DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL
DELAWARE-MARYLAND CC:SER:DEM:BAL

FROM: Mitchel S. Hyman
Senior Technician Reviewer, Branch 2 (General Litigation)

SUBJECT: Chapter 11 Plans Extending Beyond the
Ordinary Statute of Limitations for Collection

This responds to your request for advice concerning the above matter and confirms the oral advice previously given to the referring attorney and Special Procedures advisor. Pursuant to I.R.C. § 6502(a), as amended by the IRS Restructuring and Reform Act of 1998 (RRA 98), after December 31, 1999, the Service may no longer obtain waivers of the statute of limitations for collection except with respect to installment agreements. As you have correctly noted, a confirmed Chapter 11 bankruptcy plan is not an "installment agreement" for purposes of section 6502(a)(2)(A). See the NRC website answer to Question 692. Since waivers of the period of limitation on collection can no longer be obtained with respect to Chapter 11 plans, you have asked several questions regarding the Service's ability to accept Chapter 11 plan payments where such payments may extend beyond the normal collection limitation period without any extensions. For the reasons discussed in this memorandum, we conclude that the Service may generally rely on the I.R.C. § 6503(h)(2) suspension of the limitation period in order to collect tax payments after confirmation of Chapter 11 plans.

Issue #1: Is the statute of limitations on collecting a tax provided for by a confirmed Chapter 11 plan usually extended automatically, via I.R.C § 6503(h)(2), while the taxpayer is current on Chapter 11 plan payments for the tax, up until the time the taxpayer is in substantial default on the plan payments for the tax?

Answer #1: Generally, yes. While the automatic stay is the most commonly cited bankruptcy case "reason" why the Service may be prohibited from collecting a tax, within the meaning of I.R.C. § 6503(h), it is not the only bankruptcy case reason recognized by the courts and the Service for suspending the Service's limitation period for collecting a tax from a former bankruptcy debtor. See United States v. Wright, 57 F.3d 561 (7th Cir. 1995) (suspension while confirmed Chapter 11 plan was in effect, until default, plus six months); In re Montoya, 965 F.2d 554, 557 (7th

Cir. 1992) (dicta regarding suspension not being limited to automatic stay circumstances, where a Chapter 11 plan was in effect before default and where the Service's claim had been disallowed and later was reinstated) ; United States v. McCarthy, 21 F.Supp.2d 888 (S.D. Ind. 1998) (suspension while a confirmed Chapter 11 plan was in effect until the default exceeded 30 days, plus six months); Nelson v. United States, 94-1 U.S.T.C. ¶ 50,206 (E.D. Mich. 1994) (suspension between the dates the taxpayer received a Chapter 7 discharge and the discharge was revoked, plus six months). If payment of a tax is provided for by a confirmed Chapter 11 plan and plan payments of the tax are not in default, then the Service is generally prohibited from attempting to collect the tax (outside of receiving payments provided for by the plan) from the debtor or the debtor's property, pursuant to the plan injunction arising pursuant to the terms of most Chapter 11 plans and B.C. §§ 1141(a) and (c).

The conclusion that a confirmed Chapter 11 plan enjoins the Service from collecting preconfirmation taxes (outside of the plan) from the debtor or the debtor's property, unless or until the taxpayer defaults on tax payments under the plan, cleanly follows in the case of corporate, partnership, and other non-individual debtors (which together make up the overwhelming majority of Chapter 11 debtors) from the fact that these non-individual debtors receive a discharge of all of their preconfirmation taxes and other debts except as provided for in their confirmed plans, pursuant to B.C. §§ 1141(d)(1) and (d)(1)(A).[1] Non-individual Chapter 11 debtors also have no prepetition property that could have been excluded or exempted from their bankruptcy estates, to which a perfected, prepetition federal tax lien may still attach after the debt itself is discharged. In addition, the Service should not generally attempt to setoff post-confirmation tax refunds against the unpaid, prepetition tax debts that are provided for or discharged by a non-individual debtor's Chapter 11 plan.[2]

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[1] While liquidating, non-individual Chapter 11 debtors may be denied an automatic discharge arising from plan confirmation, under B.C. § 1141(d)(3), we understand that most liquidating debtors provide otherwise in their plans. When a liquidating, non-individual debtor is denied a discharge arising from Chapter 11 plan confirmation, the absence of a discharge may simply mean the automatic stay remains in effect until the Chapter 11 case is closed, pursuant to B.C. § 362(c)(2). In either case, the limitation period for the Service to collect the preconfirmation tax from the liquidating debtor should be suspended until plan default by I.R.C. § 6503(h)(2).

[2] A recent district court decision did allow what the court characterized as a tax refund arising post-confirmation (but for mostly prepetition periods) to be offset against prepetition taxes that were provided for in the confirmed Chapter 11 plan of a corporate debtor but were never paid. See In re Gordon Sel-Way, Inc., 239 B.R. 741 (E.D. Mich. 1999).

