day safe harbor requirement, even though not required to do so. On March 18, 2009, Humitech sent Winterton a letter demanding that the improperly filed petition be removed. The letter stated that Humitech would seek sanctions if the petition was not withdrawn and included a copy of the motion, with points and authorities. At no point did Winterton challenge that Humitech sent the letter and motion or that he received it. The fact that Winterton continued in his course of action, even with notice that Humitech would seek sanctions for his actions, reflects Winterton's indifference to, or willful violation of, Rule 9011.

14 While the Bankruptcy Appellate Panel has acknowledged that there are "serious questions to the appropriateness" about requiring mechanical recitation and application of the ABA standards that are both discordant with the standard of review and that may not fit the facts or context of an appeal, the B.A.P. is "bound by its prior decisions" to apply the standards. *Brooks–Hamilton,* 400 B.R. at 238, n. 18. This oddity is compounded by the fact that the Panel's decisions are not binding authority on bankruptcy courts, but yet supply the binding standard of review when the Panel reviews bankruptcy court decisions. On the other hand, if the appeal instead goes to a district court, the ABA standards are not necessarily binding. So while it would not be an abuse of discretion for a bankruptcy court to ignore the ABA standards if the appeal goes to district court, it would be an abuse of discretion if the same appeal goes to the Bankruptcy Appellate Panel. *See Brooks–Hamilton,* 400 B.R. at 238 at 253 (Markell, J., concurring).

15 A search of the court's ECF system shows that as of October 4, 2010, Winterton is listed as an attorney in 763 open or closed cases. While various factors could over-report or under-report the attorney of record on the docket, this does demonstrate that Winterton is an experienced practitioner.

16 And even this ministerial capacity may not have been properly authorized. *See Addley v. Beizer,* 205 Ga.App. 714, 423 S.E.2d 398 (1992) (lawyer for corporation not thereby empowered to serve as lawyer for officers with respect to their individual interests). *See generally* NEV. R. PROF. CONDUCT 1.13(f); 1 *Hazard, Hodes & Jarvis, supra,* at § 17.14.

17 To the extent this case has been closed or dismissed, the case is hereby reopened to allow entry of this order, and shall remain open for 30 days in order to allow parties to file any notice of appeal or Federal Rule 59 Motion.

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by In re P.J. Clarke's Restaurant Corp., Bankr.S.D.N.Y., July 31, 2001

36 F.3d 825
United States Court of Appeals,
Ninth Circuit.

In re Carol Freeman MARSCH, Debtor (Two Cases).
John D. MARSCH, Claimant-Appellant,
v.
Carol F. MARSCH, Respondent-Appellee (Two Cases).

Nos. 92-56442, 92-56443.
|
Argued and Submitted May 2, 1994.
|
Decided Sept. 14, 1994.

Synopsis
Chapter 11 petition filed by state court judgment debtor in order to avoid posting of appeal bond was dismissed as "bad faith" filing by order of Bankruptcy Court. Debtor appealed. The Ninth Circuit Bankruptcy Appellate Panel reversed. On further appeal, the Court of Appeals held that: (1) Chapter 11 petition filed by state court judgment debtor solely for purpose of avoiding posting of appeal bond, even though judgment debtor had sufficient nonbusiness assets to satisfy judgment, was filed in "bad faith" and had to be dismissed, and (2) award of Rule 9011 sanctions in amount of $27,452 was not abuse of discretion.

Decision of Bankruptcy Appellate Panel reversed; case remanded.

Trott, Circuit Judge, concurred in part and dissented in part and filed opinion.

West Headnotes (14)

[1] **Bankruptcy**
Conclusions of Law; De Novo Review

Court of Appeals reviews de novo bankruptcy court's conclusion as to whether "cause" exists for dismissal of Chapter 11 case. Bankr.Code, 11 U.S.C.A. § 1112(b).

16 Cases that cite this headnote

[2] **Bankruptcy**
Discretion
Bankruptcy
Particular Cases and Issues

Court of Appeals reviews for abuse of discretion bankruptcy court's decision to dismiss Chapter 11 case as "bad faith" filing, and reviews finding of "bad faith" for clear error. Bankr.Code, 11 U.S.C.A. § 1112(b).

44 Cases that cite this headnote

[3] **Bankruptcy**
"Bad Faith."

Chapter 11 case was properly dismissed as "bad faith" filing, where petition was filed by debtor with sufficient nonbusiness assets to satisfy state court judgment entered against her solely to avoid posting appeal bond. Bankr.Code, 11 U.S.C.A. § 1112(b).

39 Cases that cite this headnote

[4] **Bankruptcy**
Good Faith; Motive

Lack of good faith in filing Chapter 11 petition establishes "cause" for dismissal. Bankr.Code, 11 U.S.C.A. § 1112(b).

48 Cases that cite this headnote

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re La Sierra Financial Services, Inc., 9th Cir.BAP (Cal.), November 29, 2002

214 B.R. 1
United States Bankruptcy Appellate Panel of the Ninth Circuit.

In re Richard L. MULVANIA, Debtor.
Richard L. MULVANIA, Appellant,
v.
UNITED STATES of America, INTERNAL REVENUE SERVICE, Appellee.

BAP No. CC–96–2127–SHJ.
|
Bankruptcy No. SA 94–17472–LR.
|
Argued and Submitted July 23, 1997.
|
Decided Sept. 22, 1997.

Synopsis
Chapter 11 debtor objected to proof of claim filed by Internal Revenue Service (IRS). The United States Bankruptcy Court for the Central District of California, Lynne Riddle, P.J., allowed claim as filed, determined that paragraph of stipulation limiting time for assessing taxes was unenforceable, and determined that hypothetical sales costs could not be taken into account in establishing value of secured claim. Debtor appealed. The Bankruptcy Appellate Panel, Snyder, J., sitting by designation, held that: (1) bankruptcy court should not have allowed IRS' claim as filed; (2) bankruptcy court applied proper burden of proof in claim objection proceedings; (3) debtor should have been given opportunity to conduct further discovery; (4) bankruptcy court lacked inherent equitable power to reconsider and reform stipulation; and (5) IRS' claim would not be reduced by amount of hypothetical sales costs.

Affirmed in part, reversed in part, and remanded.

West Headnotes (19)

[1] **Bankruptcy**
Conclusions of Law; De Novo Review
Bankruptcy
Clear Error

Bankruptcy court's findings of fact are reviewed under clearly erroneous standard and its conclusions of law are subject to de novo review.

1 Cases that cite this headnote

[2] **Bankruptcy**
Clear Error

Review of bankruptcy court's findings of fact under clearly erroneous standard is significantly deferential, requiring definite and firm conviction that mistake has been committed.

1 Cases that cite this headnote

[3] **Bankruptcy**
Order

Bankruptcy court should not have allowed Internal Revenue Service's (IRS') claim in Chapter 11 case as filed, given its prior order establishing that maximum amount of IRS' secured claim was less than amount of secured claim as filed.

1 Cases that cite this headnote

[4] **Bankruptcy**
Judgment or Order

Bankruptcy courts no longer possess inherent ability to reconsider prior orders.

3 Cases that cite this headnote

Internal Revenue Service's (IRS') secured claim against Chapter 11 debtor would not be reduced by amount of hypothetical sales costs. Bankr.Code, 11 U.S.C.A. § 506(a).

1 Cases that cite this headnote

Attorneys and Law Firms

*2 Elmer Dean Martin, Diamond Bar, CA, for Appellant.

Richard G. Stack, Assistant United States Attorney, Los Angeles, CA, for Appellee.

Before SNYDER[1], HAGAN, and JONES, Bankruptcy Judges.

OPINION

SNYDER, Bankruptcy Judge.

Richard L. Mulvania (Debtor) appeals the bankruptcy court's determination that the claim of the Internal Revenue Service (IRS) was allowed as filed. We affirm in part, and reverse and remand in part.

I

FACTS

In 1985, the IRS sent a notice of income tax deficiency to the Debtor pursuant to *3 26 U.S.C. § 6212. The notice claimed that the Debtor owed additional income taxes for tax years 1978, 1979, 1980, and 1981. In September 1985, the Debtor filed a petition challenging the claimed deficiency in the United States Tax Court.

The Debtor filed a voluntary Chapter 7 petition[2] on July 20, 1987. The Debtor was granted a discharge in his Chapter 7 case on December 21, 1987.

On May 3, 1989, stipulations between the Debtor and the IRS were entered with the tax court as to the amounts of the 1978, 1979, 1980 and 1981 taxes. The stipulations and decisions provided that the Debtor had tax deficiencies of $81,271 for 1978, $119,040 for 1979, $80,672 for 1980, and $10,878 for 1981. The stipulations also provided that the Debtor waived the restriction contained in 26 U.S.C. § 6213(a) that prohibits assessment and collection of a deficiency until a decision of a tax court has become final.

A stipulation and order for entry of tax court judgment between the Debtor and the IRS was entered in the bankruptcy court on March 10, 1989 (March 10, 1989 stipulation). In part, the March 10, 1989 stipulation requested an order allowing the tax court to enter its judgment as stipulated. In addition, paragraph 5(b) of the stipulation provided:

5. The parties request and stipulate to an order:

....

> (b) providing that the time within which the tax liability referred to in Paragraph 4 above may be assessed shall terminate 60 (sixty) days after the end of the period during which the United States is prohibited by reason of the Debtor's Title 11 case from making the assessment of the tax liability against the Debtor.

An order confirming and approving the March 10, 1989 stipulation was entered by the bankruptcy court on April 5, 1989.

The IRS allegedly assessed the taxes for the Debtor's 1978 tax year on May 14, 1989, 1979 tax year on August 14, 1989, and 1980 and 1981 tax years on August 28, 1989. The IRS recorded tax liens for the 1978 through 1981 taxes on May 3, 1994.

On March 30, 1994, the Debtor filed a motion for interpretation of the March 10, 1989 stipulation. A hearing on the motion for interpretation was held on May 4, 1994. An order denying Debtor's motion without prejudice to any subsequent adversary proceeding was entered with the bankruptcy court on May 25, 1994.[3]

The Debtor filed a voluntary Chapter 11 petition on July 22, 1994. The IRS timely filed a proof of claim on August

5, 1994, setting forth an unsecured priority tax claim of $476.29 and a secured tax claim of $1,481,441.10. The secured portion of the claim was for unpaid income taxes for the calendar years 1978 through 1981, and 1987.

On November 14, 1994, the Debtor filed a motion for an order fixing and allowing the amount of the IRS's claim on the Debtor's property. A hearing was held on this motion on December 5, 1994. On February 28, 1995, an order was entered establishing that the maximum amount of the IRS's secured claim was $511,718.42, less income taxes payable by the Debtor's estate due to the receipt of certain accounts receivable. The order made no ruling as to the validity of the IRS's claim, but reserved the right of the Debtor to file an objection to the claim within 30 days of the effective date of the Debtor's plan of reorganization.

The Debtor's first amended Chapter 11 plan of reorganization was confirmed by an order signed on February 27, 1995.

The Debtor filed an objection to the IRS's claim on March 30, 1995. A hearing was held on the Debtor's objection to claim on June 12, 1995. The bankruptcy court entered findings of fact and conclusions of law on December 12, 1996, overruling the Debtor's objection to the IRS's claim for failure to meet his evidentiary burden under Fed. R. Bankr.P. 3001(f). The IRS's claim, as filed, *4 was allowed by order entered December 12, 1996. The bankruptcy court also rendered alternative findings of fact and conclusions of law in the event that a reviewing court disagreed. In its alternative findings of fact and conclusions of law, the bankruptcy court determined that the parties were mutually mistaken as to the termination of the automatic stay, rendering paragraph 5(b) of the March 10, 1989 stipulation unenforceable. The bankruptcy court further found that hypothetical sales costs could not be taken into account in establishing the value of a secured claim under 11 U.S.C. § 506 and that the Debtor had no standing to exercise a trustee's avoiding powers under 11 U.S.C. § 545(2). The Debtor appeals.

II

Issues[4]

1. Did the bankruptcy court err in allowing the IRS's claim as filed?

2. Did the bankruptcy court err in its application of the burden of proof in claim objection proceedings?

3. Did the bankruptcy court err in denying the Debtor an opportunity to conduct further discovery?

4. Did the bankruptcy court err in finding that paragraph 5(b) of the March 10, 1989 stipulation was unenforceable on the basis of mutual mistake?

5. Did the bankruptcy court err in finding that the IRS's claim should not be reduced by the amount of hypothetical sales costs?

III

STANDARD OF REVIEW

[1] [2] A court's findings of fact are reviewed under the clearly erroneous standard and its conclusions of law are subject to *de novo* review. *In re Park–Helena Corp.*, 63 F.3d 877, 880 (9th Cir.1995) (citing *In re United States Trustee,* 32 F.3d 1370, 1372 (9th Cir.1994)), *cert. denied,* 516 U.S. 1049, 116 S.Ct. 712, 133 L.Ed.2d 667 (1996). Review under the clearly erroneous standard is "significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.' " *Granite State Ins. Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1028 (9th Cir.1996) (quoting *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 623, 113 S.Ct. 2264, 2280, 124 L.Ed.2d 539 (1993)).

IV

discovery prior to the June 12, 1995 hearing, was detrimental to his case. However, "[i]f an objection to a claim is joined with a demand for relief of the kind specified in [Fed. R. Bankr.P.] 7001, it becomes an adversary proceeding." Fed. R. Bankr.P. 3007. An adversary proceeding is a proceeding "to determine the validity, priority, or extent of a lien." Fed. R. Bankr.P. 7001(2). The Debtor clearly specified in his memorandum in support of objection to the IRS claim, that he was seeking a determination of the validity of the IRS's lien. In his pleadings and at the June 12, 1995 hearing, the Debtor requested an opportunity to conduct additional discovery. The bankruptcy court stated in its findings of fact and conclusions of law that the Debtor

> did not request that this hearing be treated as a status conference, nor did the debtor attempt to prepare a joint status report as is normally required prior to a status conference. Thus, there was simply no basis for either this court or the IRS to discern that debtor was not requesting a hearing on the merits of his objection.

However, the fact that a party does not invoke procedures normally available in an adversary proceeding is not fatal. *In re Mathiason,* 16 F.3d 234, 238 (8th Cir.1994).

The Debtor should be allowed an opportunity to conduct reasonable discovery as to the issue of whether the taxes were validly assessed.

D. The Bankruptcy Court Erred in Finding that Paragraph 5(b) of the March 10, 1989 Stipulation was Unenforceable on the Basis of Mutual Mistake

[15] The Debtor argues that the bankruptcy court should not have relieved the IRS from the consequences of the March 10, *8 1989 stipulation, that was approved by the bankruptcy court pursuant to the order entered on April 5, 1989. A lower court's ruling on a motion for relief from judgment is reviewed for abuse of discretion. *Martinelli v. Valley Bank of Nev. (In re Martinelli),* 96 B.R. 1011, 1012 (9th Cir. BAP 1988).

Paragraph 5(b) of the March 10, 1989 stipulation provides:

> 5. The parties request and stipulate to an order:
>
> ....
>
> (b) providing that the time within which the tax liability referred to in Paragraph 4 above may be assessed shall terminate 60 (sixty) days after the end of the period during which the United States is prohibited by reason of the Debtor's Title 11 case from making the assessment of the tax liability against the Debtor.

Since the Debtor was granted a discharge in his Chapter 7 on December 21, 1987, the automatic stay terminated on that date. 11 U.S.C. § 362(c)(2)(C). Under the literal terms of the March 10, 1989 stipulation, the IRS therefore had 60 days from December 21, 1987, to assess the taxes. The IRS did not assess these taxes until 1989. The bankruptcy court determined that the 60 day assessment period contained in the March 10, 1989 stipulation was unenforceable because the parties were mutually mistaken as to the termination of the automatic stay and that enforcement of the stipulation would constitute a substantial injustice against the IRS. The bankruptcy court then applied the limitations period set forth in the Internal Revenue Code to determine that the assessments were timely.[10]

[16] Although unclear from the record, the bankruptcy court apparently relied on its inherent equitable powers to reform the stipulation and order approving the stipulation. In its pleadings, the IRS cited numerous cases for the proposition that a court can use its powers as a court of equity to reform an agreement on the basis of a mutual mistake of the parties. However, these cases are not analogous to the case before this court for they do not involve a stipulation that was approved by court order.[11] Contrary to what is asserted by the IRS, relief from a bankruptcy court order is governed by Fed.R.Civ.P. 60, which is made applicable to cases under the Bankruptcy Code pursuant to Fed. R. Bankr.P. 9024.

Although this issue has not yet been addressed in the Ninth Circuit, the issue of whether bankruptcy courts continue to have an inherent ability to reconsider their orders has been addressed by the Seventh Circuit. *Met–L–Wood Corp.,* 861 F.2d at 1018. The Seventh Circuit found that the bankruptcy court's inherent power to reconsider orders had been merged into the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure. *Met–L–Wood Corp.,* 861 F.2d at 1018. In *Met–L–Wood Corp.,* the Seventh Circuit stated:

> [L]et us now consider whether [the trustee's] motion under [Fed.R.Civ.P.] 60(b) to revoke the

> bankruptcy judge's approval of the sale was properly denied. There is a preliminary question. Long before there was a Rule 60(b), bankruptcy courts exercised what they conceived to be, and what in fact has traditionally been regarded as, an inherent judicial power to reconsider their judgments within a reasonable time, including judgments confirming sales. See 4B Collier on Bankruptcy ¶ 70.98[17], at pp. 1183–94 (14th ed.1978). Now that there is a Rule 60(b), expressly applicable to bankruptcy as we have seen, the inherent power seems otiose; and although the cases continue to refer to it, they define it in terms of Rule 60(b). *See, e.g.,* ***9** *In re Chung King, Inc.,* 753 F.2d 547, 549–50 (7th Cir.1985). As a natural development from those cases, as well from the text of Bankruptcy Rule 9024, which applies Rule 60(b) to bankruptcy proceedings, we hold that confirmed sales—which are final judicial orders—can be set aside only under Rule 60(b). We conclude that the old inherent power to reconsider bankruptcy orders has been merged into the rule.

Met–L–Wood Corp., 861 F.2d at 1018. According to the Seventh Circuit, a bankruptcy court no longer has an inherent power to reconsider its prior orders, rather its power to reconsider is governed by Fed. R. Bankr.P. 9024 applying Fed.R.Civ.P. 60.

[17] Neither party has cited a Ninth Circuit decision to suggest a result contrary to that reached by the Seventh Circuit. The Ninth Circuit cautions against creating unnecessary intercircuit conflicts. *In re Taffi,* 68 F.3d 306, 308 (9th Cir.1995), *reh'g en banc,* 96 F.3d 1190 (1996), *cert. denied,* 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987 (1997). This is especially true when a lower federal court is addressing an issue already decided by another circuit court. *See United States v. Battley (In re Berg),* 188 B.R. 615, 620 (9th Cir. BAP 1995) (holding that a lower federal court should not deviate from an interpretation made by another circuit absent compelling circumstances), *aff'd,* 121 F.3d 535 (9th Cir.1997). It was an abuse of discretion for the bankruptcy court to reform the March 10, 1989 stipulation based on an inherent equitable power. Whether relief from this order is warranted is governed by Fed.R.Civ.P. 60.

The IRS argues in the alternative, that the March 10, 1989 stipulation, if enforceable, did not waive the limitation period of 26 U.S.C. 6503(a)(1). The bankruptcy court in finding the March 10, 1989 stipulation unenforceable did not consider this argument.

[18] The bankruptcy court's decision that paragraph 5(b) of the March 10, 1989 stipulation was unenforceable is reversed and remanded with instructions that the bankruptcy court is to analyze this issue under Fed.R.Civ.P. 60.[12]

E. The Bankruptcy Court Properly Found that the Secured Claim of the IRS Should Not Be Reduced by the Amount of Hypothetical Sales Costs

Both parties admit that this issue has been resolved by the Ninth Circuit. *In re Taffi,* 96 F.3d 1190, 1192 (9th Cir.1996) (holding that hypothetical sales costs are not to be taken into account in establishing the value of a secured claim under 11 U.S.C. § 506(a)), *cert. denied,* 521 U.S. 1103, 117 S.Ct. 2478, 138 L.Ed.2d 987 (1997). The Debtor requested that the Panel reserve this issue pending a decision from the U.S. Supreme Court in *In re Rash,* 90 F.3d 1036 (5th Cir.1996), *rev'd,* 520 U.S. 953, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). The IRS stated in its opening brief that it would not object to such a procedure.

[19] The U.S. Supreme Court rendered its decision in *Rash* on June 16, 1997. Citing with approval the Ninth Circuit's decision in *Taffi,* the U.S. Supreme Court determined that the proper standard for valuing a secured claim under 11 U.S.C. § 506(a) is the replacement rather than the foreclosure-value standard. *Associates Commercial Corp. v. Rash,* 520 U.S. 953, ——, 117 S.Ct. 1879, 1882, 138 L.Ed.2d 148 (1997). The Debtor has submitted a supplemental brief alleging that the U.S. Supreme Court's statements in footnote 6 of that opinion warrant a reversal of the bankruptcy court. Contrary to what is argued by the Debtor, this language does not require a court to deduct costs of sale when determining the replacement value of a secured claim. The U.S. Supreme Court states in *Rash* that "[o]ur recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers

VOLUME 33
NUMBER 1
2014

California Bankruptcy Journal™

By Elmer Dean Martin III

WILSHIRE COURTYARD PREEMPTIVELY ARISES IN A BANKRUPTCY COURT CASE IN CLOSE NEXUS WITH THE "CALIFORNIA GESTAPO"

I. Capturing the Critical Concepts

On September 10, 2013 the Ninth Circuit filed its opinion in *Wilshire Courtyard v. California Franchise Tax Board (In re Wilshire Courtyard).*[1] The court ruled that the bankruptcy court had jurisdiction to determine whether a 1998 reorganization was a sale or cancellation of debt for purposes of determining the income tax liability of the partners of a reorganized debtor partnership. The arguments focused on whether Bankruptcy Code § 346(j), as it read in 1998 before its 2004 amendment, prevented the recognition of income resulting from the reorganization of the debtor general partnership into a limited liability company for California income tax purposes. Forty million dollars of first priority lien debt was cancelled along with $220,000,000 in second priority lien debt and the $123,000,000 worth of real property was retained by the general partnership which was converted into a limited liability company taxed as a partnership in which the first priority lien debt creditor had a 99% interest and the general partners of the debtor retained a 1% interest.[2] The debtor's partners reported the reorganization for income tax purposes as a cancellation of $208,403,714 in debt and as a result paid no income tax. The Franchise Tax Board claimed that the cancelled debt was $231,586,628 of sale gain and asserted an assessment of $13,000,000 in income tax.

The finding of jurisdiction was based on the close nexus of the transactional characterization controversy with the confirmed plan even though the outcome of the assertion of jurisdiction would be the determination of income taxes of the debtor's partners who were not debtors under the jurisdiction of the

[1] Wilshire Courtyard v. California Franchise Tax Board (*In re* Wilshire Courtyard), 729 F.3d 1279 (9th Cir. 2013).

[2] There was also a contribution of $23,000,000 by the senior secured lender who received the 99% interest, but apparently that went in from the lender and then back to the lender as a payment, leaving the residual consideration for the 99% interest to be the release of debt. The Wilshire Partners also received $3,500,000 in cash and a $450,000 nonrecourse loan apparently secured by their 1% retained interest. The second priority lien debt holder received $2,500,000.

bankruptcy court. The case was remanded for a determination of the "economic realities."

The briefing and the court opinions recognized only one of four relevant income tax law issues present in the case each of which were outcome determinative. These are discussed in detail in this article. The four issues are:

A. Whether cancellation of debt income first increases the basis of partners which is then reduced by a constructive distribution of cash in the amount of the cancelled debt. The Franchise Tax Board customarily claims that the constructive distribution occurs resulting in gain and ignores the prior pass through of cancellation of debt income which increases basis. The Board does this because typically cancellation of debt income is not taxed, and indeed in the Wilshire case it was not taxed as reported. The bankruptcy judge was not fooled by the Board's distortion of the law and clearly and correctly enunciated and applied the correct complex tax law provisions.

B. Whether the transfer was an exchange of property or partnership interests in satisfaction of recourse debt. A transaction of property in satisfaction of recourse debt is always cancellation of debt income to the extent of the difference between the value of the property and the amount of the debt. Therefore whether the transaction was a sale or a cancellation was an irrelevant issue if the debt was recourse. The Franchise Tax Board customarily ignores this issue and so did the Wilshire Partners. The briefs do not disclose whether the debt was recourse or nonrecourse.

C. Whether the transaction was an exchange of property in satisfaction of nonrecourse debt. A relevant sub-issue is whether for purposes of determining the tax issues in the case Bankruptcy Code § 1111(b)(1)(A) makes nonrecourse debt into recourse debt for tax purposes. The nonrecourse debt issue is an issue which could have been raised by the Franchise Tax Board because the traditional wisdom is that property transferred in satisfaction of nonrecourse debt is gain in the amount of the difference between the cost basis and the amount of the debt. However, it is also well established that there can be a cancellation of debt as part of a transfer of property in satisfaction of nonrecourse debt and that established principle should apply in *Wilshire* as well as a very strong argument that in this case recourse debt and nonrecourse debt should be treated similarly for income tax purposes. Furthermore, what occurred in *Wilshire* arguably was an exchange of a partnership interest for debt and Internal Revenue Code § 108(e)(8) expressly provides that this exchange can be for either recourse debt *or nonrecourse* debt. Although § 108(e)(8) as it presently reads was amended to apply to partnerships after 1998 the amendment reflects the judicial resolution of the issue prior to the amendment. The 1998 memorandum in support of confirmation discloses that the debt was nonrecourse.

D. Whether the retention of a 1% interest by the Wilshire Partners prevented the termination of the Wilshire general partnership and whether the change of the general partnership to a limited liability company was a taxable transaction. Although the Franchise Tax Board claimed that the transaction was a sale and the retention of the 1% interest was a sham, the issue was never briefed in the context of applicable partnership tax law and that tax law favored the Wilshire Partners.

Although the partners and the Franchise Tax Board contended that the *Wilshire* reorganization was *either* a sale *or* a cancellation of debt, a possible answer is that it could be both a cancellation of debt and a sale as discussed herein.

II. Introduction

At first glance the casual observer might observe that *Wilshire* is an informative but ordinary discussion of "core," "related to" and "arising in" bankruptcy jurisdiction which somehow manages to be a rare recent bankruptcy related court decision which fails to mention *Stern v. Marshall.*[3] However, anyone who has been litigating with the guardians of the California fisc for a long time would notice, after reading the *Wilshire* decision as well as the bankruptcy court and bankruptcy appellate panel decisions which preceded it, that there are a number of tax issues in *Wilshire* the implicit or explicit resolution of which by *Wilshire* potentially is enormously consequential and informative.

These issues involve tax law positions which the California Franchise Tax Board repeatedly asserts and which have no merit, determination of taxable income of a partnership which is an entity which pays no income taxes, a likely very significant change in the manner in which the Franchise Tax Board and the Internal Revenue Service will be required to respond to quick audit requests under

[3] Stern v. Marshall, 131 S. Ct. 2594 (2011), which like *Wilshire*, started with a published decision by Judge Bufford in the Central District of California. However, the bankruptcy appellate panel did take the time to distinguish *Stern* in a footnote. *In re* Wilshire Courtyard, 459 B.R. 416, 424 n.10 (B.A.P. 9th Cir. 2011) *rev'd*, 729 F.3d 1279 (9th Cir. 2013).

VOLUME 33
NUMBER 3
2016

CALIFORNIA BANKRUPTCY JOURNAL

DOCENDO DISCIMUS

By Elmer Dean Martin III

Wilshire Courtyard Redux: The BAP Decides A Twenty Year Old Bankruptcy Tax Case

In the May 2014 issue of the Journal,[1] in 25 densely reasoned pages, I analyzed numerous issues raised by the facts of the decision reported by the Ninth Circuit in 2013 in the *Wilshire Courtyard* case which started in January 1997.[2] Some of those issues were addressed by the Circuit, and many were not addressed by either the Circuit or the briefs in the case. In short, my prior discussion captured the basic pertinent concept as follows:

> The arguments focused on whether Bankruptcy Code § 346(j), as it read in 1998 before its 2005 amendment, prevented the recognition of income resulting from the reorganization of the debtor general partnership into a limited liability company for California income tax purposes. Forty million dollars of first priority lien debt was cancelled along with $220,000,000 in second priority lien debt and the $123,000,000 worth of real property was retained by the general partnership which was converted into a limited liability company taxed as a partnership in which the first priority lien debt creditor had a 99% interest and the general partners of the debtor retained a 1% interest. The debtor's partners reported the reorganization for income tax purposes as a cancellation of $208,403,714 in debt and as a result paid no income tax. The Franchise Tax Board claimed that the cancelled debt was $231,586,628 of sale gain and asserted an assessment of $13,000,000 in income tax.

My analysis ended with the sentence: "There is virtually no possibility that the 'sale only' transaction proposed by the Franchise Tax Board has any merit whatsoever."

---

[1] Elmer Dean Martin III, *Wilshire Courtyard Preemptively Arises in a Bankruptcy Court Case in Close Nexus With The "California Gestapo," Tax News & Views*, 33 CAL. BANKR. J. 103 (2014).

[2] Wilshire Courtyard v. California Franchise Tax Board (*In re* Wilshire Courtyard), 729 F.3d 1279 (9th Cir. 2013).

The Circuit reversed a prior BAP holding that the bankruptcy court had no jurisdiction to rule on the tax issues in the case and remanded the case to the BAP for further consideration. On April 7, 2015 the BAP filed its decision.[3] Its holding was "The bankruptcy court's determination that the Transaction was a restructure of the Debtor and not a sale is affirmed." . . . "the forgiveness of debt did not result in income realized by the Debtor or passed through to the Partners."

My analysis in May of 2014 addressed many issues which were not dealt with in the briefs in the case. I pointed out that it was remarkable that federal judges reached the right result even though the briefs didn't deal with many of the relevant issues. The BAP noted that even though briefs are inadequate, federal judges have to base their decisions on the correct law.

> The federal judicial process is not a GIGO (garbage in, garbage out) system. Irrespective of the sufficiency of the legal briefs, a federal judge has the responsibility to make his or her decision based on the correct law.[4]

My analysis included a discussion of the 2005 BAPCPA amendments to Bankruptcy Code § 346, especially § 346(j), to determine if there was anything in the history of BAPCPA, all the way back to the Chandler Act and before, which would indicate what was intended as to the application of § 346(j) in the *Wilshire Courtyard* case. The BAP, other than citing *Claridge Apartments*[5] which is chronicled in note 24 of my discussion, applied § 346(j) as it reads without much historical analysis and held that no income was "realized" by virtue of the transaction which occurred in the case. I pointed out that tax law in this context distinguishes between income which is not "realized," which in tax speak means it didn't exist, and income which is not "recognized" which means that it exists but is excluded from taxable income. For federal income tax purposes the *Wilshire* transaction created income which was "realized" but not "recognized" but because of § 346(j) the BAP held that for state income tax purposes no income was "realized." As I pointed out, that characterization created problems in the context of the applicable tax laws because if no income was "realized" then there was no step up in basis by the amount of the income to offset the gain which was created by the debt which was discharged. As extensively discussed, when

[3] California Franchise Tax Board v. Wilshire Courtyard (*In re* Wilshire Courtyard), 2015 Bankr. LEXIS 1172 (B.A.P. 9th Cir. 2015).

[4] *Id.* at *43.

[5] Claridge Apartments Co. v. Comm'r, 323 U.S. 141 (1944) (cited *id.* at *51).

partnership debt is discharged for federal income purposes the income "realized" from the discharge passes through to the partners and increases their partnership cost basis so that when a "constructive distribution of cash" is made by reason of the forgiveness of debt the distribution merely reduces the cost basis and the partner is left with income which is characterized as debt discharge income and not capital gain. As noted in my discussion this intellectual construct was recognized by the bankruptcy judge in *Wilshire* but often escapes understanding by the Franchise Tax Board.

For federal purposes whether or not debt discharge income is taxable depends on the circumstances of the partner, not the partnership. If the partner is insolvent after the discharge then the partner will not recognize income. There are also other exceptions to recognition of income including the one adopted by the solvent partners in *Wilshire* which prevented "recognition" of their "realized" income. I pointed out that it was notable that there was no Internal Revenue Service assertion of an income tax in the case and that often the Franchise Tax Board engages in crusades which depart from the results of the Internal Revenue Service's handling of cases.

The BAP decision operates at the partnership level and holds that because there was no income "realized" by virtue of § 346(j) there was no income at the partner level. The BAPCPA amendments attempt to adopt the federal characterization of the facts in *Wilshire* for state income tax purposes and accordingly whether the holding in *Wilshire* insofar as § 346(j) is concerned has any significance in the future will remain for future decisions to determine. What remains, however, of great interest is the holding of the Ninth Circuit, implemented by the BAP, to the effect that bankruptcy courts have jurisdiction in a partnership bankruptcy case to determine the tax consequences to partners of a bankruptcy reorganization of a partnership.

15th Annual Bankruptcy Ethics Symposium

How Not to be Befuddled by Bankruptcy Tax

November 16, 2018

Table of Contents

[1] *See* IRS.gov and any updated Revenue Ruling for the current rate of interest

11 USCS § 503

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE > SUBCHAPTER I. CREDITORS AND CLAIMS

§ 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this *title [11 USCS § 502(f)]*, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including--

(i)wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii)wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B)any tax--

(i)incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this *title [11 USCS § 507(a)(8)]*; or

(ii)attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C)any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D)notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2)compensation and reimbursement awarded under section 330(a) of this *title [11 USCS § 330(a)]*;

(3)the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A)a creditor that files a petition under section 303 of this *title [11 USCS § 303]*;

(B)a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C)a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D)a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this *title [11 USCS § 1102]*, in making a substantial contribution in a case under chapter 9 or 11 of this *title [11 USCS §§ 901* et seq. or *1101* et seq.];

(E)a custodian superseded under section 543 of this *title [11 USCS § 543]*, and compensation for the services of such custodian; or

(F)a member of a committee appointed under section 1102 of this *title [11 USCS § 1102]*, if such expenses are incurred in the performance of the duties of such committee;

(4)reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5)reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this *title [11 USCS §§ 901* et seq.; *1101* et seq.], based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6)the fees and mileage payable under chapter 119 of title 28 [*28 USCS §§ 1821* et seq.];

(7)with respect to a nonresidential real property lease previously assumed under section 365 [*11 USCS § 365*], and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6) [*11 USCS § 502(b)(6)*];

(8)the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5 [*5 USCS § 551(1)*]) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A)in disposing of patient records in accordance with section 351 [*11 USCS § 351*]; or

(B)in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9)the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid--

(1)a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the debtor's business, absent a finding by the court based on evidence in the record that--

(A)the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B)the services provided by the person are essential to the survival of the business; and

(C)either--

(i)the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii)if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2)a severance payment to an insider of the debtor, unless--

(A)the payment is part of a program that is generally applicable to all full-time employees; and

(B)the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3)other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.

History

(Nov. 6, 1978,*P.L. 95-598*, Title I, § 101, *92 Stat. 2581*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle H, § 446, *98 Stat. 374*; Oct. 27, 1986, *P.L. 99-554*, Title II, Subtitle C, § 283(g), *100 Stat. 3117*; Oct. 22, 1994, *P.L. 103-394*, Title I, § 110, Title II, § 213(c), Title III, § 304(h)(2), *108 Stat. 4113*, 4126, 4134; April 20, 2005, *P.L. 109-8*, Title III, §§ 329, 331, Title IV, Subtitle B, § 445, Title VII, § 712(b), (c), Title XI, § 1103, Title XII, §§ 1208, 1227(b), *119 Stat. 101*, 102, 117, 128, 190, 194, 200.)

Prior law and revision:

Legislative Statements

Section 503(a) of the House amendment represents a compromise between similar provisions in the House bill and the Senate amendment by leaving to the Rules of Bankruptcy Procedure the determination of the location at which a request for payment of an administrative expense may be filed. The preamble to section 503(b) of the House bill makes a similar change with respect to the allowance of administrative expenses.

Section 503(b)(1) adopts the approach taken in the House bill as modified by some provisions contained in the Senate amendment. The preamble to section 503(b) makes clear that none of the paragraphs of section 503(b) apply to claims or expenses of the kind specified in section 502(f) that arise in the ordinary course of the debtor's business or financial affairs and that arise during the gap between the commencement of an involuntary case and the appointment of a trustee or the order for relief, whichever first occurs. The remainder of section 503(b) represents a compromise between H.R. 8200 as passed by the House and the Senate amendments. Section 503(b)(3)(E) codifies present law in cases such as *Randolph v. Scruggs, 190 U.S. 533,* which accords administrative expense status to services rendered by a prepetition custodian or other party to the extent such services actually benefit the estate. Section 503(b)(4) of the House amendment conforms to the provision contained in H.R. 8200 as passed by the House and deletes language contained in the Senate amendment providing a different standard of compensation under section 330 of that amendment.

Senate Report No. 95-989

Subsection (a) of this section permits administrative expense claimants to file with the court a request for payment of an administrative expense. The Rules of Bankruptcy Procedure will specify the time, the form, and the method of such a filing.

11 USCS § 507

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE > SUBCHAPTER I. CREDITORS AND CLAIMS

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302 [*11 USCS § 701*, *702*, *703*, *1104*, *1202*, or *1302*], the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) [*11 USCS § 503(b)*] shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this *title [11 USCS § 503(b)]*, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (*12 U.S.C. 343*), and any fees and charges assessed against the estate under chapter 123 of title 28 [*28 USCS §§ 1911* et seq.].

(3) Third, unsecured claims allowed under section 502(f) of this *title [11 USCS § 502(f)*].

(4) Fourth, allowed unsecured claims, but only to the extent of $ 12,850 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for--

(A)wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B)sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan--

(A)arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B)for each such plan, to the extent of--

(i)the number of employees covered by each such plan multiplied by $ 12,850; less

(ii)the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons--

(A)engaged in the production or raising of grain, as defined in section 557(b) of this *title [11 USCS § 557(b)*], against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this *title [11 USCS § 557(b)*], for grain or the proceeds of grain, or

(B)engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility--

but only to the extent of $ 6,325 for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $ 2,850 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A)a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition--

(i)for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii)assessed within 240 days before the date of the filing of the petition, exclusive of--

(I)any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II)any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii)other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this *title [11 USCS § 523(a)(1)(B)* or *523(a)(1)(C)*], not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B)a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C)a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D)an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E)an excise tax on--

(i)a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii)if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F)a customs duty arising out of the importation of merchandise--

(i)entered for consumption within one year before the date of the filing of the petition;

(ii)covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii)entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G)a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this *title [11 USCS § 362*, *363*, or *364*], provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this *title [11 USCS § 362*], from the use, sale, or lease of such property under section 363 of this *title [11 USCS § 363*], or from the granting of a lien under section 364(d) of this *title [11 USCS § 364(d)*], then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

History

(Nov. 6, 1978,*P.L. 95-598*, Title I, § 101, *92 Stat. 2583*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle B, § 350, Subtitle H, § 449, *98 Stat. 358*, 374; Nov. 29, 1990, *P.L. 101-647*, Title XXV, Subtitle B, § 2522(d), *104 Stat. 4867*;

11 USCS § 511

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE > SUBCHAPTER I. CREDITORS AND CLAIMS

§ 511. Rate of interest on tax claims

(a) If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.

(b) In the case of taxes paid under a confirmed plan under this title, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.

History

(Added April 20, 2005,*P.L. 109-8*, Title VII, § 704(a), *119 Stat. 125*.)

Annotations

Notes

Effective date of section:

This section took effect 180 days after enactment, pursuant to § 1501(a) of Act April 20, 2005, *P.L. 109-8*, which appears as *11 USCS § 101* note.

Other provisions:

Application of section. This section is inapplicable with respect to cases commenced under Title 11, USCS, before the effective date of Act April 20, 2005, *P.L. 109-8*, pursuant to § 1501(b)(1) of such Act, which appears as *11 USCS § 101* note.

Case Notes

Third-party lender's claim was tax claim, and thus, interest rate due thereon could not be modified by debtor's Chapter 13 reorganization plan; lender, as transferee of tax lien and subrogee of taxing authorities' rights under *Tex. Tax Code Ann. § 32.065(c)*, held tax claim for purposes of *11 USCS § 511* and enjoyed at least same advantages and disadvantages of its claim as taxing authorities would have, including application of § 511 for tax claim. *Tax Ease Funding, L.P. v Thompson (In re Kizzee-Jordan) (2010, CA5 Tex) 626 F3d 239,* CCH Bankr L Rptr P 81881.

Bankruptcy court committed clear error by failing to identify approach it adopted to make such determination or to apply such approach in arriving at 3.5 percent figure; instead, bankruptcy court seemingly confirmed interest rate on

11 USCS § 522

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE > SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

Notice

Part 1 of 2. You are viewing a very large document that has been divided into parts.

§ 522. Exemptions

(a) In this section--

(1)"dependent" includes spouse, whether or not actually dependent; and

(2)"value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)

(1) Notwithstanding section 541 of this *title [11 USCS § 541*], an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this *title [11 USCS § 302*] and individual cases filed under section 301 or 303 of this *title [11 USCS § 301* or *303*] by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under *Rule 1015(b) of the Federal Rules of Bankruptcy Procedure*, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is--

(A)subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B)any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and

(C)retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under *section 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a) of the Internal Revenue Code of 1986* [*26 USCS § 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a)*].

If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under *section 7805 of the Internal Revenue Code of 1986* [*26 USCS § 7805*], and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805 [*26 USCS § 7805*], those funds are exempt from the estate if the debtor demonstrates that--

(i)no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)

(I)the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 [*26 USCS §§ 1* et seq.]; or

(II)the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 [*26 USCS §§ 1* et seq.] and the debtor is not materially responsible for that failure.

(C)A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under *section 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a) of the Internal Revenue Code of 1986* [*26 USCS § 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a)*], under *section 401(a)(31) of the Internal Revenue Code of 1986* [*26 USCS § 401(a)(31)*], or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)

(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of *section 402(c) of the Internal Revenue Code of 1986* [*26 USCS § 402(c)*] or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii)A distribution described in this clause is an amount that--

(I)has been distributed from a fund or account that is exempt from taxation under *section 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a) of the Internal Revenue Code of 1986* [*26 USCS § 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a)*]; and

(II)to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this *title [11 USCS § 502*] as if such debt had arisen, before the commencement of the case, except--

(1)a debt of a kind specified in paragraph (1) or (5) of section 523(a) [*11 USCS § 523(a)*] (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in such paragraph);

(2)a debt secured by a lien that is--

(A)

(i)not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this *title [11 USCS § 544*, *545*, *547*, *548*, *549*, or *724(a)*]; and

(ii)not void under section 506(d) of this *title [11 USCS § 506(d)*]; or

(B)a tax lien, notice of which is properly filed;

(3)a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this *title [11 USCS § 523(a)(4)* or *523(a)(6)*] owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4)a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (*20 U.S.C. 1001*)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $ 23,675 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $ 3,775 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $ 600 in value in any particular item or $ 12,625 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $ 1,600 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $ 1,250 plus up to $ 11,850 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $ 2,375 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $ 12,625 less any amount of property of the estate transferred in the manner specified in section 542(d) of this *title [11 USCS § 542(d)*], in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive--

(A)a social security benefit, unemployment compensation, or a local public assistance benefit;

(B)a veterans' benefit;

(C)a disability, illness, or unemployment benefit;

(D)alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E)a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i)such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii)such payment is on account of age or length of service; and

(iii)such plan or contract does not qualify under *section 401(a)*, *403(a)*, *403(b)*, or *408 of the Internal Revenue Code of 1986* [*26 USCS § 401(a)*, *403(a)*, *403(b)*, or *408*].

(11) The debtor's right to receive, or property that is traceable to--

(A)an award under a crime victim's reparation law;

(B)a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C)a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D)a payment, not to exceed $ 23,675, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E)a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under *section 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a) of the Internal Revenue Code of 1986* [*26 USCS § 401*, *403*, *408*, *408A*, *414*, *457*, or *501(a)*].

(e)A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f)

(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(A)a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5) [*11 USCS § 523(a)(5)*]; or

(B)a nonpossessory, nonpurchase-money security interest in any--

(i)household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii)implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii)professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)

(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i)the lien;

(ii)all other liens on the property; and

(iii)the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor--

(A)permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B)either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $ 6,425.

(4)

(A) Subject to subparagraph (B), for purposes of paragraph (1)(B), the term "household goods" means--

(i)clothing;

(ii)furniture;

(iii)appliances;

(iv)1 radio;

(v)1 television;

(vi)1 VCR;

(vii)linens;

(viii)china;

(ix)crockery;

(x)kitchenware;

(xi)educational materials and educational equipment primarily for the use of minor dependent children of the debtor;

(xii)medical equipment and supplies;

(xiii)furniture exclusively for the use of minor children, or elderly or disabled dependents of the debtor;

(xiv)personal effects (including the toys and hobby equipment of minor dependent children and wedding rings) of the debtor and the dependents of the debtor; and

(xv)1 personal computer and related equipment.

(B) The term "household goods" does not include--

(i)works of art (unless by or of the debtor, or any relative of the debtor);

(ii)electronic entertainment equipment with a fair market value of more than $ 675 in the aggregate (except 1 television, 1 radio, and 1 VCR);

(iii)items acquired as antiques with a fair market value of more than $ 675 in the aggregate;

(iv)jewelry with a fair market value of more than $ 675 in the aggregate (except wedding rings); and

(v)a computer (except as otherwise provided for in this section), motor vehicle (including a tractor or lawn tractor), boat, or a motorized recreational device, conveyance, vehicle, watercraft, or aircraft.

