Number: **199929004**
Release Date: 7/23/1999 UIL: 9999.98-00

GENERAL LITIGATION BULLETIN

Department of the Treasury *Internal Revenue Service*

Office of Chief Counsel

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BULLETIN NO. 461 ***FEBRUARY 1999***

SUMMONS ENFORCEMENT UPHELD

In **United States v. Natco Petroleum, Inc., 1999 U.S. App. LEXIS 1442 (10th Cir. Feb. 2, 1999)** ***(unpublished)***, the Service issued a summons on a closely-held corporation, seeking corporate records regarding the civil tax liability of the taxpayer, who was the president and sole shareholder. At the enforcement hearing, the revenue agent was unclear whether the Service was investigating the tax liability of the corporation or of the taxpayer. The Tenth Circuit, affirming the district court, found the summons proper.

The appeals court began by establishing the prerequisites to the Government's summons authority, under United States v. Powell, 379 U.S. 48 (1964). The Government establishes "good faith" by a showing that:

- the investigation will be conducted pursuant to a legitimate purpose;
- the inquiry may be relevant;
- the Service does not already have the information sought; and
- the administrative rules pursuant to the I.R.C. have been followed.

Once "good faith" is established, the Government is entitled to enforcement of the summons, barring a showing of abuse. In this case, the Tenth Circuit found any discrepancies in the revenue agent's testimony did not demonstrate an improper purpose or a failure to follow the administrative requirements of the Code, and so were insufficient to overcome the Service's prima facie case.

Further, the court dismissed the taxpayer's argument that, under standards used in deciding whether to admit evidence in federal court, the records requested were not relevant. The correct standard, the court held, was whether the records illuminate any aspect of the return. Addressing another argument, the court held the taxpayer could not raise a Fifth Amendment privilege. First, a corporation has no privilege, second, a custodian cannot invoke the privilege, and third, voluntarily prepared business records do not come within the scope of the privilege.

Finally, the Tenth Circuit found under the plain language of I.R.C. § 7602(d)(1), a referral to the Department of Justice after the summons was issued and the Service began enforcement proceedings did not invalidate the summons. **SUMMONSES: Defenses to Compliance: Improper Purpose: "Good Faith," Lack of**

1. **BANKRUPTCY CODE CASES: Chapter 12: Confirmation of Plan (§ 1225)**

In re Ryan, 228 B.R. 746 (Bankr. D. Or. 1999) - Service objected to debtors' ch. 12 plan, which paid post-petition, administrative income tax claims over three years while simultaneously making payments to other creditors. The court found nothing in the Bankruptcy Code which prohibited the debtors' plan from making payment of administrative expenses over the life of the plan concurrently with payments to secured or unsecured claims, and so overruled the Service's objection.

2. **BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523): No, Late or Fraudulent Returns**

In re Mickens, 1999 U.S. App. LEXIS 1560 (6th Cir. Jan. 29, 1999) (*unpublished*) - Reaffirming its holding of In re Hindenlang, 1999 U.S. App. LEXIS 795 (6th Cir. Jan. 22, 1999), the Sixth Circuit held as a matter of law that a Form 1040 filed by the debtor after the Service has made an assessment of tax is not a return for purposes of 11 U.S.C. § 523(a)(1)(B) if it no longer serves any tax purpose or has any effect under the Internal Revenue Code. The debtor's taxes thus were non-dischargeable.

3. **BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523)**
BANKRUPTCY CODE CASES: Returns by Trustee, Debtor-in-Possession or Debtor

In re Nunez, 1999 Bankr. LEXIS 33 (B.A.P. 9th Cir. Jan. 8, 1999) *(unpublished)* - Taxpayer failed to file tax returns for nine years. After the Service prepared substitute returns, the taxpayer submitted his own returns, identical to those prepared by the Service. Failing to reach a compromise on his taxes, the taxpayer filed for chapter 7 bankruptcy. The Bankruptcy Appellate Panel held the taxes dischargeable under B.C. § 523(a)(1)(B)(i), because the filing of substitute returns does not bar the taxpayer from filing returns, provided the returns were filed in good faith. The B.A.P. rejected the Service's argument that the taxpayer's prior filing history be considered in determining good faith, holding the good faith inquiry should focus only on the debtor's intent at the time the return in question was filed.

4. **BANKRUPTCY CODE CASES: Interest**

In re Bossert, 1999 U.S. Dist. LEXIS 1606 (E.D. Wash. Feb. 2, 1999) - The Service is not entitled to post-petition interest on non-dischargeable taxes in a ch. 12 bankruptcy. The court distinguished Bruning v. United States, 376 U.S. 358 (1964) (which required payment of post-petition interest in a ch. 7 case) as not applicable to ch. 12.

