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Statute of Limitations on Tax
Assessment As Affected by

December 1, 1998

Subject: Bankruptcy

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The purpose of this Notice is to address the impact of the filing of a bankruptcy petition on the running and suspension of the statute of limitations on assessment provided by I.R.C. § 6501(a).

Section 6501(a) of the Internal Revenue Code generally affords the Service three years from the time a return is filed for a given period to assess a tax for that period. Section 6503(h)(1) states that the statute of limitations for assessment is suspended throughout "the period during which the Secretary is prohibited by reason of [a bankruptcy case] from making the assessment" Prior to 1994, the automatic stay which is generally triggered by the filing of a bankruptcy petition operated to prevent the Service from assessing taxes for the period the stay was in effect. See B.C. § 362(a)(6) (assessment of claims against debtor generally prohibited).¹ Section 362(b)(9)(D), which explicitly provides that the filing of a bankruptcy petition "does not operate as a stay ... " of the making of tax assessments, was added to the Bankruptcy Code as part of the Bankruptcy Reform Act of 1994 and is effective with regard to bankruptcy cases commenced on or after October 22, 1994. With the addition of section 362(b)(9)(D), the Service is no longer precluded by the Bankruptcy Code from assessing taxes during the pendency of bankruptcies. Thus, I.R.C. § 6503(h)(1) no longer has any impact on the running of the assessment period.

However, unlike the making of a tax assessment, the filing of a Tax Court petition, as well as the continuation of a Tax Court proceeding, continue to be precluded while the automatic stay is in effect. B.C. § 362(a)(8). This prohibition applies to both Tax Court actions based on prepetition liabilities and those based on post-petition liabilities. Regardless of whether the Service issues a Notice of Deficiency before or after the taxpayer files a bankruptcy petition, the taxpayer may be prohibited by section 362(a)(8) of the Bankruptcy Code from commencing a Tax Court proceeding.

¹ In contrast, the Service's ability to issue a Notice of Deficiency during the pendency of the automatic stay was not limited by the pre-Reform Act Bankruptcy Code. See B.C. § 362(b)(9)(1994).

Two provisions of the Internal Revenue Code which serve to suspend the running of the assessment limitations period may be triggered where a Notice of Deficiency has been issued, the taxpayer does not agree to the deficiency, and the Bankruptcy Code's prohibition against filing a Tax Court petition applies: I.R.C. §§ 6503 and 6213.

Section 6503(a)(1) provides, inter alia, that the running of the period of limitations on the making of assessments

shall ... be suspended for the period during which the Secretary is prohibited from making the assessment ... (and in any event ..., if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

I.R.C. § 6503(a)(1).

Section 6213(a) prohibits the making of an assessment until the period for filing a Tax Court petition (generally 90 days as provided in I.R.C. § 6213(a)) has run, and if a Tax Court petition has been filed, until the decision of the Tax Court is final. Section 6213(f) suspends the running of the time for filing a Tax Court petition while the automatic stay is in effect, and for 60 days thereafter.

A number of scenarios invoking section 6503(a)(1) and section 6213(f) may potentially arise in bankruptcy situations. These are discussed separately below.

1. Notice of Deficiency issued more than 150 days prepetition: Initially, a Notice of Deficiency may have been issued sufficiently in advance of the bankruptcy that the period encompassing the 90 days for filing a Tax Court petition, plus 60 days, has run as of the time the bankruptcy petition is filed. In that situation, assuming that no Tax Court petition is actually filed, the suspension of the assessment period afforded by I.R.C. § 6503(a)(1) would end prepetition and the Service would be free to make a timely assessment after the bankruptcy has commenced.

Thus, for example, assume a Notice of Deficiency is issued on January 15, 1998. The normal period for filing a Tax Court petition would end 90 days later, under section 6213(a), and section 6503(a)(1) suspends the running of the assessment period for that ninety-day period and for an additional 60 days. Thus, unless a bankruptcy petition is filed within 150 days of January 15, 1998, the bankruptcy filing would not affect the running of the statute of limitations on assessment. This is because sections 6213(a) and 6503(a)(1) suspend the running of the limitations period only for the 90 days afforded for filing a Tax Court petition, plus 60 days, or for a total of 150 days. If this entire 150-day period runs before a bankruptcy petition is filed, the event of bankruptcy does not serve to affect the Service's ability to assess, since B.C. § 362(b)(9)(D) now provides explicit authority for making tax assessments even where the automatic stay is in effect.

2. Notice of Deficiency issued more than 90 days, but less than 150 days, prepetition: If only the ninety-day period, and not the additional 60 days, has run prepetition, the running of the assessment period continues to be suspended for whatever portion of the sixty-day period remains, pursuant to section 6503(a)(1). However, the Service is not precluded at any time by section 6213(f) from making an assessment, since the period for filing a Tax Court petition elapsed prepetition.