(g) Notwithstanding sections 550 and 551 of this *title [11 USCS §§ 550* and *551*], the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this *title [11 USCS § 510(c)(2)*, *542*, *543*, *550*, *551*, or *553*], to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if--

(1)

(A)such transfer was not a voluntary transfer of such property by the debtor; and

(B)the debtor did not conceal such property; or

(2) The debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if--

(1)such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this *title [11 USCS § 544*, *545*, *547*, *548*, *549*, or *724(a)*] or recoverable by the trustee under section 553 of this *title [11 USCS § 553*]; and

(2)the trustee does not attempt to avoid such transfer.

(i)

(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this *title [11 USCS § 550*], the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this *title [11 USCS § 551*], a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this *title [11 USCS § 544*, *545*, *547*, *548*, *549*, or *724(a)*], under subsection (f) or (h) of this section, or property recovered under section 553 of this *title [11 USCS § 553*], may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except--

(1)the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2)any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(n) For assets in individual retirement accounts described in *section 408* or *408A of the Internal Revenue Code of 1986* [*26 USCS § 408* or *408A*], other than a simplified employee pension under section 408(k) of such Code [*26 USCS § 408(k)*] or a simple retirement account under section 408(p) of such Code [*26 USCS § 408(p)*], the aggregate value of such assets exempted under this section, without regard to amounts attributable to rollover contributions under *section 402(c)*, *402(e)(6)*, *403(a)(4)*, *403(a)(5)*, and *403(b)(8) of the Internal Revenue Code of 1986* [*26 USCS § 402(c)*, *402(e)(6)*, *403(a)(4)*, *403(a)(5)*, and *403(b)(8)*], and earnings thereon, shall not exceed $ 1,283,025 in a case filed by a debtor who is an individual, except that such amount may be increased if the interests of justice so require.

(o) For purposes of subsection (b)(3)(A), and notwithstanding subsection (a), the value of an interest in--

(1)real or personal property that the debtor or a dependent of the debtor uses as a residence;

(2)a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(3)a burial plot for the debtor or a dependent of the debtor; or

(4)real or personal property that the debtor or a dependent of the debtor claims as a homestead;

shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay, or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt, under subsection (b), if on such date the debtor had held the property so disposed of.

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548 [*11 USCS §§ 544* and *548*], as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $ 160,375 in value in--

(A)real or personal property that the debtor or a dependent of the debtor uses as a residence;

(B)a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(C)a burial plot for the debtor or a dependent of the debtor; or

(D)real or personal property that the debtor or dependent of the debtor claims as a homestead.

(2)

(A) The limitation under paragraph (1) shall not apply to an exemption claimed under subsection (b)(3)(A) by a family farmer for the principal residence of such farmer.

(B) For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $ 160,375 if--

(A)the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18 [*18 USCS § 3156*]), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B)the debtor owes a debt arising from--

(i)any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 [*15 USCS § 78c(a)(47)*]), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii)fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 [*15 USCS § 78l* or *78o(d)*] or under section 6 of the Securities Act of 1933 [*15 USCS § 77f*];

(iii)any civil remedy under section 1964 of title 18; or

(iv)any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor.

History

(Nov. 6, 1978,*P.L. 95-598*, Title I, § 101, *92 Stat. 2586*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle A, § 306, Subtitle H, § 453, *98 Stat. 353*, 375; Oct. 27, 1986, *P.L. 99-554*, Title II, Subtitle C, § 283(i), *100 Stat. 3117*; Nov. 29, 1990, *P.L. 101-647*, Title XXV, Subtitle B, § 2522(b), *104 Stat. 4866*; Oct. 22, 1994, *P.L. 103-394*, Title I, § 108(d), Title III, §§ 303, 304(d), 310, Title V, § 501(d)(12), *108 Stat. 4112*, 4132, 4133, 4137, 4145; Feb. 12, 1998, *63 Fed. Reg. 7179;* Nov. 1, 2000, *P.L. 106-420*, § 4, *114 Stat. 1868*; Feb. 20, 2001, *66 Fed. Reg. 10910.)*

(As amended Feb. 24, 2004,*69 Fed. Reg. 8482;* April 20, 2005, *P.L. 109-8*, Title II, Subtitle B, § 216, Subtitle C, § 224(a), (e)(1), Title III, §§ 307, 308, 313(a), 322(a), *119 Stat. 55*, 62, 65, 81, 87, 96; Feb. 14, 2007, *72 Fed. Reg. 7082;* Feb. 25, 2010, *75 Fed. Reg. 8747;* Dec. 22, 2010, *P.L. 111-327*, § 2(a)(17), *124 Stat. 3559*; Feb. 21, 2013, *78 Fed. Reg. 12089;* Feb. 16, 2016, *81 Fed. Reg. 8748.)*

Prior law and revision:

Legislative Statements

Section 522 of the House amendment represents a compromise on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment. Dollar amounts specified in section 522(d) of the House bill have been reduced from amounts as contained in H.R. 8200 as passed by the House. The States may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases.

Section 522(c)(1) tracks the House bill and provides that dischargeable tax claims may not be collected out of exempt property.

Section 522(f)(2) is derived from the Senate amendment restricting the debtor to avoidance of nonpossessory, nonpurchase money security interests.

Exemptions: Section 522(c)(1) of the House amendment adopts a provision contained in the House bill that dischargeable taxes cannot be collected from exempt assets. This changes present law, which allows collection of

11 USCS § 523

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 5. CREDITORS, THE DEBTOR, AND THE ESTATE > SUBCHAPTER II. DEBTOR'S DUTIES AND BENEFITS

Notice

Part 1 of 7. You are viewing a very large document that has been divided into parts.

§ 523. Exceptions to discharge

(a)A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this *title [11 USCS § 727*, *1141*, *1228(a)*, *1228(b)*, or *1328(b)*] does not discharge an individual debtor from any debt--

(1)for a tax or a customs duty--

(A)of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this *title [11 USCS § 507(a)(2)* or *507(a)(8)*], whether or not a claim for such tax was filed or allowed;

(B)with respect to which a return, or equivalent report or notice, if required--

(i)was not filed or given; or

(ii)was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C)with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2)for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A)false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B)use of a statement in writing--

(i)that is materially false;

(ii)respecting the debtor's or an insider's financial condition;

(iii)on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv)that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A)--

(I)consumer debts owed to a single creditor and aggregating more than $ 675 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II)cash advances aggregating more than $ 950 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii)for purposes of this subparagraph--

(I)the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act [*15 USCS § 1602*]; and

(II)the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

(3)neither listed nor scheduled under section 521(a)(1) of this *title [11 USCS § 521(a)(1)]*, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A)if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B)if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4)for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5)for a domestic support obligation;

(6)for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7)to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A)relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B)imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8)unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

(A)

(i)an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii)an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B)any other educational loan that is a qualified education loan, as defined in *section 221(d)(1) of the Internal Revenue Code of 1986* [*26 USCS § 221(d)(1)*], incurred by a debtor who is an individual;

(9)for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10)that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this *title [11 USCS § 727(a)(2)*, (3), (4), (5), (6), or (7)], or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11)provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12)for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency; or

(13)for any payment of an order of restitution issued under title 18, United States Code;

(14)incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A)incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B)incurred to pay fines or penalties imposed under Federal election law;

(15)to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16)for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17)for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 [*28 USCS § 1915*] (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 [*28 USCS § 1915(h)*] (or a similar non-Federal law);

(18)owed to a pension, profit-sharing, stock bonus, or other plan established under *section 401*, *403*, *408*, *408A*, *414*, *457*, or *501(c) of the Internal Revenue Code of 1986* [*26 USCS § 401*, *403*, *408*, *408A*, *414*, *457*, or *501(c)*], under--

(A)a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [*29 USCS § 1108(b)(1)*], or subject to *section 72(p) of the Internal Revenue Code of 1986* [*26 USCS § 72(p)*]; or

(B)a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5 [*5 USCS §§ 8431* et seq.], that satisfies the requirements of section 8433(g) of such *title [5 USCS § 8433(g)]*;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d) [*26 USCS § 414(d)*], or a contract or account under section 403(b) [*26 USCS § 403(b)*], of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19)that--

(A)is for--

(i)the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [*15 USCS § 78c(a)(47)*]), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii)common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B)results, before, on, or after the date on which the petition was filed, from--

(i)any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii)any settlement agreement entered into by the debtor; or

(iii)any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to *section 6020(a) of the Internal Revenue Code of 1986* [*26 USCS § 6020(a)*], or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to *section 6020(b) of the Internal Revenue Code of 1986* [*26 USCS § 6020(b)*], or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

History

(Nov. 6, 1978,*P.L. 95-598*, Title I, § 101, *92 Stat. 2590*; Aug. 14, 1979, *P.L. 96-56*, § 3, *93 Stat. 387*; Aug. 13, 1981, *P.L. 97-35*, Title XXIII, Subtitle A, Ch 2, § 2334(b), *95 Stat. 863*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle

11 USCS § 1129

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 11. BANKRUPTCY > CHAPTER 11. REORGANIZATION > SUBCHAPTER II. THE PLAN

Notice

Part 1 of 2. You are viewing a very large document that has been divided into parts.

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this *title [11 USCS §§ 101* et seq.].

(2) The proponent of the plan complies with the applicable provisions of this *title [11 USCS §§ 101* et seq.].

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A) (i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii)the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B)the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests--

(A)each holder of a claim or interest of such class--

(i)has accepted the plan; or

(ii)will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this *title [11 USCS §§ 701* et seq.] on such date; or

(B)if section 1111(b)(2) of this *title [11 USCS § 1111(b)(2)*] applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan an account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests--

(A)such class has accepted the plan; or

(B)such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that--

(A)with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this *title [11 USCS § 507(a)(2)* or *507(a)(3)*], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B)with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this *title [11 USCS § 507(a)(1)*, *507(a)(4)*, *507(a)(5)*, *507(a)(6)*, or *507(a)(7)*], each holder of a claim of such class will receive--

(i)if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii)if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C)with respect to a claim of a kind specified in section 507(a)(8) of this *title [11 USCS § 507(a)(8)*], the holder of such claim will receive on account of such claim regular installment payments in cash--

(i)of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii)over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303 [*11 USCS § 301*, *302*, or *303*]; and

(iii)in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b) [*11 USCS § 1122(b)*]); and

(D)with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8) [*11 USCS § 507(a)(8)*], but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this *title [11 USCS § 1114*], at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this *title [11 USCS § 1114*], at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan--

(A)the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B)the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2) [*11 USCS § 1325(b)(2)*]) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)

(1) Notwithstanding section 510(a) of this *title [11 USCS § 510(a)]*, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides--

(i)

(I)that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II)that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii)for the sale, subject to section 363(k) of this *title [11 USCS § 363(k)]*, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii)for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims--

(i)the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii)the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115 [*11 USCS § 1115*], subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests--

(i)the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii)the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this *title [11 USCS § 1127(b)]*, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this *title [11 USCS § 1144*]. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 [*15 USCS § 77e*]. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) [*11 USCS § 1121(e)*] not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3) [*11 USCS § 1121(e)(3)*].

History

(Nov. 6, 1978,*P.L. 95-598*, Title I, § 101, *92 Stat. 2635*; July 10, 1984, *P.L. 98-353*, Title III, Subtitle H, § 512, *98 Stat. 386*; Oct. 27, 1986, *P.L. 99-554*, Title II, Subtitle A, § 225, Subtitle C, § 283(v), *100 Stat. 3102*, 3118; June 16, 1988, *P.L. 100-334*, § 2(b), *102 Stat. 613*; Oct. 22, 1994, *P.L. 103-394*, Title III, § 304(h)(7), Title V, § 501(d)(32), *108 Stat. 4134*, 4146.)

(As amended April 20, 2005,*P.L. 109-8*, Title II, Subtitle B, § 213(1), Title III, § 321(c), Title IV, § 438, Title VII, § 710, Title XII, § 1221(b), Title XV, § 1502(a)(8), *119 Stat. 52*, 95, 113, 127, 196, 216; Dec. 22, 2010, *P.L. 111-327*, § 2(a)(35), *124 Stat. 3561*.)

Prior law and revision:

House Judiciary Report

Subsection (a) enumerates the requirement governing confirmation of a plan. The court is required to confirm a plan if and only if all of the requirements are met.

Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as section 1122 and 1123, governing classification and contents of plan.

Paragraph (2) requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.

Paragraph (3) requires that the proponent have proposed the plan in good faith, and not by any means forbidden by law.

Paragraph (4) is derived from section 221 of present law. It requires that any payment made or promised by the proponent, the debtor, or person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, be disclosed to

26 USCS § 3102

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE C. EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX > CHAPTER 21. FEDERAL INSURANCE CONTRIBUTIONS ACT > SUBCHAPTER A. TAX ON EMPLOYEES

§ 3102. Deduction of tax from wages.

(a) Requirement. The tax imposed by section 3101 [*26 USCS § 3101*] shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(B) of section 3121(a) [*26 USCS § 3121(a)*] is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than the applicable dollar threshold (as defined in section 3121(x) [*26 USCS § 3121(x)*]) for such year; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(C) or (10) of section 3121(a) [*26 USCS § 3121(a)*] is applicable may deduct an amount equivalent to such tax from any such payments of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $ 100; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) [*26 USCS § 3121(a)*] is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $ 150; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) [*26 USCS § 6053(a)*] to which paragraph (12)(B) of section 3121(a) [*26 USCS § 3121(a)*] is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $ 20.

(b) Indemnification of employer. Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

(c) Special rule for tips.

(1) In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a) [*26 USCS § 6053(a)*], and only to the extent that collection can be made by the employer, at or after the time such statement is so furnished and before the close of the 10th day following the calendar month (or, if paragraph (3) applies, the 30th day following the year) in which the tips were deemed paid, by deducting the amount of the tax from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) as are under control of the employer.

(2) If the tax imposed by section 3101 [*26 USCS § 3101*], with respect to tips which are included in written statements furnished in any month to the employer pursuant to section 6053(a) [*26 USCS § 6053(a)*], exceeds the wages of the employee (excluding tips) from which the employer is required to collect the tax under paragraph (1), the employee may furnish to the employer on or before the 10th day of the following month (or, if paragraph (3) applies, on or before the 30th day of the following year) an amount of money equal to the amount of the excess.

(3) The Secretary may, under regulations prescribed by him, authorize employers--

(A)to estimate the amount of tips that will be reported by the employee pursuant to section 6053(a) [*26 USCS § 6053(a)*] in any calendar year,

(B)to determine the amount to be deducted upon each payment of wages (exclusive of tips) during such year as if the tips so estimated constituted the actual tips so reported, and

(C)to deduct upon any payment of wages (other than tips, but including funds turned over by the employee to the employer pursuant to paragraph (2)) to such employee during such year (and within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted upon such wages of the employee during the year to the amount required to be deducted in respect of tips included in written statements furnished to the employer during the year.

(4) If the tax imposed by section 3101 [*26 USCS § 3101*] with respect to tips which constitute wages exceeds the portion of such tax which can be collected by the employer from the wages of the employee pursuant to paragraph (1) or paragraph (3), such excess shall be paid by the employee.

(d) Special rule for certain taxable group-term life insurance benefits.

(1) In general. In the case of any payment for group-term life insurance to which this subsection applies--

(A)subsection (a) shall not apply,

(B)the employer shall separately include on the statement required under section 6051 [*26 USCS § 6051*]--

(i)the portion of the wages which consists of payments for group-term life insurance to which this subsection applies, and

(ii)the amount of the tax imposed by section 3101 [*26 USCS § 3101*] on such payments, and

(C)the tax imposed by section 3101 [*26 USCS § 3101*] on such payments shall be paid by the employee.

(2) Benefits to which subsection applies. This subsection shall apply to any payment for group-term life insurance to the extent--

(A)such payment constitutes wages, and

(B)such payment is for coverage for periods during which an employment relationship no longer exists between the employee and the employer.

(e) Special rule for certain transferred Federal employees. In the case of any payments of wages for service performed in the employ of an international organization pursuant to a transfer to which the provisions of section 3121(y) [*26 USCS § 3121(y)*] are applicable--

(1)subsection (a) shall not apply,

(2)the head of the Federal agency from which the transfer was made shall separately include on the statement required under section 6051 [*26 USCS § 6051*]--

(A)the amount determined to be the amount of the wages for such service, and

(B)the amount of the tax imposed by section 3101 [*26 USCS § 3101*] on such payments, and

(3)the tax imposed by section 3101 [*26 USCS § 3101*] on such payments shall be paid by the employee.

(f) Special rules for additional tax.

(1) In general. In the case of any tax imposed by section 3101(b)(2) [*26 USCS § 3101(b)(2)*], subsection (a) shall only apply to the extent to which the taxpayer receives wages from the employer in excess of $ 200,000, and the employer may disregard the amount of wages received by such taxpayer's spouse.

(2) Collection of amounts not withheld. To the extent that the amount of any tax imposed by section 3101(b)(2) [*26 USCS § 3101(b)(2)*] is not collected by the employer, such tax shall be paid by the employee.

(3) Tax paid by recipient. If an employer, in violation of this chapter, fails to deduct and withhold the tax imposed by section 3101(b)(2) [*26 USCS § 3101(b)(2)*] and thereafter the tax is paid by the employee, the tax so required to be deducted and withheld shall not be collected from the employer, but this paragraph shall in no case relieve the employer from liability for any penalties or additions to tax otherwise applicable in respect of such failure to deduct and withhold.

History

(Aug. 16, 1954, ch 736, 68A Stat. 415; Sept. 1, 1954, ch 1206, Title II, § 205A,*68 Stat. 1093*; Aug. 1, 1956, ch 836, Title II, § 201(h)(3), *70 Stat. 841*; July 30, 1965, *P.L. 89-97*, Title III, § 313(c)(1), (2), *79 Stat. 382*, 383; Oct. 4, 1976, *P.L. 94-455*, Title XIX, § 1906(b)(13)(A), *90 Stat. 1834*; Dec. 20, 1977, *P.L. 95-216*, Title III, § 355(a), (b), *91 Stat. 1555*; *P.L. 101-508*, Title V, § 5124(a), Nov. 5, 1990, *104 Stat. 1388*-284; *P.L. 103-296*, Title III, § 319(a)(3), Aug. 15, 1994, *108 Stat. 1534*; *P.L. 103-387*, § 2(a)(1)(D), Oct. 22, 1994, *108 Stat. 4072*; March 2, 2004, *P.L. 108-203*, Title IV, Subtitle C, § 424(b), *118 Stat. 536*; March 23, 2010, *P.L. 111-148*, Title IX, Subtitle A, § 9015(a)(2), *124 Stat. 871*.)

Annotations

Notes

Amendments:

In 2010 , *P.L. 111-148*, Sec. 9015(a)(2) (applicable with respect to remuneration received, and taxable years beginning, after 12/31/2012, as provided by Sec. 9015(c) of *P.L. 111-148*, which appears as *26 USCS § 164* note), added subsec. (f).

In 2004 , *P.L. 108-203*, Sec. 424(b), amended subsec. (a) by deleting "and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis" following "$ 150".

In 1994 , *P.L. 103-387*, Sec. 2(a)(1)(D) (applicable to remuneration paid after 12/31/93, as provided by § 2(a)(3)(A) of such Act, which appears as a note to this section), in subsec. (a), substituted "calendar year" for "calendar quarter" preceding "pays to an employee" and "is less than", and substituted "the applicable dollar threshold (as defined in section 3121(x)) for such year" for "$ 50".

P.L. 103-296, Sec. 319(a)(3) (applicable with respect to service performed after the calendar quarter following the calendar quarter in which enactment occurs, as provided by Sec. 319(c) of such Act, which appears as *26 USCS § 1402* note), added subsec. (e).

In 1990 , *P.L. 101-508*, Sec. 5124(a), added subsec. (d), effective for coverage provided after 12/31/90.

In 1982 , *P.L. 97-248*, Sec. 269(c)(3), of this Act is reproduced in note following Code Sec. 3401.

In 1978 , *P.L. 95-600*, Sec. 530, provides the rules regarding individuals as employees for purposes of the employment taxes. Sec. 530 of *P.L. 95-600* is reproduced in the note following Code Sec. 3401.

In 1977 , *P.L. 95-216*, Sec. 355(a), deleted "or (C) or (10)" after "paragraph (7)(B)" in subsec. (a), and added "and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (7)(C) or (1) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by

26 USCS § 3402

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE C. EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX > CHAPTER 24. COLLECTION OF INCOME TAX AT SOURCE > SUBCHAPTER A. WITHHOLDING FROM WAGES

§ 3402. Income tax collected at source.

(a) Requirement of withholding.

(1) In general. Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. Any tables or procedures prescribed under this paragraph shall--

(A)apply with respect to the amount of wages paid during such periods as the Secretary may prescribe, and

(B)be in such form, and provide for such amounts to be deducted and withheld, as the Secretary determines to be most appropriate to carry out the purposes of this chapter [*26 USCS §§ 3401* et seq.] and to reflect the provisions of chapter 1 [*26 USCS §§ 1* et seq.] applicable to such periods.

(2) Amount of wages. For purposes of applying tables or procedures prescribed under paragraph (1), the term "the amount of wages" means the amount by which the wages exceed the taxpayer's withholding allowance, prorated to the payroll period.

(b) Percentage method of withholding.

(1) If wages are paid with respect to a period which is not a payroll period, the withholding allowance allowable with respect to each payment of such wages shall be the allowance allowed for a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(2) In any case in which wages are paid by an employer without regard to any payroll period or other period, the withholding allowance allowable with respect to each payment of such wages shall be the allowance allowed for a miscellaneous payroll period containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(3) In any case in which the period, or the time described in paragraph (2), in respect of any wages is less than one week, the Secretary, under regulations prescribed by him, may authorize an employer to compute the tax to be deducted and withheld as if the aggregate of the wages paid to the employee during the calendar week were paid for a weekly payroll period.

(4) In determining the amount to be deducted and withheld under this subsection, the wages may, at the election of the employer, be computed to the nearest dollar.

(c) Wage bracket withholding.

(1) At the election of the employer with respect to any employee, the employer shall deduct and withhold upon the wages paid to such employee a tax (in lieu of the tax required to be deducted and withheld under subsection (a)) determined in accordance with tables prescribed by the Secretary in accordance with paragraph (6).

(2) If wages are paid with respect to a period which is not a payroll period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days (including Sundays and holidays) equal to the number of days in the period with respect to which such wages are paid.

(3) In any case in which wages are paid by an employer without regard to any payroll period or other period, the amount to be deducted and withheld shall be that applicable in the case of a miscellaneous payroll period containing a number of days equal to the number of days (including Sundays and holidays) which have elapsed since the date of the last payment of such wages by such employer during the calendar year, or the date of commencement of employment with such employer during such year, or January 1 of such year, whichever is the later.

(4) In any case in which the period, or the time described in paragraph (3), in respect of any wages is less than one week, the Secretary, under regulations prescribed by him, may authorize an employer to determine the amount to be deducted and withheld under the tables applicable in the case of a weekly payroll period, in which case the aggregate of the wages paid to the employee during the calendar week shall be considered the weekly wages.

(5) If the wages exceed the highest wage bracket, in determining the amount to be deducted and withheld under this subsection, the wages may, at the election of the employer, be computed to the nearest dollar.

(6) In the case of wages paid after December 31, 1969, the amount deducted and withheld under paragraph (1) shall be determined in accordance with tables prescribed by the Secretary. In the tables so prescribed, the amounts set forth as amounts of wages and amounts of income tax to be deducted and withheld shall be computed on the basis of table for an annual payroll period prescribed pursuant to subsection (a).

(d) Tax paid by recipient. If the employer, in violation of the provisions of this chapter [*26 USCS §§ 3401* et seq.], fails to deduct and withhold the tax under this chapter [*26 USCS §§ 3401* et seq.], and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer; but this subsection shall in no case relieve the employer from liability for any penalties or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

(e) Included and excluded wages. If the remuneration paid by an employer to an employee for services performed during one-half or more of any payroll period of not more than 31 consecutive days constitutes wages, all the remuneration paid by such employer to such employee for such period shall be deemed to be wages; but if the remuneration paid by an employer to an employee for services performed during more than one-half of any such payroll period does not constitute wages, then none of the remuneration paid by such employer to such employee for such period shall be deemed to be wages.

(f) Withholding allowance.

(1) In general. Under rules determined by the Secretary, an employee receiving wages shall on any day be entitled to a withholding allowance determined based on--

(A)whether the employee is an individual for whom a deduction is allowable with respect to another taxpayer under section 151 [*26 USCS § 151*];

(B)if the employee is married, whether the employee's spouse is entitled to an allowance, or would be so entitled if such spouse were an employee receiving wages, under subparagraph (A) or (D), but only if such spouse does not have in effect a withholding allowance certificate claiming such allowance;

(C)the number of individuals with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable a credit under section 24(a) [*26*

USCS § 24(a)] for the taxable year under subtitle A [*26 USCS §§ 1* et seq.] in respect of which amounts deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] in the calendar year in which such day falls are allowed as a credit;

(D)any additional amounts to which the employee elects to take into account under subsection (m), but only if the employee's spouse does not have in effect a withholding allowance certificate making such an election;

(E)the standard deduction allowable to such employee (one-half of such standard deduction in the case of an employee who is married (as determined under section 7703 [*26 USCS § 7703*]) and whose spouse is an employee receiving wages subject to withholding); and

(F)whether the employee has withholding allowance certificates in effect with respect to more than 1 employer.

(2) Allowance certificates.

(A) On commencement of employment. On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding allowance certificate relating to the withholding allowance claimed by the employee, which shall in no event exceed the amount to which the employee is entitled.

(B) Change of status. If, on any day during the calendar year, an employee's withholding allowance is in excess of the withholding allowance to which the employee would be entitled had the employee submitted a true and accurate withholding allowance certificate to the employer on that day, the employee shall within 10 days thereafter furnish the employer with a new withholding allowance certificate. If, on any day during the calendar year, an employee's withholding allowance is greater than the withholding allowance claimed, the employee may furnish the employer with a new withholding allowance certificate relating to the withholding allowance to which the employee is so entitled, which shall in no event exceed the amount to which the employee is entitled on such day.

(C) Change of status which affects next calendar year. If on any day during the calendar year the withholding allowance to which the employee will be, or may reasonably be expected to be, entitled at the beginning of the employee's next taxable year under subtitle A is different from the allowance to which the employee is entitled on such day, the employee shall, in such cases and at such times as the Secretary shall by regulations prescribe, furnish the employer with a withholding allowance certificate relating to the withholding allowance which the employee claims with respect to such next taxable year, which shall in no event exceed the withholding allowance to which the employee will be, or may reasonably be expected to be, so entitled.

(3) When certificate takes effect.

(A) First certificate furnished. A withholding allowance certificate furnished the employer in cases in which no previous such certificate is in effect shall take effect as of the beginning of the first payroll period ending, or the first payment of wages made without regard to a payroll period, on or after the date on which such certificate is so furnished.

(B) Furnished to take place of existing certificate.

(i) In general. Except as provided in clauses (ii) and (iii), a withholding allowance certificate furnished to the employer in cases in which a previous such certificate is in effect shall take effect as of the beginning of the 1st payroll period ending (or the 1st payment of wages made without regard to a payroll period) on or after the 30th day after the day on which such certificate is so furnished.

(ii) Employer may elect earlier effective date. At the election of the employer, a certificate described in clause (i) may be made effective beginning with any payment of wages made on or after the day on which the certificate is so furnished and before the 30th day referred to in clause (i).

(iii) Change of status which affects next year. Any certificate furnished pursuant to paragraph (2)(C) shall not take effect, and may not be made effective, with respect to any payment of wages made in the calendar year in which the certificate is furnished.

(4) Period during which certificate remains in effect. A withholding allowance certificate which takes effect under this subsection, or which on December 31, 1954, was in effect under the corresponding subsection of prior law, shall continue in effect with respect to the employer until another such certificate takes effect under this subsection.

(5) Form and contents of certificate. Withholding allowance certificates shall be in such form and contain such information as the Secretary may by regulations prescribe.

(6) Exemption of certain nonresident aliens. Notwithstanding the provisions of paragraph (1), a nonresident alien individual (other than an individual described in section 3401(a)(6)(A) or (B) [*26 USCS § 3401(a)(6)(A)* or (B)]) shall be entitled to only one withholding exemption.

(7) Allowance where certificate with another employer is in effect. If a withholding allowance certificate is in effect with respect to one employer, an employee shall not be entitled under a certificate in effect with any other employer to any withholding allowance which he has claimed under such first certificate.

(g) Overlapping pay periods, and payment by agent or fiduciary. If a payment of wages is made to an employee by an employer--

(1)with respect to a payroll period or other period, any part of which is included in a payroll period or other period with respect to which wages are also paid to such employee by such employer, or

(2)without regard to any payroll period or other period, but on or prior to the expiration of a payroll period or other period with respect to which wages are also paid to such employee by such employer, or

(3)with respect to a period beginning in one and ending in another calendar year, or

(4)through an agent, fiduciary, or other person who also has the control, receipt, custody, or disposal of, or pays, the wages payable by another employer to such employee,

the manner of withholding and the amount to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] shall be determined in accordance with regulations prescribed by the Secretary under which the withholding allowance allowed to the employee in any calendar year shall approximate the withholding allowance allowable with respect to an annual payroll period.

(h) Alternative methods of computing amount to be withheld. The Secretary may, under regulations prescribed by him, authorize--

(1) Withholding on basis of average wages. An employer--

(A)to estimate the wages which will be paid to any employee in any quarter of the calendar year,

(B)to determine the amount to be deducted and withheld upon each payment of wages to such employee during such quarter as if the appropriate average of the wages so estimated constituted the actual wages paid, and

(C)to deduct and withhold upon any payment of wages to such employee during such quarter (and, in the case of tips referred to in subsection (k), within 30 days thereafter) such amount as may be necessary to adjust the amount actually deducted and withheld upon the wages of such employee during such quarter to the amount required to be deducted and withheld during such quarter without regard to this subsection.

(2) Withholding on basis of annualized wages. An employer to determine the amount of tax to be deducted and withheld upon a payment of wages to an employee for a payroll period by--

(A)multiplying the amount of an employee's wages for a payroll period by the number of such payroll periods in the calendar year,

(B)determining the amount of tax which would be required to be deducted and withheld upon the amount determined under subparagraph (A) if such amount constituted the actual wages for the calendar year and the payroll period of the employee were an annual payroll period, and

(C)dividing the amount of tax determined under subparagraph (B) by the number of payroll periods (described in subparagraph (A)) in the calendar year.

(3) Withholding on basis of cumulative wages. An employer, in the case of any employee who requests to have the amount of tax to be withheld from his wages computed on the basis of his cumulative wages, to--

(A)add the amount of the wages to be paid to the employee for the payroll period to the total amount of wages paid by the employer to the employee during the calendar year,

(B)divide the aggregate amount of wages computed under subparagraph (A) by the number of payroll periods to which such aggregate amount of wages relates,

(C)compute the total amount of tax that would have been required to be deducted and withheld under subsection (a) if the average amount of wages (as computed under subparagraph (B)) had been paid to the employee for the number of payroll periods to which the aggregate amount of wages (computed under subparagraph (A)) relates,

(D)determine the excess, if any, of the amount of tax computed under subparagraph (C) over the total amount of tax deducted and withheld by the employer from wages paid to the employee during the calendar year, and

(E)deduct and withhold upon the payment of wages (referred to in subparagraph (A)) to the employee an amount equal to the excess (if any) computed under subparagraph (D).

(4) Other methods. An employer to determine the amount of tax to be deducted and withheld upon the wages paid to an employee by any other method which will require the employer to deduct and withhold upon such wages substantially the same amount as would be required to be deducted and withheld by applying subsection (a) or (c), either with respect to a payroll period or with respect to the entire taxable year.

(i) Changes in withholding.

(1) In general. The Secretary may by regulations provide for increases in the amount of withholding otherwise required under this section in cases where the employee requests such changes.

(2) Treatment as tax. Any increased withholding under paragraph (1) shall for all purposes be considered tax required to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.].

(j) Noncash remuneration to retail commission salesman. In the case of remuneration paid in any medium other than cash for services performed by an individual as a retail salesman for a person, where the service performed by such individual for such person is ordinarily performed for remuneration solely by way of cash commission an employer shall not be required to deduct or withhold any tax under this subchapter [*26 USCS §§ 3401* et seq.] with respect to such remuneration, provided that such employer files with the Secretary such information with respect to such remuneration as the Secretary may by regulation prescribe.

(k) Tips. In the case of tips which constitute wages, subsection (a) shall be applicable only to such tips as are included in a written statement furnished to the employer pursuant to section 6053(a) [*26 USCS § 6053(a)*], and only to the extent that the tax can be deducted and withheld by the employer, at or after the time such statement is so furnished and before the close of the calendar year in which such statement is furnished, from such wages of the employee (excluding tips, but including funds turned over by the employee to the employer for the purpose of such deduction and withholding) as are under the control of the employer; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section

6053(a) [*26 USCS § 6053(a)*] to which paragraph (16)(B) of section 3401(a) [*26 USCS § 3401(a)*] is applicable may deduct and withhold the tax with respect to such tips from any wages of the employee (excluding tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $ 20. Such tax shall not at any time be deducted and withheld in an amount which exceeds the aggregate of such wages and funds (including funds turned over under section 3102(c)(2) [*26 USCS § 3102(c)(2)*] or *section 3202(c)(2)* [*26 USCS § 3202(c)(2)*]) minus any tax required by section 3102(a) [*26 USCS § 3102(a)*] or *section 3202(a)* [*26 USCS § 3202(a)*] to be collected from such wages and funds.

(l) Determination and disclosure of marital status.

(1) Determination of status by employer. For purposes of applying the tables in subsections (a) and (c) to a payment of wages, the employer shall treat the employee as a single person unless there is in effect with respect to such payment of wages a withholding allowance certificate furnished to the employer by the employee after the date of the enactment of this subsection [enacted March 15, 1966] indicating that the employee is married.

(2) Disclosure of status by employee. An employee shall be entitled to furnish the employer with a withholding allowance certificate indicating he is married only if, on the day of such furnishing, he is married (determined with the application of the rules in paragraph (3)). An employee whose marital status changes from married to single shall, at such time as the Secretary may by regulations prescribe, furnish the employer with a new withholding allowance certificate.

(3) Determination of marital status. For purposes of paragraph (2), an employee shall on any day be considered--

(A)as not married, if (i) he is legally separated from his spouse under a decree of divorce or separate maintenance, or (ii) either he or his spouse is, or on any preceding day within the calendar year was, a nonresident alien; or

(B)as married, if (i) his spouse (other than a spouse referred to in subparagraph (A)) died within the portion of his taxable year which precedes such day, or (ii) his spouse died during one of the two taxable years immediately preceding the current taxable year and, on the basis of facts existing at the beginning of such day, the employee reasonably expects, at the close of his taxable year, to be a surviving spouse (as defined in section 2(a)).

(m) Withholding allowances. Under regulations prescribed by the Secretary, an employee shall be entitled to an additional withholding allowance or additional reductions in withholding under this subsection. In determining the additional withholding allowance or the amount of additional reductions in withholding under this subsection, the employee may take into account (to the extent and in the manner provided by such regulations)--

(1)estimated itemized deductions allowable under chapter 1 [*26 USCS §§ 1* et seq.] and the estimated deduction allowed under section 199A [*26 USCS § 199A*] (other than the deductions referred to in section 151 [*26 USCS § 151*] and other than the deductions required to be taken into account in determining adjusted gross income under section 62(a) [*26 USCS § 62(a)*]),

(2)estimated tax credits allowable under chapter 1 [*26 USCS §§ 1* et seq.], and

(3)such additional deductions (including the additional standard deduction under section 63(c)(3) [*26 USCS § 63(c)(3)*] for the aged and blind) and other items as may be specified by the Secretary in regulations.

(n) Employees incurring no income tax liability. Notwithstanding any other provision of this section, an employer shall not be required to deduct and withhold any tax under this chapter [*26 USCS §§ 3401* et seq.] upon a payment of wages to an employee if there is in effect with respect to such payment a withholding allowance certificate (in such form and containing such other information as the Secretary may prescribe) furnished to the employer by the employee certifying that the employee--

(1)incurred no liability for income tax imposed under subtitle A [*26 USCS §§ 1* et seq.] for his preceding taxable year, and

(2)anticipates that he will incur no liability for income tax imposed under subtitle A [*26 USCS §§ 1* et seq.] for his current taxable year.

The Secretary shall by regulations provide for the coordination of the provisions of this subsection with the provisions of subsection (f).

(o) Extension of withholding to certain payments other than wages.

(1) General rule. For purposes of this chapter [*26 USCS §§ 3401* et seq.] (and so much of subtitle F [*26 USCS §§ 6001* et seq.] as relates to this chapter [*26 USCS §§ 3401* et seq.])--

(A)any supplemental unemployment compensation benefit paid to an individual,

(B)any payment of an annuity to an individual, if at the time the payment is made a request that such annuity be subject to withholding under this chapter [*26 USCS §§ 3401* et seq.] is in effect, and

(C)any payment to an individual of sick pay which does not constitute wages (determined without regard to this subsection), if at the time the payment is made a request that such sick pay be subject to withholding under this chapter [*26 USCS §§ 3401* et seq.] is in effect,shall be treated as if it were a payment of wages by an employer to an employee for a payroll period.

(2) Definitions.

(A) Supplemental unemployment compensation benefits. For purposes of paragraph (1), the term "supplemental unemployment compensation benefits" means amounts which are paid to an employee, pursuant to a plan to which the employer is a party, because of an employee's involuntary separation from employment (whether or not such separation is temporary), resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions, but only to the extent such benefits are includible in the employee's gross income.

(B) Annuity. For purposes of this subsection, the term "annuity" means any amount paid to an individual as a pension or annuity.

(C) Sick pay. For purposes of this subsection, the term "sick pay" means any amount which--

(i)is paid to an employee pursuant to a plan to which the employer is a party, and

(ii)constitutes remuneration or a payment in lieu of remuneration for any period during which the employee is temporarily absent from work on account of sickness or personal injuries.

(3) Amount withheld from annuity payments or sick pay. If a payee makes a request that an annuity or any sick pay be subject to withholding under this chapter [*26 USCS §§ 3401* et seq.], the amount to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] from any payment to which such request applies shall be an amount (not less than a minimum amount determined under regulations prescribed by the Secretary) specified by the payee in such request. The amount deducted and withheld with respect to a payment which is greater or less than a full payment shall bear the same relation to the specified amount as such payment bears to a full payment.

(4) Request for withholding. A request that an annuity or any sick pay be subject to withholding under this chapter [*26 USCS §§ 3401* et seq.]--

(A)shall be made by the payee in writing to the person making the payments and shall contain the social security number of the payee,

(B)shall specify the amount to be deducted and withheld from each full payment, and

(C)shall take effect--

(i)in the case of sick pay, with respect to payments made more than 7 days after the date on which such request is furnished to the payor, or

(ii)in the case of an annuity, at such time (after the date on which such request is furnished to the payor) as the Secretary shall by regulations prescribe.Such a request may be changed or terminated by furnishing to the person making the payments a written statement of change or termination which shall take effect in the same manner as provided in subparagraph (C). At the election of the payor, any such request (or statement of change or revocation) may take effect earlier than as provided in subparagraph (C).

(5) Special rule for sick pay paid pursuant to certain collective-bargaining agreements. In the case of any sick pay paid pursuant to a collective-bargaining agreement between employee representatives and one or more employers which contains a provision specifying that this paragraph is to apply to sick pay paid pursuant to such agreement and contains a provision for determining the amount to be deducted and withheld from each payment of such sick pay--

(A)the requirement of paragraph (1)(C) that a request for withholding be in effect shall not apply, and

(B)except as provided in subsection (n), the amounts to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] shall be determined in accordance with such agreement.The preceding sentence shall not apply with respect to sick pay paid pursuant to any agreement to any individual unless the social security number of such individual is furnished to the payor and the payor is furnished with such information as is necessary to determine whether the payment is pursuant to the agreement and to determine the amount to be deducted and withheld.

(6) Coordination with withholding on designated distributions under section 3405. This subsection shall not apply to any amount which is a designated distribution (within the meaning of section 3405(e)(1) [*26 USCS § 3405(e)(1)*]).

(p) Voluntary withholding agreements.

(1) Certain federal payments.

(A) In general. If, at the time a specified Federal payment is made to any person, a request by such person is in effect that such payment be subject to withholding under this chapter [*26 USCS §§ 3401* et seq.], then for purposes of this chapter [*26 USCS §§ 3401* et seq.] and so much of subtitle F [*26 USCS §§ 6001* et seq.] as relates to this chapter [*26 USCS §§ 3401* et seq.], such payment shall be treated as if it were a payment of wages by an employer to an employee.

(B) Amount withheld. The amount to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] from any payment to which any request under subparagraph (A) applies shall be an amount equal to the percentage of such payment specified in such request. Such a request shall apply to any payment only if the percentage specified is 7 percent, any percentage applicable to any of the 3 lowest income brackets in the table under section 1(c), or such other percentage as is permitted under regulations prescribed by the Secretary.

(C) Specified federal payments. For purposes of this paragraph, the term "specified Federal payment" means--

(i)any payment of a social security benefit (as defined in section 86(d) [*26 USCS § 86(d)*]),

(ii)any payment referred to in the second sentence of section 451(d) [*26 USCS § 451(d)*] which is treated as insurance proceeds,

(iii)any amount which is includible in gross income under section 77(a) [*26 USCS § 77(a)*], and

(iv)any other payment made pursuant to Federal law which is specified by the Secretary for purposes of this paragraph.

(D) Requests for withholding. Rules similar to the rules that apply to annuities under subsection (o)(4) shall apply to requests under this paragraph and paragraph (2).

(2) Voluntary withholding on unemployment benefits. If, at the time a payment of unemployment compensation (as defined in section 85(b) [*26 USCS § 85(b)*]) is made to any person, a request by such person is in effect that such payment be subject to withholding under this chapter [*26 USCS §§ 3401* et seq.], then for purposes of this chapter [*26 USCS §§ 3401* et seq.] and so much of subtitle F [*26 USCS §§ 6001* et seq.] as relates to this chapter [*26 USCS §§ 3401* et seq.], such payment shall be treated as if it were a payment of wages by an employer to an employee. The amount to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] from any payment to which any request under this paragraph applies shall be an amount equal to 10 percent of such payment.

(3) Authority for other voluntary withholding. The Secretary is authorized by regulations to provide for withholding--

(A)from remuneration for services performed by an employee for the employee's employer which (without regard to this paragraph) does not constitute wages, and

(B)from any other type of payment with respect to which the Secretary finds that withholding would be appropriate under the provisions of this chapter [*26 USCS §§ 3401* et seq.],if the employer and employee, or the person making and the person receiving such other type of payment, agree to such withholding. Such agreement shall be in such form and manner as the Secretary may by regulations prescribe. For purposes of this chapter [*26 USCS §§ 3401* et seq.] (and so much of subtitle F [*26 USCS §§ 6001* et seq.] as relates to this chapter [*26 USCS §§ 3401* et seq.]), remuneration or other payments with respect to which such agreement is made shall be treated as if they were wages paid by an employer to an employee to the extent that such remuneration is paid or other payments are made during the period for which the agreement is in effect.

(q) Extension of withholding to certain gambling winnings.

(1) General rule. Every person, including the Government of the United States, a State, or a political subdivision thereof, or any instrumentalities of the foregoing, making any payment of winnings which are subject to withholding shall deduct and withhold from such payment a tax in an amount equal to the product of the third lowest rate of tax applicable under section 1(c) and such payment.

(2) Exemption where tax otherwise withheld. In the case of any payment of winnings which are subject to withholding made to a nonresident alien individual or a foreign corporation, the tax imposed under paragraph (1) shall not apply to any such payment subject to tax under section 1441(a) [*26 USCS § 1441(a)*] (relating to withholding on nonresident aliens) or tax under section 1442(a) [*26 USCS § 1442(a)*] (relating to withholding on foreign corporations).

(3) Winnings which are subject to withholding. For purposes of this subsection, the term "winnings which are subject to withholding" means proceeds from a wager determined in accordance with the following:

(A) In general. Except as provided in subparagraphs (B) and (C), proceeds of more than $ 5,000 from a wagering transaction, if the amount of such proceeds is at least 300 times as large as the amount wagered.

(B) State-conducted lotteries. Proceeds of more than $ 5,000 from a wager placed in a lottery conducted by an agency of a State acting under authority of State law, but only if such wager is placed with the State agency conducting such lottery, or with its authorized employees or agents.

(C) Sweepstakes, wagering pools, certain parimutuel pools, jai alai, and lotteries. Proceeds of more than $ 5,000 from--

(i)a wager placed in a sweepstakes, wagering pool, or lottery (other than a wager described in subparagraph (B)), or

(ii)a wagering transaction in a parimutuel pool with respect to horse races, dog races, or jai alai if the amount of such proceeds is at least 300 times as large as the amount wagered.

(4) Rules for determining proceeds from a wager. For purposes of this subsection--

(A)proceeds from a wager shall be determined by reducing the amount received by the amount of the wager, and

(B)proceeds which are not money shall be taken into account at their fair market value.

(5) Exemption for bingo, keno, and slot machines. The tax imposed under paragraph (1) shall not apply to winnings from a slot machine, keno, and bingo.

(6) Statement by recipient. Every person who is to receive a payment of winnings which are subject to withholding shall furnish the person making such payment a statement, made under the penalties of perjury, containing the name, address, and taxpayer identification number of the person receiving the payment and of each person entitled to any portion of such payment.