It is our office's position in the case of Chapter 11 corporate debtors with confirmed plans that the Service should not resort to use of its administrative remedies to collect a tax provided for by a confirmed plan until there is a default. The Seventh Circuit's decision in Wright, supra, approved the Service's position that the limitation period on collecting employment taxes from a partnership debtor remained (after the stay was lifted) suspended following confirmation of the partnership's Chapter 11 plan until the partnership "turned turtle" (defaulted on its plan payments). See also United States v. Colvin, 203 B.R. 930 (N.D. Tex. 1996), following remand, 222 B.R. 799 (N.D. Tex. 1998) (considering equitable tolling of the 240-day period for priority income tax claim purposes during the time that a serial Chapter 11 corporate debtor was not in default on its first confirmed plan).

Thus, in corporate and other non-individual debtor cases, the Service may generally rely on the section 6503(h) suspension, and so the inability to obtain waivers will not impact on the Service's ability to accept payments under long-term payout plans. We similarly conclude that in individual debtor cases, the Service may generally rely on the section 6503(h) suspension with respect to taxes provided for by the plan. However, the Service will not generally be able to rely upon a suspension with respect to taxes which are still owed by an individual debtor but are not provided for by full payment under the debtor's plan.

The general position we recommend the Service take for an individual taxpayer with a confirmed Chapter 11 plan (before substantial default) is that the collection limitation period remains suspended from confirmation until substantial default for tax debts the plan provides to pay in full, considering the Service's allowed claims in the case. However, both for non-dischargeable tax claims of an individual taxpayer that a confirmed Chapter 11 plan does not provide for by a promise of full payment and for surviving federal tax liens not provided for full payment by a confirmed plan, the Service should not argue that the collection limitation period will automatically be suspended while the Chapter 11 plan is in effect before a substantial default.

The Service's position regarding collection of non-dischargeable tax debts from an individual debtor with a confirmed Chapter 11 plan is stated in IRM 5.9.9.5:(1), as follows:

> Confirmation of the plan binds the debtor and creditors to the terms of the plan. Although confirmation does not discharge an individual debtor from taxes excepted from discharge under B.C. § 523(a), the IRS will not attempt to collect nondischarged pre-petition taxes outside of the plan unless there is substantial default, the non-dischargeable tax is not fully provided for by the plan, or circumstances allowing collection through setoff arise.

Notwithstanding the survival of certain tax debts as non-dischargeable for an individual with a confirmed Chapter 11 plan, we believe the collection limitation period is suspended for such debts, pursuant to I.R.C. § 6503(h)(2), as long as (1) the Service's claim for the debt is allowed, (2) the plan provides for full payment of the tax debt, and (3) the plan is not in substantial default (considering any period provided to the debtor in the plan for curing a default).[3] This was the situation and result in United States v. McCarthy, supra. The Government also made an argument along these lines in Montoya, supra, but the Seventh Circuit did not address the argument because the Service's claim also was disallowed, before being reinstated, for a period long enough to achieve the Service's desired suspension of the priority claim calculation periods at issue in that case. Although the Service may still use setoff opportunities to collect these non-dischargeable tax debts outside of the plan before the plan is in substantial default, this ability to continue to make setoffs has not stopped the Service from arguing nor the courts from finding that the Service is prohibited from "collecting" by reason of the bankruptcy case, for purposes of I.R.C. § 6502(h)(2). See Montoya, supra, at 558 (specifically addressing and dismissing the taxpayers' argument that the Service's ability to perform offsets after plan confirmation meant the Service was not barred from collecting the taxes owed).[4]

Similarly, if the confirmed Chapter 11 plan of an individual taxpayer provides for full payment through the plan of a dischargeable tax debt that is secured by a perfected federal tax lien, then we believe the Service will ordinarily be required to refrain from collecting the tax other than through the plan and that the collection limitation period for the Service using the perfected tax lien for collection (other than through the plan) should be suspended by I.R.C. § 6503(h)(2) until the plan is in substantial

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[3] The General Litigation User Guide to Chief Counsel's Macros, Document 9765 (9-96), recommends at page 1129-6 that Chapter 11 plans contain default language that allows the Service to collect tax debts provided for by a confirmed plan 14 days after the Service has made a written demand for the debtor to cure the default, if the default is not cured.

[4] See also I.R.C. § 6330(e)(1), which suspends the collection limitation period while the Service is prohibited by the new collection due process procedures from using a "levy" to collect a tax debt, even though "setoff" to obtain payment of the same debt would not be prohibited while the collection due process procedures are pending. In some districts, local bankruptcy rules or general orders now allow the Service to make setoffs of prepetition tax debts against prepetition tax refunds while the automatic stay is still in effect, without the Service moving to lift the stay. In these districts, we conclude that the Service's ability to obtain setoff in this manner, while the automatic stay otherwise prevents the Service from attempting to collect the tax, does not remove the suspension of the collection limitation period, under I.R.C. § 6503(h)(2), for the tax left unpaid after the setoff is made.

default. We are not aware of any case law to date involving these specific circumstances, but our conclusion logically follows the reasoning of the previously explained cases which involve the tax debts of non-individual taxpayers provided for by a plan or the non-dischargeable tax debts of individual debtors provided for by a plan.[5] However, as we understand this may be a circumstance of some concern to the Service at this time, we discuss further below a potential "judgment" fix for these situations.