Thus, suppose the Service issues a Notice of Deficiency on January 15, 1998, and the taxpayer files a bankruptcy petition 91 days later, or on April 16, 1998. Assume further that the taxpayer receives a discharge on June 26, 1998. Under section 6213(a), the assessment period is suspended for 90 days from the date the Notice is issued, as in the previous example, or until April 15, 1998; thereafter, the assessment period is suspended for an additional 60 days or, if a Tax Court petition has been filed, until the Tax Court's decision becomes final, pursuant to sections 6213(a) and 6503(a)(1). Although a bankruptcy petition was filed during the section 6503(a)(1) sixty-day period, section 6213(f) suspends only the time for filing a Tax Court petition, and thus fails to operate to afford any significance to the filing of a bankruptcy petition subsequent to the expiration of the ninety-day period for filing a Tax Court petition. Thus, the Service may make an assessment immediately after the period for filing a Tax Court petition has run, or as of April 16, 1998, if no Tax Court petition has been filed; if a Tax Court petition has been filed, an assessment may be made immediately after the Tax Court's decision becomes final. The Service would continue to be able to make the assessment until the normal assessment period provided by section 6501(a), plus the sixty-day period provided by section 6503(a)(1), has elapsed, regardless of the fact that a bankruptcy is ongoing.

3. Notice of Deficiency Issued Within 90 Days of Bankruptcy: In the alternative, the Notice of Deficiency may have been issued within 90 days of the time the bankruptcy petition was filed. For example, again using a Notice of Deficiency date of January 15, 1998, assume a bankruptcy filing date of January 22, 1998. In that situation, 83 days of the section 6213(a) ninety-day period to file a Tax Court petition would remain as of the date the bankruptcy commences. Additionally assuming that no Tax Court petition has already been filed, this 83-day period would cease to run until the suspension period provided by section 6213(f) terminates. This is because section 6213(f) operates as of the date a bankruptcy petition is filed to suspend the running of the period for filing a Tax Court petition during the pendency of the automatic stay and for an additional 60 days beyond the termination of the stay. Thus, if, for example, a discharge is granted which terminates the automatic stay on June 26, 1998, the amount of time the taxpayer has to file a Tax Court petition thereafter is 83 days, the portion of the ninety-day period remaining, plus the additional 60 days afforded by section 6213(f). This means that the taxpayer would have 143 (83 + 60) days beyond June 26, 1998, to file a Tax Court petition, or until November 16, 1998. Accordingly, the Service may not make an assessment prior to November 17, 1998.

As noted above, section 6503(a)(1) suspends the period for making an assessment set forth in section 6501(a) for the period the Service is prohibited from making the assessment by 6213(a), i.e., for the period given the taxpayer to file a Tax Court

petition, plus 60 days. I.R.C. § 6503(a)(1). Since the taxpayer in this example has been given an additional 60 days to file a Tax Court petition, under section 6213(f), section 6503(a)(1) should operate to suspend the assessment period during that additional 60 days. Moreover, a second additional sixty-day period, afforded by section 6503(a)(1), should be "tacked on" to the 150-day period for filing a Tax Court petition afforded by section 6213(a) and (f). Thus, where a Notice of Deficiency is issued within 90 days prior to bankruptcy, the assessment period is suspended for the balance of the ninety-day period plus during the pendency of the automatic stay plus for 60 days under section 6213(f) and for 60 days under section 6503(a)(1). This means that the assessment period, in this example, would be suspended for an additional 60 days beyond November 16, 1998, or until January 15, 1999. If the taxpayer files a Tax Court petition, the period for making an assessment is suspended until 60 days after the Tax Court decision becomes final, pursuant to section 6503(a)(1).

4. Notice of Deficiency Issued Post-petition: Where the Notice of Deficiency was issued after the bankruptcy petition was filed, while the automatic stay was in effect, section 6213(f) is again triggered, operating to suspend the running of the period for filing a Tax Court petition until the automatic stay terminates, and for an extra 60 days. Moreover, again the assessment period is suspended for an additional 60 days, pursuant to section 6503(a)(1).

As an example, assume that a bankruptcy petition is filed January 5, 1998. As in the previous example, the Service issues a Notice of Deficiency on January 15, 1998, unrestricted by the Bankruptcy Code as discussed above. Assume further that the automatic stay again terminates on June 26, 1998, 162 days later. Section 6213(a) affords the taxpayer 90 days to file a Tax Court petition, and section 6213(f) operates to suspend the period for filing a Tax Court petition until the automatic stay terminates and for 60 days thereafter. Thus, the taxpayer has until November 23, 1998, to file a Tax Court petition (90 + 60 = 150 days). If the taxpayer files a Tax Court petition, the period for making an assessment is again suspended until 60 days after the Tax Court decision becomes final, pursuant to section 6503(a)(1). If the taxpayer does not file a Tax Court petition, section 6503(a)(1) suspends the period for making an assessment until January 22, 1999, 60 days after the "new" period for filing a Tax Court petition has run. Thus, the period of limitations for assessment is suspended from January 15, 1998, until January 22, 1999, a period of 372 (162 + 90 + 60 + 60) days. This period will be added to the normal assessment period of section 6501(a).

As is demonstrated by the above examples, the 1994 amendments to the Bankruptcy Code, and specifically the addition of B.C. § 362(b)(9)(D), alter the impact of bankruptcy on the Service's ability to make assessments. Accordingly, we intend to follow up this Notice with recommended changes to the Internal Revenue Manual to reflect the current impact of bankruptcy on the running and operation of the statute of limitations on assessment.

/s/

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