5. **BANKRUPTCY CODE CASES: Liens: Determination of Secured Status**

United States v. Alfano, 1999 U.S. Dist. LEXIS 649 (E.D.N.Y. Jan. 25, 1999) - After being assessed, husband and wife transferred real property to their children, receiving no consideration. The parents continued to live on the property, and paid the mortgage and taxes in lieu of rent. The parents then filed Chapter 13 bankruptcy, and reached an agreement with the Service to reclassify their tax debts

as unsecured and thus dischargeable. Two years later, the Service began foreclosure proceedings against the property, and the children objected. The court initially determined neither res judicata nor collateral estoppel barred an action to set aside the transfer of real property as fraudulent where a prior decision in the transferor's bankruptcy case did not resolve the ultimate question of fact (whether the transfer was made with intent to hinder creditors). The court then agreed with what it saw as the majority view that, although bankruptcy may discharge an individual's personal liability for a tax debt, discharge does not automatically invalidate a tax lien, absent disallowance or avoidance. Finally, the court determined that an intrafamily transfer made without any sign of tangible consideration was presumptively fraudulent.

6. **BANKRUPTCY CODE CASES: Liens: Notice of Tax Lien**
In re Focht, 1999 U.S. Dist. LEXIS 1280 (W.D. Penn. Jan. 4, 1999) - Service filed notice of tax lien against taxpayers' partnership, listing the partnership and the wife. When the couple subsequently filed ch. 7 bankruptcy, the court determined the tax lien was invalid against three parcels of real estate owned by the couple as tenants by the entireties. Under I.R.C. § 6323(f) and Treas. Reg. § 301.6323(f)-1, the court determined, the Service was obligated to identify the husband on the Form 668 Notice before the lien could attach.

7. **BANKRUPTCY CODE CASES: Proofs of Claim (§ 501): Time for Filing**
In re McQueen, 228 B.R. 408 (Bankr. M.D. Tenn. 1998) - In a non-tax case, the bankruptcy court held that it was without legal or equitable discretion to allow late-filed proofs of claim in a ch. 13 bankruptcy, even if the creditor did not receive proper notice of the bar date.

8. **BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code (§ 108)**
In re Avila, 228 B.R. 63 (Bankr. D. Mass. 1999) - After a failed ch. 13, debtors received a ch. 7 discharge. The Government argued that the three year period of B.C. § 507(a)(8)(A)(i) was tolled during the pendency of the bankruptcies, and consequently the tax debts were nondischargeable. The court agreed, relying solely on the legislative history of section 507(a)(8)(A)(i). However, the court did not agree with the Government that the three year period was tolled an additional six months under I.R.C. § 6503(h).

9. **BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code (§ 108)**
In re Palmer, 228 B. R. 880 (B.A.P. 6th Cir. 1999) - This Panel joins the majority view that the Service is entitled to a full three-year period of collection before a tax debt may be discharged by a chapter 7 bankruptcy. The debtor dismissed a chapter 13 bankruptcy before completion, then filed for chapter 7. The Panel held that the provisions of B.C. § 108(c) and I.R.C. § 6503(b) demonstrate clear Congressional intent that the plain language of B.C. § 507(a)(8)(A)(i) should be

ignored, and that section read to toll the three year look-back period for the time the debtor was in a prior bankruptcy.

10. **BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension under Bankruptcy Code (§ 108)**
In re Weidner, 1998 Bankr. LEXIS 1227 (Bankr. N.D. Ohio July 2, 1998) - The court declined to adopt the Service's position that B.C. § 507(a)(8)(i) should be tolled for periods when the debtor was in a prior bankruptcy. The court found that the plain language of the Code did not provide for tolling, and both the Supreme Court (in United States v. Noland, 517 U.S. 535 (1996)) and the Sixth Circuit (in In re Foremost Manufacturing Co., 137 F.3d 919 (6th Cir. 1998)) rejected the idea of a court substituting its equitable opinion for statutory language. Finally, the court decided that to permit tolling would be to allow the Service a windfall as the Service was unlikely to be prejudiced by the debtor filing chapter 13 bankruptcy (the Service might be prejudiced where it was prevented from seizing nonexempt property, but not where it was receiving payments under a plan of reorganization).

NOTE: The issue of tolling under B.C. § 507(a)(8)(a)(i) also was discussed in "Tolling the Three Year Period for Discharge of Income Taxes" in 18 Mississippi College Law Review 483 (Spring 1998) by Judge William Houston Brown and Daniel Alan Hawtof.

