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GONE BUT NOT FORGOTTEN
HAAS COURT FINDS DEBTORS' PLAN INFEASIBLE

In 1995, the Eleventh Circuit held that a debtor's mere failure to pay taxes, without more, does not make those taxes nondischargeable. In re Haas, 43 F.3d 1153 (11th Cir. 1995). Now comes the sequel, **In re Haas, 1998 U.S. App. LEXIS 31388 (11th Cir. Dec. 14, 1998)**. The debtors owed the Service $617,000 in income taxes (which taxes were ruled dischargeable under B.C. § 523(a)(1)(C)) and $68,000 in employment taxes. The income taxes were secured by notices of federal tax lien, while the employment taxes were trust fund taxes, and so enjoyed priority status under section 507(a)(8)(C).

The debtors' estate was valued at $259,000, and had accumulated an additional $71,600 in cash to pay claims. The debtors proposed a plan which would pay the employment taxes in full, but as a secured claim, thus reducing the Service's secured claim to $191,000. The plan then proposed to pay the secured claims over a 30 year period (the remaining income tax claims were unsecured). The debtors argued that such an allocation of payments was permitted under United States v. Energy Resources Co., Inc., 495 U.S. 545 (1990). The Eleventh Circuit, however, found the plan in Energy Resources provided for full payment of all tax debts. By contrast, the plan proposed by the debtors in this case ignored the priority of the trust fund tax claim, thereby impermissibly adjusting its priority. In reversing both lower courts, the appeals court found that the debtor's approach would provide less protection to an undersecured creditor than Congress intended, and therefore the debtors' plan could not be confirmed.

The Eleventh Circuit further held that the plan was not feasible in assuming the debtor, a 68-year-old lawyer, would be continuing in the active practice of law for another 30 years. Even if the creditor has the protection of a pre-petition security interest, the plan must have a reasonable assurance of success to be confirmed. **BANKRUPTCY CODE CASES: Chapter 11: Confirmation of Plan**

1. **ASSESSMENTS**

Eugene G. Ziobron, Inc. v. United States, 1998 U.S. App. LEXIS 30619 (7th Cir. Dec. 1, 1998) *(unpublished?)* - S corporation paid sole shareholder a small amount of wages but a large amount of dividends. The Service assessed a deficiency based on the corporation's net income. Based on the Service's

assessment certificates, the district court granted summary judgment. On appeal, the Seventh Circuit found the taxpayer's conclusory affidavit denying the tax liability was insufficient to overcome the presumption established by the Certificates of Assessment (the Seventh Circuit noted that this presumption no longer exists for some cases due to I.R.C. § 7491, added by the Revenue and Restructuring Act of 1998).

2. **BANKRUPTCY CODE CASES: Allowance of Administrative Expenses**
BANKRUPTCY CODE CASES: Chapter 11 (Reorganization): Prepackaged Plans
In re Scott Cable Communications, Inc., 1998 Bankr. LEXIS 1583 (Bankr. D. Conn. Dec. 11, 1998) - Debtor's plan proposed sale of assets, timed to occur after plan confirmation to avoid capital gains tax treatment. The court denied confirmation, holding the $30 million capital gains tax expected to arise from a structured sale of substantially all of the debtors assets after confirmation is an administrative expense of the estate. The court determined that the bankruptcy's administrative period extends beyond the date the order confirming a liquidating plan is entered, so the capital gains tax would be an administrative expense of the debtor-in-possession. Further, the plan impermissibly attempted to enjoin the Service from collecting from non-debtor entities, specifically the debtor's note-holders, in violation of the Anti-Injunction Act. Finally, because the sale was structured to avoid capital gains tax liability falling on the noteholders, the plan was proposed for a tax avoidance purpose, which is barred by B.C. § 1129(d).

3. **BANKRUPTCY CODE CASES: Allowance of Claims (§ 502): Objections**
In re Field, Jr., 226 B.R. 178 (Bankr. D. S.C. 1998) - Unsecured creditor sought marshalling of assets. Court held that marshalling applies only to assets of the estate and not to assets belonging to a third party. In addition, third party was innocent spouse, and marshalling of her portion of joint assets would be inequitable.

4. **BANKRUPTCY CODE CASES: Appeals**
In re Yurkanin, 1998 Bankr. LEXIS 1536 (Bankr. E.D. Mich. Nov. 16, 1998) - Court granted debtor's Motion for Summary Judgment, but did not enter separate judgment as required by Fed. R. Bankr. P. 9021 and 5003. Because the Service did not waive entry of judgment, the court agreed to enter judgment and extend the appeal period.