(7) Coordination with other sections. For purposes of sections 3403 and 3404 [*26 USCS §§ 3403* and *3404*] and for purposes of so much of subtitle F [*26 USCS §§ 6001* et seq.] (except section 7205 [*26 USCS § 7205*]) as relates to this chapter [*26 USCS §§ 3401* et seq.], payments to any person of winnings which are subject to withholding shall be treated as if they were wages paid by an employer to an employee.

(r) Extension of withholding to certain taxable payments of Indian casino profits.

(1) In general. Every person, including an Indian tribe, making a payment to a member of an Indian tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe shall deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax.

(2) Exception. The tax imposed by paragraph (1) shall not apply to any payment to the extent that the payment, when annualized, does not exceed an amount equal to the sum of--

(A)the basic standard deduction (as defined in section 63(c) [*26 USCS § 63(c)*]) for an individual to whom section 63(c)(2)(C) [*26 USCS § 63(c)(2)(C)*] applies, and

(B)the exemption amount (as defined in section 151(d) [*26 USCS § 151(d)*]).

(3) Annualized tax. For purposes of paragraph (1), the term "annualized tax" means, with respect to any payment, the amount of tax which would be imposed by section 1(c) [*26 USCS § 1(c)*] (determined without regard to any rate of tax in excess of the fourth lowest rate of tax applicable under section 1(c) [*26 USCS § 1(c)*]) on an amount of taxable income equal to the excess of--

(A)the annualized amount of such payment, over

(B)the amount determined under paragraph (2).

(4) Classes of gaming activities, etc. For purposes of this subsection, terms used in paragraph (1) which are defined in section 4 of the Indian Gaming Regulatory Act (*25 U.S.C. 2701* et seq.), as in effect on the date of the enactment of this subsection [enacted Dec. 8, 1994], shall have the respective meanings given such terms by such section.

(5) Annualization. Payments shall be placed on an annualized basis under regulations prescribed by the Secretary.

(6) Alternate withholding procedures. At the election of an Indian tribe, the tax imposed by this subsection on any payment made by such tribe shall be determined in accordance with such tables or computational procedures as may be specified in regulations prescribed by the Secretary (in lieu of in accordance with paragraphs (2) and (3)).

(7) Coordination with other sections. For purposes of this chapter [*26 USCS §§ 3401* et seq.] and so much of subtitle F [*26 USCS §§ 6001* et seq.] as relates to this chapter [*26 USCS §§ 3401* et seq.], payments to any person which are subject to withholding under this subsection shall be treated as if they were wages paid by an employer to an employee.

(s) Exemption from withholding for any vehicle fringe benefit.

(1) Employer election not to withhold. The employer may elect not to deduct and withhold any tax under this chapter [*26 USCS §§ 3401* et seq.] with respect to any vehicle fringe benefit provided to any employee if such employee is notified by the employer of such election (at such time and in such manner as the Secretary shall by regulations prescribe). The preceding sentence shall not apply to any vehicle fringe benefit unless the amount of such benefit is included by the employer on a statement timely furnished under section 6051 [*26 USCS § 6051*].

(2) Employer must furnish W-2. Any vehicle fringe benefit shall be treated as wages from which amounts are required to be deducted and withheld under this chapter [*26 USCS §§ 3401* et seq.] for purposes of section 6051 [*26 USCS § 6051*].

(3) Vehicle fringe benefit. For purposes of this subsection, the term "vehicle fringe benefit" means any fringe benefit--

(A)which constitutes wages (as defined in section 3401 [*26 USCS § 3401*]), and

(B)which consists of providing a highway motor vehicle for the use of the employee.

(t) Rate of withholding for certain stock. In the case of any qualified stock (as defined in section 83(i)(2) [*26 USCS § 83(i)(2)*]) with respect to which an election is made under section 83(i) [*26 USCS § 83(i)*]--

(1)the rate of tax under subsection (a) shall not be less than the maximum rate of tax in effect under section 1 [*26 USCS § 1*], and

(2)such stock shall be treated for purposes of section 3501(b) [*26 USCS § 3501(b)*] in the same manner as a non-cash fringe benefit.

History

(Aug. 16, 1954, ch 736, 68A Stat. 457; Aug. 9, 1955, ch 666, § 2,*69 Stat. 605*; Sept. 21, 1961, *P.L. 87-256*, § 110(g)(2), *75 Stat. 537*; Feb. 26, 1964, *P.L. 88-272*, Title III, § 302(a), (b), *78 Stat. 140*; July 30, 1965, *P.L. 89-97*, Title III, § 313(d)(3)-(5), *79 Stat. 384*; Sept. 29, 1965, *P.L. 89-212*, § 2(c), *79 Stat. 859*; March 15, 1966, *P.L. 89-368*, Title I, § 101(a)-(e)(3), *80 Stat. 38*-61; June 28, 1968, *P.L. 90-364*, Title I, § 102(c), *82 Stat. 256*; June 30, 1969, *P.L. 91-36*, § 2(a), *83 Stat. 42*; Aug. 7, 1969, *P.L. 91-53*, § 6(a), *83 Stat. 96*; Dec. 30, 1969, *P.L. 91-172*, Title VIII, § 805(a)-(e), (f)(1), (g), *83 Stat. 686*, 704-708; Dec. 10, 1971, *P.L. 92-178*, Title II, § 208(a), (b)(1), (c)-(h)(1), *85 Stat. 512*-517; March 29, 1975, *P.L. 94-12*, Title II, §§ 202(b), 205, *89 Stat. 29*, 32; Dec. 23, 1975, *P.L. 94-164*, §§ 2(b)(2), 5(a)(1), *89 Stat. 971*, 975; June 30, 1976, *P.L. 94-331*, § 3(a)(1), *90 Stat. 782*; Sept. 3, 1976, *P.L. 94-396*, § 2(a)(1), *90 Stat. 1201*; Sept. 17, 1976, *P.L. 94-414*, § 3(a)(1), *90 Stat. 1273*; Oct. 4, 1976, *P.L. 94-455*, Title IV, § 401(d), Title V, §§ 502(b), 504(c)(3), Title XII, § 1207(d), Title XIX, §§ 1903(a)(17), 1906(b)(13)(A), *90 Stat. 1557*, 1559, 1566, 1705, 1810, 1834; May 23, 1977, *P.L. 95-30*, Title I, § 105, Title IV, § 405(a), *91 Stat. 140*, 156; Nov. 6, 1978, *P.L. 95-600*, Title I, §§ 101(e), 102(c), Title VI, § 601(b)(2), *92 Stat. 2770*, 2771, 2896; Dec. 24, 1980, *P.L. 96-601*, § 4(a)-(d), *94 Stat. 3496*, 3497; Aug. 13, 1981, *P.L. 97-34*, Title I, § 101(e), *95 Stat. 184*; Sept. 3, 1982, *P.L. 97-248*, Title III, §§ 317(a), 334(d), *96 Stat. 607*, 627; Aug. 5, 1983, *P.L. 98-67*, Title I, § 104(d)(3), *97 Stat. 380*; May 24, 1985, *P.L. 99-44*, § 3, *99 Stat. 77*; Oct. 22, 1986, *P.L. 99-514*, Title I, § 104(b)(15), Title XIII, §§ 1301(j)(8), 1303(b)(4), Title XV, § 1581(b), *100 Stat. 2106*, 2658, 2766; Dec. 22, 1987, *P.L. 100-203*, Title X, § 10302(a), *101 Stat. 1330*-429; Nov. 10, 1988, *P.L. 100-647*, Title I, § 1003(a)(2), *102 Stat. 3382*; Nov. 5, 1990, *P.L. 101-508*, Title XI, § 11801(a)(41), *104 Stat. 1388*-521; July 3, 1992, *P.L. 102-318*, Title V, § 522(b)(2)(D), *106 Stat. 314*; Oct. 24, 1992, *P.L. 102-486*, Title XIX, §§ 1934(a), 1942(a), *106 Stat. 3031*, 3036; Dec. 8, 1994, *P.L. 103-465*, Title VII, §§ 701(a), 702(a), *108 Stat. 4995*, 4996; June 7, 2001, *P.L. 107-16*, Title I, § 101(c)(6)-(9), *115 Stat. 43*,

[26 USCS § 6321]

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 64. COLLECTION > SUBCHAPTER C. LIEN FOR TAXES > PART II. LIENS

§ 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) 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.

History

(Aug. 16, 1954, ch 736, 68A Stat. 779.)

Annotations

Notes

Short titles:

Act Nov. 2, 1966, *P.L. 89-719*, § 1(a), *80 Stat. 1125*, provides: "This Act may be cited as the 'Federal Tax Lien Act of 1966'.". For full classification of such Act, consult USCS Tables volumes.

Case Notes

I. IN GENERAL
1. Generally
2. Constitutionality
3. Construction
II. RELATIONSHIP WITH OTHER LAWS
4. Generally
5. Determination of rights and interests in property
6. --Particular cases
7. Exemptions
8. --Particular cases
9. Seizure of property
10. Statute of limitations
11. Title 31
12. Miscellaneous
III. IMPOSITION OF LIEN
13. Generally
14. Neglect or refusal to pay

26 USCS § 6322

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 64. COLLECTION > SUBCHAPTER C. LIEN FOR TAXES > PART II. LIENS

§ 6322. Period of lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 [*26 USCS § 6321*] shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

History

(Aug. 16, 1954, ch 736, 68A Stat. 779; Nov. 2, 1966,*P.L. 89-719*, Title I, § 113(a), *80 Stat. 1146*.)

Annotations

Notes

Amendments:

In 1966 , *P.L. 89-719*, Sec. 113, added "(or a judgment against the taxpayer arising out of such liability)" after "liability for the amount so assessed" effective after 11/2/66, regardless of when a lien or a title of the U.S. arose or when the lien or interest of any other person was acquired. For a special exception included in Sec. 114 of *P.L. 89-719* see the note to Code Sec. 6323.

Case Notes

1. Construction
2. Time at which lien arises
3. --Time of assessment
4. Duration of lien
5. --Extensions of time
6. --Lapse of time
7. Miscellaneous

1. Construction

Language of predecessor to *26 USCS § 6322* is to be interpreted literally. *Filipowicz v Rothensies (1942, ED Pa) 43 F Supp 619, 28 AFTR 1455.*

26 USCS § 6323

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 64. COLLECTION > SUBCHAPTER C. LIEN FOR TAXES > PART II. LIENS

§ 6323. Validity and priority against certain persons.

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. The lien imposed by section 6321 [*26 USCS § 6321*] shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

(b) Protection for certain interests even though notice filed. Even though notice of a lien imposed by section 6321 [*26 USCS § 6321*] has been filed, such lien shall not be valid--

(1) Securities. With respect to a security (as defined in subsection (h)(4))--

(A)as against a purchaser of such security who at the time of purchase did not have actual notice or knowledge of the existence of such lien; and

(B)as against a holder of a security interest in such security who, at the time such interest came into existence, did not have actual notice or knowledge of the existence of such lien.

(2) Motor vehicles. With respect to a motor vehicle (as defined in subsection (h)(3)), as against a purchaser of such motor vehicle, if--

(A)at the time of the purchase such purchaser did not have actual notice or knowledge of the existence of such lien, and

(B)before the purchaser obtains such notice or knowledge, he has acquired possession of such motor vehicle and has not thereafter relinquished possession of such motor vehicle to the seller or his agent.

(3) Personal property purchased at retail. With respect to tangible personal property purchased at retail, as against a purchaser in the ordinary course of the seller's trade or business, unless at the time of such purchase such purchaser intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

(4) Personal property purchased in casual sale [Caution: See § 3.43 of *Rev. Proc. 2017-58* (*26 USCS § 1* note) for provision that, for calendar year 2018, a federal tax lien is not valid against certain purchasers under this paragraph that purchased personal property in a casual sale for less than $ 1,560.]. With respect to household goods, personal effects, or other tangible personal property described in section 6334(a) [*26 USCS § 6334(a)*] purchased (not for resale) in a casual sale for less than $ 1,000, as against the purchaser, but only if such purchaser does not have actual notice or knowledge (A) of the existence of such lien, or (B) that this sale is one of a series of sales.

(5) Personal property subject to possessory lien. With respect to tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of such property, as against a holder of such a lien, if such holder is, and has been, continuously in possession of such property from the time such lien arose.

(6) Real property tax and special assessment liens. With respect to real property, as against a holder of a lien upon such property, if such lien is entitled under local law to priority over security interests in such property which are prior in time, and such lien secures payment of--

(A)a tax of general application levied by any taxing authority based upon the value of such property;

(B)a special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement; or

(C)charges for utilities or public services furnished to such property by the United States, a State or political subdivision thereof, or an instrumentality of any one or more of the foregoing.

(7) Residential property subject to a mechanic's lien for certain repairs and improvements [Caution: See § 3.43 of *Rev. Proc. 2017-58* (*26 USCS § 1* note) for provision that, for calendar year 2018, a federal tax lien is not valid against a mechanic's lienor under this paragraph that repaired or improved certain residential property if the contract price with the owner is not more than $ 7,820.]. With respect to real property subject to a lien for repair or improvement of a personal residence (containing not more than four dwelling units) occupied by the owner of such residence, as against a mechanic's lienor, but only if the contract price on the contract with the owner is not more than $ 5,000.

(8) Attorneys' liens. With respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforcible against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement, except that this paragraph shall not apply to any judgment or amount in settlement of a claim or of a cause of action against the United States to the extent that the United States offsets such judgment or amount against any liability of the taxpayer to the United States.

(9) Certain insurance contracts. With respect to a life insurance, endowment, or annuity contract, as against the organization which is the insurer under such contract, at any time--

(A)before such organization had actual notice or knowledge of the existence of such lien;

(B)after such organization had such notice or knowledge, with respect to advances required to be made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge; or

(C)after satisfaction of a levy pursuant to section 6332(b) [*26 USCS § 6332(b)*], unless and until the Secretary delivers to such organization a notice, executed after the date of such satisfaction, of the existence of such lien.

(10) Deposit-secured loans. With respect to a savings deposit, share, or other account with an institution described in section 581 or 591 [*26 USCS § 581* or *591*], to the extent of any loan made by such institution without actual notice or knowledge of the existence of such lien, as against such institution, if such loan is secured by such account.

(c) Protection for certain commercial transactions financing agreements, etc.

(1) In general. To the extent provided in this subsection, even though notice of a lien imposed by section 6321 [*26 USCS § 6321*] has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing but which--

(A)is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting--

(i)a commercial transactions financing agreement,

(ii)a real property construction or improvement financing agreement, or

(iii)an obligatory disbursement agreement, and

(B)is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(2) Commercial transactions financing agreement. For purposes of this subsection--

(A) Definition. The term "commercial transactions financing agreement" means an agreement (entered into by a person in the course of his trade or business)--

(i)to make loans to the taxpayer to be secured by commercial financing security acquired by the taxpayer in the ordinary course of his trade or business, or

(ii)to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of his trade or business;but such an agreement shall be treated as coming within the term only to the extent that such loan or purchase is made before the 46th day after the date of tax lien filing or (if earlier) before the lender or purchaser had actual notice or knowledge of such tax lien filing.

(B) Limitation on Qualified Property. The term "qualified property", when used with respect to a commercial transactions financing agreement, includes only commercial financing security acquired by the taxpayer before the 46th day after the date of tax lien filing.

(C) Commercial Financing Security Defined. The term "commercial financing security" means (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory.

(D) Purchaser Treated as Acquiring Security Interest. A person who satisfies subparagraph (A) by reason of clause (ii) thereof shall be treated as having acquired a security interest in commercial financing security.

(3) Real property construction or improvement financing agreement. For purposes of this subsection--

(A) Definition. The term "real property construction or improvement financing agreement" means an agreement to make cash disbursements to finance--

(i)the construction or improvement of real property,

(ii)a contract to construct or improve real property, or

(iii)the raising or harvesting of a farm crop or the raising of livestock or other animals. For purposes of clause (iii), the furnishing of goods and services shall be treated as the disbursement of cash.

(B) Limitation on qualified property. The term "qualified property", when used with respect to a real property construction or improvement financing agreement, includes only--

(i)in the case of subparagraph (A)(i), the real property with respect to which the construction or improvement has been or is to be made,

(ii)in the case of subparagraph (A)(ii), the proceeds of the contract described therein, and

(iii)in the case of subparagraph (A)(iii), property subject to the lien imposed by section 6321 [*26 USCS § 6321*] at the time of tax lien filing and the crop or the livestock or other animals referred to in subparagraph (A)(iii).

(4) Obligatory disbursement agreement. For purposes of this subsection--

(A) Definition. The term "obligatory disbursement agreement" means an agreement (entered into by a person in the course of his trade or business) to make disbursements, but such an agreement shall be treated as coming within the term only to the extent of disbursements which are required to be made by reason of the intervention of the rights of a person other than the taxpayer.

(B) Limitation on qualified property. The term "qualified property", when used with respect to an obligatory disbursement agreement, means property subject to the lien imposed by section 6321

[*26 USCS § 6321*] at the time of tax lien filing and (to the extent that the acquisition is directly traceable to the disbursements referred to in subparagraph (A)) property acquired by the taxpayer after tax lien filing.

(C) Special rules for surety agreements. Where the obligatory disbursement agreement is an agreement ensuring the performance of a contract between the taxpayer and another person--

(i)the term "qualified property" shall be treated as also including the proceeds of the contract the performance of which was ensured, and

(ii) If the contract the performance of which was ensured was a contract to construct or improve real property, to produce goods, or to furnish services, the term "qualified property" shall be treated as also including any tangible personal property used by the taxpayer in the performance of such ensured contract.

(d)45-day period for making disbursements. Even though notice of a lien imposed by section 6321 [*26 USCS § 6321*] has been filed, such lien shall not be valid with respect to a security interest which came into existence after tax lien filing by reason of disbursements made before the 46th day after the date of tax lien filing, or (if earlier) before the person making such disbursements had actual notice or knowledge of tax lien filing, but only if such security interest--

(1)is in property (A) subject, at the time of tax lien filing, to the lien imposed by section 6321 [*26 USCS § 6321*], and (B) covered by the terms of a written agreement entered into before tax lien filing, and

(2)is protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

(e) Priority of interest and expenses. If the lien imposed by section 6321 [*26 USCS § 6321*] is not valid as against a lien or security interest, the priority of such lien or security interest shall extend to--

(1)any interest or carrying charges upon the obligation secured,

(2)the reasonable charges and expenses of an indenture trustee or agent holding the security interest for the benefit of the holder of the security interest,

(3)the reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4)the reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5)the reasonable costs of insuring payment of the obligation secured, and

(6)amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the lien so satisfied is entitled to priority over the lien imposed by section 6321 [*26 USCS § 6321*],

to the extent that, under local law, any such item has the same priority as the lien or security interest to which it relates.

(f) Place for filing notice; form.

(1) Place for filing. The notice referred to in subsection (a) shall be filed--

(A) Under state laws.

(i) Real property. In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property. In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State; or

(B) With clerk of district court. In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A); or

(C) With recorder of deeds of the District of Columbia. In the office of the Recorder of Deeds of the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(2) Situs of property subject to lien. For purposes of paragraphs (1) and (4), property shall be deemed to be situated--

(A) Real property. In the case of real property, at its physical location; or

(B) Personal property. In the case of personal property, whether tangible or intangible, at the residence of the taxpayer at the time the notice of lien is filed.For purposes of paragraph (2)(B), the residence of a corporation or partnership shall be deemed to be the place at which the principal executive office of the business is located, and the residence of a taxpayer whose residence is without the United States shall be deemed to be in the District of Columbia.

(3) Form. The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

(4) Indexing required with respect to certain real property. In the case of real property, if--

(A)under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B)there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens,then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspection of the index will reveal the existence of the lien.

(5) National filing systems. The filing of a notice of lien shall be governed solely by this title and shall not be subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system.

(g) Refiling of notice. For purposes of this section--

(1) General rule. Unless notice of lien is refiled in the manner prescribed in paragraph (2) during the required refiling period, such notice of lien shall be treated as filed on the date on which it is filed (in accordance with subsection (f)) after the expiration of such refiling period.

(2) Place for filing. A notice of lien refiled during the required refiling period shall be effective only--

(A)if--

(i)such notice of lien is refiled in the office in which the prior notice of lien was filed, and

(ii)in the case of real property, the fact of refiling is entered and recorded in an index to the extent required by subsection (f)(4); and

(B)in any case in which, 90 days or more prior to the date of a refiling of notice of lien under subparagraph (A), the Secretary received written information (in the manner prescribed in regulations issued by the Secretary) concerning a change in the taxpayer's residence, if a notice of such lien is also filed in accordance with subsection (f) in the State in which such residence is located.

(3) Required refiling period. In the case of any notice of lien, the term "required refiling period" means--

(A)the one-year period ending 30 days after the expiration of 10 years after the date of the assessment of the tax, and

(B)the one-year period ending with the expiration of 10 years after the close of the preceding required refiling period for such notice of lien.

(4) Transitional rule. Notwithstanding paragraph (3), if the assessment of the tax was made before January 1, 1962, the first required refiling period shall be the calendar year 1967.

(h) Definitions. For purposes of this section and section 6324 [*26 USCS § 6324*]--

(1) Security interest. The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

(2) Mechanic's lienor. The term "mechanic's lienor" means any person who under local law has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor, or materials furnished in connection with the construction or improvement of such property. For purposes of the preceding sentence, a person has a lien on the earliest date such lien becomes valid under local law against subsequent purchasers without actual notice, but not before he begins to furnish the services, labor, or materials.

(3) Motor vehicle. The term "motor vehicle" means a self-propelled vehicle which is registered for highway use under the laws of any State or foreign country.

(4) Security. The term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(5) Tax lien filing. The term "tax lien filing" means the filing of notice (referred to in subsection (a)) of the lien imposed by section 6321 [*26 USCS § 6321*].

(6) Purchaser. The term "purchaser" means a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice. In applying the preceding sentence for purposes of subsection (a) of this section, and for purposes of section 6324 [*26 USCS § 6324*]--

(A)a lease of property,

(B)a written executory contract to purchase or lease property,

(C)an option to purchase or lease property or any interest therein, or

(D)an option to renew or extend a lease of property,which is not a lien or security interest shall be treated as an interest in property.

(i) Special rules.

(1) Actual notice or knowledge. For purposes of this subchapter [*26 USCS §§ 6320* et seq.], an organization shall be deemed for purposes of a particular transaction to have actual notice or knowledge of any fact from the time such fact is brought to the attention of the individual conducting such transaction, and in any event from the time such fact would have been brought to such individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(2) Subrogation. Where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by section 6321 or 6324 [*26 USCS § 6321* or *6324*].

(3) Forfeitures. For purposes of this subchapter [*26 USCS §§ 6320* et seq.], a forfeiture under local law of property seized by a law enforcement agency of a State, county, or other local governmental subdivision shall relate back to the time of seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the State, county, or other local governmental subdivision in the property.

(4) Cost-of-living adjustment. In the case of notices of liens imposed by section 6321 [*26 USCS § 6321*] which are filed in any calendar year after 1998, each of the dollar amounts under paragraph (4) or (7) of subsection (b) shall be increased by an amount equal to--

(A)such dollar amount, multiplied by

(B)the cost-of-living adjustment determined under section 1(f)(3) [*26 USCS § 1(f)(3)*] for the calendar year, determined by substituting "calendar year 1996" for "calendar year 2016" in subparagraph (A)(ii) thereof.If any amount as adjusted under the preceding sentence is not a multiple of $ 10, such amount shall be rounded to the nearest multiple of $ 10.

(j) Withdrawal of notice in certain circumstances.

(1) In general. The Secretary may withdraw a notice of a lien filed under this section and this chapter [*26 USCS §§ 6301* et seq.] shall be applied as if the withdrawn notice had not been filed, if the Secretary determines that--

(A)the filing of such notice was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B)the taxpayer has entered into an agreement under section 6159 [*26 USCS § 6159*] to satisfy the tax liability for which the lien was imposed by means of installment payments, unless such agreement provides otherwise,

(C)the withdrawal of such notice will facilitate the collection of the tax liability, or

(D)with the consent of the taxpayer or the National Taxpayer Advocate, the withdrawal of such notice would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.Any such withdrawal shall be made by filing notice at the same office as the withdrawn notice. A copy of such notice of withdrawal shall be provided to the taxpayer.

(2) Notice to credit agencies, etc. Upon written request by the taxpayer with respect to whom a notice of a lien was withdrawn under paragraph (1), the Secretary shall promptly make reasonable efforts to notify credit reporting agencies, and any financial institution or creditor whose name and address is specified in such request, of the withdrawal of such notice. Any such request shall be in such form as the Secretary may prescribe.

History

26 USCS § 6325

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 64. COLLECTION > SUBCHAPTER C. LIEN FOR TAXES > PART II. LIENS

§ 6325. Release of lien or discharge of property.

(a) Release of lien. Subject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which--

(1) Liability satisfied or unenforceable. The Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or

(2) Bond accepted. There is furnished to the Secretary and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such regulations.

(b) Discharge of property.

(1) Property double the amount of the liability. Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter [26 USCS §§ 6301 et seq.] if the Secretary finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority over such lien.

(2) Part payment; interest of United States valueless. Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge of any part of the property subject to the lien if--

(A)there is paid over to the Secretary in partial satisfaction of the liability secured by the lien an amount determined by the Secretary, which shall not be less than the value, as determined by the Secretary, of the interest of the United States in the part to be so discharged, or

(B)the Secretary determines at any time that the interest of the United States in the part to be so discharged has no value.In determining the value of the interest of the United States in the part to be so discharged, the Secretary shall give consideration to the value of such part and to such liens thereon as have priority over the lien of the United States.

(3) Substitution of proceeds of sale. Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge of any part of the property subject to the lien if such part of the property is sold and, pursuant to an agreement with the Secretary, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property.

(4) Right of substitution of value.

(A) In general. At the request of the owner of any property subject to any lien imposed by this chapter [26 USCS §§ 6301 et seq.], the Secretary shall issue a certificate of discharge of such property if such owner--

(i)deposits with the Secretary an amount of money equal to the value of the interest of the United States (as determined by the Secretary) in the property; or

(ii)furnishes a bond acceptable to the Secretary in a like amount.

(B) Refund of deposit with interest and release of bond. The Secretary shall refund the amount so deposited (and shall pay interest at the overpayment rate under section 6621 [26 USCS § 6621]), and shall release such bond, to the extent that the Secretary determines that--

(i)the unsatisfied liability giving rise to the lien can be satisfied from a source other than such property; or

(ii)the value of the interest of the United States in the property is less than the Secretary's prior determination of such value.

(C) Use of deposit, etc., if action to contest lien not filed. If no action is filed under section 7426(a)(4) [26 USCS § 7426(a)(4)] within the period prescribed therefor, the Secretary shall, within 60 days after the expiration of such period--

(i)apply the amount deposited, or collect on such bond, to the extent necessary to satisfy the unsatisfied liability secured by the lien; and

(ii)refund (with interest as described in subparagraph (B)) any portion of the amount deposited which is not used to satisfy such liability.

(D) Exception. Subparagraph (A) shall not apply if the owner of the property is the person whose unsatisfied liability gave rise to the lien.

(c) Estate or gift tax. Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge of any or all of the property subject to any lien imposed by section 6324 [26 USCS § 6324] if the Secretary finds that the liability secured by such lien has been fully satisfied or provided for.

(d) Subordination of lien. Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of subordination of any lien imposed by this chapter [26 USCS §§ 6301 et seq.] upon any part of the property subject to such lien if--

(1)there is paid over to the Secretary an amount equal to the amount of the lien or interest to which the certificate subordinates the lien of the United States,

(2)the Secretary believes that the amount realizable by the United States from the property to which the certificate relates, or from any other property subject to the lien, will ultimately be increased by reason of the issuance of such certificate and that the ultimate collection of the tax liability will be facilitated by such subordination, or

(3)in the case of any lien imposed by section 6324B [26 USCS § 6324B], if the Secretary determines that the United States will be adequately secured after such subordination.

(e) Nonattachment of lien. If the Secretary determines that, because of confusion of names or otherwise, any person (other than the person against whom the tax was assessed) is or may be injured by the appearance that a notice of lien filed under section 6323 [26 USCS § 6323] refers to such person, the Secretary may issue a certificate that the lien does not attach to the property of such person.

(f) Effect of certificate.

(1) Conclusiveness. Except as provided in paragraphs (2) and (3), if a certificate is issued pursuant to this section by the Secretary and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:

(A)in the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished;

(B)in the case of a certificate of discharge, such certificate shall be conclusive that the property covered by such certificate is discharged from the lien;

(C)in the case of subordination, such certificate shall be conclusive that the lien or interest to which the lien of the United States is subordinated is superior to the lien of the United States; and

(D)in the case of a certificate of nonattachment, such certificate shall be conclusive that the lien of the United States does not attach to the property of the person referred to in such certificate.

(2) Revocation of certificate of release or nonattachment. If the Secretary determines that a certificate of release or nonattachment of a lien imposed by section 6321 [*26 USCS § 6321*] was issued erroneously or improvidently, or if a certificate of release of such lien was issued pursuant to a collateral agreement entered into in connection with a compromise under section 7122 [*26 USCS § 7122*] which has been breached, and if the period of limitation on collection after assessment has not expired, the Secretary may revoke such certificate and reinstate the lien--

(A)by mailing notice of such revocation to the person against whom the tax was assessed at his last known address, and

(B)by filing notice of such revocation in the same office in which the notice of lien to which it relates was filed (if such notice of lien had been filed).Such reinstated lien (i) shall be effective on the date notice of revocation is mailed to the taxpayer in accordance with the provisions of subparagraph (A), but not earlier than the date on which any required filing of notice of revocation is filed in accordance with the provisions of subparagraph (B), and (ii) shall have the same force and effect (as if such date), until the expiration of the period of limitation on collection after assessment, as a lien imposed by section 6321 [*26 USCS § 6321*] (relating to lien for taxes).

(3) Certificates void under certain conditions. Notwithstanding any other provision of this subtitle [*26 USCS §§ 6001* et seq.], any lien imposed by this chapter [*26 USCS §§ 6301* et seq.] shall attach to any property with respect to which a certificate of discharge has been issued if the person liable for the tax reacquires such property after such certificate has been issued.

(g) Filing of certificates and notices. If a certificate or notice issued pursuant to this section may not be filed in the office designated by State law in which the notice of lien imposed by section 6321 [*26 USCS § 6321*] is filed, such certificate or notice shall be effective if filed in the office of the clerk of the United States district court for the judicial district in which such office is situated.

(h) Cross reference. For provisions relating to bonds, see chapter 73 (sec. 7101 and following).

History

(Aug. 16, 1954, ch 736, 68A Stat. 783; Sept. 2, 1958,*P.L. 85-866*, Title I, § 77, *72 Stat. 1662*; Nov. 2, 1966, *P.L. 89-719*, Title I, § 103(a), *80 Stat. 1133*; Oct. 4, 1976, *P.L. 94-455*, Title XIX, § 1906(b)(13)(A), *90 Stat. 1834*; Nov. 6, 1978, *P.L. 95-600*, Title V, § 513(a), *92 Stat. 2883*; Sept. 3, 1982, *P.L. 97-248*, Title III, § 348(a), *96 Stat. 638*; July 22, 1998, *P.L. 105-206*, Title III, § 3106(a), *112 Stat. 732*.)

Annotations

Notes

Amendments:

26 USCS § 6331

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 64. COLLECTION > SUBCHAPTER D. SEIZURE OF PROPERTY FOR COLLECTION OF TAXES > PART II. LEVY

§ 6331. Levy and distraint.

(a) Authority of Secretary. If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334 [*26 USCS § 6334*]) belonging to such person or on which there is a lien provided in this chapter [*26 USCS §§ 6301* et seq.] for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) [*26 USCS § 3401(d)*]) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property. The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures. Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Requirement of notice before levy.

(1) In general. Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2)30-day requirement. The notice required under paragraph (1) shall be--

(A)given in person,

(B)left at the dwelling or usual place of business of such person, or

(C)sent by certified or registered mail to such person's last known address,no less than 30 days before the day of the levy.

(3) Jeopardy. Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(4) Information included with notice. The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms--

(A)the provisions of this title relating to levy and sale of property,

(B)the procedures applicable to the levy and sale of property under this title,

(C)the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,

(D)the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159 [*26 USCS § 6159*]),

(E)the provisions of this title relating to redemption of property and release of liens on property,

(F)the procedures applicable to the redemption of property and the release of a lien on property under this title, and

(G)the provisions of section 7345 [*26 USCS § 7345*] relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts pursuant to section 32101 of the FAST Act.

(e) Continuing levy on salary and wages. The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released under section 6343 [*26 USCS § 6343*].

(f) Uneconomical levy. No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) Levy on appearance date of summons.

(1) In general. No levy may be made on the property of any person on any day on which such person (or officer or employee of such person) is required to appear in response to a summons issued by the Secretary for the purpose of collecting any underpayment of tax.

(2) No application in case of jeopardy. This subsection shall not apply if the Secretary finds that the collection of tax is in jeopardy.

(h) Continuing levy on certain payments.

(1) In general. If the Secretary approves a levy under this subsection, the effect of such levy on specified payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. Notwithstanding section 6334 [*26 USCS § 6334*], such continuous levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

(2) Specified payment. For the purposes of paragraph (1), the term "specified payment" means--

(A)any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee,

(B)any payment described in paragraph (4), (7), (9), or (11) of section 6334(a) [*26 USCS § 6334*], and

(C)any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act.

(3) Increase in levy for certain payments. Paragraph (1) shall be applied by substituting "100 percent" for "15 percent" in the case of any specified payment due to a vendor of property, goods, or services sold or leased to the Federal Government and by substituting "100 percent" for "15 percent" in the case of any specified payment due to a Medicare provider or supplier under title XVIII of the Social Security Act [*42 USCS §§ 1395* et seq.].

(i) No levy during pendency of proceedings for refund of divisible tax.

(1) In general. No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid divisible tax during the pendency of any proceeding brought by such person in a proper Federal trial court for the recovery of any portion of such divisible tax which was paid by such person if--

(A)the decision in such proceeding would be res judicata with respect to such unpaid tax; or

(B)such person would be collaterally estopped from contesting such unpaid tax by reason of such proceeding.

(2) Divisible tax. For purposes of paragraph (1), the term "divisible tax" means--

(A)any tax imposed by subtitle C [*26 USCS §§ 3101* et seq.]; and

(B)the penalty imposed by section 6672 [*26 USCS § 6672*] with respect to any such tax.

(3) Exceptions.

(A) Certain unpaid taxes. This subsection shall not apply with respect to any unpaid tax if--

(i)the taxpayer files a written notice with the Secretary which waives the restriction imposed by this subsection on levy with respect to such tax; or

(ii)the Secretary finds that the collection of such tax is in jeopardy.

(B) Certain levies. This subsection shall not apply to--

(i)any levy to carry out an offset under section 6402 [*26 USCS § 6402*]; and

(ii)any levy which was first made before the date that the applicable proceeding under this subsection commenced.

(4) Limitation on collection activity; authority to enjoin collection.

(A) Limitation on collection. No proceeding in court for the collection of any unpaid tax to which paragraph (1) applies shall be begun by the Secretary during the pendency of a proceeding under such paragraph. This subparagraph shall not apply to--

(i)any counterclaim in a proceeding under such paragraph; or

(ii)any proceeding relating to a proceeding under such paragraph.

(B) Authority to enjoin. Notwithstanding section 7421(a) [*26 USCS § 7421(a)*], a levy or collection proceeding prohibited by this subsection may be enjoined (during the period such prohibition is in force) by the court in which the proceeding under paragraph (1) is brought.

(5) Suspension of statute of limitations on collection. The period of limitations under section 6502 [*26 USCS § 6502*] shall be suspended for the period during which the Secretary is prohibited under this subsection from making a levy.

(6) Pendency of proceeding. For purposes of this subsection, a proceeding is pending beginning on the date such proceeding commences and ending on the date that a final order or judgment from which an appeal may be taken is entered in such proceeding.

(j) No levy before investigation of status of property.

(1) In general. For purposes of applying the provisions of this subchapter [*26 USCS §§ 6330* et seq.], no levy may be made on any property or right to property which is to be sold under section 6335 [*26 USCS § 6335*] until a thorough investigation of the status of such property has been completed.

(2) Elements in investigation. For purposes of paragraph (1), an investigation of the status of any property shall include--

(A)a verification of the taxpayer's liability;

(B)the completion of an analysis under subsection (f);

(C)the determination that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability; and

(D)a thorough consideration of alternative collection methods.

(k) No levy while certain offers pending or installment agreement pending or in effect.

(1) Offer-in-compromise pending. No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax--

(A)during the period that an offer-in-compromise by such person under section 7122 [*26 USCS § 7122*] of such unpaid tax is pending with the Secretary; and

(B)if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending).For purposes of subparagraph (A), an offer is pending beginning on the date the Secretary accepts such offer for processing.

(2) Installment agreements. No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax--

(A)during the period that an offer by such person for an installment agreement under section 6159 [*26 USCS § 6159*] for payment of such unpaid tax is pending with the Secretary;

(B)if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);

(C)during the period that such an installment agreement for payment of such unpaid tax is in effect; and

(D)if such agreement is terminated by the Secretary, during the 30 days thereafter (and, if an appeal of such termination is filed within such 30 days, during the period that such appeal is pending).

(3) Certain rules to apply. Rules similar to the rules of--

(A)paragraphs (3) and (4) of subsection (i), and

(B)except in the case of paragraph (2)(C), paragraph (5) of subsection (i),shall apply for purposes of this subsection.

(l) Cross references.

(1) For provisions relating to jeopardy, see subchapter A of chapter 70 [*26 USCS §§ 6851* et seq.].

(2) For proceedings applicable to sale of seized property, see section 6335 [*26 USCS § 6335*].

(3) For release and notice of release of levy, see section 6343 [*26 USCS § 6343*].

History

(Aug. 16, 1954, ch 736, 68A Stat. 783; Nov. 2, 1966,*P.L. 89-719*, Title I, § 104(a), *80 Stat. 1135*; Dec. 10, 1971, *P.L. 92-178*, Title II, § 211(a), *85 Stat. 520*; Oct. 4, 1976, *P.L. 94-455*, Title XII, § 1209(d)(1), (2), (4), Title XIX, § 1906(b)(13)(A), *90 Stat. 1710*, 1711, 1834; Sept. 3, 1982, *P.L. 97-248*, Title III, § 349(a), *96 Stat. 639*; July 18, 1984, *P.L. 98-369*, Div A, Title VII, § 714(o), *98 Stat. 964*; Nov. 10, 1988, *P.L. 100-647*, Title VI, § 6236(a), (b), (d), *102 Stat. 3737*, 3739; Aug. 5, 1997, *P.L. 105-34*, Title X, § 1024(a), *111 Stat. 923*; July 22, 1998, *P.L. 105-206*, Title III, §§ 3433(a), 3444(a), 3462(b), Title VI, § 6010(f), *112 Stat. 759*, 762, 765, 814; Dec. 21, 2000, *P.L. 106-554*, § 1(a)(7) (Title III, § 313(b)(3)), *114 Stat. 2763*, 2763A-642; March 9, 2002, *P.L. 107-147*, Title IV, Subtitle B, § 416(e)(1), *116 Stat. 55*; Oct. 22, 2004, *P.L. 108-357*, Title VIII, Subtitle D, § 887(a), *118 Stat. 1641*; Nov. 21, 2011, *P.L. 112-56*, Title III, § 301(a), *125 Stat. 733*; Dec. 19, 2014, *P.L. 113-295*, Div B, Title II, § 209(a), *128 Stat. 4074*;

[26 USCS § 6343]

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 64. COLLECTION > SUBCHAPTER D. SEIZURE OF PROPERTY FOR COLLECTION OF TAXES > PART II. LEVY

§ 6343. Authority to release levy and return property.

(a) Release of levy and notice of release.

(1) In general. Under regulations prescribed by the Secretary, the Secretary shall release the levy upon all, or part of, the property or rights to property levied upon and shall promptly notify the person upon whom such levy was made (if any) that such levy has been released if--

(A)the liability for which such levy was made is satisfied or becomes unenforceable by reason of lapse of time,

(B)release of such levy will facilitate the collection of such liability,

(C)the taxpayer has entered into an agreement under section 6159 [*26 USCS § 6159*] to satisfy such liability by means of installment payments, unless such agreement provides otherwise,

(D)the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer, or

(E)the fair market value of the property exceeds such liability and release of the levy on a part of such property could be made without hindering the collection of such liability.For purposes of subparagraph (C), the Secretary is not required to release such levy if such release would jeopardize the secured creditor status of the Secretary.

(2) Expedited determination on certain business property. In the case of any tangible personal property essential in carrying on the trade or business of the taxpayer, the Secretary shall provide for an expedited determination under paragraph (1) if levy on such tangible personal property would prevent the taxpayer from carrying on such trade or business.

(3) Subsequent levy. The release of levy on any property under paragraph (1) shall not prevent any subsequent levy on such property.

(b) Return of property. If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return--

(1)the specific property levied upon,

(2)an amount of money equal to the amount of money levied upon, or

(3)an amount of money equal to the amount of money received by the United States from a sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 2 years from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) [*26 USCS § 6335(e)*] (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(c) Interest. Interest shall be allowed and paid at the overpayment rate established under section 6621 [*26 USCS § 6621*]--

(1)in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or

(2)in a case described in subsection (b)(3), from the date of the sale of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

(d) Return of property in certain cases. If--

(1)any property has been levied upon, and

(2)the Secretary determines that--

(A)the levy on such property was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B)the taxpayer has entered into an agreement under section 6159 [*26 USCS § 6159*] to satisfy the tax liability for which the levy was imposed by means of installment payments, unless such agreement provides otherwise,

(C)the return of such property will facilitate the collection of the tax liability, or

(D)with the consent of the taxpayer or the National Taxpayer Advocate, the return of such property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States,

the provisions of subsection (b) shall apply in the same manner as if such property had been wrongly levied upon, except that no interest shall be allowed under subsection (c).

(e) Release of levy upon agreement that amount is not collectible. In the case of a levy on the salary or wages payable to or received by the taxpayer, upon agreement with the taxpayer that the tax is not collectible, the Secretary shall release such levy as soon as practicable.

(f) Individuals held harmless on wrongful levy, etc. on retirement plan.

(1) In general. If the Secretary determines that an individual's account or benefit under an eligible retirement plan (as defined in section 402(c)(8)(B) [*26 USCS § 402(c)(8)(B)*]) has been levied upon in a case to which subsection (b) or (d)(2)(A) applies and property or an amount of money is returned to the individual--

(A)the individual may contribute such property or an amount equal to the sum of--

(i)the amount of money so returned by the Secretary, and

(ii)interest paid under subsection (c) on such amount of money,into such eligible retirement plan if such contribution is permitted by the plan, or into an individual retirement plan (other than an endowment contract) to which a rollover contribution of a distribution from such eligible retirement plan is permitted, but only if such contribution is made not later than the due date (not including extensions) for filing the return of tax for the taxable year in which such property or amount of money is returned, and

(B)the Secretary shall, at the time such property or amount of money is returned, notify such individual that a contribution described in subparagraph (A) may be made.

(2) Treatment as rollover. The distribution on account of the levy and any contribution under paragraph (1) with respect to the return of such distribution shall be treated for purposes of this title as if such distribution and contribution were described in section 402(c), 402A(c)(3), 403(a)(4), 403(b)(8), 408(d)(3), 408A(d)(3), or 457(e)(16) [*26 USCS § 402(c)*, *402A(c)(3)*, *403(a)(4)*, *403(b)(8)*, *408(d)(3)*, *408A(d)(3)*, or *457(e)(16)*], whichever is applicable; except that--

(A)the contribution shall be treated as having been made for the taxable year in which the distribution on account of the levy occurred, and the interest paid under subsection (c) shall be treated as earnings within the plan after the contribution and shall not be included in gross income, and

(B)such contribution shall not be taken into account under section 408(d)(3)(B) [*26 USCS § 408(d)(3)(B)*].

(3) Refund, etc., of income tax on levy.

(A) In general. If any amount is includible in gross income for a taxable year by reason of a distribution on account of a levy referred to in paragraph (1) and any portion of such amount is treated as a rollover contribution under paragraph (2), any tax imposed by chapter 1 on such portion shall not be assessed, and if assessed shall be abated, and if collected shall be credited or refunded as an overpayment made on the due date for filing the return of tax for such taxable year.

(B) Exception. Subparagraph (A) shall not apply to a rollover contribution under this subsection which is made from an eligible retirement plan which is not a Roth IRA or a designated Roth account (within the meaning of section 402A [*26 USCS § 402A*]) to a Roth IRA or a designated Roth account under an eligible retirement plan.

(4) Interest. Notwithstanding subsection (d), interest shall be allowed under subsection (c) in a case in which the Secretary makes a determination described in subsection (d)(2)(A) with respect to a levy upon an individual retirement plan.

(5) Treatment of inherited accounts. For purposes of paragraph (1)(A), section 408(d)(3)(C) [*26 USCS § 408(d)(3)(C)*] shall be disregarded in determining whether an individual retirement plan is a plan to which a rollover contribution of a distribution from the plan levied upon is permitted.

History

(Aug. 16, 1954, ch 736, 68A Stat. 789; Nov. 2, 1966,*P.L. 89-719*, Title I, § 104(i), *80 Stat. 1138*; Oct. 4, 1976, *P.L. 94-455*, Title XIX, § 1906(b)(13)(A), *90 Stat. 1834*; Dec. 29, 1979, *P.L. 96-167*, § 4(a), *93 Stat. 1275*; Oct. 22, 1986, *P.L. 99-514*, Title XV, § 1511(c)(10), *100 Stat. 2745*; Nov. 10, 1988, *P.L. 100-647*, Title VI, § 6236(f), *102 Stat. 3740*; July 30, 1996, *P.L. 104-168*, Title V, § 501(b), *110 Stat. 1460*; July 22, 1998, *P.L. 105-206*, Title I, § 1102(d)(1)(B), Title III, § 3432(a), *112 Stat. 704*, 759.)