11. **COMPROMISE AND SETTLEMENT: Closing Agreement**
Kercheval v. United States, 1999 U.S. App. LEXIS 1070 (4th Cir. Jan. 26, 1999) ***(unpublished)*** - Taxpayer rolled over pension transfer refund into an IRA, but was later informed by the Service that the transfer was subject to tax. Consequently, taxpayer entered into a closing agreement and paid a reduced amount of taxes. The Fourth Circuit then held in another retiree's case that the transfer refund was not includable in income, prompting the taxpayer to file a refund suit. The Fourth Circuit, in this unpublished opinion, found no misrepresentation of a material fact under I.R.C. § 7121(b). Not only is the Service under no duty to provide taxpayers with legal advice, the court ruled, but just because the Service's legal position later turns out to be erroneous is no basis to allow a taxpayer to reopen a closing agreement.

12. **LEVY: Wrongful**
SUITS: Against the U.S. or employees: Wrongful Levy
Allied/Royal Parking L.P. v. United States, 1999 U.S. App. LEXIS 1325 (9th Cir. Feb. 2, 1999) - Plaintiff partnership managed a parking garage for a third party, subtracting its management fees before forwarding the balance of the monthly income to the third party. When the plaintiff failed to pay its federal employment taxes, the Service levied on its bank account, causing the third party to cancel the management contract. The plaintiff sued for wrongful levy under I.R.C. § 7433. The court found the plaintiff limited partners lacked standing because they were not "taxpayers", and although the third party to whom the funds belonged may have a

right of action for wrongful levy under I.R.C. § 7426, the plaintiff lacked standing under section 7433 because it did not own the funds in the account.

13. **LEVY: Wrongful**
TRANSFEREES AND FRAUDULENT CONVEYANCES: Nominee
TRANSFEREES AND FRAUDULENT CONVEYANCES: Uniform Fraudulent Transfer Act
Colby B. Foundation v. United States, 1999 U.S. App. LEXIS 163 (9th Cir. Jan. 6, 1999) *(unpublished)* - The Ninth Circuit, in an unpublished opinion, affirmed the lower court's factual findings that the plaintiff was the taxpayer's nominee, and that under state law the real property was transferred fraudulently to the plaintiff.

14. **LIENS: Priority Over State and Local Taxes**
PRIORITY: Insolvency (31 U.S.C. § 3713)
Burke v. United States, No. 9701034 (Mass. Super. Ct. Dec. 22, 1998) - State unemployment tax lien was filed and perfected before notice of federal tax lien. The state court found the rationale of Estate of Romani, 523 U.S. 517 (1998), which gave a private judgment creditor with a prior perfected lien priority over the United States, extended to any perfected creditor. Thus, under Romani, the United States could no longer rely on the Insolvency Statute, 31 U.S.C. § 3713, to prime a prior secured lien by a state taxing authority.

15. **PENALTIES: Failure to Collect, Withhold, or Pay Over**
Macagnone v. United States, 228 B.R. 784 (Bankr. M.D. Fla. 1998) - Reconsidering its opinion reported at 224 B.R. 212 *(see August, 1998 GL Bulletin)*, the court concluded it applied the wrong standard of willfulness. To find a debtor willfully failed to collect and pay over trust fund taxes under I.R.C. § 6672, the debtor need not have actual knowledge. Instead, a "reckless disregard of a known or obvious risk" is sufficient to satisfy the willfulness requirement. Nevertheless, even under this standard the court held the record did not support a finding of willfulness, and therefore the federal taxes were discharged in the debtors' ch. 7 bankruptcy.

16. **SUITS: By the U.S.: Reduce Tax to Judgment**
United States v. Young, 1999 U.S. Dist. LEXIS 1284 (N.D. Ohio Jan. 19, 1999) - Government brought suit to reduce tax assessments to judgment and foreclose on tax lien. Taxpayers counterclaimed that the tax had been paid and raised an affirmative defense of accord and satisfaction. The court found because the Government brought suit, the taxpayers could assert the doctrine of equitable recoupment and so avoid the bar of sovereign immunity. Similarly, equitable recoupment permits the taxpayers to avoid the bar imposed by the statute of limitations. Finally, the court concluded that because I.R.C. § 7121 & § 7122 limit the Service's ability to compromise or settle a tax liability, the taxpayers were not entitled to assert the affirmative defense of accord and satisfaction.

17. **SUMMONSES: Defenses to Compliance: Fifth Amendment: Taxpayer's Records in Possession of Third Party**
Quraishi v. United States, 1999 U.S. Dist. LEXIS 1236 (D. Conn. Jan. 13, 1999) - Service issued summons to taxpayer's accountant. The court denied the taxpayer's Fifth Amendment claim because the summons was not directed to the taxpayer, nor were the documents summoned in the "constructive possession" of the taxpayer.