5. **BANKRUPTCY CODE CASES: Automatic Stay (§ 362): Collection, Assessment or Recovery of Claims**
In re Westberry, 1998 U.S. Dist. LEXIS 18536 (M.D. Tenn. Nov. 4, 1998) - The court held that since taxes are involuntarily imposed for a public purpose and result from earning money rather than consumption, such taxes are not "incurred" within the meaning of B.C. § 101(8) and § 1301. Consequently, the court concluded that taxes are not "consumer debt" and the co-debtor stay of section 1301 is

inapplicable, reversing the bankruptcy court's decision reported at 219 B.R. 976 *(see June 1998 GL bulletin)*.

6. **BANKRUPTCY CODE CASES: Chapter 13 (Regular Income Plans)**
In re Berenato, Sr., 226 B.R. 819 (Bankr. E.D. Pa. 1998) - Service filed a priority claim for $461,000 against debtor in chapter 13 bankruptcy, which debtor disputed. Although the Service presented the issue of whether the debtor was a responsible person under I.R.C. § 6672, the court concluded that it needed to address the debtor's eligibility under B.C. § 109(e) before it could address the merits of the Service's claim. The court found, under In re Mazzeo, 131 F.3d 295 (2d Cir. 1997), that debtor's liability arises when he fails to pay a statutorily imposed tax when due, and does not become noncontingent simply because debtor disputes it. Also, because the amount of the claim is ascertainable, it is liquidated within the meaning of section 109(e). The debtor thus did not meet the chapter 13 debt limits.

7. **BANKRUPTCY CODE CASES: Determination of Tax Liability (§ 505)**
In re Weisberg, 226 B.R. 172 (Bankr. E.D. Pa. 1998) - Debtor received tax refunds after filing for bankruptcy, which trustee intended to distribute to creditors. Fearing Service would review his returns and determine that refunds were excessive, obligating him to pay refunds he no longer had. Court refused his request under B.C. § 505(b) to shorten the normal statutory time the Service has to review tax returns.

8. **BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523)**
In re Sternberg, 1998 U.S. Dist. LEXIS 17885 (S.D. Fla. Nov. 12, 1998) - Taxpayer signed pre-nuptial agreement with his fourth wife, but after unfavorable Tax Court ruling he amended it so that all of his substantial assets were either in her name or held by the entireties. He then filed for chapter 7 bankruptcy. Although the bankruptcy court found the Service's claim for $2 million in unpaid taxes dischargeable, the district court reversed. Under B.C. § 523(A)(1)(C), as interpreted by In re Haas, 48 F.3d 1153 (11th Cir. 1995), where the debtor did not merely fail to pay taxes, but tried to defeat payment by understating his tax liability on his returns and attempting to place his assets beyond the Service's reach, such taxes are nondischargeable.

9. **BANKRUPTCY CODE CASES: Property of the Estate (§ 541)**
In re Watson, 1998 U.S. App. LEXIS 30482 (9th Cir. Dec. 1, 1998) - Debtor's profit sharing plan is included in the bankruptcy estate where the lone participant is a self-employed sole shareholder in his own corporation.

10. **FREEDOM OF INFORMATION ACT: Exemptions from Disclosure: Internal personnel procedures:**
Abraham & Rose, P.L.C., v. United States, 1998 U.S. Dist. LEXIS 19570 (E.D. Mich., Nov. 16, 1998) - On reversal and remand from the Sixth Circuit, the district court again held that computerized records of tax lien filings are exempt from

disclosure. Under subsection 522 (b)(7)(C) of FOIA, the public's right to information is outweighed by an individual's right to privacy concerning their name, address and amount of tax liability. Even where the tax liens have been filed publically, the court found "a vast difference between the public records that might be found after a diligent search of courthouse files ... and a computerized summary located in a single clearinghouse of information," citing Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 764 (1989).

11. **LEVY: Wrongful**

Bergvinsson v. United States, 1998 U.S. Dist. LEXIS 18772 (W.D. Wash. Nov. 10, 1998) - Taxpayer accused Government of conversion of personal property following levy. The magistrate judge found the exclusive remedy for tort claims against the United States is the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. However, the court held under section 2680(c) that any action taken in assessment or collection of a tax is excluded from the Act's coverage, and so the taxpayer lacks a basis for his claim.