(As amended Dec. 22, 2017,*P.L. 115-97*, Title I, Subtitle A, Part VII, § 11071(a), *131 Stat. 2091*; Feb. 9, 2018, *P.L. 115-123*, Div D, Title II, § 41104(a), *132 Stat. 155*.)

Annotations

Notes

Amendments:

In 2018 , *P.L. 115-123*, Sec. 41104(a) (applicable to amounts paid under subsecs. (b), (c), and (d)(2)(A) of this section in taxable years beginning after 12/31/2017, as provided by Sec. 41104(b) of *P.L. 115-123*, which appears as a note to this section), added subsec. (f).

In 2017 , *P.L. 115-97*, Sec. 11071(a) (applicable to levies made after 12/22/2017, as provided by Sec. 11071(c) of *P.L. 115-97*, which appears as a note to this section), amended subsec. (b) by substituting "2 years" for "9 months" in the concluding matter.

26 USCS § 6621

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 67. INTEREST > SUBCHAPTER C. DETERMINATION OF INTEREST RATE; COMPOUNDING OF INTEREST

§ 6621. Determination of rate of interest.

(a) General rule.

(1) Overpayment rate. The overpayment rate established under this section shall be the sum of--

(A)the Federal short-term rate determined under subsection (b), plus

(B)3 percentage points (2 percentage points in the case of a corporation).To the extent that an overpayment of tax by a corporation for any taxable period (as defined in subsection (c)(3), applied by substituting 'overpayment' for 'underpayment') exceeds $ 10,000, subparagraph (B) shall be applied by substituting "0.5 percentage point" for "2 percentage points".

(2) Underpayment rate. The underpayment rate established under this section shall be the sum of--

(A)the Federal short-term rate determined under subsection (b), plus

(B)3 percentage points.

(b) Federal short-term rate. For purposes of this section--

(1) General rule. The Secretary shall determine the Federal short-term rate for the first month in each calendar quarter.

(2) Period during which rate applies.

(A) In general. Except as provided in subparagraph (B), the Federal short-term rate determined under paragraph (1) for any month shall apply during the first calendar quarter beginning after such month.

(B) Special rule for individual estimated tax. In determining the addition to tax under section 6654 [*26 USCS § 6654*] for failure to pay estimated tax for any taxable year, the Federal short-term rate which applies during the 3rd month following such taxable year shall also apply during the first 15 days of the 4th month following such taxable year.

(3) Federal short-term rate. The federal short-term rate for any month shall be the Federal short-term rate determined during such month by the Secretary in accordance with section 1274(d) [*26 USCS § 1274(d)*]. Any such rate shall be rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, such rate shall be increased to the next highest full percent).

(c) Increase in underpayment rate for large corporate underpayments.

(1) In general. For purposes of determining the amount of interest payable under section 6601 [*26 USCS § 6601*] on any large corporate underpayment for periods after the applicable date, paragraph (2) of subsection (a) shall be applied by substituting "5 percentage points" for "3 percentage points".

(2) Applicable date. For purposes of this subsection--

(A) In general. The applicable date is the 30th day after the earlier of --

(i)the date on which the 1st letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent, or

(ii)the date on which the deficiency notice under section 6212 [*26 USCS § 6212*] is sent.The preceding sentence shall be applied without regard to any such letter or notice which is withdrawn by the Secretary.

(B) Special rules.

(i) Nondeficiency procedures. In the case of any underpayment of any tax imposed by this title to which the deficiency procedures do not apply, subparagraph (A) shall be applied by taking into account any letter or notice provided by the Secretary which notifies the taxpayer of the assessment or proposed assessment of the tax.

(ii) Exception where amounts paid in full. For purposes of subparagraph (A), a letter or notice shall be disregarded if, during the 30-day period beginning on the day on which it was sent, the taxpayer makes a payment equal to the amount shown as due in such letter or notice, as the case may be.

(iii) Exception for letters or notices involving small amounts. For purposes of this paragraph, any letter or notice shall be disregarded if the amount of the deficiency or proposed deficiency (or the assessment or proposed assessment) set forth in such letter or notice is not greater than $ 100,000 (determined by not taking into account any interest, penalties, or additions to tax).

(3) Large corporate underpayment. For purposes of this subsection--

(A) In general. The term "large corporate underpayment" means any underpayment of a tax by a C corporation for any taxable period if the amount of such underpayment for such period exceeds $ 100,000.

(B) Taxable period. For purposes of subparagraph (A), the term "taxable period" means--

(i)in the case of any tax imposed by subtitle A [*26 USCS §§ 1* et seq.], the taxable year, or

(ii)in the case of any other tax, the period to which the underpayment relates.

(d) Elimination of interest on overlapping periods of tax overpayments and underpayments. To the extent that, for any period, interest is payable under subchapter A [*26 USCS §§ 6601* et seq.] and allowable under subchapter B [*26 USCS §§ 6611* et seq.] on equivalent underpayments and overpayments by the same taxpayer of tax imposed by this title, the net rate of interest under this section on such amounts shall be zero for such period.

History

(Added Jan. 3, 1975,*P.L. 93-625*, § 7(a)(1), *88 Stat. 2114*; Oct. 4, 1976, *P.L. 94-455*, Title XIX, § 1906(b)(13)(A), *90 Stat. 1834*; Dec. 29, 1979, *P.L. 96-167*, § 4(b), *93 Stat. 1275*; Aug. 13, 1981, *P.L. 97-34*, Title VII, § 711(a)-(c), *95 Stat. 340*; Sept. 3, 1982, *P.L. 97-248*, Title III, § 345(a), *96 Stat. 636*; July 18, 1984, *P.L. 98-369*, Div A, Title I, § 144(a), *98 Stat. 682*; Oct. 22, 1986, *P.L. 99-514*, Title XV, §§ 1511(a), (c)(1), 1535(a), *100 Stat. 2744*, 2750; Nov. 10, 1988, *P.L. 100-647*, Title I, § 1015(d), *102 Stat. 3569*; Dec. 19, 1989, *P.L. 101-239*, Title VII, § 7721(b), *103 Stat. 2399*; Nov. 5, 1990, *P.L. 101-508*, Title XI, § 11341(a), *104 Stat. 1388*-470; Dec. 8, 1994, *P.L. 103-465*, Title VII, § 713(a), *108 Stat. 5001*; Aug. 20, 1996, *P.L. 104-188*, Title I, § 1702(c)(6), (7), *110 Stat. 1870*; Aug. 5, 1997, *P.L. 105-34*, Title XIV, § 1463(a), Title XVI, § 1604(b)(1), *111 Stat. 1057*, 1097; July 22, 1998, *P.L. 105-206*, Title III, §§ 3301(a), 3302(a), *112 Stat. 741*.)

Annotations

26 USCS § 6651

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 68. ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES > SUBCHAPTER A. ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS > PART I. GENERAL PROVISIONS

§ 6651. Failure to file tax return or to pay tax.

(a) Addition to the tax. In case of failure--

(1) [Caution: In the case of any return required to be filed in 2019, see § 3.46 of *Rev. Proc. 2017-58*(*26 USCS § 1* note) for provision that amount of addition to tax under this subsection for failure to file tax return within 60 days of due date of such return (determined with regard to any extensions of time for filing) shall not be less than the lesser of $ 210 or 100 percent of the amount required to be shown as tax on such returns.] to file any return required under authority of subchapter A of chapter 61 [*26 USCS §§ 6001* et seq.] (other than part III thereof [*26 USCS §§ 6031* et seq.]), subchapter A of chapter 51 [*26 USCS §§ 5001* et seq.] (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 [*26 USCS §§ 5701* et seq.] (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 [*26 USCS §§ 5801* et seq.] (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

(2)to pay the amount shown as tax on any return specified in paragraph (1) on or before the date prescribed for payment of such tax (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax on such return 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate; or

(3)to pay any amount in respect of any tax required to be shown on a return specified in paragraph (1) which is not so shown (including an assessment made pursuant to section 6213(b) [*26 USCS § 6213(b)*]) within 21 calendar days from the date of notice and demand therefor (10 business days if the amount for which such notice and demand is made equals or exceeds $ 100,000), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand 0.5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 0.5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

In the case of a failure to file a return of tax imposed by chapter 1 [*26 USCS §§ 1* et seq.] within 60 days of the date prescribed for filing of such return (determined with regard to any extensions of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, the addition to tax under paragraph (1) shall not be less than the lesser of $ 205 or 100 percent of the amount required to be shown as tax on such return.

(b) Penalty imposed on net amount due. For purposes of--

(1)subsection (a)(1), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed on the return,

(2)subsection (a)(2), the amount of tax shown on the return shall, for purposes of computing the addition for any month, be reduced by the amount of any part of the tax which is paid on or before the beginning of such month and by the amount of any credit against the tax which may be claimed on the return, and

(3)subsection (a)(3), the amount of tax stated in the notice and demand shall, for the purpose of computing the addition for any month, be reduced by the amount of any part of the tax which is paid before the beginning of such month.

(c) Limitations and special rule.

(1) Additions under more than one paragraph. With respect to any return, the amount of the addition under paragraph (1) of subsection (a) shall be reduced by the amount of the addition under paragraph (2) of subsection (a) for any month (or fraction thereof) to which an addition to tax applies under both paragraphs (1) and (2). In any case described in the last sentence of subsection (a), the amount of the addition under paragraph (1) of subsection (a) shall not be reduced under the preceding sentence below the amount provided in such last sentence.

(2) Amount of tax shown more than amount required to be shown. If the amount required to be shown as tax on a return is less than the amount shown as tax on such return, subsections (a)(2) and (b)(2) shall be applied by substituting such lower amount.

(d) Increase in penalty for failure to pay tax in certain cases.

(1) In general. In the case of each month (or fraction thereof) beginning after the day described in paragraph (2) of this subsection, paragraphs (2) and (3) of subsection (a) shall be applied by substituting "1 percent" for "0.5 percent" each place it appears.

(2) Description. For purposes of paragraph (1), the day described in this paragraph is the earlier of--

(A)the day 10 days after the date on which notice is given under section 6331(d) [*26 USCS § 6331(d)*], or

(B)the day on which notice and demand for immediate payment is given under the last sentence of section 6331(a) [*26 USCS § 6331(a)*].

(e) Exception for estimated tax. This section shall not apply to any failure to pay any estimated tax required to be paid by section 6654 or 6655 [*26 USCS § 6654* or *6655*].

(f) Increase in penalty for fraudulent failure to file. If any failure to file any return is fraudulent, paragraph (1) of subsection (a) shall be applied--

(1)by substituting "15 percent" for "5 percent" each place it appears, and

(2)by substituting "75 percent" for "25 percent" .

(g) Treatment of returns prepared by Secretary under section 6020(b). In the case of any return made by the Secretary under section 6020(b) [*26 USCS § 6020(b)*]--

(1)such return shall be disregarded for purposes of determining the amount of the addition under paragraph (1) of subsection (a), but

(2)such return shall be treated as the return filed by the taxpayer for purposes of determining the amount of the addition under paragraphs (2) and (3) of subsection (a).

(h) Limitation on penalty on individual's failure to pay for months during period of installment agreement. In the case of an individual who files a return of tax on or before the due date for the return (including extensions), paragraphs (2) and (3) of subsection (a) shall each be applied by substituting "0.25" for "0.5" each place it appears for purposes of determining the addition to tax for any month during which an installment agreement under section 6159 [*26 USCS § 6159*] is in effect for the payment of such tax.

(i) Application to imputed underpayment. For purposes of this section, any failure to comply with section 6226(b)(4)(A)(ii) [*26 USCS § 6226(b)(4)(A)(ii)*] shall be treated as a failure to pay the amount described in subclause (II) thereof and such amount shall be treated for purposes of this section as an amount shown as tax on a return specified in subsection (a)(1).

(j) Adjustment for inflation.

(1) In general. In the case of any return required to be filed in a calendar year beginning after 2014, the $ 205 dollar amount under subsection (a) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) [*26 USCS § 1(f)(3)*] for the calendar year determined by substituting "calendar year 2013" for "calendar year 2016" in subparagraph (A)(ii) thereof.

(2) Rounding. If any amount adjusted under paragraph (1) is not a multiple of $ 5, such amount shall be rounded to the next lowest multiple of $ 5.

History

(Aug. 16, 1954, ch 736, 68A Stat. 821; June 28, 1968,*P.L. 90-364*, Title I, § 103(e)(4), *82 Stat. 264*; Dec. 30, 1969, *P.L. 91-172*, Title IX, § 943(a), *83 Stat. 727*; April 1, 1971, *P.L. 92-9*, § 3(j)(1), *85 Stat. 22*; Oct. 4, 1976, *P.L. 94-455*, Title XIX, § 1904(b)(10)(A)(v), *90 Stat. 1817*; Sept. 3, 1982, *P.L. 97-248*, Title III, § 318(a), (b), *96 Stat. 610*; July 18, 1984, *P.L. 98-369*, Div A, Title IV, § 412(b)(8), *98 Stat. 792*; Oct. 22, 1986, *P.L. 99-514*, Title XV, § 1502(a), (b), *100 Stat. 2741*; Dec. 22, 1987, *P.L. 100-203*, Title X, § 10301(b)(6), *101 Stat. 1330*-429; Dec. 19, 1989, *P.L. 101-239*, Title VII, § 7741(a), *103 Stat. 2404*; July 30, 1996, *P.L. 104-168*, Title III, § 303(b)(2), Title XIII, § 1301(a), *110 Stat. 1458*, 1475; July 22, 1998, *P.L. 105-206*, Title III, § 3303(a), *112 Stat. 742*; June 17, 2008, *P.L. 110-245*, Title III, § 303(a), *122 Stat. 1649*; Dec. 19, 2014, *P.L. 113-295*, Div B, Title II, § 208(a), *128 Stat. 4072*; Feb. 24, 2016, *P.L. 114-125*, Title IX, § 921(a), (b), *130 Stat. 281*.)

(As amended Dec. 22, 2017,*P.L. 115-97*, Title I, Subtitle A, Part I, § 11002(d)(1)(KK), *131 Stat. 2060*; March 23, 2018, *P.L. 115-141*, Div U, Title II, § 206(n)(1), Title IV, § 401(a)(299)(A), *132 Stat. 1181*, 1198.)

Annotations

Notes

Amendments:

In 2018 , *P.L. 115-141*, Sec. 206(n)(1) (effective as if included in Sec. 1101 of *P.L. 114-74*, as provided by Sec. 207 of *P.L. 115-141*, which appears as a note to Code Sec. 6031), redesignated subsec. (i) as subsec. (j); and inserted new subsec. (i).
--P.L. 115-141, Sec. 401(a)(299)(A), purported to amended subsec. (i)(1) by inserting "an amount equal to" and by inserting "for the calendar year"; however, such amendment was executed in subsec. (j), in order to effectuate the probable intent of Congress.

In 2017 , *P.L. 115-97*, Sec. 11002(d)(1)(KK) (applicable to taxable years beginning after 12/31/2017, as provided by Sec. 11002(e) of *P.L. 115-97*, which appears as a note to Code Sec. 1), amended subsec. (i)(1) by substituting "for 'calendar year 2016' in subparagraph (A)(ii)" for "for 'calendar year 1992' in subparagraph (B)".

[26 USCS § 6654](#)

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 68. ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES > SUBCHAPTER A. ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS > PART I. GENERAL PROVISIONS

§ 6654. Failure by individual to pay estimated income tax.

(a) Addition to the tax. Except as otherwise provided in this section, in the case of any underpayment of estimated tax by an individual, there shall be added to the tax under chapter 1 [*26 USCS §§ 1* et seq.], the tax under chapter 2 [*26 USCS §§ 1401* et seq.], and the tax under chapter 2A [*26 USCS §§ 1411*] for the taxable year an amount determined by applying--

(1)the underpayment rate established under section 6621 [*26 USCS § 6621*],

(2)to the amount of the underpayment,

(3)for the period of the underpayment.

(b) Amount of underpayment; period of underpayment. For purposes of subsection (a)

(1) Amount. The amount of the underpayment shall be the excess of--

(A)the required installment, over

(B)the amount (if any) of the installment paid on or before the due date for the installment.

(2) Period of underpayment. The period of the underpayment shall run from the due date for the installment to whichever of the following dates is the earlier--

(A)the 15th day of the 4th month following the close of the taxable year, or

(B)with respect to any portion of the underpayment, the date on which such portion is paid.

(3) Order of crediting payments. For purposes of paragraph (2)(B), a payment of estimated tax shall be credited against unpaid required installments in the order in which such installments are required to be paid.

(c) Number of required installments; due dates. For purposes of this section--

(1) Payable in 4 installments. There shall be 4 required installments for each taxable year.

(2) Time for payment of installments.

In the case of the following required installments:	The due date is:
1st ....…	April 15
2nd ....…	June 15
3rd ....…	September 15

4th ....…	January 15 of the following taxable year.

(d) Amount of required installments. For purposes of this section--

(1) Amount.

(A) In general. Except as provided in paragraph (2), the amount of any required installment shall be 25 percent of the required annual payment.

(B) Required annual payment. For purposes of subparagraph (A), the term 'required annual payment' means the lesser of--

(i)90 percent of the tax shown on the return for the taxable year (or, if no return is filed, 90 percent of the tax for such year), or

(ii)100 percent of the tax shown on the return of the individual for the preceding taxable year.Clause (ii) shall not apply if the preceding taxable year was not a taxable year of 12 months or if the individual did not file a return for such preceding taxable year.

(C) Limitation on use of preceding year's tax.

(i) In general. If the adjusted gross income shown on the return of the individual for the preceding taxable year beginning in any calendar year exceeds $ 150,000, clause (ii) of subparagraph (B) shall be applied by substituting "110 percent" for "100 percent".

(ii) Separate returns. In the case of a married individual (within the meaning of section 7703 [*26 USCS § 7703*]) who files a separate return for the taxable year for which the amount of the installment is being determined, clause (i) shall be applied by substituting '$ 75,000' for '$ 150,000'.

(iii) Special rule. In the case of an estate or trust, adjusted gross income shall be determined as provided in section 67(e) [*26 USCS § 67(e)*].

(D)[Deleted]

(2) Lower required installment where annualized income installment is less than amount determined under paragraph (1).

(A) In general. In the case of any required installment, if the individual establishes that the annualized income installment is less than the amount determined under paragraph (1)--

(i)the amount of such required installment shall be the annualized income installment, and

(ii)any reduction in a required installment resulting from the application of this subparagraph shall be recaptured by increasing the amount of the next required installment determined under paragraph (1) by the amount of such reduction (and by increasing subsequent required installments to the extent that the reduction has not previously been recaptured under this clause).

(B) Determination of annualized income installment. In the case of any required installment, the annualized income installment is the excess (if any) of--

(i)an amount equal to the applicable percentage of the tax for the taxable year computed by placing on an annualized basis the taxable income, alternative minimum taxable income, and adjusted self-employment income for months in the taxable year ending before the due date for the installment, over

(ii)the aggregate amount of any prior required installments for the taxable year.

(C) Special rules. For purposes of this paragraph--

(i) Annualization. The taxable income, alternative minimum taxable income, and adjusted self-employment income shall be placed on an annualized basis under regulations prescribed by the Secretary.

(ii) Applicable percentage.

In the case of the following required installments:	The applicable percentage is:
1st	22.5
2nd	45
3rd	67.5
4th	90.

(iii) Adjusted self-employment income. The term "adjusted self-employment income" means self-employment income (as defined in section 1402(b) [*26 USCS § 1402(b)*]); except that section 1402(b) [*26 USCS § 1402(b)*] shall be applied by placing wages (within the meaning of section 1402(b) [*26 USCS § 1402(b)*]) for months in the taxable year ending before the due date for the installment on an annualized basis consistent with clause (i).

(D) Treatment of subpart F income.

(i) In general. Any amounts required to be included in gross income under section 951(a) [*26 USCS § 951(a)*] (and credits properly allocable thereto) shall be taken into account in computing any annualized income installment under subparagraph (B) in a manner similar to the manner under which partnership income inclusions (and credits properly allocable thereto) are taken into account.

(ii) Prior year safe harbor. If a taxpayer elects to have this clause apply to any taxable year--

(I)clause (i) shall not apply, and

(II)for purposes of computing any annualized income installment for such taxable year, the taxpayer shall be treated as having received ratably during such taxable year items of income and credit described in clause (i) in an amount equal to the amount of such items shown on the return of the taxpayer for the preceding taxable year (the second preceding taxable year in the case of the first and second required installments for such taxable year).

(e) Exceptions.

(1) Where tax is small amount. No addition to tax shall be imposed under subsection (a) for any taxable year if the tax shown on the return for such taxable year (or, if no return is filed, the tax), reduced by the credit allowable under section 31 [*26 USCS § 31*], is less than $ 1,000.

(2) Where no tax liability for preceding taxable year. No addition to tax shall be imposed under subsection (a) for any taxable year if--

(A)the preceding taxable year was a taxable year of 12 months,

(B)the individual did not have any liability for tax for the preceding taxable year, and

(C)the individual was a citizen or resident of the United States throughout the preceding taxable year.

(3) Waiver in certain cases.

(A) In general. No addition to tax shall be imposed under subsection (a) with respect to any underpayment to the extent the Secretary determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience.

(B) Newly retired or disabled individuals. No addition to tax shall be imposed under subsection (a) with respect to any underpayment if the Secretary determines that--

(i)the taxpayer--

(I)retired after having attained age 62, or

(II)became disabled,in the taxable year for which estimated payments were required to be made or in the taxable year preceding such taxable year, and

(ii)such underpayment was due to reasonable cause and not to willful neglect.

(f) Tax computed after application of credits against tax. For purposes of this section, the term "tax" means--

(1)the tax imposed by chapter 1 [*26 USCS §§ 1* et seq.] (other than any increase in such tax by reason of section 143(m) [*26 USCS § 143(m)*]), plus

(2)the tax imposed by chapter 2 [*26 USCS §§ 1401* et seq.], plus

(3)the tax imposed by chapter 2A [*26 USCS § 1411*], minus

(4)the credits against tax provided by part IV of subchapter A of chapter 1 [*26 USCS §§ 21* et seq.], other than the credit against tax provided by section 31 [*26 USCS § 31*] (relating to tax withheld on wages).

(g) Application of section in case of tax withheld on wages.

(1) In general. For purposes of applying this section, the amount of the credit allowed under section 31 [*26 USCS § 31*] for the taxable year shall be deemed a payment of estimated tax, and an equal part of such amount shall be deemed paid on each due date for such taxable year, unless the taxpayer establishes the dates on which all amounts were actually withheld, in which case the amounts so withheld shall be deemed payments of estimated tax on the dates on which such amounts were actually withheld.

(2) Separate application. The taxpayer may apply paragraph (1) separately with respect to--

(A)wage withholding, and

(B)all other amounts withheld for which credit is allowed under section 31 [*26 USCS § 31*].

(h) Special rule where return filed on or before January 31. If, on or before January 31 of the following taxable year, the taxpayer files a return for the taxable year and pays in full the amount computed on the return as payable, then no addition to tax shall be imposed under subsection (a) with respect to any underpayment of the 4th required installment for the taxable year.

(i) Special rules for farmers and fishermen. For purposes of this section--

(1) In general. If an individual is a farmer or fisherman for any taxable year--

(A)there shall be only 1 required installment for the taxable year,

(B)the due date for such installment shall be January 15 of the following taxable year,

(C)the amount of such installment shall be equal to the required annual payment determined under subsection (d)(1)(B) by substituting "66 2/3 percent" for "90 percent" and without regard to subparagraph (C) of subsection (d)(1), and

(D)subsection (h) shall be applied--

(i)by substituting "March 1" for "January 31", and

(ii)by treating the required installment described in subparagraph (A) of this paragraph as the 4th required installment.

(2) Farmer or fisherman defined. An individual is a farmer or fisherman for any taxable year if--

(A)the individual's gross income from farming or fishing (including oyster farming) for the taxable year is at least 66 2/3 percent of the total gross income from all sources for the taxable year, or

(B)such individual's gross income from farming or fishing (including oyster farming) shown on the return of the individual for the preceding taxable year is at least 66 2/3 percent of the total gross income from all sources shown on such return.

(j) Special rules for nonresident aliens. In the case of a nonresident alien described in section 6072(c) [26 USCS § 6072(c)]:

(1) Payable in 3 installments. There shall be 3 required installments for the taxable year.

(2) Time for payment of installments. The due dates for required installments under this subsection shall be determined under the following table:

In the case of the following required installments:	The due date is:
1st	June 15
2nd	September 15
3rd	January 15 of the following taxable year.

(3) Amount of required installments.

(A) First required installment. In the case of the first required installment, subsection (d) shall be applied by substituting '50 percent' for '25 percent' in subsection (d)(1)(A).

(B) Determination of applicable percentage. The applicable percentage for purposes of subsection (d)(2) shall be determined under the following table:

In the case of the following required installments:	The applicable percentage is:
1st	45
2nd	67.5
3rd	90.

(k) Fiscal years and short years.

(1) Fiscal years. In applying this section to a taxable year beginning on any date other than January 1, there shall be substituted, for the months specified in this section, the months which correspond thereto.

(2) Short taxable year. This section shall be applied to taxable years of less than 12 months in accordance with regulations prescribed by the Secretary.

(l) Estates and trusts.

(1) In general. Except as otherwise provided in this subsection, this section shall apply to any estate or trust.

(2) Exception for estates and certain trusts. With respect to any taxable year ending before the date 2 years after the date of the decedent's death, this section shall not apply to--

(A)the estate of such decedent, or

(B)any trust--

(i)all of which was treated (under subpart E of part I of subchapter J of chapter 1 [*26 USCS §§ 671* et seq.]) as owned by the decedent, and

(ii)to which the residue of the decedent's estate will pass under his will (or, if no will is admitted to probate, which is the trust primarily responsible for paying debts, taxes, and expenses of administration).

(3) Exception for charitable trusts and private foundations. This section shall not apply to any trust which is subject to the tax imposed by section 511 [*26 USCS § 511*] or which is a private foundation.

(4) Special rule for annualizations. In the case of any estate or trust to which this section applies, subsection (d)(2)(B)(i) shall be applied by substituting "ending before the date 1 month before the due date for the installment" for "ending before the due date for the installment".

(m) Special rule for Medicare tax. For purposes of this section, the tax imposed under section 3101(b)(2) [*26 USCS § 3101(b)(2)*] (to the extent not withheld) shall be treated as a tax imposed under chapter 2 [*26 USCS §§ 1401* et seq.].

(n) Regulations. The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this section.

History

(Aug. 16, 1954, ch 736, 68A Stat. 823; Sept. 25, 1962,*P.L. 87-682*, § 1(a)(4), *76 Stat. 575*; March 15, 1966, *P.L. 89-368*, Title I, § 102(b)(1)-(3), 103(a), *80 Stat. 62*-64; Dec. 30, 1969, *P.L. 91-172*, Title III, § 301(b)(13), *83 Stat. 586*; March 17, 1971, *P.L. 92-5*, Title II, § 203(b)(7), *85 Stat. 11*; July 1, 1972, *P.L. 92-336*, Title II, § 203(b)(7), *86 Stat. 420*; July 9, 1973, *P.L. 93-66*, Title II, § 203(b)(7), (d), *87 Stat. 153*; Dec. 31, 1973, *P.L. 93-233*, § 5(b)(7), (d), *87 Stat. 954*; Jan. 3, 1975, *P.L. 93-625*, § 7(c), *88 Stat. 2115*; Oct. 4, 1976, *P.L. 94-455*, Title XIX, § 1906(a)(35), (b)(13)(A), *90 Stat. 1829*, 1834; May 23, 1977, *P.L. 95-30*, Title I, § 102(b)(16), *91 Stat. 139*; Nov. 6, 1978, *P.L. 95-600*, Title IV, § 421(e)(9), *92 Stat. 2877*; Aug. 13, 1981, *P.L. 97-34*, Title VI, § 601(a)(6)(A), Title VII, § 725(b), (c)(5), *95 Stat. 336*, 346; Sept. 3, 1982, *P.L. 97-248*, Title II, § 207(d)(7) [207(c)(7)], Title III, §§ 307(a)(14), 308(a), 328(a), *96 Stat. 420*, 590, 591, 618; Jan. 12, 1983, *P.L. 97-448*, Title I, § 106(a)(4)(C), 107(c)(1), Title II, § 201(j)(3), Title III, § 306(a)(1)(A)(i), *96 Stat. 2390*, 2391, 2396, 2400; Aug. 5, 1983, *P.L. 98-67*, Title I, § 102(a), *97 Stat. 369*; July 18, 1984, *P.L. 98-369*, Div A, Title IV, § 411, *98 Stat. 788*; Oct. 22, 1986, *P.L. 99-514*, Title XIV, § 1404(a), Title XV, §§ 1511(c)(14), 1541(a), (b), Title XVIII, § 1841, *100 Stat. 2713*, 2745, 2751, 2852; Aug. 23, 1988, *P.L. 100-418*, Title I, § 1941(b)(6)(A), *102 Stat. 1324*; Nov. 10, 1988, *P.L. 100-647*, Title I, § 1014(d)(1), (2), Title IV, § 4005(g)(5), *102 Stat. 3560*, 3651; Dec. 19, 1989, *P.L. 101-239*, Title VII, § 7811(j)(5), (6), *103 Stat. 2411*, 2412; Nov. 15, 1991, *P.L. 102-164*, Title IV, § 403(a), (b), *105 Stat. 1062*, 1064; Aug. 10, 1993, *P.L. 103-66*, Title XIII, § 13214(a), (b), *107 Stat. 475*; Dec. 8, 1994, *P.L. 103-465*, Title VII, § 711(b), *108 Stat. 4998*; Aug. 5, 1997, *P.L. 105-34*, Title X, § 1091(a), Title XII, § 1202(a), *111 Stat. 962*, 994; Oct. 21, 1998, *P.L. 105-277*, Div J, Title II, § 2003(a), *112 Stat. 2681*-901; Dec. 17, 1999, *P.L. 106-170*, Title V, § 531(a), *113 Stat. 1928*; Feb. 17, 2009, *P.L. 111-5*, Div B, Title I, Subtitle C, Part II, § 1212, *123 Stat. 336*; March 30, 2010, *P.L. 111-152*, Title I, Subtitle E, § 1402(a)(2), (b)(2), *124 Stat. 1062*, 1063.)

(As amended March 23, 2018,*P.L. 115-141*, Div U, Title IV, § 401(a)(301), (302), (b)(48), (49), (d)(1)(D)(xix), *132 Stat. 1199*, 1204, 1205, 1208.)

Annotations

26 USCS § 6662

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 68. ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES > SUBCHAPTER A. ADDITIONS TO THE TAX AND ADDITIONAL AMOUNTS > PART II. ACCURACY-RELATED AND FRAUD PENALTIES

§ 6662. Imposition of accuracy-related penalty on underpayments.

(a) Imposition of penalty. If this section applies to any portion of an underpayment of tax required to be shown on a return, there shall be added to the tax an amount equal to 20 percent of the portion of the underpayment to which this section applies.

(b) Portion of underpayment to which section applies. This section shall apply to the portion of any underpayment which is attributable to 1 or more of the following:

(1) Negligence or disregard of rules or regulations.

(2) Any substantial understatement of income tax.

(3) Any substantial valuation misstatement under chapter 1 [*26 USCS §§ 1* et seq.].

(4) Any substantial overstatement of pension liabilities.

(5) Any substantial estate or gift tax valuation understatement.

(6) Any disallowance of claimed tax benefits by reason of a transaction lacking economic substance (within the meaning of section 7701(o) [*26 USCS § 7701(o)*]) or failing to meet the requirements of any similar rule of law.

(7) Any undisclosed foreign financial asset understatement.

(8) Any inconsistent estate basis.

This section shall not apply to any portion of an underpayment on which a penalty is imposed under section 6663 [*26 USCS § 6663*]. Except as provided in paragraph (1) or (2)(B) of section 6662A(e) [*26 USCS § 6662A(e)*], this section shall not apply to the portion of any underpayment which is attributable to a reportable transaction understatement on which a penalty is imposed under section 6662A [*26 USCS § 6662A*].

(c) Negligence. For purposes of this section, the term "negligence" includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" includes any careless, reckless, or intentional disregard.

(d) Substantial understatement of income tax.

(1) Substantial understatement.

(A) In general. For purposes of this section, there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of--

(i)10 percent of the tax required to be shown on the return for the taxable year, or

(ii)$ 5,000.

(B) Special rule for corporations. In the case of a corporation other than an S corporation or a personal holding company (as defined in section 542 [*26 USCS § 542*]), there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the lesser of--

(i)10 percent of the tax required to be shown on the return for the taxable year (or, if greater, $ 10,000), or

(ii)$ 10,000,000.

(C) Special rule for taxpayers claiming section 199A deduction. In the case of any taxpayer who claims any deduction allowed under section 199A [*26 USCS § 199A*] for the taxable year, subparagraph (A) shall be applied by substituting "5 percent" for "10 percent".

(2) Understatement.

(A) In general. For purposes of paragraph (1), the term "understatement" means the excess of--

(i)the amount of the tax required to be shown on the return for the taxable year, over

(ii)the amount of the tax imposed which is shown on the return, reduced by any rebate (within the meaning of section 6211(b)(2) [*26 USCS § 6211(b)(2)*]).The excess under the preceding sentence shall be determined without regard to items to which section 6662A [*26 USCS § 6662A*] applies.

(B) Reduction for understatement due to position of taxpayer or disclosed item. The amount of the understatement under subparagraph (A) shall be reduced by that portion of the understatement which is attributable to--

(i)the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or

(ii)any item if--

(I)the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return, and

(II)there is a reasonable basis for the tax treatment of such item by the taxpayer.For purposes of clause (ii)(II), in no event shall a corporation be treated as having a reasonable basis for its tax treatment of an item attributable to a multiple-party financing transaction if such treatment does not clearly reflect the income of the corporation.

(C) Reduction not to apply to tax shelters.

(i) In general. Subparagraph (B) shall not apply to any item attributable to a tax shelter.

(ii) Tax shelter. For purposes of clause (i), the term "tax shelter" means--

(I)a partnership or other entity,

(II)any investment plan or arrangement, or

(III)any other plan or arrangement,if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.

(3) Secretarial list. The Secretary may prescribe a list of positions which the Secretary believes do not meet 1 or more of the standards specified in paragraph (2)(B)(i), section 6664(d)(3) [*26 USCS § 6664(d)(3)*], and *section 6694(a)(1)* [*26 USCS § 6694(a)(1)*]. Such list (and any revisions thereof) shall be published in the Federal Register or the Internal Revenue Bulletin.

(e) Substantial valuation misstatement under chapter 1.

(1) In general. For purposes of this section, there is a substantial valuation misstatement under chapter 1 [*26 USCS §§ 1* et seq.] if--

(A)the value of any property (or the adjusted basis of any property) claimed on any return of tax imposed by chapter l [*26 USCS §§ 1* et seq.] is 150 percent or more of the amount determined to be the correct amount of such valuation or adjusted basis (as the case may be), or

(B)

(i)the price for any property or services (or for the use of property) claimed on any such return in connection with any transaction between persons described in section 482 [*26 USCS § 482*] is 200 percent or more (or 50 percent or less) of the amount determined under section 482 [*26 USCS § 482*] to be the correct amount of such price, or

(ii)the net section 482 [*26 USCS § 482*] transfer price adjustment for the taxable year exceeds the lesser of $ 5,000,000 or 10 percent of the taxpayer's gross receipts.

(2) Limitation. No penalty shall be imposed by reason of subsection (b)(3) unless the portion of the underpayment for the taxable year attributable to substantial valuation misstatements under chapter 1 [*26 USCS §§ 1* et seq.] exceeds $ 5,000 ($ 10,000 in the case of a corporation other than an S corporation or a personal holding company (as defined in section 542) [*26 USCS § 542*]).

(3) Net section 482 transfer price adjustment. For purposes of this subsection--

(A) In general. The term "net section 482 transfer price adjustment" means, with respect to any taxable year, the net increase in taxable income for the taxable year (determined without regard to any amount carried to such taxable year from another taxable year) resulting from adjustments under section 482 [*26 USCS § 482*] in the price for any property or services (or for the use of property).

(B) Certain adjustments excluded in determining threshold. For purposes of determining whether the threshold requirements of paragraph (1)(B)(ii) are met, the following shall be excluded:

(i) Any portion of the net increase in taxable income referred to in subparagraph (A) which is attributable to any redetermination of a price if--

(I)it is established that the taxpayer determined such price in accordance with a specific pricing method set forth in the regulations prescribed under section 482 [*26 USCS § 482*] and that the taxpayer's use of such method was reasonable,

(II)the taxpayer has documentation (which was in existence as of the time of filing the return) which sets forth the determination of such price in accordance with such a method and which establishes that the use of such method was reasonable, and

(III)the taxpayer provides such documentation to the Secretary within 30 days of a request for such documentation.

(ii) Any portion of the net increase in taxable income referred to in subparagraph (A) which is attributable to a redetermination of price where such price was not determined in accordance with such a specific pricing method if--

(I)the taxpayer establishes that none of such pricing methods was likely to result in a price that would clearly reflect income, the taxpayer used another pricing method to determine such price, and such other pricing method was likely to result in a price that would clearly reflect income,

(II)the taxpayer has documentation (which was in existence as of the time of filing the return) which sets forth the determination of such price in accordance with such other method and which establishes that the requirements of subclause (I) were satisfied, and

(III)the taxpayer provides such documentation to the Secretary within 30 days of request for such documentation.

(iii) Any portion of such net increase which is attributable to any transaction solely between foreign corporations unless, in the case of any such corporations, the treatment of such transaction affects the determination of income from sources within the United States or taxable income effectively connected with the conduct of a trade or business within the United States.

(C) Special rule. If the regular tax (as defined in section 55(c) [*26 USCS § 55(c)*]) imposed by chapter 1 [*26 USCS §§ 1* et seq.] on the taxpayer is determined by reference to an amount other than taxable income, such amount shall be treated as the taxable income of such taxpayer for purposes of this paragraph.

(D) Coordination with reasonable cause exception. For purposes of section 6664(c) [*26 USCS § 6664(c)*] the taxpayer shall not be treated as having reasonable cause for any portion of an underpayment attributable to a net section 482 transfer price adjustment unless such taxpayer meets the requirements of clause (i), (ii), or (iii) of subparagraph (B) with respect to such portion.

(f) Substantial overstatement of pension liabilities.

(1) In general. For purposes of this section, there is a substantial overstatement of pension liabilities if the actuarial determination of the liabilities taken into account for purposes of computing the deduction under paragraph (1) or (2) of section 404(a) [*26 USCS § 404(a)*] is 200 percent or more of the amount determined to be the correct amount of such liabilities.

(2) Limitation. No penalty shall be imposed by reason of subsection (b)(4) unless the portion of the underpayment for the taxable year attributable to substantial overstatements of pension liabilities exceeds $ 1,000.

(g) Substantial estate or gift tax valuation understatement.

(1) In general. For purposes of this section, there is a substantial estate or gift tax valuation understatement if the value of any property claimed on any return of tax imposed by subtitle B [*26 USCS §§ 2001* et seq.] is 65 percent or less of the amount determined to be the correct amount of such valuation.

(2) Limitation. No penalty shall be imposed by reason of subsection (b)(5) unless the portion of the underpayment attributable to substantial estate or gift tax valuation understatements for the taxable period (or, in the case of the tax imposed by chapter 11 [*26 USCS §§ 2001* et seq.], with respect to the estate of the decedent) exceeds $ 5,000.

(h) Increase in penalty in case of gross valuation misstatements.

(1) In general. To the extent that a portion of the underpayment to which this section applies is attributable to one or more gross valuation misstatements, subsection (a) shall be applied with respect to such portion by substituting "40 percent" for "20 percent".

(2) Gross valuation misstatements. The term "gross valuation misstatements" means--

(A)any substantial valuation misstatement under chapter 1 [*26 USCS §§ 1* et seq.] as determined under subsection (e) by substituting--

(i)in paragraph (1)(A), "200 percent" for "150 percent",

(ii)in paragraph (1)(B)(i)--

(I)"400 percent" for "200 percent", and

(II)"25 percent" for "50 percent", and

(iii)in paragraph (1)(B)(ii)--

(I)"$ 20,000,000" for "$ 5,000,000", and

(II)"20 percent" for "10 percent".

(B)any substantial overstatement of pension liabilities as determined under subsection (f) by substituting "400 percent" for "200 percent", and

(C)any substantial estate or gift tax valuation understatement as determined under subsection (g) by substituting "40 percent" for "65 percent".

(i) Increase in penalty in case of nondisclosed noneconomic substance transactions.

(1) In general. In the case of any portion of an underpayment which is attributable to one or more nondisclosed noneconomic substance transactions, subsection (a) shall be applied with respect to such portion by substituting "40 percent" for "20 percent".

(2) Nondisclosed noneconomic substance transactions. For purposes of this subsection, the term "nondisclosed noneconomic substance transaction" means any portion of a transaction described in subsection (b)(6) with respect to which the relevant facts affecting the tax treatment are not adequately disclosed in the return nor in a statement attached to the return.

(3) Special rule for amended returns. In no event shall any amendment or supplement to a return of tax be taken into account for purposes of this subsection if the amendment or supplement is filed after the earlier of the date the taxpayer is first contacted by the Secretary regarding the examination of the return or such other date as is specified by the Secretary.

(j) Undisclosed foreign financial asset understatement.

(1) In general. For purposes of this section, the term "undisclosed foreign financial asset understatement" means, for any taxable year, the portion of the understatement for such taxable year which is attributable to any transaction involving an undisclosed foreign financial asset.

(2) Undisclosed foreign financial asset. For purposes of this subsection, the term "undisclosed foreign financial asset" means, with respect to any taxable year, any asset with respect to which information was required to be provided under section 6038, 6038B, 6038D, 6046A, or 6048 [*26 USCS § 6038*, *6038B*, *6038D*, *6046A*, or *6048*] for such taxable year but was not provided by the taxpayer as required under the provisions of those sections.

(3) Increase in penalty for undisclosed foreign financial asset understatements. In the case of any portion of an underpayment which is attributable to any undisclosed foreign financial asset understatement, subsection (a) shall be applied with respect to such portion by substituting "40 percent" for "20 percent".

(k) Inconsistent estate basis reporting. For purposes of this section, the term "inconsistent estate basis" means any portion of an underpayment attributable to the failure to comply with section 1014(f) [*26 USCS § 1014(f)*].

History

(Added Dec. 19, 1989,*P.L. 101-239*, Title VII, § 7721(a), *103 Stat. 2395*; Nov. 5, 1990, *P.L. 101-508*, Title XI, § 11312(a), (b), *104 Stat. 1388*-454, 1388-455; Aug. 10, 1993, *P.L. 103-66*, Title XIII, §§ 13236(a)-(d), 13251(a), *107 Stat. 505*, 506, 531; Dec. 8, 1994, *P.L. 103-465*, Title VII, § 744(a), (b), *108 Stat. 5011*; Aug. 5, 1997, *P.L. 105-34*, Title X, § 1028(c), *111 Stat. 928*; Oct. 22, 2004, *P.L. 108-357*, Title VIII, Subtitle B, Part I, §§ 812(b), (d), (e)(1), 819(a), (b), *118 Stat. 1578*, 1580, 1584; Dec. 21, 2005, *P.L. 109-135*, Title IV, Subtitle A, §§ 403(x)(1), 412(aaa), *119 Stat. 2629*, 2641; Aug. 17, 2006, *P.L. 109-280*, Title XII, Subtitle B, Part 1, § 1219(a)(1), (2), *120 Stat. 1083*; March 18, 2010, *P.L. 111-147*, Title V, Subtitle A, Part II, § 512(a), *124 Stat. 110*; March 30, 2010, *P.L. 111-152*, Title I, Subtitle E, § 1409(b)(1), (2), *124 Stat. 1069*; Dec. 19, 2014, *P.L. 113-295*, Div A, Title II, § 208(a), *128 Stat. 4028*; July 31, 2015, *P.L. 114-41*, Title II, § 2004(c), *129 Stat. 456*.)

(As amended Dec. 22, 2017,*P.L. 115-97*, Title I, Subtitle A, Part II, § 11011(c), *131 Stat. 2070*; March 23, 2018, *P.L. 115-141*, Div T, § 101(a)(2)(A), Div U, Title I, § 104(a), Title IV, § 401(a)(303), (304), *132 Stat. 1155*, 1170, 1189.)

26 USCS § 6672

Current through PL 115-270, approved 10/23/18

United States Code Service - Titles 1 through 54 > TITLE 26. INTERNAL REVENUE CODE > SUBTITLE F. PROCEDURE AND ADMINISTRATION > CHAPTER 68. ADDITIONS TO THE TAX, ADDITIONAL AMOUNTS, AND ASSESSABLE PENALTIES > SUBCHAPTER B. ASSESSABLE PENALTIES > PART I. GENERAL PROVISIONS

§ 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.

(a) General rule. Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 [*26 USCS § 6653*] or part II of subchapter A of chapter 68 [*26 USCS §§ 6662* et seq.] for any offense to which this section is applicable.

(b) Preliminary notice requirement.

(1) In general. No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) [*26 USCS § 6212(b)*] or in person that the taxpayer shall be subject to an assessment of such penalty.

(2) Timing of notice. The mailing of the notice described in paragraph (1) (or, in the case of such a notice delivered in person, such delivery) shall precede any notice and demand of any penalty under subsection (a) by at least 60 days.