12. **LIENS: Foreclosure: Parties**

United States v. Butts, 1998 U.S. Dist. LEXIS 18757 (W.D. Wash. Nov. 17, 1998) - Court granted summary judgment to Government, but refused to allow foreclosure of tax lien because Government identified outstanding local tax lien but did not join locality as party to the foreclosure suit.

13. **LIENS: Removal: Discharge: After Non-Judicial Sale**

United States v. Scheve, 1998 U.S. Dist. LEXIS 19559 (D. Md. Nov. 20, 1998) - Taxpayer owned a one-half interest in real estate, which was sold by county at tax sale in May of 1991 to purchasers subject to taxpayer's right of redemption. In September of 1991, the Service filed a notice of federal tax lien. In May and June of 1993, the purchasers corresponded with the Service, requesting that the lien be discharged. In December, 1993, the purchasers were granted a conveyance of the property and a decree foreclosing the taxpayer's redemption rights. In November, 1994, the purchasers again requested discharge of the lien, which request was denied by the Service in December, 1994. The Service then began an action to enforce the lien through sale of the property. The court found the Service had the right to sell the property under I.R.C. § 7403. The federal tax lien was not discharged by the tax sale or conveyance because the purchasers failed to properly notify the Service under I.R.C. § 7425(c)(1). Further, because the federal tax lien was perfected before the purchasers made improvements to the property, the purchasers have a right only to be equitably subrogated out of the tax sale proceeds for the amount paid to satisfy the state real estate tax lien.

14. **PENALTIES: Failure to Collect, Withhold or Pay Over: Responsible Officer**

Adams v. Coveney, 1998 U.S. App. LEXIS 30805 (1st Cir. Dec. 4, 1998) - Coveney was the president and a director of a corporation, managing the business, hiring and firing staff, and paying suppliers. Under an oral agreement, the

corporation's treasurer prepared, filed and paid taxes. In 1989, the treasurer told Coveney that the taxes were not being paid, and the two borrowed money to cover the shortfall. However, the business remained in crisis, and then filed for bankruptcy. The appeals court ruled under the agreement between Coveney and the treasurer, and in actual practice, Coveney had no duty to pay over the taxes, and thus was not a responsible person (although this case involves state trust fund taxes, the First Circuit stated the result would be the same under the federal "responsible person" test).

15. **SUITS: By the United States: Reduce Tax to Judgment**
United States v. Cram, 82 A.F.T.R.2d ¶ 98-5614 (D. Utah Oct. 27, 1998) - Court found taxpayers liable for unpaid federal income taxes based on presumption of correctness given to certified Certificate of Assessments. The court further held that the taxpayers had no right to a jury trial because the question of ownership of real property held by trust and foreclosure of federal tax liens are equitable issues. The court also found that the trustee could not represent the trust pro se because he was not the real party in interest or the sole beneficiary.

16. **SUMMONSES: Defenses to Compliance: Improper Purpose**
Barmes v. United States, 1998 U.S. Dist. LEXIS 19212 (S.D. Ill. Nov. 24, 1998) - Service issued summons to taxpayer's bank, so taxpayers filed petition to quash for failure to notify them under I.R.C. § 7609(a). The Government first argued that it had not been properly served under F.R.C.P. 4, but the court determined it had jurisdiction because the taxpayers filed a petition rather than a complaint, therefore Rule 4 is inapplicable. The Government next argued that summons was issued in aid of collection, so no notice was required under section 7609(c)(2). The court agreed that the plain meaning of section 7609(c)(2) did not limit the exception to summonses issued for the sole purpose of aiding in the collection of a tax liability. Instead, the court found the 7609(c)(2) exception includes summonses issued for more than one purpose, as long as the primary purpose is for aiding collection.

17. **SUMMONSES: Defenses to Compliance**
Harris v. United States, 1998 U.S. App. LEXIS 31331 (7th Cir. Dec. 10, 1998) *(unpublished)* - Third-party recordkeeper demanded information about Service investigation before responding to summons. The Seventh Circuit ruled that compliance with the Privacy Act, 5 U.S.C. § 552a, is not a prerequisite to the enforcement of a summons, and that the third-party recordkeeper's defenses were limited to disproving the elements of the Government's prima facie case or showing that the summons was issued in bad faith.