(3) Statute of limitations. If a notice described in paragraph (1) with respect to any penalty is mailed or delivered in person before the expiration of the period provided by section 6501 [*26 USCS § 6501*] for the assessment of such penalty (determined without regard to this paragraph), the period provided by such section for the assessment of such penalty shall not expire before the later of--

(A)the date 90 days after the date on which such notice was mailed or delivered in person, or

(B)if there is a timely protest of the proposed assessment, the date 30 days after the Secretary makes a final administrative determination with respect to such protest.

(4) Exception for jeopardy. This subsection shall not apply if the Secretary finds that the collection of the penalty is in jeopardy.

(c) Extension of period of collection where bond is filed.

(1) In general. If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person--

(A)pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B)files a claim for refund of the amount so paid, and

(C)furnishes a bond which meets the requirements of paragraph (3),no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a) [*26 USCS § 7421(a)*], the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Suit must be brought to determine liability for penalty. If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Federal Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond. The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in an amount equal to 1 1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection. The running of the period of limitations provided in section 6502 [*26 USCS § 6502*] on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection. If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

(d) Right of contribution where more than1 person liable for penalty. If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty. Any claim for such a recovery may be made only in a proceeding which is separate from, and is not joined or consolidated with--

(1)an action for collection of such penalty brought by the United States, or

(2)a proceeding in which the United States files a counterclaim or third-party complaint for the collection of such penalty.

(e) Exception for voluntary board members of tax-exempt organizations. No penalty shall be imposed by subsection (a) on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax under subtitle A [*26 USCS §§ 1* et seq.] if such member--

(1)is solely serving in an honorary capacity,

(2)does not participate in the day-to-day or financial operations of the organization, and

(3)does not have actual knowledge of the failure on which such penalty is imposed.

The preceding sentence shall not apply if it results in no person being liable for the penalty imposed by subsection (a).

History

(Aug. 16, 1954, ch 736, 68A Stat. 828; Nov. 10, 1978,*P.L. 95-628*, § 9(a), *92 Stat. 3633*; Dec. 19, 1989, *P.L. 101-239*, Title VII, §§ 7721(c)(9), 7737(a), *103 Stat. 2400*, 2404; July 30, 1996, *P.L. 104-168*, Title IX, §§ 901(a), 903(a), 904(a), *110 Stat. 1465*-1467; July 22, 1998, *P.L. 105-206*, Title III, § 3307(a), (b), *112 Stat. 744*.)

(As amended March 23, 2018,*P.L. 115-141*, Div U, Title IV, § 401(a)(325)(D), *132 Stat. 1200*.)

Annotations

Notes

26 CFR 31.6302-1

This document is current through the November 8, 2018 issue of the Federal Register. Title 3 is current through November 2, 2018.

Code of Federal Regulations > TITLE 26 -- INTERNAL REVENUE > CHAPTER I -- INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY > SUBCHAPTER C -- EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE > PART 31 -- EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE > SUBPART G -- ADMINISTRATIVE PROVISIONS OF SPECIAL APPLICATION TO EMPLOYMENT TAXES (SELECTED PROVISIONS OF SUBTITLE F, INTERNAL REVENUE CODE OF 1954)

§ 31.6302-1 Deposit rules for taxes under the Federal Insurance Contributions Act (FICA) and withheld income taxes.

(a) Introduction. With respect to employment taxes attributable to payments made after December 31, 1992, an employer is either a monthly depositor or a semi-weekly depositor based on an annual determination. An employer must generally deposit employment taxes under one of two rules: the Monthly rule in paragraph (c)(1) of this section, or the Semi-Weekly rule in paragraph (c)(2) of this section. Various exceptions and safe harbors are provided. Paragraph (f) of this section provides certain safe harbors for employers who inadvertently fail to deposit the full amount of taxes. Paragraph (c)(3) of this section provides an overriding exception to the Monthly and Semi-Weekly rules where an employer has accumulated $ 100,000 or more of employment taxes. Paragraph (e) of this section provides the definition of employment taxes.

(b) Determination of status --

(1) In general. The determination of whether an employer is a monthly or semi-weekly depositor for a calendar year is based on an annual determination and generally depends upon the aggregate amount of employment taxes reported by the employer for the lookback period as defined in paragraph (b)(4) of this section.

(2) Monthly depositor --

(i) In general. An employer is a monthly depositor for the entire calendar year if the aggregate amount of employment taxes reported for the lookback period is $ 50,000 or less.

(ii) Special rule. An employer ceases to be a monthly depositor on the first day after the employer is subject to the One-Day ($ 100,000) rule in paragraph (c)(3) of this section. At that time, the employer immediately becomes a semi-weekly depositor for the remainder of the calendar year and for the following calendar year.

(3) Semi-weekly depositor. An employer is a semi-weekly depositor for the entire calendar year if the aggregate amount of employment taxes reported for the lookback period exceeds $ 50,000.

(4) Lookback period --(i) In general. For employers who file Form 941, "Employer's QUARTERLY Federal Tax Return," (or any related Spanish-language returns or returns for U.S. possessions) the lookback period for each calendar year is the twelve month period ended the preceding June 30. For example, the lookback period for calendar year 2006 is the period July 1, 2004, to June 30, 2005. The lookback period for employers who file Form 944, "Employer's ANNUAL Federal Tax Return," or filed Form 944 (or any related Spanish-language returns or returns for U.S. possessions) for either of the two previous calendar years, is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 2006 is calendar year 2004. In determining status as either a monthly or semi-weekly depositor, an employer should determine the aggregate amount of employment tax liabilities reported on its return(s) (Forms 941 or Form 944) for the lookback period. The amount of employment tax liabilities reported for the lookback period is the amount the employer reported on either Forms 941 or Form 944 even if the employer is required to file the other form for the current calendar year. New employers shall be treated as having employment tax liabilities of zero for any part of the lookback period before the date the employer started or acquired its business.

(ii) Adjustments and claims for refund. The employment tax liability reported on the original return for the return period is the amount taken into account in determining whether the aggregate amount of employment taxes reported for the lookback period exceeds $ 50,000. Any amounts reported on adjusted returns or claims for refund pursuant to sections 6205, 6402, 6413, and 6414 *[26 USCS §§ 6205,* 6402, 6413, and 6414] filed after the due date of the original return are not taken into account when determining the aggregate amount of employment taxes reported for the lookback period. Prior period adjustments reported on Forms 941 or Form 944 for 2008 and earlier years are taken into account in determining the employment tax liability for the return period in which the adjustments are reported.

(c) Deposit rules --(1) Monthly rule. An employer that is a monthly depositor must deposit employment taxes accumulated with respect to payments made during a calendar month by electronic funds transfer by the 15th day of the following month. If the 15th day of the following month is a Saturday, Sunday, or legal holiday in the District of Columbia under section 7503 *[26 USCS § 7503],* taxes will be treated as timely deposited if deposited on the next succeeding day which is not a Saturday, Sunday, or legal holiday.

(2) Semi-Weekly rule --(i) In general. An employer that is a semi-weekly depositor for a calendar year must deposit employment taxes by electronic funds transfer by the dates set forth below:

Payment dates/semi-weekly periods	Deposit date
(A) Wednesday, Thursday and/or Friday	On or before the following Wednesday.
(B) Saturday, Sunday, Monday and/or Tuesday	On or before the following Friday.

(ii) Semi-weekly period spanning two return periods. If the return period ends during a semi-weekly period in which an employer has two or more payment dates, two deposit obligations may exist. For example, if one quarterly return period ends on Thursday and a new quarterly return period begins on Friday, employment taxes from payments on Wednesday and Thursday are subject to one deposit obligation, and employment taxes from payments on Friday are subject to a separate deposit obligation. Two separate federal tax deposits are required.

(iii) Special rule for computing days. Semi-weekly depositors have at least three business days following the close of the semi-weekly period by which to deposit employment taxes accumulated during the semi-weekly period. Business days include every calendar day other than Saturdays, Sundays, or legal holidays in the District of Columbia under section 7503 *[26 USCS § 7503].* If any of the three weekdays following the close of a semi-weekly period is a legal holiday, the employer has an additional day for each day that is a legal holiday by which to make the required deposit. For example, if the Monday following the close of a Wednesday to Friday semi-weekly period is Memorial Day, a legal holiday, the required deposit for the semi-weekly period is not due until the following Thursday rather than the following Wednesday.

(3) Exception--One-Day rule. Notwithstanding paragraphs (c)(1) and (c)(2) of this section, if on any day within a deposit period (monthly or semi-weekly) an employer has accumulated $ 100,000 or more of employment taxes, those taxes must be deposited by electronic funds transfer in time to satisfy the tax obligation by the close of the next day. If the next day is a Saturday, Sunday, or legal holiday in the District of Columbia under section 7503 *[26 USCS § 7503],* the taxes will be treated as timely deposited if deposited on the next succeeding day which is not a Saturday, Sunday, or legal holiday. For purposes of determining whether the $ 100,000 threshold is met--

(i)A monthly depositor takes into account only those employment taxes accumulated in the calendar month in which the day occurs; and

(ii)A semi-weekly depositor takes into account only those employment taxes accumulated in the Wednesday-Friday or Saturday-Tuesday semi-weekly period in which the day occurs.

(4) Deposits required only on business days. No taxes are required to be deposited under this section on any day that is a Saturday, Sunday, or legal holiday. Deposits are required only on business days. Business days include every calendar day other than Saturdays, Sundays, or legal holidays. For purposes of this paragraph (c), legal holidays shall have the same meaning provided in section 7503 *[26 USCS § 7503].* Pursuant to section 7503 *[26 USCS § 7503],* the term legal holiday means a legal holiday in the District of Columbia. For purposes of this paragraph (c), the term "legal holiday" does not include other Statewide legal holidays.

(5) Exception to the monthly and semi-weekly deposit rules for employers in the Employers' Annual Federal Tax Program (Form 944). Generally, an employer who files Form 944 for a taxable year may remit its accumulated employment taxes with its timely filed return for that taxable year and is not required to deposit under either the monthly or semi-weekly rules set forth in paragraphs (c)(1) and (c)(2) of this section during that taxable year. An employer who files Form 944 whose actual employment tax liability exceeds the eligibility threshold, as set forth in §§ 31.6011(a)-1(a)(5) and 31.6011(a)-4(a)(4), will not qualify for this exception and should follow the deposit rules set forth in this section.

(6) Extension of time to deposit for employers in the Employers' Annual Federal Tax Program (Form 944) during the preceding year. An employer who filed Form 944 for the preceding year but will file Form 941 instead for the current year will be deemed to have timely deposited its current year's January deposit obligation(s) under paragraphs (c)(1) through (c)(4) of this section if the employer deposits the amount of such deposit obligation(s) by March 15 of that year.

(7) Exception to the monthly and semi-weekly deposit rules for employers making interest-free adjustments. An employer filing an adjusted return under § 31.6205-1 to report taxes that were accumulated in a prior return period shall pay the amount of the adjustment by the time it files the adjusted return, and the amount timely paid will be deemed to have been timely deposited by the employer. The payment may be made by a check or money order with the adjusted return, by electronic funds transfer, or by other methods of payment as provided by the instructions relating to the adjusted return.

(d) Examples. The provisions of paragraphs (a), (b) and (c) of this section are illustrated by the following examples:

Example 1.

Monthly depositor. (i) Determination of status. For calendar year 2011, Employer A determines its depositor status using the lookback period July 1, 2009 to June 30, 2010. For the four calendar quarters within this period, A reported aggregate employment tax liabilities of $ 42,000 on its quarterly Forms 941. Because the aggregate amount did not exceed $ 50,000, A is a monthly depositor for the entire calendar year 2011.

(ii) Monthly rule. During December 2011, A (a monthly depositor) accumulates $ 3,500 in employment taxes. A has a $ 3,500 deposit obligation that must be satisfied by the 15th day of the following month. Since January 15, 2012, is a Sunday, and January 16, 2012, Dr. Martin Luther King, Jr.'s Birthday, is a legal holiday, A's deposit obligation will be satisfied if the deposit is made by electronic funds transfer by the next business day, January 17, 2012.

Example 2.

Semi-weekly depositor. (i) Determination of status. For the calendar year 2011, Employer B determines its depositor status using the lookback period July 1, 2009 to June 30, 2010. For the four calendar quarters within this period, B reported aggregate employment tax liabilities of $ 88,000 on its

Redacted

quarterly Forms 941. Because that amount exceeds $ 50,000, B is a semi-weekly depositor for the entire calendar year 2011.

(ii) Semi-weekly rule. On Friday, January 7, 2011, B (a semi-weekly depositor) has a pay day on which it accumulates $ 4,000 in employment taxes. B has a $ 4,000 deposit obligation that must be satisfied by the following Wednesday, January 12, 2011.

(iii) Deposit made within three business days. On Friday, January 14, 2011, B (a semi-weekly depositor) has a pay day on which it accumulates $ 4,200 in employment taxes. Generally, B would have a required deposit obligation of employment taxes that must be satisfied by the following Wednesday, January 19, 2011. Because Monday, January 17, 2011, is Dr. Martin Luther King, Jr.'s Birthday, a legal holiday, B has an additional day to make the required deposit. B has a $ 4,200 deposit obligation that must be satisfied by the following Thursday, January 20, 2011.

Example 3.

One-Day rule. On Monday, January 10, 2011, Employer C accumulates $ 110,000 in employment taxes with respect to wages paid on that date. C has a deposit obligation of $ 110,000 that must be satisfied by the next business day. If C was not subject to the semi-weekly rule on January 10, 2011, C becomes subject to that rule as of January 11, 2011. See paragraph (b)(2)(ii) of this section.

Example 4.

One-Day rule in combination with subsequent deposit obligation. Employer D is subject to the semi-weekly rule for calendar year 2011. On Monday, January 10, 2011, D accumulates $ 115,000 in employment taxes. D has a deposit obligation that must be satisfied by the next business day. On Tuesday, January 11, D accumulates an additional $ 30,000 in employment taxes. Although D has a $ 115,000 deposit obligation incurred earlier in the semi-weekly period, D has an additional and separate deposit obligation of $ 30,000 on Tuesday that must be satisfied by the following Friday.

Example 5.

Legal Holidays. Employer E conducts business in State X. Wednesday, August 31, 2011, is a statewide legal holiday in State X which is not a legal holiday in the District of Columbia. On Friday, August 26, 2011, E (a semi-weekly depositor) has a pay day on which it accumulates $ 4,000 in employment taxes. E has a $ 4,000 deposit obligation that must be satisfied on or before the following Wednesday, August 31, 2011, notwithstanding that the day is a statewide legal holiday in State X.

Example 6.

Extension of time to deposit for employers who filed Form 944 for the preceding year satisfied. F (a monthly depositor) was notified to file Form 944 to report its employment tax liabilities for the 2006 calendar year. F filed Form 944 on January 31, 2007, reporting a total employment tax liability for 2006 of $ 3,000. Because F's annual employment tax liability for the 2006 taxable year exceeded $ 1,000 (the applicable eligibility threshold for that taxable year), the IRS notified F to file Forms 941 for calendar year 2007 and thereafter. Based on F's liability during the lookback period (calendar year 2005, pursuant to paragraph (b)(4)(i) of this section), F is a monthly depositor for 2007. F accumulates $ 1,000 in employment taxes during January 2007. Because F is a monthly depositor, F's January deposit obligation is due February 15, 2007. F does not deposit these accumulated employment taxes on February 15, 2007. F accumulates $ 1,500 in employment taxes during February 2007. F's February deposit is due March 15, 2007. F deposits the $ 2,500 of employment taxes accumulated during January and February on March 15, 2007. Pursuant to paragraph (c)(6) of this section, F will be deemed to have timely deposited the employment taxes due for January 2007, and, thus, the IRS will not impose a failure-to-deposit penalty under section 6656 *[26 USCS § 6656]* for that month.

(e) Employment taxes defined. (1) For purposes of this section, the term "employment taxes" means --

(i) The employee portion of the tax withheld under section 3102 *[26 USCS § 3102];*

(ii) The employer tax under section 3111 *[26 USCS § 3111];*

(iii) The income tax withheld under sections 3402 and 3405 *[26 USCS §§ 3402* and 3405], except income tax withheld with respect to payments made after December 31, 1993, on the following --

(A) Certain gambling winnings under section 3402(q) *[26 USCS § 3402*(q)];

(B) Retirement pay for service in the Armed Forces of the United States under section 3402 *[26 USCS § 3402];*

(C) Certain annuities described in section 3402(o)(1)(B) *[26 USCS § 3402*(o)(1)(B)]; and

(D) Pensions, annuities, IRAs, and certain other deferred income under section 3405 *[26 USCS § 3405];* and

(iv) The income tax withheld under section 3406 *[26 USCS § 3406],* relating to backup withholding with respect to reportable payments made before January 1, 1994.

(2) The term employment taxes does not include taxes with respect to wages for domestic service in a private home of the employer, unless the employer is otherwise required to file a Form 941 or Form 944 under § 31.6011(a)-4 or § 31.6011(a)-5. In the case of employers paying advance earned income credit amounts for periods ending before January 1, 2011, the amount of taxes required to be deposited shall be reduced by advance amounts paid to employees. Also, see § 31.6302-3 concerning a taxpayer's option with respect to payments made before January 1, 1994, to treat backup withholding amounts under section 3406 *[26 USCS § 3406]* separately.

(f) Safe harbor/De minimis rules -- (1) Single deposit safe harbor. An employer will be considered to have satisfied its deposit obligation imposed by this section if --

(i) The amount of any shortfall does not exceed the greater of $ 100 or 2 percent of the amount of employment taxes required to be deposited; and

(ii) The employer deposits the shortfall on or before the shortfall make-up date.

(2) Shortfall defined. For purposes of this paragraph (f), the term "shortfall" means the excess of the amount of employment taxes required to be deposited for the period over the amount deposited for the period. For this purpose, a period is either a monthly, semi-weekly or daily period.

(3) Shortfall make-up date --

(i) Monthly rule. A shortfall with respect to a deposit required under the Monthly rule must be deposited or remitted no later than the due date for the quarterly return, in accordance with the applicable form and instructions.

(ii) Semi-Weekly rule and One-Day rule. A shortfall with respect to a deposit required under the Semi-Weekly rule or the One-Day rule must be deposited on or before the first Wednesday or Friday (whichever is earlier), falling on or after the 15th day of the month following the month in which the deposit was required to be made or, if earlier, the return due date for the return period.

(4) De minimis rule --(i) De minimis deposit rules for quarterly and annual return periods beginning on or after January 1, 2001. If the total amount of accumulated employment taxes for the return period is de minimis and the amount is fully deposited or remitted with a timely filed return for the return period, the amount deposited or remitted will be deemed to have been timely deposited. The total amount of accumulated employment taxes is de minimis if it is less than $ 2,500 for the return period or if it is de minimis pursuant to paragraph (f)(4)(ii) of this section.

(ii) De minimis deposit rule for quarterly return periods beginning on or after January 1, 2010. For purposes of paragraph (f)(4)(i) of this section, if the total amount of accumulated employment taxes for the immediately preceding quarter was less than $ 2,500, unless §

31.6302-1(c)(3) applies to require a deposit at the close of the next day, then the employer will be deemed to have timely deposited the employer's employment taxes for the current quarter if the employer complies with the time and method payment requirements contained in paragraph (f)(4)(i) of this section.

(iii) De minimis deposit rule for employers who file Form 944. An employer who files Form 944 whose employment tax liability for the year equals or exceeds $ 2,500 but whose employment tax liability for a quarter of the year is de minimis pursuant to paragraph (f)(4)(i) of this section will be deemed to have timely deposited the employment taxes due for that quarter if the employer fully deposits the employment taxes accumulated during the quarter by the last day of the month following the close of that quarter. Employment taxes accumulated during the fourth quarter can be either deposited by January 31 or remitted with a timely filed return for the return period.

(5) Examples. The provisions of this paragraph (f) may be illustrated by the following examples:

Example 1. Safe-harbor rule satisfied. On Monday, January 4, 1993, J (a semi-weekly depositor), pays wages and accumulates employment taxes. As required under this section, J makes a deposit on or before the following Friday, January 8, 1993, in the amount of $ 4,000. Subsequently, J determines that it was actually required to deposit $ 4,090 by Friday. J has a shortfall of $ 90. The $ 90 shortfall does not exceed the greater of $ 100 or 2% of the amount required to be deposited (2% of $ 4,090=$ 81.80). Therefore, J satisfies the safe harbor of paragraph (f)(1) of this section as long as the $ 90 shortfall is deposited by the first deposit date (Wednesday or Friday) on or after the 15th day of the next month (in this case Wednesday, February 17, 1993).

Example 2. Safe-harbor rule not satisfied. The facts are the same as in Example 1 except that on Friday, January 8, 1993, J makes a deposit of $ 25,000, and later determines that it was actually required to deposit $ 26,000. Since the $ 1,000 shortfall ($ 26,000 less $ 25,000) exceeds $ 520 (the greater of $ 100 or 2% of the amount required to be deposited (2% of $ 26,000=$ 520)), the safe harbor of paragraph (f)(1) of this section is not satisfied, and absent reasonable cause, J will be subject to a failure-to-deposit penalty under section 6656 *[26 USCS § 6656].*

Example 3. De minimis deposit rule for employers who file Form 944 satisfied. K (a monthly depositor) was notified to file Form 944 to report its employment tax liabilities for the 2006 calendar year. In the first quarter of 2006, K accumulates employment taxes in the amount of $ 1,000. On April 28, 2006, K deposits the $ 1,000 of employment taxes accumulated in the first quarter. K accumulates another $ 1,000 of employment taxes during the second quarter of 2006. On July 31, 2006, K deposits the $ 1,000 of employment taxes accumulated in the second quarter. K's business grows and accumulates $ 1,500 in employment taxes during the third quarter of 2006. On October 31, 2006, K deposits the $ 1,500 of employment taxes accumulated in the third quarter. K accumulates another $ 2,000 in employment taxes during the fourth quarter. K files Form 944 on January 31, 2007, reporting a total employment tax liability for 2006 of $ 5,500 and submits a check for the remaining $ 2,000 of employment taxes with the return. K will be deemed to have timely deposited the employment taxes due for all of 2006 because K complied with the de minimis deposit rule provided in paragraph (f)(4)(iii) of this section. Therefore, the IRS will not impose a failure-to-deposit penalty under section 6656 *[26 USCS § 6656]* for any month of the year. Under this de minimis deposit rule, because K was required to file Form 944 for calendar year 2006, if K's employment tax liability for a quarter is de minimis, then K may deposit that quarter's liability by the last day of the month following the close of the quarter. This de minimis rule allows K to have the benefit of the same quarterly de minimis amount K would have received if K filed Form 941 each quarter instead of Form 944 annually. Thus, because K's employment tax liability for each quarter was de minimis, K could deposit quarterly.

(g) Agricultural employers--special rules --(1) In general. An agricultural employer reports wages paid to farm workers annually on Form 943 (Employer's Annual Tax Return for Agricultural Employees) and reports wages paid to nonfarm workers quarterly on Form 941 or annually on Form 944. Accordingly, an agricultural employer must treat employment taxes reportable on Form 943 ("Form 943 taxes") separately from employment taxes reportable on Form 941 or Form 944 ("Form 941 or Form 944 taxes"). Form 943 taxes and Form 941 or Form 944 taxes are not combined for purposes of determining whether a deposit of either is due, whether the One-Day rule of paragraph (c)(3) of this section applies, or whether any safe harbor is applicable. In addition, Form 943 taxes and Form 941 or Form 944 taxes must be deposited separately. (See paragraph (b) of this section for rules for determining an agricultural employer's deposit status for Form 941 taxes). Whether an agricultural employer is a monthly or semi-weekly depositor of Form 943 taxes is determined according to the rules of this paragraph (g).

(2) Monthly depositor. An agricultural employer is a monthly depositor of Form 943 taxes for a calendar year if the amount of Form 943 taxes accumulated in the lookback period (as defined in paragraph (g)(4) of this section) is $ 50,000 or less. An agricultural employer ceases to be a monthly depositor of Form 943 taxes on the first day after the employer is subject to the One-Day rule in paragraph (c)(3) of this section. At that time, the agricultural employer immediately becomes a semi-weekly depositor of Form 943 taxes for the remainder of the calendar year and the succeeding calendar year.

(3) Semi-weekly depositor. An agricultural employer is a semi-weekly depositor of Form 943 taxes for a calendar year if the amount of Form 943 taxes accumulated in the lookback period (as defined in paragraph (g)(4) of this section) exceeds $ 50,000.

(4) Lookback period --

(i) In general. For purposes of this paragraph (g), the lookback period for Form 943 taxes is the second calendar year preceding the current calendar year. For example, the lookback period for calendar year 1993 is calendar year 1991. New employers shall be treated as having employment tax liabilities of zero for any lookback period before the date the employer started or acquired its business.

(ii) Adjustments and Claims for Refund. The employment tax liability reported on the original return for the return period is the amount taken into account in determining whether the amount of Form 943 taxes accumulated in the lookback period exceeds $ 50,000. Any amounts reported on adjusted returns or claims for refund pursuant to sections 6205, 6402, 6413 and 6414 [26 USCS §§ 6205, 6402, 6413 and 6414] filed after the due date of the original return are not taken into account when determining the amount of Form 943 taxes accumulated in the lookback period. However, prior period adjustments reported on Form 943 for 2008 and earlier years are taken into account in determining the employment tax liability for the return period in which the adjustments are reported.

(5) The following example illustrates the provisions of this section.

Example. A, an agricultural employer, employs both farm workers and nonfarm workers (employees in its administrative offices). A's depositor status for calendar year 1993 for Form 941 taxes will be based upon its employment tax liabilities reported on Forms 941 for the third and fourth quarters of 1991 and the first and second quarters of 1992 (the period July 1 to June 30). A's depositor status for Form 943 taxes will be based upon its employment tax liability reported on its annual Form 943 for calendar year 1991.

(h) Time and manner of deposit -- deposits required to be made by electronic funds transfer -- (1) In general. Section 6302(h) [26 USCS § 6302(h)] requires the Secretary to prescribe such regulations as may be necessary for the development and implementation of an electronic funds transfer system to be used for the collection of the depository taxes as described in paragraph (h)(3) of this section. Section 6302(h)(2) [26 USCS § 6302(h)(2)] provides a phase-in schedule that sets forth escalating minimum percentages of those depository taxes to be deposited by electronic funds transfer. This paragraph (h) prescribes the rules necessary for implementing an electronic funds transfer system for collection of depository taxes and for effecting an orderly and expeditious phase-in of that system.

(2) Applicability of requirement -- (i) Deposits for return periods beginning before January 1, 2000. (A) Taxpayers whose aggregate deposits of the taxes imposed by Chapters 21 (Federal Insurance Contributions Act), 22 (Railroad Retirement Tax Act), and 24 (Collection of Income Tax at Source on

Wages) of the Internal Revenue Code during a 12-month determination period exceed the applicable threshold amount are required to deposit all depository taxes described in paragraph (h)(3) of this section by electronic funds transfer (as defined in paragraph (h)(4) of this section) unless exempted under paragraph (h)(5) of this section. If the applicable effective date is January 1, 1995, or January 1, 1996, the requirement to deposit by electronic funds transfer applies to all deposits required to be made on or after the applicable effective date. If the applicable effective date is July 1, 1997, the requirement to deposit by electronic funds transfer applies to all deposits required to be made on or after July 1, 1997 with respect to deposit obligations incurred for return periods beginning on or after January 1, 1997. If the applicable effective date is January 1, 1998, or thereafter, the requirement to deposit by electronic funds transfer applies to all deposits required to be made with respect to deposit obligations incurred for return periods beginning on or after the applicable effective date. In general, each applicable effective date has one 12-month determination period. However, for the applicable effective date January 1, 1996, there are two determination periods. If the applicable threshold amount is exceeded in either of those determination periods, the taxpayer becomes subject to the requirement to deposit by electronic funds transfer, effective January 1, 1996. The threshold amounts, determination periods and applicable effective dates for purposes of this paragraph (h)(2)(i)(A) are as follows:

Threshold amount	**Determination period**	**Applicable effective date**
$ 78 million	1-1-93 to 12-31-93	Jan. 1, 1995.
$ 47 million	1-1-93 to 12-31-93	Jan. 1, 1996.
$ 47 million	1-1-94 to 12-31-94	Jan. 1, 1996.
$ 50 thousand	1-1-95 to 12-31-95	July 1, 1997.
$ 50 thousand	1-1-96 to 12-31-96	Jan. 1, 1998.
$ 50 thousand	1-1-97 to 12-31-97	Jan. 1, 1999.

(B) Unless exempted under paragraph (h)(5) of this section, a taxpayer that does not deposit any of the taxes imposed by chapters 21, 22, and 24 during the applicable determination periods set forth in paragraph (h)(2)(i)(A) of this section, but that does make deposits of other depository taxes (as described in paragraph (h)(3) of this section), is nevertheless subject to the requirement to deposit by electronic funds transfer if the taxpayer's aggregate deposits of all depository taxes exceed the threshold amount set forth in this paragraph (h)(2)(i)(B) during an applicable 12-month determination period. This requirement to deposit by electronic funds transfer applies to all depository taxes due with respect to deposit obligations incurred for return periods beginning on or after the applicable effective date. The threshold amount, determination periods, and applicable effective dates for purposes of this paragraph (h)(2)(i)(B) are as follows:

Threshold amount	**Determination period**	**Applicable effective date**
$ 50 thousand	1-1-95 to 12-31-95	Jan. 1, 1998.
$ 50 thousand	1-1-96 to 12-31-96	Jan. 1, 1998.
$ 50 thousand	1-1-97 to 12-31-97	Jan. 1, 1999.

(C) This paragraph (h)(2)(i) applies only to deposits required to be made for return periods beginning before January 1, 2000. Thus, a taxpayer, including a taxpayer that is required under this paragraph (h)(2)(i) to make deposits by electronic funds transfer beginning in 1999 or an earlier year, is not required to use electronic funds transfer to make deposits for return periods beginning after December 31, 1999, unless deposits by electronic funds transfer are required under paragraph (h)(2)(ii) of this section.

(ii) Deposits for return periods beginning after December 31, 1999, and made before January 1, 2011. Unless exempted under paragraph (h)(5) of this section, for deposits for return periods beginning after December 31, 1999, and made before January 1, 2011, a taxpayer that deposits more than $ 200,000 of taxes described in paragraph (h)(3) of this section during a calendar year beginning after December 31, 1997, must use electronic funds transfer (as defined in paragraph (h)(4) of this section) to make all deposits of those taxes that are required to be made for return periods beginning after December 31 of the following year and must continue to deposit by electronic funds transfer in all succeeding years. As an example, a taxpayer that exceeds the $ 200,000 deposit threshold during calendar year 1998 is required to make deposits for return periods beginning in or after calendar year 2000 by electronic funds transfer.

(iii) Deposits made after December 31, 2010. Unless exempted under paragraph (h)(5) of this section, a taxpayer that has a required tax deposit obligation described in paragraph (h)(3) of this section must use electronic funds transfer (as defined in paragraph (h)(4) of this section) to make all deposits of those taxes made after December 31, 2010.

(iv) Voluntary deposits. A taxpayer that is authorized to make payment of taxes with a return under regulations may voluntarily make a deposit by electronic funds transfer.

(3) Taxes required to be deposited by electronic funds transfer. The requirement to deposit by electronic funds transfer under paragraph (h)(2) of this section applies to all the taxes required to be deposited under §§ 1.6302-1, 1.6302-2, and 1.6302-3 of this chapter; §§ 31.6302-1, 31.6302-2, 31.6302-3, 31.6302-4, and 31.6302(c)-3; and § 40.6302(c)-1 of this chapter.

(4) Definitions --

(i) Electronic funds transfer. An electronic funds transfer is any transfer of depository taxes made in accordance with *Revenue Procedure 97-33,* (1997-30 I.R.B.), (see § 601.601(d)(2) of this chapter), or in accordance with procedures subsequently prescribed by the Commissioner.

(ii) Taxpayer. For purposes of this section, a taxpayer is any person required to deposit federal taxes, including not only individuals, but also any trust, estate, partnership, association, company or corporation.

(5) Exemptions. If any categories of taxpayers are to be exempted from the requirement to deposit by electronic funds transfer, the Commissioner will identify those taxpayers by guidance published in the Internal Revenue Bulletin. (See § 601.601(d)(2)(ii)(b) of this chapter.)

(6) Separation of deposits. A deposit for one return period must be made separately from a deposit for another return period.

(7) Payment of balance due. If the aggregate amount of taxes reportable on the applicable tax return for the return period exceeds the total amount deposited by the taxpayer with regard to the return period, then the balance due must be remitted in accordance with the applicable form and instructions.

(8) Time deemed deposited. A deposit of taxes by electronic funds transfer will be deemed made when the amount is withdrawn from the taxpayer's account, provided the U.S. Government is the payee and the amount is not returned or reversed.

(9) Time deemed paid. In general, an amount deposited under this paragraph (h) will be considered to be a payment of tax on the last day prescribed for filing the applicable return for the return period (determined without regard to any extension of time for filing the return) or, if later, at the time deemed deposited under paragraph (h)(8) of this section. In the case of the taxes imposed by chapters 21 and 24 of the Internal Revenue Code, solely for purposes of section 6511 *[26 USCS § 6511]* and the regulations thereunder (relating to the period of limitation on credit or refund), if an amount is deposited prior to April 15th of the calendar year immediately succeeding the calendar year that includes the period for which the amount was deposited, the amount will be considered paid on April 15th.

(i) Time and manner of remittance with a return --(1) General rules. A remittance required to be made by this section that is authorized to be made with a return under regulations and is made with a return must be made separately from a remittance required by any other section. Further, a remittance for a deposit period in one return period must be made separately from a remittance for a deposit period in another return period.

(2) Payment of balance due. If the aggregate amount of taxes reportable on the return for the return period exceeds the total amount deposited by the employer with regard to the return period pursuant to this section, the balance due must be remitted in accordance with the applicable form and instructions.

(3) Time deemed paid. In general, amounts remitted with a return under this section will be considered as paid on the date payment is received by the Internal Revenue Service at the place prescribed for filing by regulations or forms and instructions (or if section 7502(a) *[26 USCS § 7502*(a)] applies, by the date the payment is treated as received under section 7502(a) *[26 USCS § 7502*(a)]), or on the last day prescribed for filing the return (determined without regard to any extension of time for filing the return), whichever is later. In the case of the taxes imposed by chapter 21 and 24 of the Internal Revenue Code, solely for purposes of section 6511 *[26 USCS § 6511]* and the regulations thereunder (relating to the period of limitation on credit or refund), if an amount is remitted with a return under this section prior to April 15th of the calendar year immediately succeeding the calendar year that contains the period for which the amount was remitted, the amount will be considered paid on April 15th of the succeeding calendar year.

(j) Voluntary payments by electronic funds transfer. Any person may voluntarily remit by electronic funds transfer any payment of tax imposed by subtitle C of the Internal Revenue Code. Such payment must be made in accordance with procedures prescribed by the Commissioner.

(k) Special rules --

(1) Notice exception. The provisions of this section are not applicable with respect to employment taxes for any month in which the employer receives notice that a return is required under § 31.6011(a)-5 (or for any subsequent month for which such a return is required), if those taxes are also required to be deposited under the separate accounting procedures provided in § 301.7512-1 of the Regulations on Procedure and Administration (which procedures are applicable if notification is given by the Commissioner of failure to comply with certain employment tax requirements). In cases in which a monthly return is required under § 31.6011(a)-5 but the taxes are not required to be deposited under the separate accounting procedures provided in § 301.7512-1, the provisions of this section shall apply except those provisions shall not authorize the deferral of any deposit to a date after the date on which the return is required to be filed.

(2) Wages paid in nonconvertible foreign currency. The provisions of this section are not applicable with respect to wages paid in nonconvertible foreign currency pursuant to § 301.6316-7.

(l)[Reserved].

(m) Cross references --

(1) Failure to deposit penalty. For provisions relating to the penalty for failure to make a deposit within the prescribed time, see section 6656 *[26 USCS § 6656].*

(2) Saturday, Sunday, or legal holiday. For provisions relating to the time for performance of acts where the last day falls on Saturday, Sunday, or a legal holiday, see the provisions of § 301.7503-1.

(n) Effective/applicability dates. Sections 31.6302-1 through 31.6302-3 apply with respect to the deposit of employment taxes attributable to payments made after December 31, 1992. To the extent that the provisions of §§ 31.6302-1 through 31.6302-3 are inconsistent with the provisions of §§ 31.6302(c)-1 and 31.6302(c)-2, a taxpayer will be considered to be in compliance with §§ 31.6302-1 through 31.6302-3 if the taxpayer makes timely deposits during 1993 in accordance with §§ 31.6302(c)-1 and 31.6302(c)-2. Paragraphs (b)(4), (c)(5), (c)(6), (d) Example 6, (e)(2), (f)(4)(i), (f)(4)(iii), (f)(5) Example 3, and (g)(1) of this section apply to taxable years beginning on or after December 30, 2008. Paragraph (f)(4)(ii) of this section applies to taxable years beginning on or after January 1, 2010. The rules of paragraphs (e)(2) and (g)(1) of this section that apply to taxable years beginning before December 30, 2008, are contained in § 31.6302-1 as in effect prior to December 30, 2008. The rules of paragraphs (b)(4), (c)(5), (c)(6), (d) Example 6, (f)(4)(i), (f)(4)(iii), and (f)(5) Example 3 of this section that apply to taxable years beginning on or after January 1, 2006, and before December 30, 2008, are contained in § 31.6302-1T as in effect prior to December 30, 2008. The rules of paragraphs (b)(4) and (f)(4) of this section that apply to taxable years beginning before January 1, 2006, are contained in § 31.6302-1 as in effect prior to January 1, 2006. The rules of paragraph (g) of this section eliminating use of Federal tax deposit coupons apply to deposits and payments made after December 31, 2010.

(o) Effective/applicability date. Paragraphs (c), (d) Examples 1 through 5, (h)(2)(ii), (h)(2)(iii), (h)(2)(iv),(i)(1) and (i)(3) of this section apply to deposits and payments made after December 31, 2010.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

26 U.S.C. 7805.

History

[57 FR 44102, Sept. 24, 1992, Treas. Dec. 8436; *57 FR 48724,* Oct. 28, 1992; *58 FR 68035,* Dec. 23, 1993, Treas. Dec. 8504; *59 FR 6218,* Feb. 10, 1993, Treas. Dec. 8436; *62 FR 37490, 37492, 37493,* July 14, 1997, Treas. Dec. 8723; *63 FR 32735, 32736,* June 16, 1998, Treas. Dec. 8771; *64 FR 32408,* June 17, 1999; *64 FR 37675, 37676,* July 13, 1999, Treas. Dec. 8828; *65 FR 76152, 76153,* Dec. 6, 2000; *66 FR 28370,* May 23, 2001, Treas. Dec. 8946; *66 FR 32541, 32542,* June 15, 2001, Treas. Dec. 8946; *66 FR 33830, 33831,* June 26, 2001, Treas. Dec. 8952; *71 FR 11, 13, 15,* Jan. 3, 2006, Treas. Dec. 9239; *73 FR 37371, 37379,* July 1, 2008, Treas. Dec. 9405; *73 FR 79354, 79359,* Dec. 29, 2008, Treas. Dec. 9440; *75 FR 75897, 75901,* Dec. 7, 2010, Treas. Dec. 9507; *76 FR 26583, 26602,* May 9, 2011, Treas. Dec. 9524; *76 FR 77672, 77676,* Dec. 14, 2011, Treas. Dec. 9566; *77 FR 24611, 24612,* Apr. 25, 2012, Treas. Dec. 9586]

Annotations

Notes

Section 31.6302-1 also issued under *26 U.S.C. 6302*(a) and (h).

[EFFECTIVE DATE NOTE:

75 FR 75897, 75901, Dec. 7, 2010, amended this section, effective Jan. 1, 2011; *76 FR 26583, 26602,* May 9, 2011, amended paragraph (e)(1)(iii) and revised paragraph (n), effective May 9, 2011; *76 FR 77672, 77676,* Dec. 14, 2011, amended this section, effective Dec. 14, 2011; *77 FR 24611, 24612,* Apr. 25, 2012, revised paragraphs (e)(1)(iii)(C) and (n), and removed paragraph (e)(1)(iii)(E), effective Apr. 25, 2012.]

Case Notes

LexisNexis® Notes

26 CFR 601.401

This document is current through the November 8, 2018 issue of the Federal Register. Title 3 is current through November 2, 2018.

Code of Federal Regulations > TITLE 26 -- INTERNAL REVENUE > CHAPTER I -- INTERNAL REVENUE SERVICE, DEPARTMENT OF THE TREASURY > SUBCHAPTER H -- INTERNAL REVENUE PRACTICE > PART 601 -- STATEMENT OF PROCEDURAL RULES > SUBPART D -- PROVISIONS SPECIAL TO CERTAIN EMPLOYMENT TAXES

§ 601.401 Employment taxes.

(a) General --

(1) Description of taxes. Federal employment taxes are imposed by Subtitle C of the Internal Revenue Code. Chapter 21 (Federal Insurance Contributions Act) imposes a tax on employers of one or more individuals and also a tax on employees, with respect to "wages" paid and received. Chapter 22 (Railroad Retirement Tax Act) imposes (i) an employer tax and employee tax with respect to "compensation" paid and received, (ii) an employee representative tax with respect to "compensation" received, and (iii) a supplemental tax on employers, measured by man-hours for which "compensation" is paid. Chapter 23 (Federal Unemployment Tax Act) imposes a tax on employers of one or more individuals with respect to "wages" paid. Chapter 24 (collection of income tax at source on wages) requires every employer making payment of "wages" to deduct and withhold upon such wages the tax computed or determined as provided therein. The tax so deducted and withheld is allowed as a credit against the income tax liability of the employee receiving such wages.

(2) Applicable regulations. The descriptive terms used in this section to designate the various classes of taxes are intended only to indicate their general character. Specific information relative to the scope of each tax, the forms used, and the functioning of the Service with respect thereto is contained in the applicable regulations. Copies of all necessary forms, and instructions as to their preparation and filing, may be obtained from the district director of internal revenue.

(3) Collection methods. Employment taxes are collected by means of returns and by withholding by employers. Employee tax must be deducted and withheld by employers from "wages" or "compensation" (including tips reported in writing to employer) paid to employees, and the employer is liable for the employee tax whether or not it is so deducted. For special rules relating to tips see §§ 31.3102-3 and 31.3402 (k)-1. *Rev. Proc. 81-48, 1981-2 C.B. 623,* provides guidelines for determining wages when the employer pays the employee tax imposed by Chapter 21 without deducting the amount from the employee's pay. Employee representatives (as defined in the Railroad Retirement Tax Act) are required to file returns. Employment tax returns must be filed with the district director or, if so provided in instructions applicable to a return, with the service center designated in the instructions. The return of the Federal unemployment tax is required to be filed annually on Form 940 with respect to wages paid during the calendar year. All other returns of Federal employment taxes (with the exception of returns filed for agricultural employees) are required to be filed for each calendar quarter except that if pursuant to regulations the district director so notifies the employer, returns on Form 941 are required to be filed on a monthly basis. In the case of certain employers required to report withheld income tax but not required to report employer and employee taxes imposed by Chapter 21 (for example, state and local government employers), Form 941E is prescribed for reporting on a quarterly basis. The employer and employee taxes imposed by Chapter 21 (other than the employer and employee taxes on wages paid for agricultural labor) and the tax required to be deducted and withheld upon wages by Chapter 24 are combined in a single return on Form 941. In the case of wages paid by employers for domestic service performed in a private home not on a farm operated for profit, the return of both the employee tax and the employer tax imposed by Chapter 21 is on Form 942. However, if the employer is required to file a return for the same quarter on Form 941, the employer may elect to include the taxes with respect to such domestic service on Form 941. The employer and employee taxes imposed by Chapter 21 with respect to wages paid for agricultural labor are required to be reported annually on Form 943. Under the Railroad Retirement Tax Act, the return required of the employer is on Form CT-1, and the return required of each employee representative is on Form CT-2. An employee is not required to file a return of employee tax, except that the employee must include in his or her income tax return (as provided in the applicable instructions) any amount of employee tax (i) due with respect to tips that the employee failed to report to the employer or (ii) shown on the employee's Form W-2 as "Uncollected Employee Tax on Tips".

(4) Receipts for employees. Employers are required to furnish each employee a receipt or statement, in duplicate, showing the total wages subject to income tax withholding, the amount of income tax withheld, the amount of wages subject to tax under the Federal Insurance Contributions Act, and the amount of employee tax withheld. See section 6051 of the Code *[26 USCS § 6051].*

(5) Use of authorized financial institutions in connection with payment of Federal employment taxes. Most employers are required to deposit employment taxes either on a monthly basis, a semimonthly basis or quarter-monthly period basis as follows:

(i) Quarter-monthly period deposits. With respect to wages paid after January 31, 1971 (March 31, 1971, in the case of wages paid for agricultural labor), if at the close of any quarter-monthly period (that ends on the 7th, 15th, 22d, or the last day of any month) the aggregate amount of undeposited taxes, exclusive of taxes reportable on Form 942, is $ 2,000 or more, the employer shall deposit such taxes within 3 banking days after the close of such quarter-monthly period.

(ii) Monthly deposits. With respect to employers not required to make deposits under subdivision (i) of this subparagraph, if after January 31, 1971 (March 31, 1971, in the case of income tax withheld from wages paid for agricultural labor) (a) during any calendar month, other than the last month of a calendar quarter, the aggregate amount of the employee tax deducted and the employer tax under Chapter 21 and the income tax withheld at source on wages under Chapter 24, exclusive of taxes reportable on Form 942, exceeds $ 200 or (b) at the end of any month or period of 2 or more months and prior to December 1 of any calendar year, the total amount of undeposited taxes imposed by Chapter 21, with respect to wages paid for agricultural labor, exceeds $ 200, it is the duty of the employer to deposit such amount within 15 days after the close of such calendar month.

(iii) Quarterly and year-end deposits. Whether or not an employer is required to make deposits under subdivisions (i) and (ii) of this subparagraph, if the amount of such taxes reportable on Form 941 or 943 (reduced by any previous deposits) exceeds $ 200, the employer shall, on or before the last day of the first calendar month following the period for which the return is required to be filed, deposit such amount with an authorized financial institution. However, if the amount of such taxes (reduced by any previous deposits) does not exceed $ 200, the employer may either include with his return a direct remittance for the amount of such taxes or, on or before the last day of the first calendar month following the period for which the return is required to be filed, voluntarily deposit such amount with an authorized financial institution.

(iv) Additional rules. Deposits under subdivisions (i), (ii) and (iii) of this subparagraph are made with an authorized financial institution. The remittance of such amount must be accompanied by a Federal Tax Deposit form. Each employer making deposits shall report on the return for the period with respect to which such deposits are made information regarding such deposits in accordance with the instructions applicable to such return and pay therewith (or deposit by the due date of such return) the balance, if any, of the taxes due for such period.

(v) Employers under Chapter 22 of the Code. Depositary procedures similar to those prescribed in this subparagraph are prescribed for employers as defined by the Railroad Retirement Tax Act, except that railroad retirement taxes are not requested to be deposited semimonthly or quarter-monthly. Such taxes must be deposited by using a Federal Tax Deposit form.

(vi) Employers under chapter 23 of the Code. Every person who is an employer as defined by the Federal Unemployment Tax Act shall deposit the tax imposed under Chapter 23 on or before the last day of the first calendar month following the quarterly period in which the amount of such tax exceeds $ 100.

(6) Separate accounting. If an employer fails to withhold and pay over income, social security, or railroad retirement tax due on wages of employees, the employer may be required by the district director to collect such taxes and deposit them in a separate banking account in trust for the United States not later than the second banking day after such taxes are collected.

(b) Provisions special to the Federal Insurance Contributions Act --

(1) Employers' identification numbers. For purposes of the Federal Insurance Contributions Act each employer who files Form 941 or Form 943 must have an identification number. Any such employer who does not have an identification number must secure a Form SS-4 from the district director of internal revenue or from a district office of the Social Security Administration and, after executing the form in accordance with the instructions contained thereon, file it with the district director or the district office of the Social Security Administration. At a subsequent date the district director will assign the employer a number which must appear in the appropriate space on each tax return, Form 941 or Form 943, filed thereafter. The requirement to secure an identification number does not apply to an employer who employs only employees who are engaged exclusively in the performance of domestic service in the employer's private home not on a farm operated for profit.

(2) Employees' account numbers. Each employee (or individual making a return of net earnings from self-employment) who does not have an account number must file an application on Form SS-5, a copy of which may be obtained from any district office of the Social Security Administration or from a district director of internal revenue. The form, after execution in accordance with the instructions thereon, must be filed with the district office of the Social Security Administration, and at a later date the employee will be furnished an account number. The employee must furnish such number to each employer for whom the employee works, in order that such number may be entered on each tax return filed thereafter by the employer.

(3) Reporting of wages. Forms 941, 942, and 943 each require, as a part of the return, that the wages of each employee paid during the period covered by the return be reported thereon. Form 941a is available to employers who need additional space for the listing of employees. Employers who meet the requirements of the Social Security Administration may, with the approval of the Commissioner of Internal Revenue, submit wage information on reels of magnetic tape in lieu of Form 941a. It is necessary at times that employers correct wage information previously reported. A special form, Form 941c, has been adopted for use in correcting erroneous wage information or omissions of such wage information on Form 941, 942, or 943. Instructions on Form 941, 941c, 942, and 943 explain the manner of preparing and filing the forms. Any further instructions should be obtained from the district director.

(c) Adjustments by employers -- (1) Undercollections and underpayments -- (i) Employer tax or employee tax. If a return is filed by an employer under the Federal Insurance Contributions Act or the Railroad Retirement Tax Act, and the employer reports and pays less than the correct amount of employer tax or employee tax, the employer is required to report and pay the additional amount due. The reporting will be an adjustment without interest only if the employer reports and pays the additional amount on or before the last day on which the return is required to be filed for the return period in which the error is ascertained. The employer may so report the additional amount either on the return for that period or on a supplemental return for the period for which the underpayment was made. If the employer fails to report the additional amount due within the time so fixed for making an interest-free adjustment, the employer nevertheless is required to report the additional amount in the same manner, but interest will be due. No adjustment of an underpayment may be made under this section or § 31.6205-1(b)(2) if the employer is sent a notice and demand for payment of the additional tax.

(ii) Income tax withholding. If an employer files a return reporting and paying less than the correct amount of income tax required to be withheld from wages paid during the return period, the employer is required to report and pay the additional amount due, either (a) on a return for any return period in the calendar year in which the wages were paid, or (b) on a supplemental return for the return period in which the wages were paid. The reporting will be an adjustment without interest only if the employer reports and pays the additional amount on or before the last day on which the return is required to be filed for the return period in which the error was ascertained. If an employer reports and pays less than the correct amount of income tax required to be withheld in a calendar year, and the employer does not correct the underpayment in the same calendar year, the employer should consult the District Director of Internal Revenue as to the manner of correcting the error.

(2) Overcollections from employees --

(i) Employee tax. If an employer collects from an employee more than the correct amount of employee tax under the Federal Insurance Contributions Act or the Railroad Retirement Act, and the error is ascertained within the applicable period of limitation on credit or refund, the employer is required either to repay the amount to the employee, or to reimburse the employee by applying the amount of the overcollection against employee tax which otherwise would be collected from the employee after the error is ascertained. If the overcollection is repaid to the employee, the employer is required to obtain and keep the employee's written receipt showing the date and amount of the repayment. In addition, if the employer repays or reimburses an employee in any calendar year for an overcollection which occurred in a prior calendar year, the employer is required to obtain and keep the employee's written statement (a) that the employee has not claimed refund or credit of the amount of the overcollection, or if so, such claim has been rejected, and (b) that the employee will not claim refund or credit of such amount.

(ii) Income tax withholding. If, in any return period in a calendar year, an employer withholds more than the correct amount of income tax, and pays over to the Internal Revenue Service the amount withheld, the employer may repay or reimburse the employee in the excess amount in any subsequent return period in the same calendar year. If the amount is so repaid, the employer is required to obtain and keep the employee's written receipt showing the date and amount of the repayment.

(3) Employer's claims for credit or refund of overpayments --

(i) Employee tax. If an employer repays or reimburses an employee for an overcollection of employee tax, as described in subparagraph (2)(i) of this paragraph, the employer may claim credit on a return in accordance with the instructions applicable to the return. In lieu of claiming credit the employer may claim refund by filing Form 843, but the employer may not thereafter claim credit for the same overpayment.

(ii) Income tax withholding. If an employer repays or reimburses an employee for an excess amount withheld as income tax, as described in subparagraph (2)(ii) of this paragraph, the employer may claim credit on a return for a return period in the calendar year in which the excess amount was withheld. The employer is not otherwise permitted to claim credit or refund for any overpayment of income tax that the employer deducted or withheld from an employee.

(d) Special refunds of employee social security tax.

(1) An employee who receives wages from more than one employer during a calendar year may, under certain conditions, receive a "special refund" of the amount of employee social security tax (i.e., employee tax under the Federal Insurance Contributions Act) deducted and withheld from wages that exceed the following amounts: calendar years 1968 through 1971, $ 7,800; calendar year 1972, $ 9,000; calendar year 1973, $ 10,800; calendar year 1974, $ 13,200; calendar years after 1974, an amount equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) effective with respect to that year. An employee who is entitled to a special refund of employee tax with respect to wages received during a calendar year, and who is required to file an income tax return for such calendar year (or for his last taxable year beginning in such calendar year), may obtain the benefits of such special refund only by claiming credit for such special refund on such income tax return in the same manner as if such special refund were an amount deducted and withheld as income tax at source on wages.

(2) The amount of the special refund allowed as a credit shall be considered as an amount deducted and withheld as income tax at source on wages. If the amount of such special refund when added to amounts deducted and withheld as income tax under chapter 24 exceeds the income tax imposed by chapter 1, the amount of the excess constitutes an overpayment of income tax, and interest on such overpayment is allowed to the extent provided under section 6611 of the Code *[26 USCS § 6611]* upon an overpayment of income tax resulting from a credit for income tax withheld at source on wages.

(3) If an employee entitled to a special refund of employee social security tax is not required to file an income tax return for the year in which such special refund may be claimed as a credit, the employee may file a claim for refund of the excess social security tax on Form 843. Claims must be filed with the district director of internal revenue for the district in which the employee resides.

(4) Employee taxes under the Federal Insurance Contributions Act and the Railroad Retirement Tax Act include a percentage rate for hospital insurance. If in 1968 or any calendar year thereafter employee taxes under both Acts are deducted from an employee's wages and compensation aggregating more than $ 7,800, the "special refund" provisions may apply to the portion of the tax that is deducted for hospital insurance. The employee may take credit on Form 1040 for the amount allowable, in accordance with the instructions applicable to that form.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 301 and 552.

History

[32 FR 15990, Nov. 22, 1967, as amended at *33 FR 6825,* May 4, 1968; *33 FR 17239,* Nov. 21, 1968; *36 FR 7586,* Apr. 22, 1971; *38 FR 4970,* Feb. 23, 1973; *39 FR 8918,* Mar. 7, 1974; *41 FR 20883,* May 21, 1976; *45 FR 7257,* Feb. 1, 1980; *49 FR 19648, 19649,* May 9, 1984; *49 FR 25239,* June 20, 1984; *49 FR 36500,* Sept. 18, 1984; *T.D. 8952, 66 FR 33830, 33831,* June 26, 2001]

Annotations

Notes

[EFFECTIVE DATE NOTE:

66 FR 33830, 33831, June 26, 2001, amended this section, effective June 26, 2001.]

Case Notes

Cal Code Civ Proc § 2101

Deering's California Codes are current through all urgency legislation of the 2018 Regular Session and all other 2018 legislation except Chapters 554, 564, 599, 626, 634, 662, 665, 703, 726, 743, 769, 801, 896, 958, 1000, and 1011.

Deering's California Codes Annotated > CODE OF CIVIL PROCEDURE > Part 4 Miscellaneous Provisions > Title 7 Uniform Federal Lien Registration Act

§ 2101. Filing of notices

(a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with this title.

(b) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be filed for record in the office of the recorder of the county in which the real property subject to the liens is situated.

(c) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the lien applies is a corporation, a limited liability company, or a partnership whose principal executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the Secretary of State.

(2) If the person against whose interest the lien applies is a trust that is not covered by paragraph (1), in the office of the Secretary of State.

(3) If the person against whose interest the lien applies is the estate of a decedent, in the office of the Secretary of State.

(4) In all other cases, in the office of the recorder of the county where the person against whose interest the lien applies resides at the time of filing of the notice of lien.

History

Added Stats 1979 ch 330 § 1. Amended *Stats 1991 ch 932 § 2 (AB 1646)*; *Stats 1997 ch 892 § 2 (SB 73)*.

Annotations

Notes

Former Sections:

Historical Derivation:

Amendments:

Former Sections:

Rev. Rul. 2018-7; 2018 IRB LEXIS 141; 2018-13 I.R.B. 445

Determination of Rate of Interest

US Internal Revenue Service

March 07, 2018

Reporter
2018 IRB LEXIS 141 *; Rev. Rul. 2018-7; 2018-13 I.R.B. 445

Revenue Ruling 2018-07

Applicable Sections

26 CFR 301.6621-1: Interest rate.

[*1]

Core Terms

overpayment, short-term, calendar, compound

Text

Section 6621 of the Internal Revenue Code establishes the interest rates on overpayments and underpayments of tax. Under *section 6621 (a) (1)*, the overpayment rate is the sum of the federal short-term rate plus 3 percentage points (2 percentage points in the case of a corporation), except the rate for the portion of a corporate overpayment of tax exceeding $10,000 for a taxable period is the sum of the federal short-term rate plus 0.5 of a percentage point. Under *section 6621 (a) (2)*, the underpayment rate is the sum of the federal short-term rate plus 3 percentage points.

Section 6621 (c) provides that for purposes of interest payable under *section 6601* on any large corporate underpayment, the underpayment rate under *section 6621 (a) (2)* is determined by substituting "5 percentage points" for "3 percentage points."

See *section 6621 (c)* and *section 301.6621-3 of the Regulations* on Procedure and Administration for the definition of a large corporate underpayment and for the rules for determining the applicable date. *Section 6621 (c)* and *section 301.6621-3* are generally effective for periods after December 31, 1990.

Section 6621 (b) (1) provides that the **[*2]** Secretary will determine the federal short-term rate for the first month in each calendar quarter. *Section 6621 (b) (2) (A)* provides that the federal short-term rate determined under *section 6621 (b) (1)* for any month applies during the first calendar quarter beginning after that month. *Section 6621 (b) (3)* provides that the federal short-term rate for any month is the federal short-term rate determined during that month by the Secretary in accordance with *section 1274 (d)*, rounded to the nearest full percent (or, if a multiple of 1/2 of 1 percent, the rate is increased to the next highest full percent).

Notice 88-59, 1988-1 C.B. 546, announced that in determining the quarterly interest rates to be used for overpayments and underpayments of tax under *section 6621*, the Internal Revenue Service will use the federal short-term rate based on daily compounding because that rate is most consistent with *section 6621* which, pursuant to *section 6622*, is subject to daily compounding.

The federal short-term rate determined in accordance with *section 1274 (d)* during January 2018 is the rate published in *Revenue Ruling 2018-5, 2018-6 I.R.B. 339*, to take effect beginning February 1, 2018. The federal **[*3]** short-term rate, rounded to the nearest full percent, based on daily compounding determined during the month of January 2018 is 2 percent. Accordingly, an overpayment rate of 5 percent (4 percent in the case of a corporation) and an underpayment rate of 5 percent are established for the calendar quarter beginning April 1, 2018. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 for the calendar quarter beginning April 1, 2018 is 2.5 percent. The underpayment rate for large corporate underpayments for the calendar quarter beginning April 1, 2018, is 7 percent. These rates apply to amounts bearing interest during that calendar quarter.

Sections 6654 (a) (1) and *6655 (a) (1)* provide that the underpayment rate established under *section 6621* applies in determining the addition to tax under *sections 6654* and *6655* for failure to pay estimated tax for any taxable year. Thus, the 5 percent rate also applies to estimated tax underpayments for the second calendar quarter beginning April 1, 2018. Pursuant to *section 6621 (b) (2) (B)*, however, in determining the addition to tax under *section 6654* for any taxable year for an individual, the federal short-term rate that **[*4]** applies during the third month following the taxable year also applies during the first 15 days of the 4th month following the taxable year. Thus, for the period of April 1 - 15, 2018, the 4 percent rate applicable to the first quarter of 2018 applies to the addition to tax under *section 6654*. See *Revenue Ruling 2017-25, 2017-52 IRB 586*. In addition, pursuant to *section 6603 (d) (4)*, the rate of interest on *section 6603* deposits is 2 percent for the second calendar quarter in 2018.

Interest factors for daily compound interest for annual rates of 2.5 percent, 4 percent, 5 percent and 7 percent are published in Tables 10, 13, 15 and 19 of *Rev. Proc. 95-17, 1995-1 C.B. 564, 567, 569* and *573*.

Annual interest rates to be compounded daily pursuant to *section 6622* that apply for prior periods are set forth in the tables accompanying this revenue ruling.

DRAFTING INFORMATION

The principal author of this revenue ruling is Richard Duenas of the Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding this revenue ruling, contact Mr. Duenas at (202) 317-6877 (not a toll-free call).

Attachment

APPENDIX A

365 Day Year

0.5% Compound Rate 184 Days

Days	**Factor**	**Days**	**Factor**	**Days**	**Factor**
1	0.000013699	63	0.000863380	125	0.001713784
2	0.000027397	64	0.000877091	126	0.001727506
3	0.000041096	65	0.000890801	127	0.001741228
4	0.000054796	66	0.000904512	128	0.001754951
5	0.000068495	67	0.000918223	129	0.001768673
6	0.000082195	68	0.000931934	130	0.001782396
7	0.000095894	69	0.000945646	131	0.001796119
8	0.000109594	70	0.000959357	132	0.001809843
9	0.000123294	71	0.000973069	133	0.001823566
10	0.000136995	72	0.000986781	134	0.001837290
11	0.000150695	73	0.001000493	135	0.001851013

365 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
12	0.000164396	74	0.001014206	136	0.001864737
13	0.000178097	75	0.001027918	137	0.001878462
14	0.000191798	76	0.001041631	138	0.001892186
15	0.000205499	77	0.001055344	139	0.001905910
16	0.000219201	78	0.001069057	140	0.001919635
17	0.000232902	79	0.001082770	141	0.001933360
18	0.000246604	80	0.001096484	142	0.001947085
19	0.000260306	81	0.001110197	143	0.001960811
20	0.000274008	82	0.001123911	144	0.001974536
21	0.000287711	83	0.001137625	145	0.001988262
22	0.000301413	84	0.001151339	146	0.002001988
23	0.000315116	85	0.001165054	147	0.002015714
24	0.000328819	86	0.001178768	148	0.002029440
25	0.000342522	87	0.001192483	149	0.002043166
26	0.000356225	88	0.001206198	150	0.002056893
27	0.000369929	89	0.001219913	151	0.002070620
28	0.000383633	90	0.001233629	152	0.002084347
29	0.000397336	91	0.001247344	153	0.002098074
30	0.000411041	92	0.001261060	154	0.002111801
31	0.000424745	93	0.001274776	155	0.002125529
32	0.000438449	94	0.001288492	156	0.002139257
33	0.000452154	95	0.001302208	157	0.002152985
34	0.000465859	96	0.001315925	158	0.002166713
35	0.000479564	97	0.001329641	159	0.002180441
36	0.000493269	98	0.001343358	160	0.002194169
37	0.000506974	99	0.001357075	161	0.002207898
38	0.000520680	100	0.001370792	162	0.002221627
39	0.000534386	101	0.001384510	163	0.002235356
40	0.000548092	102	0.001398227	164	0.002249085
41	0.000561798	103	0.001411945	165	0.002262815
42	0.000575504	104	0.001425663	166	0.002276544
43	0.000589211	105	0.001439381	167	0.002290274
44	0.000602917	106	0.001453100	168	0.002304004
45	0.000616624	107	0.001466818	169	0.002317734
46	0.000630331	108	0.001480537	170	0.002331465
47	0.000644039	109	0.001494256	171	0.002345195
48	0.000657746	110	0.001507975	172	0.002358926
49	0.000671454	111	0.001521694	173	0.002372657
50	0.000685161	112	0.001535414	174	0.002386388
51	0.000698869	113	0.001549133	175	0.002400120
52	0.000712578	114	0.001562853	176	0.002413851
53	0.000726286	115	0.001576573	177	0.002427583
54	0.000739995	116	0.001590293	178	0.002441315
55	0.000753703	117	0.001604014	179	0.002455047
56	0.000767412	118	0.001617734	180	0.002468779
57	0.000781121	119	0.001631455	181	0.002482511
58	0.000794831	120	0.001645176	182	0.002496244
59	0.000808540	121	0.001658897	183	0.002509977
60	0.000822250	122	0.001672619	184	0.002523710

365 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
61	0.000835960	123	0.001686340		
62	0.000849670	124	0.001700062		

366 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
1	0.000013661	63	0.000861020	125	0.001709097
2	0.000027323	64	0.000874693	126	0.001722782
3	0.000040984	65	0.000888366	127	0.001736467
4	0.000054646	66	0.000902040	128	0.001750152
5	0.000068308	67	0.000915713	129	0.001763837
6	0.000081970	68	0.000929387	130	0.001777522
7	0.000095632	69	0.000943061	131	0.001791208
8	0.000109295	70	0.000956735	132	0.001804893
9	0.000122958	71	0.000970409	133	0.001818579
10	0.000136620	72	0.000984084	134	0.001832265
11	0.000150283	73	0.000997758	135	0.001845951
12	0.000163947	74	0.001011433	136	0.001859638
13	0.000177610	75	0.001025108	137	0.001873324
14	0.000191274	76	0.001038783	138	0.001887011
15	0.000204938	77	0.001052459	139	0.001900698
16	0.000218602	78	0.001066134	140	0.001914385
17	0.000232266	79	0.001079810	141	0.001928073
18	0.000245930	80	0.001093486	142	0.001941760
19	0.000259595	81	0.001107162	143	0.001955448
20	0.000273260	82	0.001120839	144	0.001969136
21	0.000286924	83	0.001134515	145	0.001982824
22	0.000300590	84	0.001148192	146	0.001996512
23	0.000314255	85	0.001161869	147	0.002010201
24	0.000327920	86	0.001175546	148	0.002023889
25	0.000341586	87	0.001189223	149	0.002037578
26	0.000355252	88	0.001202900	150	0.002051267
27	0.000368918	89	0.001216578	151	0.002064957
28	0.000382584	90	0.001230256	152	0.002078646
29	0.000396251	91	0.001243934	153	0.002092336
30	0.000409917	92	0.001257612	154	0.002106025
31	0.000423584	93	0.001271291	155	0.002119715
32	0.000437251	94	0.001284969	156	0.002133405
33	0.000450918	95	0.001298648	157	0.002147096
34	0.000464586	96	0.001312327	158	0.002160786
35	0.000478253	97	0.001326006	159	0.002174477
36	0.000491921	98	0.001339685	160	0.002188168
37	0.000505589	99	0.001353365	161	0.002201859
38	0.000519257	100	0.001367044	162	0.002215550
39	0.000532925	101	0.001380724	163	0.002229242
40	0.000546594	102	0.001394404	164	0.002242933
41	0.000560262	103	0.001408085	165	0.002256625
42	0.000573931	104	0.001421765	166	0.002270317

366 Day Year

0.5% Compound Rate 184 Days

Days	Factor	Days	Factor	Days	Factor
43	0.000587600	105	0.001435446	167	0.002284010
44	0.000601269	106	0.001449127	168	0.002297702
45	0.000614939	107	0.001462808	169	0.002311395
46	0.000628608	108	0.001476489	170	0.002325087
47	0.000642278	109	0.001490170	171	0.002338780
48	0.000655948	110	0.001503852	172	0.002352473
49	0.000669618	111	0.001517533	173	0.002366167
50	0.000683289	112	0.001531215	174	0.002379860
51	0.000696959	113	0.001544897	175	0.002393554
52	0.000710630	114	0.001558580	176	0.002407248
53	0.000724301	115	0.001572262	177	0.002420942
54	0.000737972	116	0.001585945	178	0.002434636
55	0.000751643	117	0.001599628	179	0.002448331
56	0.000765315	118	0.001613311	180	0.002462025
57	0.000778986	119	0.001626994	181	0.002475720
58	0.000792658	120	0.001640678	182	0.002489415
59	0.000806330	121	0.001654361	183	0.002503110
60	0.000820003	122	0.001668045	184	0.002516806
61	0.000833675	123	0.001681729		
62	0.000847348	124	0.001695413		

TABLE OF INTEREST RATES

PERIODS BEFORE JUL. 1, 1975 -

PERIODS ENDING DEC. 31, 1986

OVERPAYMENTS AND UNDERPAYMENTS

		In 1995-1 C.B.
PERIOD	**RATE**	**DAILY RATE TABLE**
Before Jul. 1, 1975	6%	Table 2, pg. 557
Jul. 1, 1975--Jan. 31, 1976	9%	Table 4, pg. 559
Feb. 1, 1976--Jan. 31, 1978	7%	Table 3, pg. 558
Feb. 1, 1978--Jan. 31, 1980	6%	Table 2, pg. 557
Feb. 1, 1980--Jan. 31, 1982	12%	Table 5, pg. 560
Feb. 1, 1982--Dec. 31, 1982	20%	Table 6, pg. 560
Jan. 1, 1983--Jun. 30, 1983	16%	Table 37, pg. 591
Jul. 1, 1983--Dec. 31, 1983	11%	Table 27, pg. 581
Jan. 1, 1984--Jun. 30, 1984	11%	Table 75, pg. 629
Jul. 1, 1984--Dec. 31, 1984	11%	Table 75, pg. 629
Jan. 1, 1985--Jun. 30, 1985	13%	Table 31, pg. 585
Jul. 1, 1985--Dec. 31, 1985	11%	Table 27, pg. 581
Jan. 1, 1986--Jun. 30, 1986	10%	Table 25, pg. 579
Jul. 1, 1986--Dec. 31, 1986	9%	Table 23, pg. 577

TABLE OF INTEREST RATES

FROM JAN. 1, 1987 - Dec. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG

TABLE OF INTEREST RATES
FROM JAN. 1, 1987 - Dec. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 1987--Mar. 31, 1987	8%	21	575	9%	23	577
Apr. 1, 1987--Jun. 30, 1987	8%	21	575	9%	23	577
Jul. 1, 1987--Sep. 30, 1987	8%	21	575	9%	23	577
Oct. 1, 1987--Dec. 31, 1987	9%	23	577	10%	25	579
Jan. 1, 1988--Mar. 31, 1988	10%	73	627	11%	75	629
Apr. 1, 1988--Jun. 30, 1988	9%	71	625	10%	73	627
Jul. 1, 1988--Sep. 30, 1988	9%	71	625	10%	73	627
Oct. 1, 1988--Dec. 31, 1988	10%	73	627	11%	75	629
Jan. 1, 1989--Mar. 31, 1989	10%	25	579	11%	27	581
Apr. 1, 1989--Jun. 30, 1989	11%	27	581	12%	29	583
Jul. 1, 1989--Sep. 30, 1989	11%	27	581	12%	29	583
Oct. 1, 1989--Dec. 31, 1989	10%	25	579	11%	27	581
Jan. 1, 1990--Mar. 31, 1990	10%	25	579	11%	27	581
Apr. 1, 1990--Jun. 30, 1990	10%	25	579	11%	27	581
Jul. 1, 1990--Sep. 30, 1990	10%	25	579	11%	27	581
Oct. 1, 1990--Dec. 31, 1990	10%	25	579	11%	27	581
Jan. 1, 1991--Mar. 31, 1991	10%	25	579	11%	27	581
Apr. 1, 1991--Jun. 30, 1991	9%	23	577	10%	25	579
Jul. 1, 1991--Sep. 30, 1991	9%	23	577	10%	25	579
Oct. 1, 1991--Dec. 31, 1991	9%	23	577	10%	25	579
Jan. 1, 1992--Mar. 31, 1992	8%	69	623	9%	71	625
Apr. 1, 1992--Jun. 30, 1992	7%	67	621	8%	69	623
Jul. 1, 1992--Sep. 30, 1992	7%	67	621	8%	69	623
Oct. 1, 1992--Dec. 31, 1992	6%	65	619	7%	67	621
Jan. 1, 1993--Mar. 31, 1993	6%	17	571	7%	19	573

TABLE OF INTEREST RATES
FROM JAN. 1, 1987 - Dec. 31, 1998

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Apr. 1, 1993--Jun. 30, 1993	6%	17	571	7%	19	573
Jul. 1, 1993--Sep. 30, 1993	6%	17	571	7%	19	573
Oct. 1, 1993--Dec. 31, 1993	6%	17	571	7%	19	573
Jan. 1, 1994--Mar. 31, 1994	6%	17	571	7%	19	573
Apr. 1, 1994--Jun. 30, 1994	6%	17	571	7%	19	573
Jul. 1, 1994--Sep. 30, 1994	7%	19	573	8%	21	575
Oct. 1, 1994--Dec. 31, 1994	8%	21	575	9%	23	577
Jan. 1, 1995--Mar. 31, 1995	8%	21	575	9%	23	577
Apr. 1, 1995--Jun. 30, 1995	9%	23	577	10%	25	579
Jul. 1, 1995--Sep. 30, 1995	8%	21	575	9%	23	577
Oct. 1, 1995--Dec. 31, 1995	8%	21	575	9%	23	577
Jan. 1, 1996--Mar. 31, 1996	8%	69	623	9%	71	625
Apr. 1, 1996--Jun. 30, 1996	7%	67	621	8%	69	623
Jul. 1, 1996--Sep. 30, 1996	8%	69	623	9%	71	625
Oct. 1, 1996--Dec. 31, 1996	8%	69	623	9%	71	625
Jan. 1, 1997--Mar. 31, 1997	8%	21	575	9%	23	577
Apr. 1, 1997--Jun. 30, 1997	8%	21	575	9%	23	577
Jul. 1, 1997--Sep. 30, 1997	8%	21	575	9%	23	577
Oct. 1, 1997--Dec. 31, 1997	8%	21	575	9%	23	577
Jan. 1, 1998--Mar. 31, 1998	8%	21	575	9%	23	577
Apr. 1, 1998--Jun. 30, 1998	7%	19	573	8%	21	575
Jul. 1, 1998--Sep. 30, 1998	7%	19	573	8%	21	575
Oct. 1, 1998--Dec. 31, 1998	7%	19	573	8%	21	575

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 - PRESENT

NONCORPORATE OVERPAYMENTS AND UNDERPAYMENTS

		1995-1 C.B.	
	RATE	**TABLE**	**PAGE**
Jan. 1, 1999--Mar. 31, 1999	7%	19	573
Apr. 1, 1999--Jun. 30, 1999	8%	21	575
Jul. 1, 1999--Sep. 30, 1999	8%	21	575
Oct. 1, 1999--Dec. 31, 1999	8%	21	575
Jan. 1, 2000--Mar. 31, 2000	8%	69	623
Apr. 1, 2000--Jun. 30, 2000	9%	71	625
Jul. 1, 2000--Sep. 30, 2000	9%	71	625
Oct. 1, 2000--Dec. 31, 2000	9%	71	625
Jan. 1, 2001--Mar. 31, 2001	9%	23	577
Apr. 1, 2001--Jun. 30, 2001	8%	21	575
Jul. 1, 2001--Sep. 30, 2001	7%	19	573
Oct. 1, 2001--Dec. 31, 2001	7%	19	573
Jan. 1, 2002--Mar. 31, 2002	6%	17	571
Apr. 1, 2002--Jun. 30, 2002	6%	17	571
Jul. 1, 2002--Sep. 30, 2002	6%	17	571
Oct. 1, 2002--Dec. 31, 2002	6%	17	571
Jan. 1, 2003--Mar. 31, 2003	5%	15	569
Apr. 1, 2003--Jun. 30, 2003	5%	15	569
Jul. 1, 2003--Sep. 30, 2003	5%	15	569
Oct. 1, 2003--Dec. 31, 2003	4%	13	567
Jan. 1, 2004--Mar. 31, 2004	4%	61	615
Apr. 1, 2004--Jun. 30, 2004	5%	63	617
Jul. 1, 2004--Sep. 30, 2004	4%	61	615
Oct. 1, 2004--Dec. 31, 2004	5%	63	617
Jan. 1, 2005--Mar. 31, 2005	5%	15	569
Apr. 1, 2005--Jun. 30, 2005	6%	17	571
Jul. 1, 2005--Sep. 30, 2005	6%	17	571
Oct. 1, 2005--Dec. 31, 2005	7%	19	573
Jan. 1, 2006--Mar. 31, 2006	7%	19	573
Apr. 1, 2006--Jun. 30, 2006	7%	19	573
Jul. 1, 2006--Sep. 30, 2006	8%	21	575
Oct. 1, 2006--Dec. 31, 2006	8%	21	575
Jan. 1, 2007--Mar. 31, 2007	8%	21	575
Apr. 1, 2007--Jun. 30, 2007	8%	21	575
Jul. 1, 2007--Sep. 30, 2007	8%	21	575
Oct. 1, 2007--Dec. 31, 2007	8%	21	575
Jan. 1, 2008--Mar. 31, 2008	7%	67	621
Apr. 1, 2008--Jun. 30, 2008	6%	65	619
Jul. 1, 2008--Sep. 30, 2008	5%	63	617
Oct. 1, 2008--Dec. 31, 2008	6%	65	619
Jan. 1, 2009--Mar. 31, 2009	5%	15	569
Apr. 1, 2009--Jun. 30, 2009	4%	13	567
Jul. 1, 2009--Sep. 30, 2009	4%	13	567
Oct. 1, 2009--Dec. 31, 2009	4%	13	567
Jan. 1, 2010--Mar. 31, 2010	4%	13	567
Apr. 1, 2010--Jun. 30, 2010	4%	13	567
Jul. 1, 2010--Sep. 30, 2010	4%	13	567
Oct. 1, 2010--Dec. 31, 2010	4%	13	567

Jan. 1, 2011--Mar. 31, 2011	3%	11	565
Apr. 1, 2011--Jun. 30, 2011	4%	13	567
Jul. 1, 2011--Sep. 30, 2011	4%	13	567
Oct. 1, 2011--Dec. 31, 2011	3%	11	565
Jan. 1, 2012--Mar. 31, 2012	3%	59	613
Apr. 1, 2012--Jun. 30, 2012	3%	59	613
Jul. 1, 2012--Sep. 30, 2012	3%	59	613
Oct. 1, 2012--Dec. 31, 2012	3%	59	613
Jan. 1, 2013--Mar. 31, 2013	3%	11	565
Apr. 1, 2013--Jun. 30, 2013	3%	11	565
Jul. 1, 2013--Sep. 30, 2013	3%	11	565
Oct. 1, 2013--Dec. 31, 2013	3%	11	565
Jan. 1, 2014--Mar. 31, 2014	3%	11	565
Apr. 1, 2014--Jun. 30, 2014	3%	11	565
Jul. 1, 2014--Sep. 30, 2014	3%	11	565
Oct. 1, 2014--Dec. 31, 2014	3%	11	565
Jan. 1, 2015--Mar. 31, 2015	3%	11	565
Apr. 1, 2015--Jun. 30, 2015	3%	11	565
Jul. 1, 2015--Sep. 30, 2015	3%	11	565
Oct. 1. 2015--Dec. 31, 2015	3%	11	565
Jan. 1, 2016--Mar. 31, 2016	3%	59	613
Apr. 1, 2016--Jun. 30, 2016	4%	61	615
Jul. 1, 2016--Sep. 30, 2016	4%	61	615
Oct. 1, 2016--Dec. 31, 2016	4%	61	615
Jan. 1, 2017--Mar. 31, 2017	4%	13	567
Apr. 1, 2017--Jun. 30, 2017	4%	13	567
Jul. 1, 2017--Sep. 30, 2017	4%	13	567
Oct. 1, 2017--Dec. 31, 2017	4%	13	567
Jan. 1, 2018--Mar. 31, 2018	4%	13	567
Apr. 1, 2018--Jun. 30, 2018	5%	15	569

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 - PRESENT
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			**UNDERPAYMENTS**		
	1995-1 C.B.			**1995-1 C.B.**		
	RATE	**TABLE**	**PG**	**RATE**	**TABLE**	**PG**
Jan. 1, 1999--Mar. 31, 1999	6%	17	571	7%	19	573
Apr. 1, 1999--Jun. 30, 1999	7%	19	573	8%	21	575
Jul. 1, 1999--Sep. 30, 1999	7%	19	573	8%	21	575
Oct. 1, 1999--Dec. 31, 1999	7%	19	573	8%	21	575
Jan. 1, 2000--Mar. 31, 2000	7%	67	621	8%	69	623
Apr. 1, 2000--Jun. 30, 2000	8%	69	623	9%	71	625
Jul. 1, 2000--Sep. 30, 2000	8%	69	623	9%	71	625
Oct. 1, 2000--Dec. 31, 2000	8%	69	623	9%	71	625

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 - PRESENT
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			**UNDERPAYMENTS**		
	1995-1 C.B.			**1995-1 C.B.**		
	RATE	**TABLE**	**PG**	**RATE**	**TABLE**	**PG**
Jan. 1, 2001--Mar. 31, 2001	8%	21	575	9%	23	577
Apr. 1, 2001--Jun. 30, 2001	7%	19	573	8%	21	575
Jul. 1, 2001--Sep. 30, 2001	6%	17	571	7%	19	573
Oct. 1, 2001--Dec. 31, 2001	6%	17	571	7%	19	573
Jan. 1, 2002--Mar. 31, 2002	5%	15	569	6%	17	571
Apr. 1, 2002--Jun. 30, 2002	5%	15	569	6%	17	571
Jul. 1, 2002--Sep. 30, 2002	5%	15	569	6%	17	571
Oct. 1, 2002--Dec. 31, 2002	5%	15	569	6%	17	571
Jan. 1, 2003--Mar. 31, 2003	4%	13	567	5%	15	569
Apr. 1, 2003--Jun. 30, 2003	4%	13	567	5%	15	569
Jul. 1, 2003--Sep. 30, 2003	4%	13	567	5%	15	569
Oct. 1, 2003--Dec. 31, 2003	3%	11	565	4%	13	567
Jan. 1, 2004--Mar. 31, 2004	3%	59	613	4%	61	615
Apr. 1, 2004--Jun. 30, 2004	4%	61	615	5%	63	617
Jul. 1, 2004--Sep. 30, 2004	3%	59	613	4%	61	615
Oct. 1, 2004--Dec. 31, 2004	4%	61	615	5%	63	617
Jan. 1, 2005--Mar. 31, 2005	4%	13	567	5%	15	569
Apr. 1, 2005--Jun. 30, 2005	5%	15	569	6%	17	571
Jul. 1, 2005--Sep. 30, 2005	5%	15	569	6%	17	571
Oct. 1, 2005--Dec. 31, 2005	6%	17	571	7%	19	573
Jan. 1, 2006--Mar. 31, 2006	6%	17	571	7%	19	573
Apr. 1, 2006--Jun. 30, 2006	6%	17	571	7%	19	573
Jul. 1, 2006--Sep. 30, 2006	7%	19	573	8%	21	575
Oct. 1, 2006--Dec. 31, 2006	7%	19	573	8%	21	575

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 - PRESENT
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			**UNDERPAYMENTS**		
	1995-1 C.B.			**1995-1 C.B.**		
	RATE	**TABLE**	**PG**	**RATE**	**TABLE**	**PG**
Jan. 1, 2007--Mar. 31, 2007	7%	19	573	8%	21	575
Apr. 1, 2007--Jun. 30, 2007	7%	19	573	8%	21	575
Jul. 1, 2007--Sep. 30, 2007	7%	19	573	8%	21	575
Oct. 1, 2007--Dec. 31, 2007	7%	19	573	8%	21	575
Jan. 1, 2008--Mar. 31, 2008	6%	65	619	7%	67	621
Apr. 1, 2008--Jun. 30, 2008	5%	63	617	6%	65	619
Jul. 1, 2008--Sep. 30, 2008	4%	61	615	5%	63	617
Oct. 1, 2008--Dec. 31, 2008	5%	63	617	6%	65	619
Jan. 1, 2009--Mar. 31, 2009	4%	13	567	5%	15	569
Apr. 1, 2009--Jun. 30, 2009	3%	11	565	4%	13	567
Jul. 1, 2009--Sep. 30, 2009	3%	11	565	4%	13	567
Oct. 1, 2009--Dec. 31, 2009	3%	11	565	4%	13	567
Jan. 1, 2010--Mar. 31, 2010	3%	11	565	4%	13	567
Apr. 1, 2010--Jun. 30, 2010	3%	11	565	4%	13	567
Jul. 1, 2010--Sep. 30, 2010	3%	11	565	4%	13	567
Oct. 1, 2010--Dec. 31, 2010	3%	11	565	4%	13	567
Jan. 1, 2011--Mar. 31, 2011	2%	9	563	3%	11	565
Apr. 1, 2011--Jun. 30, 2011	3%	11	565	4%	13	567
Jul. 1, 2011--Sep. 30, 2011	3%	11	565	4%	13	567
Oct. 1, 2011--Dec. 31, 2011	2%	9	563	3%	11	565
Jan. 1, 2012--Mar. 31, 2012	2%	57	611	3%	59	613
Apr. 1, 2012--Jun. 30, 2012	2%	57	611	3%	59	613
Jul. 1, 2012--Sep. 30, 2012	2%	57	611	3%	59	613
Oct. 1, 2012--Dec. 31, 2012	2%	57	611	3%	59	613

TABLE OF INTEREST RATES
FROM JANUARY 1, 1999 - PRESENT
CORPORATE OVERPAYMENTS AND UNDERPAYMENTS

	OVERPAYMENTS			UNDERPAYMENTS		
	1995-1 C.B.			1995-1 C.B.		
	RATE	TABLE	PG	RATE	TABLE	PG
Jan. 1, 2013--Mar. 31, 2013	2%	9	563	3%	11	565
Apr. 1, 2013--Jun. 30, 2013	2%	9	563	3%	11	565
Jul. 1, 2013--Sep. 30, 2013	2%	9	563	3%	11	565
Oct. 1, 2013--Dec. 31, 2013	2%	9	563	3%	11	565
Jan. 1, 2014--Mar. 31, 2014	2%	9	563	3%	11	565
Apr. 1, 2014--Jun. 30, 2014	2%	9	563	3%	11	565
Jul. 1, 2014--Sep. 30, 2014	2%	9	563	3%	11	565
Oct. 1, 2014--Dec. 31, 2014	2%	9	563	3%	11	565
Jan. 1, 2015--Mar. 31, 2015	2%	9	563	3%	11	565
Apr. 1, 2015--Jun. 30, 2015	2%	9	563	3%	11	565
Jul. 1. 2015--Sep. 30, 2015	2%	9	563	3%	11	565
Oct. 1, 2015--Dec. 31, 2015	2%	9	563	3%	11	565
Jan. 1, 2016--Mar. 31, 2016	2%	57	611	3%	59	613
Apr. 1, 2016--Jun. 30, 2016	3%	59	613	4%	61	615
Jul. 1, 2016--Sep. 30, 2016	3%	59	613	4%	61	615
Oct. 1, 2016--Dec. 31, 2016	3%	59	613	4%	61	615
Jan. 1, 2017--Mar. 31, 2017	3%	11	565	4%	13	567
Apr. 1, 2017--Jun. 30, 2017	3%	11	565	4%	13	567
Jul. 1, 2017--Sep. 30, 2017	3%	11	565	4%	13	567
Oct. 1, 2017--Dec. 31. 2017	3%	11	565	4%	13	567
Jan. 1, 2018--Mar. 31, 2018	3%	11	565	4%	13	567
Apr. 1, 2018--Jun. 30, 2018	4%	13	567	5%	15	569

TABLE OF INTEREST RATES FOR
LARGE CORPORATE UNDERPAYMENTS
FROM JANUARY 1, 1991 - PRESENT

	1995-1 C.B.		
	RATE	TABLE	PG
Jan. 1, 1991 Mar. 31, 1991	13%	31	585
Apr. 1, 1991--Jun. 30, 1991	12%	29	583
Jul. 1, 1991--Sep. 30, 1991	12%	29	583
Oct. 1, 1991--Dec. 31, 1991	12%	29	583
Jan. 1, 1992--Mar. 31, 1992	11%	75	629
Apr. 1, 1992--Jun. 30, 1992	10%	73	627
Jul. 1, 1992--Sep. 30, 1992	10%	73	627
Oct. 1, 1992--Dec. 31, 1992	9%	71	625
Jan. 1, 1993--Mar. 31, 1993	9%	23	577
Apr. 1, 1993--Jun. 30, 1993	9%	23	577
Jul. 1, 1993--Sep. 30, 1993	9%	23	577
Oct. 1, 1993--Dec. 31, 1993	9%	23	577
Jan. 1, 1994--Mar. 31, 1994	9%	23	577
Apr. 1, 1994--Jun. 30, 1994	9%	23	577
Jul. 1, 1994--Sep. 30, 1994	10%	25	579
Oct. 1, 1994--Dec. 31, 1994	11%	27	581
Jan. 1, 1995--Mar. 31, 1995	11%	27	581
Apr. 1, 1995--Jun. 30, 1995	12%	29	583
Jul. 1, 1995--Sep. 30, 1995	11%	27	581
Oct. 1, 1995--Dec. 31, 1995	11%	27	581
Jan. 1, 1996--Mar. 31, 1996	11%	75	629
Apr. 1, 1996--Jun. 30, 1996	10%	73	627
Jul. 1, 1996--Sep. 30, 1996	11%	75	629
Oct. 1, 1996--Dec. 31, 1996	11%	75	629
Jan. 1, 1997--Mar. 31, 1997	11%	27	581
Apr. 1, 1997--Jun. 30, 1997	11%	27	581
Jul. 1, 1997--Sep. 30, 1997	11%	27	581

Oct. 1, 1997--Dec. 31, 1997	11%	27	581
Jan. 1, 1998--Mar. 31, 1998	11%	27	581
Apr. 1, 1998--Jun. 30, 1998	10%	25	579
Jul. 1, 1998--Sep. 30, 1998	10%	25	579
Oct. 1, 1998--Dec. 31, 1998	10%	25	579
Jan. 1, 1999--Mar. 31, 1999	9%	23	577
Apr. 1, 1999--Jun. 30, 1999	10%	25	579
Jul. 1, 1999--Sep. 30, 1999	10%	25	579
Oct. 1, 1999--Dec. 31, 1999	10%	25	579
Jan. 1, 2000--Mar. 31, 2000	10%	73	627
Apr. 1, 2000--Jun. 30, 2000	11%	75	629
Jul. 1, 2000--Sep. 30, 2000	11%	75	629
Oct. 1, 2000--Dec. 31, 2000	11%	75	629
Jan. 1, 2001--Mar. 31, 2001	11%	27	581
Apr. 1, 2001--Jun. 30, 2001	10%	25	579
Jul. 1, 2001--Sep. 30, 2001	9%	23	577
Oct. 1, 2001--Dec. 31, 2001	9%	23	577
Jan. 1, 2002--Mar. 31, 2002	8%	21	575
Apr. 1, 2002--Jun. 30, 2002	8%	21	575
Jul. 1, 2002--Sep. 30, 2002	8%	21	575
Oct. 1, 2002--Dec. 31, 2002	8%	21	575
Jan. 1, 2003--Mar. 31, 2003	7%	19	573
Apr. 1, 2003--Jun. 30, 2003	7%	19	573
Jul. 1, 2003--Sep. 30, 2003	7%	19	573
Oct. 1, 2003--Dec. 31, 2003	6%	17	571
Jan. 1, 2004--Mar. 31, 2004	6%	65	619
Apr. 1, 2004--Jun. 30, 2004	7%	67	621
Jul. 1, 2004--Sep. 30, 2004	6%	65	619
Oct. 1, 2004--Dec. 31, 2004	7%	67	62

			1
Jan. 1, 2005--Mar. 31, 2005	7%	19	573
Apr. 1, 2005--Jun. 30, 2005	8%	21	575
Jul. 1, 2005--Sep. 30, 2005	8%	21	575
Oct. 1, 2005--Dec. 31, 2005	9%	23	577
Jan. 1, 2006--Mar. 31, 2006	9%	23	577
Apr. 1, 2006--Jun. 30, 2006	9%	23	577
Jul. 1, 2006--Sep. 30, 2006	10%	25	579
Oct. 1, 2006--Dec. 31, 2006	10%	25	579
Jan. 1, 2007--Mar. 31, 2007	10%	25	579
Apr. 1, 2007--Jun. 30, 2007	10%	25	579
Jul. 1, 2007--Sep. 30, 2007	10%	25	579
Oct. 1, 2007--Dec. 31, 2007	10%	25	579
Jan. 1, 2008--Mar. 31, 2008	9%	71	625
Apr. 1, 2008--Jun. 30, 2008	8%	69	623
Jul. 1, 2008--Sep. 30, 2008	7%	67	621
Oct. 1, 2008--Dec. 31, 2008	8%	69	623
Jan. 1, 2009--Mar. 31, 2009	7%	19	573
Apr. 1, 2009--Jun. 30, 2009	6%	17	571
Jul. 1, 2009--Sep. 30, 2009	6%	17	571
Oct. 1, 2009--Dec. 31, 2009	6%	17	571
Jan. 1, 2010--Mar. 31, 2010	6%	17	571
Apr. 1, 2010--Jun. 30, 2010	6%	17	571
Jul. 1, 2010--Sep. 30, 2010	6%	17	571
Oct. 1, 2010--Dec. 31, 2010	6%	17	571
Jan. 1, 2011--Mar. 31, 2011	5%	15	569
Apr. 1, 2011--Jun. 30, 2011	6%	17	571
Jul. 1, 2011--Sep. 30, 2011	6%	17	571
Oct. 1, 2011--Dec. 31, 2011	5%	15	569

Jan. 1, 2012--Mar. 31, 2012	5%	63	617
Apr. 1, 2012--Jun. 30, 2012	5%	63	617
Jul. 1, 2012--Sep. 30, 2012	5%	63	617
Oct. 1, 2012--Dec. 31, 2012	5%	63	617
Jan. 1, 2013--Mar. 31, 2013	5%	15	569
Apr. 1, 2013--Jun. 30, 2013	5%	15	569
Jul. 1, 2013--Sep. 30, 2013	5%	15	569
Oct. 1, 2013--Dec. 31, 2013	5%	15	569
Jan. 1, 2014--Mar. 31, 2014	5%	15	569
Apr. 1, 2014--Jun. 30, 2014	5%	15	569
Jul. 1, 2014--Sep. 30, 2014	5%	15	569
Oct. 1, 2014--Dec. 31, 2014	5%	15	569
Jan. 1, 2015--Mar. 31, 2015	5%	15	569
Apr. 1, 2015--Jun. 30, 2015	5%	15	569
Jul. 1, 2015--Sep. 30, 2015	5%	15	569
Oct. 1, 2015--Dec. 31, 2015	5%	15	569
Jan. 1, 2016--Mar. 31, 2016	5%	63	617
Apr. 1, 2016--Jun. 30, 2016	6%	65	619
Jul. 1, 2016--Sep. 30, 2016	6%	65	619
Oct. 1, 2016--Dec. 31, 2016	6%	65	619
Jan. 1, 2017--Mar. 31, 2017	6%	17	571
Apr. 1, 2017--Jun. 30, 2017	6%	17	571
Jul. 1, 2017--Sep. 30, 2017	6%	17	571
Oct. 1, 2017--Dec. 31, 2017	6%	17	571
Jan. 1, 2018--Mar. 31, 2018	6%	17	571
Apr. 1, 2018--Jun. 30, 2018	7%	19	573

TABLE OF INTEREST RATES FOR CORPORATE OVERPAYMENTS EXCEEDING $10,000 FROM JANUARY 1, 1995 - PRESENT

1995-1 C.B.

	RATE	TABLE	PG
Jan. 1, 1995--Mar. 31, 1995	6.5%	18	572
Apr. 1, 1995--Jun. 30, 1995	7.5%	20	574
Jul. 1, 1995--Sep. 30, 1995	6.5%	18	572
Oct. 1, 1995--Dec. 31, 1995	6.5%	18	572
Jan. 1, 1996--Mar. 31, 1996	6.5%	66	620
Apr. 1, 1996--Jun. 30, 1996	5.5%	64	618
Jul. 1, 1996--Sep. 30, 1996	6.5%	66	620
Oct. 1, 1996--Dec. 31, 1996	6.5%	66	620
Jan. 1, 1997--Mar. 31, 1997	6.5%	18	572
Apr. 1, 1997--Jun. 30, 1997	6.5%	18	572
Jul. 1, 1997--Sep. 30, 1997	6.5%	18	572
Oct. 1, 1997--Dec. 31, 1997	6.5%	18	572
Jan. 1, 1998--Mar. 31, 1998	6.5%	18	572
Apr. 1, 1998--Jun. 30, 1998	5.5%	16	570
Jul. 1. 1998--Sep. 30, 1998	5.5%	16	570
Oct. 1, 1998--Dec. 31, 1998	5.5%	16	570
Jan. 1, 1999--Mar. 31, 1999	4.5%	14	568
Apr. 1, 1999--Jun. 30, 1999	5.5%	16	570
Jul. 1, 1999--Sep. 30, 1999	5.5%	16	570
Oct. 1, 1999--Dec. 31, 1999	5.5%	16	570
Jan. 1, 2000--Mar. 31, 2000	5.5%	64	618
Apr. 1, 2000--Jun. 30, 2000	6.5%	66	620
Jul. 1, 2000--Sep. 30, 2000	6.5%	66	620
Oct. 1, 2000--Dec. 31, 2000	6.5%	66	620
Jan. 1, 2001--Mar. 31, 2001	6.5%	18	572
Apr. 1, 2001--Jun. 30, 2001	5.5%	16	570
Jul. 1, 2001--Sep. 30, 2001	4.5%	14	568
Oct. 1, 2001--Dec. 31, 2001	4.5%	14	56

			8
Jan. 1, 2002--Mar. 31, 2002	3.5%	12	566
Apr. 1, 2002--Jun. 30, 2002	3.5%	12	566
Jul. 1, 2002--Sep. 30, 2002	3.5%	12	566
Oct. 1, 2002--Dec. 31, 2002	3.5%	12	566
Jan. 1, 2003--Mar. 31, 2003	2.5%	10	564
Apr. 1, 2003--Jun. 30, 2003	2.5%	10	564
Jul. 1, 2003--Sep. 30, 2003	2.5%	10	564
Oct. 1, 2003--Dec. 31, 2003	1.5%	8	562
Jan. 1, 2004--Mar. 31, 2004	1.5%	56	610
Apr. 1, 2004--Jun. 30, 2004	2.5%	58	612
Jul. 1, 2004--Sep. 30, 2004	1.5%	56	610
Oct. 1, 2004--Dec. 31, 2004	2.5%	58	612
Jan. 1, 2005--Mar. 31, 2005	2.5%	10	564
Apr. 1, 2005--Jun. 30, 2005	3.5%	12	566
Jul. 1, 2005--Sep. 30, 2005	3.5%	12	566
Oct. 1, 2005--Dec. 31, 2005	4.5%	14	568
Jan. 1, 2006--Mar. 31, 2006	4.5%	14	568
Apr. 1, 2006--Jun. 30, 2006	4.5%	14	568
Jul. 1, 2006--Sep. 30, 2006	5.5%	16	570
Oct. 1, 2006--Dec. 31, 2006	5.5%	16	570
Jan. 1, 2007--Mar. 31, 2007	5.5%	16	570
Apr. 1, 2007--Jun. 30, 2007	5.5%	16	570
Jul. 1, 2007--Sep. 30, 2007	5.5%	16	570
Oct. 1, 2007--Dec. 31, 2007	5.5%	16	570
Jan. 1, 2008--Mar. 31, 2008	4.5%	62	616
Apr. 1, 2008--Jun. 30, 2008	3.5%	60	614
Jul. 1, 2008--Sep. 30, 2008	2.5%	58	612
Oct. 1, 2008--Dec. 31, 2008	3.5%	60	614

Jan. 1, 2009--Mar. 31, 2009	2.5%	10	564
Apr. 1, 2009--Jun. 30, 2009	1.5%	8	562
Jul. 1, 2009--Sep. 30, 2009	1.5%	8	562
Oct. 1, 2009--Dec. 31, 2009	1.5%	8	562
Jan. 1, 2010--Mar. 31, 2010	1.5%	8	562
Apr. 1, 2010--Jun. 30, 2010	1.5%	8	562
Jul. 1, 2010--Sep. 30, 2010	1.5%	8	562
Oct. 1, 2010--Dec. 31, 2010	1.5%	8	562
Jan. 1, 2011--Mar. 31, 2011	0.5%*		
Apr. 1, 2011--Jun. 30, 2011	1.5%	8	562
Jul. 1, 2011--Sep. 30, 2011	1.5%	8	562
Oct. 1, 2011--Dec. 31, 2011	0.5%*		
Jan. 1, 2012--Mar. 31, 2012	0.5%*		
Apr. 1, 2012--Jun. 30, 2012	0.5%*		
Jul. 1, 2012--Sep. 30, 2012	0.5%*		
Oct. 1, 2012--Dec. 31, 2012	0.5%*		
Jan. 1, 2013--Mar. 31, 2013	0.5%*		
Apr. 1, 2013--Jun. 30, 2013	0.5%*		
Jul. 1, 2013--Sep. 30, 2013	0.5%*		
Oct. 1, 2013--Dec. 31, 2013	0.5%*		
Jan. 1, 2014--Mar. 31, 2014	0.5%*		
Apr. 1, 2014--Jun. 30, 2014	0.5%*		
Jul. 1, 2014--Sep. 30, 2014	0.5%*		
Oct. 1, 2014--Dec. 31, 2014	0.5%*		
Jan. 1, 2015--Mar. 31, 2015	0.5%*		
Apr. 1, 2015--Jun. 30, 2015	0.5%*		
Jul. 1, 2015--Sep. 30, 2015	0.5%*		
Oct. 1, 2015--Dec. 31, 2015	0.5%*		
Jan. 1, 2016--Mar. 31, 2016	0.5%*		
Apr. 1, 2016--Jun. 30, 2016	1.5%	56	610
Jul. 1, 2016--Sep. 30, 2016	1.5%	56	610
Oct. 1, 2016--Dec. 31, 2016	1.5%	56	610
Jan. 1, 2017--Mar. 31, 2017	1.5%	8	562
Apr. 1, 2017--Jun. 30, 2017	1.5%	8	562
Jul. 1, 2017--Sep. 30, 2017	1.5%	8	562

Oct. 1, 2017--Dec. 31, 2017	1.5%	8	562
Jan. 1, 2018--Mar. 31, 2018	1.5%	8	562
Apr. 1, 2018--Jun. 30, 2018	2.5%	10	564

* The asterisk reflects the interest factors for daily compound interest for annual rates of 0.5 percent published in Appendix A of this Revenue Ruling.

Load Date: 2018-03-08

End of Document

(e) Request to be Added to Courtesy NEF.

(1) Filing. Any person or entity registered as a CM/ECF User may file a Request to be Added to Courtesy NEF in any case or proceeding, using the court-approved form.

(2) Consent to Electronic Notice and Service. Subject to the provisions of LBR 9036-1, a person or entity who files a Request to be Added to Courtesy NEF consents to electronic notice and service from the clerk and parties in interest in the case or proceeding.

(3) No Duty. The filing of a Request to be Added to Courtesy NEF does not create a duty on the clerk or any party in interest to provide notice or service of any document.

LBR 2002-2. NOTICE TO AND SERVICE UPON THE UNITED STATES OR FEDERAL AGENCIES

(a) United States Trustee.

(1) Duty to Provide Notice to and Service Upon the United States trustee. Pursuant to FRBP 2002(k), FRBP 9034 and these rules, and unless otherwise directed, a copy of any document filed by a person or entity in a bankruptcy case or adversary proceeding under chapters 7, 9, or 11 must be served upon the United States trustee. In chapter 12 or 13 cases, only a notice of conversion or motion to convert the case to another chapter must be served upon the United States trustee. Proofs of claim or copies thereof must not be served upon the United States trustee.

(2) Consent to Electronic Notice and Service of Documents Filed with the Court. Notwithstanding subsection (a)(1) of this rule, and except as provided in subsection (a)(3) of this rule, the United States trustee consents to electronic notice and service of any document filed in a bankruptcy case or adversary proceeding.

(A) Electronic Notice. The electronic transmission to the United States trustee of an NEF or a notice through the Bankruptcy Noticing Center constitutes notice to the United States trustee of a document filed in a bankruptcy case or adversary proceeding, including notice of entry of an order or judgment, whether it is the duty of the clerk or another person or entity to give such notice. A proof of service prepared and filed pursuant to LBR 9013-3 must state that the United States trustee will be served electronically by the court.

(B) Electronic Service. The electronic transmission to the United States trustee of an NEF regarding a document filed in a bankruptcy case or adversary proceeding, which is required to be served on the United States trustee pursuant to FRBP 2002(k), FRBP 9022, FRBP 9034 or these rules, constitutes service of the document on the United States trustee. A proof of service prepared and filed pursuant to LBR 9013-3 must state that the United States trustee will be served electronically by the court.

(3) Exceptions to Electronic Notice and Service. Notwithstanding the foregoing and in addition to the exceptions to electronic notice and service set forth in LBR 9036-1(a)(2), the following documents must be served on the United States trustee non-electronically:

(A) A document exceeding 50 pages in length, including exhibits;

(B) A motion to be heard on an emergency basis pursuant to LBR 9075-1(a) or on shortened notice pursuant to LBR 9075-1(b), and any response thereto;

(C) Any document filed within 7 days of the date of the hearing;

(D) Proposed orders or judgments if required to be served on the United States trustee under LBR 9021-1(b);

(E) Complaints served upon the United States trustee as a defendant. Persons and entities must comply with FRBP 7004(b)(10) when the United States trustee is named in an adversary proceeding as a party, whether or not the United States trustee is a trustee in the case; and

(F) Any document served upon the United States trustee and/or any of the United States trustee's staff in their capacity as individuals. The service of any such document must be made in compliance with Rule 4 of the F.R.Civ.P. and with any and all other applicable rules of civil, bankruptcy and/or appellate procedure.

(4) Telephonic Notice of Hearing Set on an Emergency Basis or Shortened Notice. Telephonic notice of a hearing set on an emergency basis or hearing set on shortened notice basis pursuant to LBR 9075-1 must be given to the United States trustee if the United States trustee would otherwise be entitled to notice of the type of motion or hearing.

(5) Place of Service for Non-electronic Notice or Service. For documents for which the United States trustee has not consented to electronic notice and service, the United States trustee must be served non-electronically at the applicable mailing address listed in the Register of Federal and State Governmental Unit Addresses contained in the Court Manual.

(b) **<u>United States Attorney</u>.** The United States attorney for this district has waived notice under FRBP 2002(j). If notice is required in a case or proceeding, the United States attorney must file a request for notice with the court and serve the debtor, debtor's attorney (if any), the United States trustee, any trustee, and the representatives of any committee appointed in a case.

(c) **<u>Internal Revenue Service</u>.**

(1) <u>General Notice Matters</u>. Except with respect to contested matters or adversary proceedings (where service must comply with the requirements of FRBP 7004 and LBR 2002-2(c)(2)), or as otherwise ordered by the court, the United States Internal Revenue Service must be served at the address listed in the Register of Federal and State Governmental Unit Addresses contained in the Court Manual.

(2) <u>Adversary Proceedings and Contested Matters</u>. In all contested matters and adversary proceedings involving the United States Internal Revenue Service, the United States, the Attorney General in Washington, D.C., and the United States attorney in Los Angeles must be served at addresses listed in the Register of Federal and State Governmental Unit Addresses contained in the Court Manual.

LBR 2004-1. <u>MOTIONS FOR EXAMINATION UNDER FRBP 2004</u>

(a) **<u>Conference Required</u>.** Prior to filing a motion for examination or for production of documents under FRBP 2004, the moving party must attempt to confer (in person or telephonically) with the entity to be examined, or its counsel, to arrange for a mutually agreeable date, time, place, and scope of an examination or production.

(b) **<u>Motion</u>.** A motion for examination under FRBP 2004 must be filed stating the name, place of residence, and the place of employment of the entity to be examined, if known. The motion must include a declaration of counsel stating whether the required conference was held and the efforts made to obtain an agreeable date, time, place, and scope of an examination or production. The motion must also explain why the examination cannot proceed under FRBP 7030 or 9014.

(c) **<u>Notice and Service</u>.** The motion must be served on the debtor, debtor's attorney (if any), the trustee (if any), the United States trustee, and the entity to be examined. Not less than 21 days notice of the examination must be provided, calculated from the date of service of the motion, unless otherwise ordered by the court.

(d) **<u>Order</u>.** Unless otherwise ordered by the court, a motion for examination will be ruled on without a hearing pursuant to LBR 9013-1(p).

(e) **<u>Subpoena</u>.** If the court approves a Rule 2004 examination of an entity other than the debtor, the attendance of the entity for examination and for the production of documents must be compelled by subpoena issued, and served pursuant to FRBP 9016 and F.R.Civ.P. 45.

Appendix D: Register of Federal & State Government Unit Addresses [FRBP 5003(e)]

This Page Intentionally Left Blank

1.0 Federal Rules of Bankruptcy Procedure 5003(e)

Pursuant to Federal Rules of Bankruptcy Procedure 5003(e), federal and state agencies may file a statement with the court designating their mailing addresses. See Local Bankruptcy Rule 2002-2 for related noticing requirements.

2.0 Federal Agencies

2.1 Internal Revenue Service (IRS)

Internal Revenue Service
P.O. Box 7346
Philadelphia, PA 19101-7346

2.2 Securities Exchange Commission

U.S. Securities and Exchange Commission
Attn: Bankruptcy Counsel
444 South Flower Street, Suite 900
Los Angeles, CA 90071-9591

2.3 United States Trustee

a. **Electronic Notice and Service.** The Office of the United States Trustee consented to electronic notice and service of documents. Therefore, service of documents by U.S. mail is not necessary in cases where a Notice of Electronic Filing is generated upon filing a document with the court electronically in CM/ECF.

b. **Notice and Service by U.S. Mail**. When service by U.S. mail is necessary, papers must be served on the Office of the United States Trustee at the following addresses:

1. **Papers in All Cases and Proceedings Assigned to Los Angeles Judges**:

   United States Trustee
   915 Wilshire Blvd., Suite 1850
   Los Angeles, CA 90017

2. **Papers in All Cases and Proceedings Assigned to Santa Ana Division Judges:**

   United States Trustee
   411 West Fourth Street, Suite 7160
   Santa Ana, CA 92701

3. **Papers in All Cases and Proceedings Assigned to Riverside Division Judges**:

   United States Trustee
   3801 University Avenue, Suite 720
   Riverside, CA 92501

4. **Papers in All Cases and Proceedings Assigned to Northern Division and San Fernando Valley Judges**:

   United States Trustee
   915 Wilshire Blvd., Suite 1850
   Los Angeles, CA 90017

2.4 **United States Attorney**. In contested matters and adversary proceedings involving the United States, the United States Attorney and Attorney General shall be served at the following addresses:

a. **Civil Process Clerk**

   United States Attorney's Office
   Federal Building, Room 7516
   300 North Los Angeles Street
   Los Angeles, CA 90012

b. **Attorney General**

United States Department of Justice
Ben Franklin Station
P. O. Box 683
Washington, DC 20044

2.5 United States Small Business Administration (SBA). Send notices to the SBA at the following address in bankruptcy cases where the SBA is a creditor (**do not** send notices to the SBA if the SBA is not a creditor).

U.S. Small Business Administration
Attn: So Cal Legal Unit
330 North Brand Boulevard, Suite 1200
Glendale, CA 91203-2304

3.0 State Agencies

3.1 State of California Employment Development Department

Employment Development Department
Bankruptcy Group MIC 92E
P. O. Box 826880
Sacramento, CA 94280-0001

3.2 State of California Franchise Tax Board

a. Service of Adversary Proceedings:

Franchise Tax Board Chief Counsel
c/o General Counsel Section
P.O. Box 1720, MS: A-260
Rancho Cordova, CA 95741-1720

b. Bankruptcy Code Section 505 Requests and All Other Service and Notices:

Franchise Tax Board Bankruptcy Section, MS: A-340
P. O. Box 2952
Sacramento, CA 95812-2952

3.3 State of California Board of Equalization

a. Service of Adversary Proceedings:

Executive Director
State Board of Equalization
450 N Street, MIC: 73
Sacramento, CA 95814-0073

b. Bankruptcy Code Section 505 Requests:

State Board of Equalization
Special Operations Bankruptcy Team, MIC: 74
P.O. Box 942879
Sacramento, CA 94279-0074

c. All Other Service and Bankruptcy Notices:

State Board of Equalization
Account Information Group, MIC: 29
P.O. Box 942879
Sacramento, CA 94279-0029

4.0 Los Angeles County Treasurer and Tax Collector

4.1 Los Angeles County Tax Collector. The methods of making tax payments in Los Angeles County are set forth in the Tax Collector's web site at: <***http://ttc.lacounty.gov***.> Moreover, any taxpayer and/or bankruptcy counsel with questions on how to make tax payments may call 1(888) 807-2111. The correct and proper address to serve the Los Angeles County Tax Collector is:

Los Angeles County Tax Collector
P. O. Box 54110
Los Angeles, CA 90054-0110

Fill in this information to identify the case:

Debtor 1 [redacted]

Debtor 2
(Spouse, if filing)

United States Bankruptcy Court for the: CENTRAL District of CALIFORNIA
(State)

Case number 2:18-BK-[redacted]-SK

Official Form 410

Proof of Claim

04/16

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. Who is the current creditor?

Department of the Treasury - Internal Revenue Service
Name of the current creditor (the person or entity to be paid for this claim)

Other names the creditor used with the debtor

2. Has this claim been acquired from someone else?

■ No
☐ Yes. From whom?

3. Where should notices and payments to the creditor be sent?

Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
Internal Revenue Service Name	Internal Revenue Service Name
P.O. Box 7346 Number Street	Insolvency Group 1 300 North Los Angeles St, M/S 5022 Number Street
Philadelphia PA 19101-7346 City State ZIP Code	Los Angeles CA 90012 City State ZIP Code
Contact phone 1-800-973-0424	Contact phone [redacted]
Contact email	Contact email
Creditor Number: 38571765	

Uniform claim identifier for electronic payments in chapter 13 (if you use one)

__ __

4. Does this claim amend one already filed?

■ No
☐ Yes. Claim number on court claims registry (if known) 1 Filed on: MM / DD / YYYY

5. Do you know if anyone else has filed a proof of claim for this claim?

■ No
☐ Yes. Who made the earlier filing?

Part 2: **Give Information About the Claim as of the Date the Case Was Filed**

6. Do you have any number you use to identify the debtor?

☐ No
■ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: See Attachment

7. How much is the claim?

$ 342,852.91

Does this amount include interest or other charges?
☐ No
■ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim?

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

Taxes

9. Is all or part of the claim secured?

☐ No
■ Yes. The claim is secured by a lien on property.

Nature of property:

■ Real Estate. If the claim is secured by the debtor's principal residence, file a Mortgage Proof of Claim Attachment (Official Form 410-A) with this Proof of Claim.

■ Motor Vehicle

■ Other. Describe: *All of debtor(s) right, title and interest to property - 26 U.S.C. §6321.

Basis for perfection: See Attachment
Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of Property: $

Amount of the claim that is secured: $ 208,713.38

Amount of the claim that is unsecured: $ 134,139.53 (The sum of the secured and unsecured amounts should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $

Annual Interest Rate (when case was filed) 5 **%**

☐ Fixed
■ Variable

10. Is this claim based on a lease?

■ No
☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $

11. Is this claim subject to a right of setoff?

☐ No
■ Yes. Identify the property See Attachment

12. Is all or part of the claim entitled to priority under 11 U.S.C. §507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ No

■ Yes. Check all that apply:

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $2,850* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $12,850*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
■ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$ 16,102.07
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$

*Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

■ I am the creditor.

☐ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this Proof of Claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this Proof of Claim and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 07/09/2018
MM / DD / YYYY

/s/[redacted]
(Signature)

Print the name of the person who is completing and signing this claim:

Name [redacted]
First name Middle name Last name

Title Insolvency [redacted]

Company Internal Revenue Service
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address Insolvency Group 1 300 North Los Angeles St, M/S 5022
Number Street

Los Angeles CA 90012
City State ZIP Code

Contact Phone [redacted] Email:

Proof of Claim for Internal Revenue Taxes

Department of the Treasury/Internal Revenue Service

Form 410
Attachment

In the Matter of: [redacted]
[redacted] AVENUE
[redacted], CA [redacted]

Case Number
2:18-BK-[redacted]-SK

Type of Bankruptcy Case
CHAPTER 11

Date of Petition
[redacted]/2018

The United States has not identified a right of setoff or counterclaim. However, this determination is based on available data and is not intended to waive any right to setoff against this claim debts owed to this debtor by this or any other federal agency. All rights of setoff are preserved and will be asserted to the extent lawful.

Civ Pen is for TFRP under IRC 6672 entitled to Priority 507(a)(8)(C)
TRUST FUND HAS BEEN ASSESSED AGAINST BOTH DEBTORS INDIVIDUALLY

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

Taxpayer ID Number	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*	*Tax Due*	*Penalty to Petition Date*	*Interest to Petition Date*	*Notice of Tax Lien Filed: Date*	*Office Location*
XXX-XX-[redacted]	CIVIL PEN	06/30/2013	11/27/2017	$4,996.94	$0.00	$180.43	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	INCOME	12/31/2014	06/08/2015	$4,899.77	$1,527.67	$745.34	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	03/31/2015	11/27/2017	$7,154.74	$0.00	$170.78	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	06/30/2015	11/27/2017	$30,508.05	$0.00	$728.16	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	09/30/2015	11/27/2017	$31,786.14	$0.00	$758.67	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	12/31/2015	11/27/2017	$27,117.08	$0.00	$647.23	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	03/31/2016	11/27/2017	$29,984.47	$0.00	$715.67	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	06/30/2016	11/27/2017	$37,804.74	$0.00	$902.33	04/05/2018	LOS ANGELES COU
XXX-XX-[redacted]	CIVIL PEN	09/30/2016	11/27/2017	$27,430.46	$0.00	$654.71	04/05/2018	LOS ANGELES COU
				$201,682.39	$1,527.67	$5,503.32		

Total Amount of Secured Claims: $208,713.38

Unsecured Priority Claims under section 507(a)(8) of the Bankruptcy Code

Taxpayer ID Number	*Kind of Tax*	*Tax Period*		*Date Tax Assessed*	*Tax Due*	*Interest to Petition Date*
XXX-XX-[redacted]	INCOME	12/31/2015	1	Unassessed-No Return	$4,796.40	$442.63
XXX-XX-[redacted]	INCOME	12/31/2015	1	Unassessed-No Return	$3,343.00	$308.52
XXX-XX-[redacted]	INCOME	12/31/2017	1	Unassessed-No Return	$7,055.25	$56.27
XXX-XX-[redacted]	INCOME	12/31/2017	1	Unassessed-No Return	$100.00	$0.00
					$15,294.65	$807.42

Total Amount of Unsecured Priority Claims: $16,102.07

Unsecured General Claims

Taxpayer ID Number	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*	*Tax Due*	*Interest to Petition Date*
XXX-XX-[redacted]	INCOME	12/31/2010	02/11/2013	$0.00	$1,934.44

1 UNASSESSED TAX LIABILITY(IES) HAVE BEEN LISTED ON THIS CLAIM BECAUSE OUR RECORDS SHOW NO RETURN(S) FILED. WHEN THE DEBTOR(S) FILES THE RETURN OR PROVIDES OTHER INFORMATION AS REQUIRED BY LAW THE CLAIM WILL BE AMENDED

Proof of Claim for Internal Revenue Taxes

Department of the Treasury/Internal Revenue Service

Form 410
Attachment

In the Matter of: [redacted]
[redacted] AVENUE
[redacted], CA [redacted]

Case Number
2:18-BK-[redacted]-SK

Type of Bankruptcy Case
CHAPTER 11

Date of Petition
[redacted]/2018

Unsecured General Claims (Continued from Page 1)

Taxpayer ID Number	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*	*Tax Due*	*Interest to Petition Date*
XXX-XX-[redacted]	INCOME	12/31/2011	11/19/2012	$74,695.50	$19,003.30
				$74,695.50	$20,937.74

Penalty to date of petition on unsecured general claims (including interest thereon) $22,404.22

Total Amount of Unsecured General Claims: **$118,037.46**

COURT RECORDING DATA

INTERNAL REVENUE SERVICE FACSIMILE FEDERAL TAX LIEN DOCUMENT BANKRUPTCY DOCKET: 2:18-BK-[redacted]-SK	Lien Recorded : 04/05/2018 - 00:00AM Recording Number: [redacted] UCC Number : Liber : Page :
Area: SMALL BUSINESS/SELF EMPLOYED #7 Lien Unit Phone: (800) 829-3903	IRS Serial Number: [redacted]

This Lien Has Been Filed in Accordance with
Internal Revenue Regulation 301.6323(f)-1.

Name of Taxpayer:
[redacted]

Residence:
[redacted]AVE
[redacted], CA [redacted]

With respect to each assessment below, unless notice of lien is refiled by the date in column(e), this notice shall constitute the certificate of release of lien as defined in IRC 6325(a).

Form (a)	Period (b)	ID Number (c)	Assessed (d)	Refile Deadline (e)	Unpaid Balance (f)
CIVP	06/30/2013	XXX-XX-[redacted]	11/27/2017	12/27/2027	$7,787.01
1040	12/31/2014	XXX-XX-[redacted]	06/08/2015	07/08/2025	$4,988.41
CIVP	03/31/2015	XXX-XX-[redacted]	11/27/2017	12/27/2027	$7,154.74
CIVP	06/30/2015	XXX-XX-[redacted]	11/27/2017	12/27/2027	$30,508.05
CIVP	09/30/2015	XXX-XX-[redacted]	11/27/2017	12/27/2027	$31,786.14
CIVP	12/31/2015	XXX-XX-[redacted]	11/27/2017	12/27/2027	$27,117.08
CIVP	03/31/2016	XXX-XX-[redacted]	11/27/2017	12/27/2027	$29,984.47
CIVP	06/30/2016	XXX-XX-[redacted]	11/27/2017	12/27/2027	$37,804.74
CIVP	09/30/2016	XXX-XX-[redacted]	11/27/2017	12/27/2027	$27,430.46

Filed at: COUNTY RECORDER LOS ANGELES COUNTY NORWALK, CA 90650	Total	$204,561.10

This notice was prepared and executed at OAKLAND, CA
on this, the 22nd day of March, 2018.

Authorizing Official: [redacted]	Title: ACS SBSE [redacted]

Instructions for Requesting a Certificate of Release of Federal Tax Lien

Section 6325(a) of the Internal Revenue Code directs us to release a Federal tax lien within 30 days of when the liability is fully paid or becomes legally unenforceable or the IRS accepts a bond for payment of the liability. When all the liabilities shown on the Notice of Federal Tax Lien are satisfied, we will issue a Certificate of Release of Federal Tax Lien for filing in the same location where the notice of lien was filed. If we have not released the lien within 30 days, you can ask for a certificate of release.

Requesting a Copy of the Certificate

If it has been more than 30 days since you satisfied your tax liability and you have not received a copy of the Certificate of Release of Federal Tax Lien, you may call the Centralized Lien Operation to check the status of the certificate. If you prefer to write, your request should be mailed or faxed to the following address:

Internal Revenue Service
Centralized Lien Operation
P.O. Box 145595, Stop 8420G
Cincinnati, OH 45250-5595

Telephone Number: 800-913-6050
Outside the United States: 859-669-4811
Fax number: 855-390-3528

The copy of the certificate you receive will not show the official recording information. For a copy of the recorded certificate, you must contact the recording office where the Certificate of Release of Federal Tax Lien was filed.

Requesting a Certificate of Release

If the Federal tax lien has not been released, you can request a Certificate of Release of Federal Tax Lien. The request must be in writing and should be mailed to the Advisory Group servicing your area. Use Publication 4235, Collection Advisory Group Addresses, to determine the address to mail your request.

Your request must contain the following information:
- The date of your request
- The name and address of the taxpayer
- One copy of each Notice of Federal Tax Lien you want released
- Why the lien should be released
- A telephone number with the best time for us to call you should we need additional information

If you have paid the tax liability, enclose a copy of any of the following with your request:
- An Internal Revenue receipt
- A canceled check
- A record of payment by electronic fund transfer
- Any other acceptable proof of payment

We may need to research your account. We will provide a certificate of release once we have confirmed your liability is satisfied.

If you have an immediate or urgent need for a Certificate of Release of Federal Tax Lien, you can visit or telephone the local IRS office. A list of local offices, their available services, and their hours of operation may be found on our website www.irs.gov by searching “Local Contacts.”

When visiting the IRS office, be prepared to show proof of payment or other documentation that demonstrates your liability has been satisfied. If there is an unpaid balance on your liability, you must pay the balance with a certified check, cashier’s check, or acceptable money order before a certificate of release can be issued. For other forms of payment, the certificate of release will be issued within 30 days of the liability being satisfied.

To request a payoff or other information about your Notice of Federal Tax Lien, contact the Centralized Lien Operation as shown above. General information about Federal tax liens may be found at www.irs.gov by searching “liens.”

Form **668(Z)** (Rev. 10-2000)	Department of the Treasury - Internal Revenue Service

Certificate of Release of Federal Tax Lien

	Serial Number	For Use by Recording Office

I certify that as to the following-named taxpayer, the requirements of section 6325 (a) of the Internal Revenue Code have been satisfied for the taxes listed below and for all statutory additions. Therefore, the lien provided by Code section 6321 for these taxes and additions has been released. The proper officer in the office where the notice of internal revenue tax lien was filed on **,_,** is authorized to note the books to show the release of this lien for these taxes and additions.

Name of Taxpayer

Residence

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)

Place of Filing

Total

This notice was prepared and signed at , on this, the_ day of_, .

Signature	**Title**
, Employee # -	, Phone # -

(NOTE: *Certificate of officer authorized by law to take acknowledgements is not essential to the validity of Certificate of Release of Federal Tax Lien Rev. Rul. 71-466, 1971-2 C.B. 409)*

Form **668(Z)**
(Rev. 10-2000)

Department of the Treasury - Internal Revenue Service

Certificate of Release of Federal Tax Lien

Serial Number

For Use by Recording Office

I certify that as to the following-named taxpayer, the requirements of section 6325 (a) of the Internal Revenue Code have been satisfied for the taxes listed below and for all statutory additions. Therefore, the lien provided by Code section 6321 for these taxes and additions has been released. The proper officer in the office where the notice of internal revenue tax lien was filed on **, _,** is authorized to note the books to show the release of this lien for these taxes and additions.

Name of Taxpayer

Residence

Kind of Tax (a)	Tax Period Ended (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)

Place of Filing

Total

This notice was prepared and signed at , on this, the_ day of_, .

Signature

, Employee # -

Title

, Phone # -

(NOTE: *Certificate of officer authorized by law to take acknowledgements is not essential to the validity of Certificate of Release of Federal Tax Lien Rev. Rul. 71-466, 1971-2 C.B. 409)*

Collection Advisory Group Numbers and Addresses

Use this publication to determine which Collection Advisory office to contact with questions about Notices of Federal Tax Lien and where to submit requests or applications for lien-related certificates, such as those listed below.

You can find answers to many of your lien questions on our website www.IRS.gov. There you can type a key word or phrase of your question in the search box and then choose a resulting page matching your topic. For example:

- For general lien information, type "lien" and select the "Understanding a Federal Tax Lien" page (http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Understanding-a-Federal-Tax-Lien).
- To get the total amount of your tax debt, type "payoff" and select the "View Your Account" page (http://www.irs.gov/payments/view-your-tax-account).
- For information about decedent situations and federal estate tax liens, type "deceased" and select the "Deceased Taxpayers – Probate, Filing Estate and Individual Returns, Paying Taxes Due" page (http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Deceased-Taxpayers-Probate-Filing-Estate-and-Individual-Returns-Paying-Taxes-Due).

If you cannot find an answer on our website or if you need specific case assistance, contact our offices as shown below.

Topic	Instructions, Forms, or Additional Information*	Office to contact
General lien questions, requests for lien payoff balance	IRS website	Centralized Lien Operation
Release of Federal Tax Lien	Publication 1450, Instructions on How to Request a Certificate of Release of Federal Tax Lien	Centralized Lien Operation
Discharge of Property from Federal Tax Lien	Publication 783, Instructions on how to apply for a Certificate of Discharge of Property From Federal Tax Lien	Advisory office for state where the property is located
Non-Attachment of Federal Tax Lien	Publication 1024, How to Prepare an Application for a Certificate of Non-Attachment of Federal Tax Lien	Advisory office for state where the notice of lien is filed
Subordination of Federal Tax Lien	Publication 784, How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien	Advisory office for state where the property is located
Withdrawal of Notice of Federal Tax Lien	Form 12277, Application for Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien	Advisory office for state where the taxpayer resides
Withdrawal of Notice of Federal Tax Lien – after lien released	Form 12277, Application for Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien	Centralized Lien Operation
Foreclosure of property—Redemption Issues	Publication 487, How to Prepare an Application Requesting the United States to Release Its Right to Redeem Property Secured by a Federal Tax Lien	Advisory office for state where the notice of lien is filed
Foreclosure of property—Non-judicial sales	Publication 786, Instructions for Preparing a Notice of Non-Judicial Sale and Application for Consent to Sale	Advisory office for state where the notice of lien is filed
General questions regarding liens on deceased taxpayers	IRS website	Advisory office for state where the taxpayer last resided

*Publications and Forms referenced above may be obtained through the IRS.gov website or the contact office. Certain topics also have supplemental instructional videos at http://www.irsvideos.gov/Professional/IRSLiens.

See page two for the complete listing and contact information for each Advisory Office.

On page two, match the number for the applicable State with the associated Advisory office.

- Send requests for lien-related certificates ("Lien"), such as discharges, subordinations, non-attachments, and withdrawals, to the first Advisory office listed for the State.
- Send all other correspondence ("Other"), such as claims, non-judicial sale notices, and redemption inquiries, to the second Advisory office listed for the State.

Address correspondence to IRS Advisory Group.

Contact information for the Centralized Lien Operation is as follows:

Centralized Lien Operation
P.O. Box 145595, Stop 8420G
Cincinnati, OH 45250-5595

Phone: 800-913-6050
Phone (outside the U.S.): 859-320-3526
FAX: 855-753-8177

Advisory Offices

Match the number for the applicable State with the associated Advisory office. See page one for instructions.

State	Lien	Other
Alabama	9	11
Alaska	1	29
Arizona	1	1
Arkansas	9	25
California (North, Central)	2	2
Includes Santa Barbara, Ventura, Kern, Fresno Counties		
California (South)	3	3
Includes Los Angeles, San Bernardino, Inyo Counties		
Colorado	1	5
Connecticut	17	24
Delaware	8	22
District of Columbia	8	12
Florida (North)	7	6
Includes Tallahassee, Jacksonville, Orlando		
Florida (South)	7	7
Includes Ft. Lauderdale, Miami		
Georgia	8	8
Hawaii	2	4
Idaho	2	4
Illinois	9	9
Indiana	9	10
Iowa	9	14

State	Lien	Other
Kansas	9	15
Kentucky	20	20
Louisiana	9	11
Maine	17	24
Maryland	8	12
Massachusetts	17	24
Michigan	20	13
Minnesota	9	14
Mississippi	9	11
Missouri	9	15
Montana	1	29
Nebraska	9	14
Nevada	1	1
New Hampshire	17	24
New Jersey	20	16
New Mexico	1	1
New York (City, East)	17	17
Includes New York City and surrounding counties		
New York (Central, West)	17	18
Includes Albany, Buffalo, Upper Hudson Valley		
North Carolina	8	19
North Dakota	9	14

State	Lien	Other
Ohio	20	20
Oklahoma	7	21
Oregon	1	29
Pennsylvania (East)	8	22
Pennsylvania (West)	17	23
Rhode Island	17	24
South Carolina	8	19
South Dakota	9	14
Tennessee	9	25
Texas (North)	7	26
Includes Dallas, Ft. Worth, Lubbock, Midland, Odessa		
Texas (South)	7	27
Includes Houston, Austin, Beaumont, El Paso, Waco		
Utah	1	5
Vermont	17	24
Virginia	8	28
Washington	1	29
West Virginia	20	20
Wisconsin	9	30
Wyoming	1	29
International	7	7
Includes Puerto Rico, U.S. Possessions & Territories		

#	Address	Phone/Fax
1	4041 N. Central Ave., Suite 112, MS 5021PHX, Phoenix, AZ 85012	Ph 602-636-9358 Fx 877-477-9225
2	1301 Clay St., Suite 1410S Oakland, CA 94612	Ph 510-907-5173 Fx 877-477-9228
3	24000 Avila Rd., MS 5905 Laguna Niguel, CA 92677	Ph 949-575-6425 Fx 877-477-9239
4	300 N. Los Angeles St., MS-5021 Los Angeles, CA 90012	Ph 213-372-4545 Fx 855-673-2055
5	1999 Broadway, MS 5021DEN Denver, CO 80202-2490	Ph 303-603-4570 Fx 877-477-9236
6	400 West Bay St. Stop 5710 Jacksonville, FL 32202	Ph 904-665-0832 Fx 855-851-8234
7	7850 SW 6th Court, MS 5780 Plantation, FL 33324	Ph 954-991-4008 Fx 855-851-8235
8	401 W. Peachtree St., NW, Stop 333-D Atlanta, GA 30308	Ph 470-639-2495 Fx 855-847-7741
9	Stop 5012 CHI, 230 S. Dearborn, Rm 2630 Chicago, IL 60604	Ph 312-292-2892 Fx 877-477-8752
10	Stop SB 461, 575 N. Pennsylvania St. Indianapolis, IN 46204	Ph 414-231-2121 Fx 877-477-9261
11	1555 Poydras St, Suite 220-Stop 65 New Orleans, LA 70112-3747	Ph 504-202-9630 Fx 877-477-9213
12	31 Hopkins Plaza, MS 1150 Baltimore, MD 21201	Ph 443-853-5417 Fx 855-851-8233
13	985 Michigan Ave., Stop 47 Detroit, MI 48226	Ph 313-234-2398 Fx 877-816-8631
14	M/S 5900, 30 E. 7th St., Suite 1222 St. Paul, MN 55101-4940	Ph 314-339-1604 Fx 877-477-9247
15	Stop 5333STL, Rm 9.203, 1222 Spruce St. St. Louis, MO 63103	Ph 314-339-1604 Fx 877-477-9247

#	Address	Phone/Fax
16	4 Paragon Way, Suite 2 Freehold, NJ 07728	Ph 973-921-4283 Fx 855-564-8324
17	290 Broadway, MS 05-A New York, NY 10007	Ph 212-436-1046 Fx 877-477-8744
18	11A Clinton Ave., Suite 521 Albany, NY 12207	Ph 518-242-5404 Fx 888-981-4255
19	4905 Koger Blvd. Suite 102, MS #8 Greensboro, NC 27407	Ph 336-690-6095 Fx 855-847-7742
20	550 Main St., Room 3411 Cincinnati, OH 45202	Ph 513-975-6685 Fx 855-807-0661
21	55 N. Robinson, MS 5021 OKC Oklahoma City, OK 73102	Ph 405-982-6604 Fx 855-564-4242
22	600 Arch St., Room 3259 Philadelphia, PA 19106	Ph 267-941-6205 Fx 855-847-7739
23	1000 Liberty Ave., Room 704 Pittsburgh, PA 15222	Ph 412-404-9700 Fx 877-477-8750
24	380 Westminster St., 4th floor Providence, RI 02903	Ph 617-316-2608 Fx 877-477-8740
25	801 Broadway, MDP 53 Nashville, TN 37203	Ph 615-250-5797 Fx 877-477-9209
26	1100 Commerce St., Mail Code 5028 DAL Dallas, TX 75242	Ph 405-982-6604 Fx 877-477-9223
27	1919 Smith St., 5021 HOU Houston, TX 77002	Ph 713-209-4399 Fx 877-477-9214
28	400 N. 8th St., Room 898, Box 75 Richmond, VA 23219	Ph 804-916-8039 Fx 855-851-8233
29	915 2nd Ave, MS W245 Seattle, WA 98174	Ph 206-946-3080 Fx 877-477-9227
30	Stop 5303MIL, 211 W. Wisconsin Ave Milwaukee, WI 53203	Ph 414-231-2121 Fx 877-477-9261

Instructions on how to apply for

Certificate of Discharge From Federal Tax Lien

A Certificate of Discharge under Internal Revenue Code Section 6325(b) removes the United States' lien from the property named in the certificate. Discharge of property under Internal Revenue Code Section 6325(c) subject to an Estate Tax Lien is not covered in this publication. For Estate Tax Lien discharges see instead the application and instructions found in Form 4422

1. Complete Form 14135, *Application for Certificate of Discharge of Federal Tax Lien* attached with this publication.
2. Mail the completed Form 14135 and the appropriate attachments to:
   IRS, Attn: Advisory Group Manager
   (Refer to **Publication 4235** *Collection Advisory Group Addresses* for the correct address. The correct address is the office assigned to the location where the property is located.)

If you have any questions, contact the applicable Advisory Office.

If you want to know how much you owe in order to pay the lien(s) in full, call 1-800-913-6050, visit the nearest Taxpayer Assistance Center, or contact the revenue officer assigned to your case.

Important!
Please submit your application at least 45 days before the transaction date that the certificate of discharge is needed. Doing so will allow sufficient time for review, determination, notification and the furnishing of any applicable documents by the transaction date.

Information Required on the Application

Section 1 - Taxpayer Information

1. Enter the name and address of the individual(s) or business as it appears on the Notice of Federal Tax Lien (NFTL). A second name line is provided if needed.
2. Enter, if known, the last 4 digits of the social security number (SSN) or full employer identification number as it appears on the NFTL.
3. Enter, if known and if applicable, the last 4 digits of any spousal SSN (secondary SSN) associated with the tax debt listed on the NFTL.
4. Provide a daytime phone number and a fax number.

Section 2 - Applicant Information

1. Check the box on the first line of Section 2 if you are both the taxpayer and the applicant. If you are not the taxpayer, attach a copy of the lien.
2. If you have checked the box indicating that you are the taxpayer **and** your information is the same as listed on the lien, enter "same as taxpayer" on the name line.
3. If you are **not** the taxpayer **or** you are the taxpayer but your information is no longer the same as the information on the Notice of Federal Tax Lien, enter your name (include any name changes), current address, daytime phone number and fax number.
4. If you are **not** the taxpayer, enter in the box next to "Name" your relationship to the taxpayer (e.g. parent, uncle, sister, no relation, etc).

Section 3 - Purchaser/Transferee/New Owner

1. Check the box on the first line of Section 3 if you are both the property owner and the applicant.
2. Enter the name of the property owner. **Or** enter "NA" if you have checked the box indicating you are both the applicant and the property owner, enter, "same as applicant".
3. Enter the property owner's relationship to the taxpayer (e.g. taxpayer, parent, no relation, etc.).

Section 4 - Attorney/Representative Information

This section is used to list the taxpayer's representative or a representative of a party other than the taxpayer, such as the lender, needing to receive information from the IRS. However, you do not need a representative to request discharge of the federal tax lien.

1. Check the box on the first line of Section 4 if you are attaching a Form 8821 (Tax Information Authority) or Form 2848 (Power of Attorney) with your application. If you are attaching one of these forms, please make sure it is completely filled out, signed, and dated. You must provide one of these forms if the representative represents an interest other than the taxpayer.
2. Enter the name, address, phone number, and fax number of your representative in this action. The IRS will work with you and your representative to process your application. **Or** enter "NA" on the name line if you are not using a representative.
3. Enter whose interest the representative represents (e.g. taxpayer, lender, title company, etc.). This allows the IRS to determine what information can be shared with the representative.

Section 5 – Lender/Finance Company Information
(Settlement/Escrow Company** for Section 6325(b)(3) only**)

Enter the company name, contact name, and phone number for the title or escrow company that will be used at settlement.

Section 6 – Monetary Information

1. Provide the proposed property sale amount
2. Provide the amount of proceeds the IRS can expect for application to the tax liability.
3. Enter NA for the amount of proceeds the IRS can expect, if you anticipate there will be no proceeds.

Section 7 - Basis for Discharge

Discharge of property from the federal tax lien may be granted under several Internal Revenue Code (IRC) provisions. After reviewing the discharge sections, explanations, and examples below, select the discharge section that best applies to your application. If the IRS does not agree with your selection after its review, an explanation of the decision will be provided.

1. **6325(b)(1)** – a discharge may be issued under this provision if the value of the taxpayer's remaining property encumbered by the federal tax lien is equal to at least twice the amount of the federal tax liability secured by the lien and any encumbrance entered into before the IRS filed its public notice of the lien. If there are mortgages, state and/or local taxes, mechanics liens, etc., the amount of these debts would be added to the amount of the tax liability and multiplied by 2.

   Example

Tax liability		$15,500
Other Debts	+	23,334
		38,834
	X	2
		$77,668

   The property remaining subject to the lien must be at least $77,668.

2. **6325(b)(2)(A)** – a discharge may be issued under this provision when the tax liability is partially satisfied with an amount paid that is not less than the value of the United States' interest in the property being discharged. **For example**, the IRS has a lien totaling $203,000 and with the ...

   - Property selling for: $215,000
   - Minus encumbrances senior to IRS lien: $135,000
   - Minus proposed settlement costs: $ 15,000
   - The IRS lien interest equals: $ 65,000

   After the IRS receives and applies the $65,000 in partial satisfaction of the tax liability, there remains an outstanding tax debt of $138,000.

   In the case of Tenancy by Entireties property, the United States is generally paid one-half of the proceeds in partial satisfaction of the liability secured by the tax lien.

3. **6325(b)(2)(B)** - a discharge may be issued under this provision when it is determined that the government's interest in the property has no value. The debts senior to the federal tax lien are greater than the fair market value of the property or greater than the sale value of the property. Submit a copy of the proposed escrow agreement as part of the application.

4. **6325(b)(3)** – a discharge may be issued under this provision if an agreement is reached with the IRS allowing the property to be sold. Per an escrow agreement the sale proceeds must be held in a fund subject to the claims of the United States in the same manner and priority the claims had prior to the property being discharged. **For example**, there are two mortgages senior to the IRS tax lien totaling $32,000 and $5,000. The government's interest in the property is $40,000 and there are liens on the property junior to the IRS lien in the amount of $3,000, $12,000 and $2,990. The proceeds from the sale would be dispensed by paying the debts in the following sequence.

   a. $32,000
   b. $5,000
   c. $40,000
   d. $3,000
   e. 12,000
   f. $2,990

   Submit a copy of the proposed escrow agreement.

5. **6325(b)(4)** – a discharge will be issued under this provision to a third party who owns the property if a deposit is made or an acceptable bond provided equal to the government's interest in the property. **In the case of Tenancy by Entireties property,** a deposit or an acceptable bond totaling one-half the government's interest in the property must be made. If you are the property owner (but not the taxpayer, i.e., you are not responsible for the tax liability) and you make a deposit or post an acceptable bond to obtain a discharge under this section, you have 120 days to file an action in federal district court, under section 7426(a)(4), challenging the IRS' determination of the government's lien interest. **This is the exclusive remedy available to the third party for the return of the deposit or accepted bond or a portion thereof.** An administrative request for refund and a refund suit in district court is not available. The *Circular 570*, available at http://fms.treas.gov/c570/index.html contains a list of companies certified by the Secretary of the Treasury as providers of acceptable securities.

6. **6325(c)** – a discharge of property subject to an Estate Tax Lien is not covered in this publication. Please refer to Form 4422.

Section 8 - Description of Property

1. Enter a detailed description of the property to be discharged from the federal tax lien.
2. When the property is real estate include the type of property, for example, 3-bedroom house; etc. When the property is personal property include serial or vehicle numbers, as appropriate, for example, 2002 Cessna twin engine airplane, serial number AT919000000000X00; etc.
3. Provide the physical address if real estate or physical location address if personal property.
4. Check the appropriate box to indicate whether you attached a copy of the title or deed to the property.
5. If you are applying under 6325(b)(1) check the "Attached" box **and** attach copies of the titles or deeds for property remaining subject to the lien. If you are not applying under 6325(b)(1) check the "NA" box.

Section 9 - Appraisal and Valuations

1. Check the "Attached" box after "Required Appraisal" indicate whether you have attached the required appraisal by a disinterested third party. This is typically a professional appraisal providing neighborhood analysis; description of the site; description of the improvements; cost approach; comparable sales; definition of market value; certification; contingent and limiting conditions; interior and exterior photos of the property; exterior photos of comparable sales used; comparable sales location map; sketch of subject property showing room layout; flood map and qualifications of the appraiser.
2. Check the appropriate box under the "**Plus** One of the Following Additional Valuations" section to indicate which other type of property value verification is attached with your application.

   Note: For applications under IRC 6325(b)(1), valuation information described above must also be provided for property remaining subject to lien.

   Note: For property being sold at public auction, provide the date and place of the sale, the proposed amount for which the property will be sold, and a statement that the United States will be paid in the proper priority from the proceeds.

Section 10 - Federal Tax Liens

This section is important when the applicant and the taxpayer are different. If the applicant and the taxpayer are the same, this section may be skipped.

1. Check the “attached” box if you have attached copies of the liens with your application.
2. If you checked the “no” box list the System Lien Identification Number (SLID) found in the top right hand box of the lien document, if available. If you do not have the number(s) enter “unknown” in the first box.

Section 11 - Sales Contract/Purchase Agreement

1. Check the box indicating whether the proposed sales contract or purchase agreement is attached.
2. If you checked the “no” box, describe how the taxpayer named on the lien will be divested of their interest in the property or why they have no interest in the property.

Section 12 - Title Report

1. Check the box indicating whether the title report is attached.
2. If you checked the “no” box, use the space provided to list any encumbrances (liens or claims) against the property that came into existence before the United States’ lien interest or which have priority over the lien. Include name and address of holder; description of encumbrance, e.g., mortgage, state lien, etc.; date of agreement; original amount and interest rate; amount due at time of application; and family relationship of the holder, if applicable.
3. Attach a separate sheet with the information in item # 2 above if there is not enough space provided on the form.

Section 13 - Closing Statement

1. Check the box indicating whether the proposed closing statement is attached. This statement is often referred to as a HUD-1.
2. If you checked the “no” box, use the space provided to itemize all proposed costs, commissions, and expenses of any transfer or sale associated with property.
3. Attach a separate sheet with the information in item # 2 above if there is not enough space provided on the form.

Section 14 - Additional Information

1. Check the box indicating whether you are attaching other documents relevant to the discharge application. This could include affidavits or court documents.
2. Check the “no” box if you do not have any additional documentation.

Section 15 - Escrow Agreement

1. Check the box indicating whether you are attaching a draft escrow agreement. This is only applicable if you are applying under 6325(b)(3).
2. An escrow agreement must specify type of account, name and depositary for account, conditions under which payment will be made, cost of escrow, and the name and address of any party identified as part of the escrow agreement.

Section 16 - Waiver

This section applies only if you are:

- The property owner, but
- Not liable for the tax debt *(i.e. not named on the lien)*, and
- Applying under 6325(b)(2)(A).

By checking the “Waive” box you are waiving the option to have the payment treated as a deposit under section 6325(b)(4) which has the accompanying right to request a return of funds and to bring an action under section 7426(a)(4).

If you check the “no” box, your application will automatically be considered under 6325(b)(4) which provides for return of deposited funds and a court challenge under 7426(b)(4).

Section 17 - Declaration

The applicant or their authorized Power of Attorney signs the application form. You must sign your application under penalties of perjury attesting to having examined the application, accompanying schedules or documents, exhibits, affidavits, and statements and declaring to the best of your knowledge and belief that it is true, correct and complete.

Frequently Asked Questions

Q1: When do I make a payment?

The Internal Revenue Code section under which the certificate of discharge will be issued or granted determines the details regarding making a payment.

- Discharge under **6325(b)(1)** or **6325(b)(2)(B)** does not require a payment.
- Discharge under **6325(b)(2)(A)** requires a payment, but do not send a payment with the application. The Advisory Group Manager will notify you, after determining the amount due, when to send payment.

NOTE: If a **mortgage foreclosure** is anticipated, the application is made under section 6325(b)(2)(A) or 6325(b)(2)(B). A determination will be made that either an amount is required for discharge or the United States’ interest is valueless.

In the case of foreclosure you will receive, within 30 days of the receipt of a complete and approved application, a conditional commitment letter for a certificate of discharge.

NOTE: Relocation Expenses - If a discharge under 6325(b)(2)(A) or 6325(b)(2)(B) is issued and if the sale is of the principal residence, the *taxpayer* may be eligible for a relocation expense allowance because of an inability to pay. The relocation expense allowance is subject to limitations. To apply for the allowance complete and submit Form 12451, “Request for Relocation Expense Allowance” with the application for discharge.

- Discharge under **6325(b)(3)** requires a payment, but do not send a payment with the application. First, the draft escrow agreement must be submitted.

  Second, the Advisory Group Manager approves the escrow agent selected by the applicant; any reasonable expenses submitted as incurred in connection with the sale of the property; the claim amounts and priorities, and the distribution timing of the fund.

  Third, the agreement is finalized and contains signatures of all parties involved including Advisory Group Manager prior to the discharge being issued.

Note: The escrow account must be funded before payment of any claim or lien through money paid by the applicant or from the sale proceeds.

- Discharge under **6325(b)(4)** requires a bond or deposit but do not send one with the application. The Advisory Group manager must first determine the amount of bond or deposit needed for the discharge and determine that the bond company, if applicable, is from the approved list.

Q2: What is an acceptable form of payment?

Make payments in cash or by the following types of checks: certified; cashiers; or treasurer's check. The check must be drawn on any bank or trust company incorporated under the laws of the United States, or of any state, or possession of the United States. Payment can also be made using a United States postal, bank, express or telegraph money order.

Important! If you pay by personal check, issuance of the certificate of discharge will be delayed until the bank honors the check.

Q3: Who makes the decision to issue a Certificate of Discharge?

In all cases Advisory staff will review and verify the information provided, determine whether a certificate of discharge should be issued, and contact you with any questions. Advisory may contact you, your representative, or any person relative to the transaction for additional information.

The Advisory Group Manager has the responsibility to review and approve the determination and let you know the outcome. If approved, you will receive a conditional commitment letter.

Q4: When will I receive the Certificate of Discharge?

The Internal Revenue Code under which the certificate of discharge will be issued or granted and the time at which you are divested of your interest in the property determines when you will receive the certificate.

- Under **6325(b)(1)** you will receive the certificate when it is determined the remaining property meets the criteria of the provision.
- Under **6325(b)(2)(A)** you will receive the certificate after IRS receives payment of the agreed upon amount in partial satisfaction of the tax liability, proof that the taxpayer has been divested of title, and receipt of a copy of the final settlement statement.
- Under **6325(b)(2)(B)** you will receive the certificate when it is determined that the government's interest in the property is valueless, the IRS has received proof that the taxpayer has been divested of title, and a copy of the final settlement statement.

NOTE: Under provisions **6325(b)(2)(A)** and **6325(b)(2)(B)** at the conclusion of a mortgage foreclosure the certificate will be issued in accordance with the terms of the conditional commitment letter. Also see, Publication 487, *How to Prepare an Application Requesting the United States to Release Its Right to Redeem Property Secured by a Federal Tax Lien.*

- Under **6325(b)(3)** you will receive the certificate when the amount of the government's interest in the property has been placed in the approved escrow account.
- Under **6325(b)(4)** you will receive the certificate when the amount equal to the government's interest in the property is received or an approved bond has posted.

Q5: What happens if my application is denied?

If your application is denied, you will receive Form 9423, Collection Appeal Request and Publication 1660, Collection Appeal Rights, with an explanation of why your application was denied.

Privacy and Paperwork Reduction Act Notice

The Privacy act of 1974 says that when we ask you for information about yourself, we must first tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if you do not provide it and whether or not you must respond under the law.

We ask for the information on this form to carry out the Internal Revenue laws of the United States. This information requested on this form is needed to process your application and to determine whether the federal tax lien can be discharged. You are not required to apply for discharge; however, if you want the federal tax lien to be discharged, you are required to provide the information requested on this form. Section 6109 requires you to provide the requested identification numbers. Failure to provide this information may delay or prevent processing your application; providing any false information may subject you to penalties.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individuals filing this form is approved under OMB control number 1545-2174. The estimated burden for those who file this form is shown below.

- Recordkeeping 2 hr., 45 min.
- Learning about the law or the form 2 hr.
- Preparing the form 1 hr., 30 min.
- Copying, assembling, and sending the form to the IRS 85 min.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and United States commonwealths and possessions for use in administering their tax laws. Advisory may contact you, your representative, or any person relative to the transaction for additional information. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

Form 14135 (June 2010)	Department of the Treasury — Internal Revenue Service **Application for Certificate of Discharge of Property from Federal Tax Lien**	OMB No. 1545-2174

Complete the entire application. Enter NA *(not applicable)*, when appropriate. Attachments and exhibits should be included as necessary. Additional information may be requested of you or a third party to clarify the details of the transaction(s).

1. Taxpayer Information *(Individual or Business named on the notice of lien)*:

Name *(Individual First, Middle Initial, Last)* or *(Business)* as it appears on lien		Primary Social Security Number *(last 4 digits only)*
Name Continuation *(Individual First, Middle Initial, Last)* or *(Business d/b/a)*		Secondary Social Security Number *(last 4 digits only)*
Address *(Number, Street, P.O. Box)*		Employer Identification Number
City	State	ZIP Code
Telephone Number *(with area code)*	Fax Number *(with area code)*	

2. Applicant Information: ☐ Check if also the Taxpayer *(If not the taxpayer, attach copy of lien. See Sec.10)*

Name *(First, Middle Initial, Last)*		Relationship to taxpayer
Address *(Number, Street, P.O. Box)*		
City	State	ZIP Code
Telephone Number *(with area code)*	Fax Number *(with area code)*	

3. Purchase/Transferee/New Owner ☐ Check if also the Applicant

	Relationship to taxpayer

4. Attorney/Representative Information **Attached:** Form 8821 or Power of Attorney Form 2848 ☐ Yes ☐ No

Name *(First, Middle Initial, Last)*		Interest Represented *(e.g. taxpayer, lender, etc.)*
Address *(Number, Street, P.O. Box)*		
City	State	ZIP Code
Telephone Number *(with area code)*	Fax Number *(with area code)*	

5. Lender/Finance Company Information - or *(Settlement/Escrow Company* *for applications under Section 6325(b)(3) only)*

Company Name	Contact Name	Contact Phone Number

6. Monetary Information

Proposed sales price	
Expected proceeds to be paid to the United States in exchange for the certificate of discharge *(Enter NA if no proceeds are anticipated)*	

7. Basis for Discharge:

Check the box below that best addresses what you would like the United States to consider in your application for discharge. *(Publication 783 has additional descriptions of the Internal Revenue Code sections listed below.)*

- ☐ 6325(b)(1) — Value of property remaining attached by the lien(s) is at least double the liability of the federal tax lien(s) plus other encumbrances senior to the lien(s)
- ☐ 6325(b)(2)(A) — The United States receives an amount not less than the value of the United States' interest.
  *(**Note**: If you are applying under 6325(b)(2)(A) and are the property owner but not the taxpayer, see also section 16.)*
- ☐ 6325(b)(2)(B) — Interest of the United States in the property to be discharged has no value.
- ☐ 6325(b)(3) — Proceeds from property sale held in escrow subject to the liens and claims of the United States.
- ☐ 6325(b)(4) — Deposit made or bond furnished in an amount equal to the value of the United States' interest.
  *(**Note**: This selection provides a remedy under 7426(a)(4) for return of deposit but is exclusively for a property owner not named as the taxpayer on the lien)*

8. Description of property

(for example, 3 bedroom rental house; 2002 Cessna twin engine airplane, serial number AT919000000000X00; etc.):

Address of real property *(If this is personal property, list the address where the property is located)*:

Address *(Number, Street, P.O. Box)*		
City	State	ZIP Code

FOR REAL ESTATE: a legible copy of the deed or title showing the legal description is required	☐ Attached	☐ NA
FOR Discharge Requests under Section 6325(b)(1): copy of deed(s) or title(s) for property remaining subject to the Federal Tax Lien is required	☐ Attached	☐ NA

9. Appraisal and Valuations

REQUIRED APPRAISAL Professional appraisal completed by a disinterested third party	☐ Attached
<u>PLUS</u> ONE OF THE FOLLOWING ADDITIONAL VALUATIONS:	
County valuation of property *(real property)*	☐ Attached
Informal valuation of property by disinterested third party	☐ Attached
Proposed selling price *(for property being sold at auction)*	☐ Attached
Other: ______________________	☐ Attached

<u>AND</u> for applications under Section 6325(b)(1), valuation information (of the type described above in this section) must also be provided for property remaining subject to the lien.

10. Copy of Federal Tax Lien(s) *(Complete if applicant and taxpayer differ)* ☐ Attached ☐ No

OR list the lien number(s) found near the top right corner on the lien document(s) *(if known)*

11. Copy of the sales contract/purchase agreement *(if available)* ☐ Attached ☐ No

OR

Describe how and when the taxpayer will be divested of his/her interest in the property:

12. Copy of a current title report ☐ Attached ☐ No

OR

List encumbrances senior to the Federal Tax Lien. Include name and address of holder; description of encumbrance, e.g., mortgage, state lien, etc.; date of agreement; original loan amount and interest rate; amount due at time of application; and family relationship, if applicable ***(Attach additional sheets as needed)***:

13. Copy of proposed closing statement ***(aka HUD-1)*** ☐ Attached ☐ No

OR

Itemize all proposed costs, commissions, and expenses of any transfer or sale associated with property ***(Attach additional sheets as needed)***:

14. Additional information that may have a bearing on this request, such as pending litigation, explanations of unusual situations, etc., is attached for consideration ☐ Attached ☐ No

15. Escrow Agreement *(For applications under IRC 6325(b)(3))* ☐ Attached ☐ No

Escrow agreement must specify type of account, name and depositary for account, conditions under which payment will be made, cost of escrow, name and address of any party identified as part of escrow agreement, and signatures of all parties involved including Advisory Group Manager. Terms for agreement must be reached before discharge approved.

16. WAIVER *(For applications made by third parties under IRC 6325(b)(2))*

If you are applying as an owner of the property and you are not the taxpayer, to have this application considered under section 6325(b)(2), you must waive the rights that would be available if the application were made under section 6325(b)(4). If you choose not to waive these rights, the application will be treated as one made under 6325(b)(4) and any payment will be treated like a deposit under that section. Please check the appropriate box.

I understand that an application and payment made under section 6325(b)(2) does not provide the judicial remedy available under section 7426(a)(4). In making such an application / payment, I waive the option to have the payment treated as a deposit under section 6325(b)(4) and the right to request a return of funds and to bring an action under section 7426(a)(4).

☐ Waive ☐ No

17. Declaration

Under penalties of perjury, I declare that I have examined this application, including any accompanying schedules, exhibits, affidavits, and statements and to the best of my knowledge and belief it is true, correct and complete.

Signature/Title ____________________ Date ____________

Signature/Title ____________________ Date ____________

Instructions on how to apply for a

Certificate of Subordination of Federal Tax Lien

IRS

A Certificate of Subordination under Internal Revenue Code Section 6325(d)(1) and 6325(d)(2) allows a named creditor to move their junior creditor position ahead of the United States' position for the property named in the certificate. For *How to Apply for a Certificate of Subordination of Federal Estate Tax Lien* Under Section 6325(d)(3) of the Internal Revenue Code use Publication 1153.

1. Complete Form 14134, *Application for Certificate of Subordination of Federal Tax Lien* attached with this publication.
2. Mail the completed Form 14134 and the appropriate attachments to:
   IRS, Attn: Advisory Group Manager
   (Refer to **Publication 4235**, *Collection Advisory Group Addresses* for the correct address. The correct address is the office assigned to the location where the property is located.)

If you have any questions, contact the applicable Advisory Office.

If you want to know how much you owe in order to pay the lien(s) in full, call 1-800-913-6050, visit the nearest Taxpayer Assistance Center, or contact the revenue officer assigned to your case.

Important!

Please submit your application at least 45 days before the transaction date that the certificate of subordination is needed. Doing so will allow sufficient time for review, determination, notification and the furnishing of any applicable documents by the transaction date.

Information Required on the Application

Section 1 - Taxpayer Information

1. Enter the name and address of the individual(s) or business as it appears on the Notice(s) of Federal Tax Lien (NFTL). A second name line is provided if needed.
2. Enter, if known, the last 4 digits of the social security number (SSN) or full employer identification number as it appears on the NFTL.
3. Enter, if known and if applicable, the last 4 digits of any spousal SSN (secondary SSN) associated with the tax debt listed on the NFTL.
4. Provide a daytime phone number and a fax number.

Section 2 - Applicant Information

1. Check the box on the first line of Section 2 if you are both the taxpayer and the applicant. If you are not the taxpayer, attach a copy of the lien.
2. If you have checked the box indicating that you are the taxpayer **and** your information is the same as listed on the lien, enter "same as taxpayer" on the name line.
3. If you are **not** the taxpayer **or** you are the taxpayer but your information is no longer the same as the information on the Notice of Federal Tax Lien, enter your name (include any name changes), current address, daytime phone number and fax number.
4. If you are **not** the taxpayer, enter in the box next to "Name" your relationship to the taxpayer (e.g. parent, uncle, sister, no relation, etc.).

Section 3 - Property Owner

1. Check the box on the first line of Section 3 if you are both the property owner and the applicant.
2. Enter the name of the property owner. **Or** if you have checked the box indicating you are both the applicant and the property owner, enter, "same as applicant".
3. Enter the property owner's relationship to the taxpayer (e.g. taxpayer, parent, no relation, etc.).

Section 4 - Attorney/Representative Information

This section is used to list the taxpayer's representative or a representative of a party other than the taxpayer, such as the lender, needing to receive information from the IRS. However, you do not need a representative to request subordination of the federal tax lien.

1. Check the box on the first line of Section 4 if you are attaching a Form 8821 (Tax Information Authority) or Form 2848 (Power of Attorney) with your application. If you are attaching one of these forms, please make sure it is completely filled out, signed, and dated. You must provide one of these forms if the representative represents an interest other than the taxpayer.
2. Enter the name, address, phone number, and fax number of your representative in this action. The IRS will work with you and your representative to process your application. **Or** enter "NA" on the name line if you are not using a representative.
3. Enter whose interest the representative represents (e.g. taxpayer, lender, title company, etc.). This allows the IRS to determine what information can be shared with the representative.

Section 5 - Lender/Finance Company Information

1. Enter the company name, contact name, phone number, and fax number for the lender you are requesting the United States subordinate its interest to.
2. Enter the type of transaction. For example, a loan consolidation or refinance often prompts a subordination request.

Section 6 - Monetary Information

1. Enter the amount of your existing or outstanding financing.
2. Enter the amount of new financing you are seeking.
3. Enter the amount anticipated being paid toward the United States' interest (For applications requested under 6325(d)(1) only).

Section 7 - Basis for Subordination

A subordination may be granted under Internal Revenue Code (IRC) 6325(d)(1) or 6325(d)(2). Review the information below and select the section which best applies to your subordination request. If the IRS does not agree with your selection after its review, an explanation of the decision will be provided.

6325(d)(1) - a subordination may be issued under this section if you pay an amount equal to the lien or interest to which the certificate subordinates the lien of the United States. The following example uses an 80% loan to value and a 3% closing cost to financing ratio.

Example:

	Current/New	Original
Fair Market Value	$200,000	N/A
Refinance	$160,000	$145,000
Closing Costs	$ 4,800	N/A
United States Interest	$ 10,200	N/A

In this example the United States' interest is the equity you obtain from your refinanced loan after paying off the existing loan of $145,000 and paying the closing costs to obtain the loan. ($200,000 property value x 80% loan to value ratio = $160,000 refinance loan amount. $160,000 - $145,000 loan payoff = $15,000 potential equity. $160,000 x 3% = $4800 closing costs to obtain the loan. $15,000 potential equity - $4,800 closing costs = $10,200) The IRS would ask for $10,200 in return for the United States subordinating its interest to the refinanced loan. The lien remains on the property but the refinanced loan has priority over the lien.

4. **6325(d)(2)** – a subordination may be issued under this section if the IRS determines that the issuance of the certificate will increase the amount the government realizes and make collection of the tax liability easier. This might involve a refinance to a lower interest rate which would, if the subordination were granted, allow a larger monthly repayment rate on the tax liability. Or the situation might be more complex. For example, AAA Auto Sales currently pays the IRS $2000 per month on a $120,000 tax debt. Their inventory needs replenishing but their wholesaler is reluctant to provide added inventory because of the federal tax lien. AAA requests subordination and provides the IRS with documentation that an inventory replenishment of 500 cars could allow them to increase their monthly payment to $3000 as well as increase their pay back rate to bi-weekly. In this example the United States' interest would be second on the new inventory, if the subordination is granted.

   For applications under section 6325(d)(2), **complete** and **attach** a signed and dated statement describing how the amount the United States may ultimately realize through this subordination will increase and how collection will be facilitated by the subordination.

5. **6325(d)(3)** - Questions and applications for this section refer to Publication 1153 for instructions.

Section 8 - Description of Property

1. Enter a detailed description of the collateral you will use for the loan or other financing. This is the collateral on which you want the lien interest subordinated to the loan or financing. If this is real estate, you must provide the legal description.
2. When the property is real estate include the type of property. For example, 3-bedroom house; etc. When the property is personal property include serial or vehicle numbers, as appropriate. For example, 2002 Cessna twin engine airplane, serial number AT919000000000X00; etc.
3. Provide the property's physical address if it is real estate or provide the physical address where the property is located, if it is personal property.
4. Check the appropriate box to indicate whether you attached a copy of the title or deed to the property.

Section 9 - Appraisal and Valuations

1. Check the "Attached" box after "Appraisal" to indicate whether you have attached an appraisal completed by a disinterested third party. This is typically a professional appraisal providing neighborhood analysis; description of the site; description of the improvements; cost approach; comparable sales; definition of market value; certification; contingent and limiting conditions; interior and exterior photos of the property; exterior photos of comparable sales used; comparable sales location map; sketch of subject property showing room layout; flood map and qualifications of the appraiser. **This type of appraisal is not required for a certificate of subordination.**
2. Check the appropriate box under the "**Or** One of the Following Valuations" section to indicate which type of property value verification is attached with your application.

Section 10 - Federal Tax Liens

This section is important when the applicant and the taxpayer are different. If the applicant and the taxpayer are the same, this section may be skipped.

1. Check the "Attached" box if you have attached copies of the lien(s) with your application.
2. If you checked the "no" box list the System Lien Identification Number (SLID) found in the top right hand box of the lien document, if available. If you do not have the numbers enter "unknown" in the first box.

Section 11 - Proposed loan agreement

1. Check the "attached" box if you have attached the proposed mortgage contract **and** describe how subordination is in the best interests of the United States
2. If you checked the "no" box, describe how subordination is in the best interests of the United States.

Section 12 - Current title report

1. Check the “attached” box if you attached the title report. This is required for subordination.
2. If you checked the “no” box **and** the title report is not attached, use the space provided to list any encumbrances (liens or claims) against the property and whether those encumbrances are senior to the United States’ lien interest. Include the name and address of the holder; description of the encumbrance, e.g., mortgage, state lien, etc.; date of agreement; original loan amount and interest rate; amount due at time of application; and family relationship, if applicable.
3. If any mortgages listed on your title report are home equity lines of credit (HELOCs), the NFTL takes priority over advances made via the HELOC on the 46th day after the NFTL is filed. This means any advances made to you more than 46 days after the NFTL is filed, were made subject to the NFTL. The advances need to be included in the equity interest to which the United States attaches. To make an accurate value determination and to avoid processing delays with your application, provide documentation on any HELOC advances from the 46th day after the NFTL was filed, through the date you submit your application, and include expected advances through the date the certificate will be issued.
4. Attach a separate sheet titled “Section 12” with the information in item # 2 and # 3 above if there is not enough space provided on the form.

Section 13 - Proposed closing statement

1. Check the “attached” box if you attached the proposed closing statement. This statement is often referred to as a HUD-1.
2. If you checked the “no” box **and** you did not attach the proposed closing statement, use the space provided to itemize all proposed costs, commissions, and expenses to refinance the property.
3. Attach a separate sheet titled “Section 13” with the information in item # 2 above if there is not enough space provided on the form.

Section 14 - Additional Information

1. Check the “attached” box if you have attached other documents relevant to the subordination application. This could include affidavits or court documents.
2. Check the “no” box if you do not have any additional documentation.

Section 15 - Declaration

The applicant or their authorized Power of Attorney signs the application form. You must sign your application under penalties of perjury attesting to having examined the application, accompanying schedules or documents, exhibits, affidavits, and statements and declaring to the best of your knowledge and belief that the application is true, correct and complete.

Frequently Asked Questions

Q1: When do I make a payment?

The Internal Revenue Code section under which the certificate of subordination will be issued or granted determines the details regarding making a payment.

- Subordination under **6325(d)(1)** requires a payment, but do not send a payment with the application. The Advisory Group Manager will notify you after determining the amount due and when to send payment.
- Subordination under **6325(d)(2)** does not require a payment.

Q2: What is an acceptable form of payment?

Make payments in cash or by the following types of checks: certified; cashiers; or treasurer’s check. The check must be drawn on any bank or trust company incorporated under the laws of the United States, or of any state, or possession of the United States. Payment can also be made using a United States postal, bank, express or telegraph money order.

Important! If you pay by personal check, issuance of the certificate of subordination will be delayed until the bank honors the check.

Q3: Who makes the decision to issue a Certificate of Subordination?

In all cases Advisory staff will review and verify the information provided, determine whether a certificate of subordination should be issued, and contact you with any questions. Advisory may contact you, your representative, or any person relative to the transaction for additional information.

The Advisory Group Manager has the responsibility to review and approve the determination and let you know the outcome. If approved, you will receive a conditional commitment letter.

Q4: When will I receive the Certificate of Subordination?

The Internal Revenue Code under which the certificate of subordination will be issued or granted determines when you will receive the certificate.

- Under **6325(d)(1)**, you will receive the certificate upon receipt of the amount determined to be the interest of the United States in the property subject to the federal tax lien.
- Under **6325(d)(2)**, you will receive the certificate after your application has been investigated and the information verified. The Advisory Group Manager will notify you of the decision and provide you with a projected date for mailing the certificate of subordination.

Q5: What happens if my application is denied?

If your application is denied, you will receive **Form 9423**, *Collection Appeal Request* and **Publication 1660**, *Collection Appeal Rights*, with an explanation of why your application was denied.

Privacy and Paperwork Reduction Act Notice

The Privacy act of 1974 says that when we ask you for information about yourself, we must first tell you our legal right to ask for the information, why we are asking for it, and how it will be used. We must also tell you what could happen if you do not provide it and whether or not you must respond under the law.

We ask for the information on this form to carry out the Internal Revenue laws of the United States. This information requested on this form is needed to process your application and to determine whether the federal tax lien can be discharged. You are not required to apply for discharge; however, if you want the federal tax lien to be discharged, you are required to provide the information requested on this form. Section 6109 requires you to provide the requested identification numbers. Failure to provide this information may delay or prevent processing your application; providing any false information may subject you to penalties.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individuals filing this form is approved under OMB control number 1545-2174. The estimated burden for those who file this form is shown below.

- Recordkeeping 2 hr., 45 min.
- Learning about the law or the form 2 hr.
- Preparing the form 1 hr., 30 min.
- Copying, assembling, and sending the form to the IRS 85 min.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and United States commonwealths and possessions for use in administering their tax laws. Advisory may contact you, your representative, or any person relative to the transaction for additional information. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

Form 14134 (June 2010)	Department of the Treasury — Internal Revenue Service **Application for Certificate of Subordination of Federal Tax Lien**	OMB No. 1545-2174

Complete the entire application. Enter NA *(not applicable)*, when appropriate. Attachments and exhibits should be included as necessary. Additional information may be requested to clarify the details of the transaction*(s)*.

1. Taxpayer Information ***(Individual or Business named on the notice of lien)***

Name *(Individual First, Middle Initial, Last)* or *(Business)* as it appears on lien		Primary Social Security Number *(last 4 digits only)*
Name Continuation *(Individual First, Middle Initial, Last)* or *(Business d/b/a)*		Secondary Social Security Number *(last 4 digits only)*
Address *(Number, Street, P.O. Box)*		Employer Identification Number
City	State	ZIP Code
Telephone Number *(with area code)*	Fax Number *(with area code)*	

2. Applicant Information ☐ Check if also the Taxpayer *(If not the taxpayer, attach copy of lien. See Sec.10)*

Name *(First, Middle Initial, Last)*	Relationship to taxpayer
Address *(Number, Street, P.O. Box)*	

City	State	ZIP Code
Telephone Number *(with area code)*	Fax Number *(with area code)*	

3. Property Owner ☐ Check if also the Applicant

	Relationship to Taxpayer

4. Attorney/Representative Information **Attached:** Form 8821 or Power of Attorney Form 2848 ☐ Yes ☐ No

Name *(First, Middle Initial, Last)*	Interest Represented *(e.g. taxpayer, lender, etc.)*
Address *(Number, Street, P.O. Box)*	

City	State	ZIP Code
Telephone Number *(with area code)*	Fax Number *(with area code)*	

5. Lending/Finance Company

Company Name	Contact Name	Contact Phone Number
Type of transaction *(For example, loan consolidation, refinance, etc)*		

6. Monetary Information

Amount of existing loan *(if refinancing)*	
Amount of new loan	
Amount to be paid to the United States *(6325(d)(1) applications only)*	

7. Basis for Subordination: Check the box below that best addresses what you would like the United States to consider in your application for subordination. *(Publication 784 has additional descriptions of the Internal Revenue Code sections listed below.)*

☐ 6325(d)(1) the United States will receive an amount equal to the lien or interest to which the certificate of subordination is issued *(provide amount in Section 6 above)*

☐ 6325(d)(2) the issuance of the certificate of subordination will increase the government's interest and make collection of the tax liability easier. ***(Complete and attach a signed and dated statement describing how the amount the United States may ultimately realize will increase and how collection will be facilitated by the subordination.)***

Statement ☐ Attached ☐ NA

8. Description of property *(For example, 3 bedroom rental house; 2002 Cessna twin engine airplane, serial number AT919000000000X00; etc.):*

Address of real property ***(If this is personal property list the address where the property is located)*:**

Address *(Number, Street, P.O. Box)*

City	State	ZIP Code

Real Estate:
Legible copy of deed or title showing legal description ☐ Attached ☐ NA

9. Appraisal and Valuations

Appraisal: (Professional appraisal completed by a disinterested third party but it is not required for a subordination)	☐ Attached
OR ONE OF THE FOLLOWING VALUATIONS:	
County valuation of property *(real property)*	☐ Attached
Informal valuation of property by disinterested third party	☐ Attached
Proposed selling price *(for property being sold at auction)*	☐ Attached
Other:____________________________________	☐ Attached

10. Copy of Federal Tax Lien(s) *(Complete if applicant and taxpayer differ)* ☐ Attached ☐ No

OR list the lien number(s) found near the top right corner on the lien document(s) *(if known)*

11. Copy of the proposed loan agreement *(if available)* ☐ Attached ☐ No

AND

Describe how subordination is in the best interests of the United States:

12. Copy of a current title report *(required for subordination)* ☐ Attached ☐ No

OR

List encumbrances with seniority over the Federal Tax Lien. Include name and address of the holder; description of the encumbrance, e.g., mortgage, state lien, etc.; date of agreement; original loan amount and interest rate; amount due at time of application; and family relationship, if applicable. Include any home equity line of credit (HELOCs) advances beginning the 46th day after the NFTL was filed, through the date you submit your application, and include expected advances through the date the certificate will be issued. ***(Attach additional sheets as needed)***:

13. Copy of proposed closing statement ***(aka HUD-1)*** ☐ Attached ☐ No

OR

Itemize all proposed costs, commissions, and expenses of any transfer or sale associated with property ***(Attach additional sheets as needed)****:*

14. Additional information that may have a bearing on this request, such as pending litigation, explanations of unusual situations, etc., is attached for consideration ☐ Yes ☐ No

15. Declaration

Under penalties of perjury, I declare that I have examined this application, including any accompanying schedules, exhibits, affidavits, and statements and to the best of my knowledge and belief it is true, correct and complete.

Signature/Title

Date

Signature/Title

Date

Form **12277**
(October 2011)

Department of the Treasury — Internal Revenue Service

Application for Withdrawal of Filed Form 668(Y), Notice of Federal Tax Lien

(Internal Revenue Code Section 6323(j))

1. Taxpayer Name *(as shown on the Notice of Federal Tax Lien)*	2. Social Security/Employer Identification No.

3. Taxpayer's Representative, if applicable, or Name and Title of contact person, if taxpayer is a business

4. Address *(Number, Street, P.O. Box)*

5. City	6. State	7. ZIP code	8. Phone Number

9. Attach copy of the Form 668(Y), Notice of Federal Tax Lien, if available, **OR**, if you don't have a copy, provide the following information, if available:

Serial number of Form 668(Y) *(found near the top of the document)*	Date Form 668(Y) filed

Recording office where Form 668(Y) was filed

10. Current status of the federal tax lien *("x" appropriate box)*

☐ Open ☐ Released ☐ Unknown

11. Reason for requesting withdrawal of the filed Notice of Federal Tax Lien *("x" appropriate box(es))*

☐ The Notice of Federal Tax Lien was filed prematurely or not in accordance with IRS procedures.

☐ The taxpayer entered into an installment agreement to satisfy the liability for which the lien was imposed and the agreement did not provide for a Notice of Federal Tax Lien to be filed.

  ☐ The taxpayer is under a Direct Debit Installment Agreement.

☐ Withdrawal will facilitate collection of the tax.

☐ The taxpayer, or the Taxpayer Advocate acting on behalf of the taxpayer, believes withdrawal is in the best interest of the taxpayer and the government.

12. Explain the basis for the withdrawal request *(attach additional sheets and other documentation that substantiates your request, as needed)*

Affirmation

Under penalties of perjury, I declare that I have examined this application (including any accompanying schedules, exhibits, affidavits, and statements) and, to the best of my knowledge and belief, it is true, correct, and complete

Signature *(Taxpayer or Representative)*	Title *(if business)*	Date

General Instructions

1. Complete the application. If the information you supply is not complete, it may be necessary for the IRS to obtain additional information before making a determination on the application.

   - Sections 1 and 2: Enter the taxpayer's name and Social Security Number (SSN) or Employer Identification Number (EIN) as shown on the Notice of Federal Tax Lien (NFTL).

   - Section 3: Enter the name of the person completing the application if it differs from the taxpayer's name in section 1 (for example, taxpayer representative). For business taxpayers, enter the name and title of person making the application. Otherwise, leave blank.

   - Sections 4 through 8: Enter current contact information of taxpayer or representative.

   - Section 9: Attach a copy of the NFTL to be withdrawn, if available. If you don't have a copy of the NFTL but have other information about the NFTL, enter that information to assist the IRS in processing your request.

   - Section 10: Check the box that indicates the current status of the lien.
     "Open" means there is still a balance owed with respect to the tax liabilities listed on the NFTL.
     "Released" means the lien has been satisfied or is no longer enforceable.
     "Unknown" means you do not know the current status of the lien.

   - Section 11: Check the box(es) that best describe the reason(s) for the withdrawal request. **NOTE**: If you are requesting a withdrawal of a released NFTL, you generally should check the last box regarding the best interest provision.

   - Section 12: Provide a detailed explanation of the events or the situation to support your reason(s) for the withdrawal request. Attach additional sheets and supporting documentation, as needed.

   - Affirmation: Sign and date the application. If you are completing the application for a business taxpayer, enter your title in the business.

2. Mail your application to the IRS office assigned your account. If the account is not assigned or you are uncertain where it is assigned, mail your application to IRS, ATTN: Advisory Group Manager, in the area where you live or is the taxpayer's principal place of business. Use Publication 4235, *Advisory Group Addresses*, to determine the appropriate office.

3. Your application will be reviewed and, if needed, you may be asked to provide additional information. You will be contacted regarding a determination on your application.

   a. If a determination is made to withdraw the NFTL, we will file a Form 10916(c), *Withdrawal of Filed Notice of Federal Tax Lien*, in the recording office where the original NFTL was filed and provide you a copy of the document for your records.
   b. If the determination is made to not withdraw the NFTL, we will notify you and provide information regarding your rights to appeal the decision.

4. **At your request, we will notify other interested parties of the withdrawal notice. Your request must be in writing and provide the names and addresses of the credit reporting agencies, financial institutions, and/or creditors that you want notified.**

   NOTE: Your request serves as our authority to release the notice of withdrawal information to the agencies, financial institutions, or creditors you have identified.

5. If, at a later date, additional copies of the withdrawal notice are needed, you must provide a written request to the Advisory Group Manager. The request must provide:

   a. The taxpayer's name, current address, and taxpayer identification number with a brief statement authorizing the additional notifications;.
   b. A copy of the notice of withdrawal, if available; and
   c. A supplemental list of the names and addresses of any credit reporting agencies, financial institutions, or creditors to notify of the withdrawal of the filed Form 668(Y).

.

Privacy Act Notice

We ask for the information on this form to carry out the Internal Revenue laws of the United States. The primary purpose of this form is to apply for withdrawal of a notice of federal tax lien. The information requested on this form is needed to process your application and to determine whether the notice of federal tax lien can be withdrawn. You are not required to apply for a withdrawal; however, if you want the notice of federal tax lien to be withdrawn, you are required to provide the information requested on this form. Sections 6001, 6011, and 6323 of the Internal Revenue Code authorize us to collect this information. Section 6109 requires you to provide the requested identification numbers. Failure to provide this information may delay or prevent processing your application; providing false or fraudulent information may subject you to penalties.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

IRS Contact Numbers

Practitioner Priority Service
1-866-860-4259

Centralized Insolvency Operations
1-800-973-0424