While the majority of non-dischargeable or non-discharged federal tax debts of an individual Chapter 11 debtor may be covered by the two circumstances described above, where the plan provides for payment of the federal tax debt in full, there are also a number of common circumstances for individuals where a confirmed Chapter 11 plan does not usually provide for full payment of the surviving tax debt or lien. When the plan does not provide for full payment of the tax debt, the Service may not safely assume that the collection limitation period is suspended with respect to these tax debts while the Chapter 11 plan is in effect and before substantial default. A partial list of circumstances for an individual Chapter 11 debtor where the Service may not safely rely on a suspension of the collection limitation period during the plan payout period appears below:

(1) The tax is prepetition and non-dischargeable but the Service was not aware of the tax soon enough to file a timely bankruptcy proof of claim, usually because the tax was not assessed or the tax period was not under audit by the Service before the claim bar date. Consequently, the confirmed Chapter

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[5] In at least one pre-RRA 98 enactment case which involved secured federal tax debts of an individual debtor and a proposed 30 year payout period under a Chapter 11 plan, the bankruptcy court required the debtor to sign waivers of the collection limitation period for the length of the proposed plan payout period as a way of addressing the Service's plan feasibility concerns. See In re Haas, 195 B.R. 933, 940 (Bankr. S.D. Ala. 1996), rev'd, 162 F.3d 1087 (11th Cir. 1998) (where the Eleventh Circuit ultimately found the plan infeasible, without addressing the collection limitation issue). While the collection limitation period waivers in that case may have provided the Government with a slightly higher comfort level with the proposed plan, we do not believe the waivers were necessary to suspend the limitation period while the plan was in effect until substantial default. The Government remained dissatisfied with the bankruptcy court's solution to its plan feasibility concerns, prompting it to appeal that case successfully to the Eleventh Circuit. In other open cases where the Service may have been satisfied by waivers that now will expire by their own terms or by law before the Chapter 11 payout period in a case is due to expire, the suspension of the collection limitation period while the automatic stay is in effect and while a confirmed Chapter 11 providing fully for the tax is in effect, should not be shortened by these outstanding collection limitation waivers that now will expire at an earlier date certain by agreement or by law. See In re Klingshirn, 147 F.3d 526 (6th Cir. 1998)

11 plan was not required to provide for full payment of these unclaimed or late-claimed prepetition tax debts through the plan. The Service ordinarily takes the position that these non-dischargeable prepetition taxes are immediately collectible from the individual debtor outside of the plan. See In re Gurwitch, 794 F.2d 584 (11th Cir. 1986); In re Grynberg, 986 F.2d 367 (10th Cir. 1993). Accordingly, the Service should not rely on a suspension of the collection limitation period in these circumstances.

(2) The prepetition tax or prepetition tax penalty is non-dischargeable but is not entitled to priority claim treatment (i.e., non-priority taxes and tax penalties described in B.C. §§ 523(a)(1)(B), (a)(1)(C), or (a)(7)), the Service filed a general unsecured claim for these non-dischargeable taxes or penalties, and the confirmed Chapter 11 plan provides for less than full payment of these taxes or penalties. As the confirmed plan is not required to and does not provide for full payment of these prepetition, non-dischargeable taxes and penalties, the Service would not ordinarily argue that it is prohibited by the confirmed plan from attempting to collect these taxes outside of the plan. The Service should not rely on a suspension of the collection limitation period in these circumstances.

(3) The post-petition, preconfirmation interest for a non-dischargeable prepetition tax is also non-dischargeable, but this post-petition interest may not ordinarily be claimed by the Service or paid through the confirmed plan. See Bruning v. United States, 376 U.S. 358 (1964); Hanna v. United States, 872 F.2d 829 (8th Cir. 1989).[6] As the confirmed plan is once again not required to and does not provide for full payment of the post-petition, preconfirmation interest component of this tax debt, the Service would not ordinarily argue that it is prohibited by the confirmed plan from attempting to collect these tax debts outside of the plan. The Service should not rely on a suspension of the collection limitation period for the post-petition interest in these circumstances, even though it may rely on such a suspension with respect to the underlying tax debt that is fully provided for by the confirmed plan.

(4) The prepetition tax itself is discharged by the individual debtor's confirmed Chapter 11 plan becoming effective, but the tax was secured before the

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[6] For secured taxes of the kind and for the periods specified in B.C. § 507(a)(8), the circuits are presently split on whether the taxes and post-petition interest thereon are excepted from discharge by B.C. § 523(a)(1)(A). See In re Gust, 1999 U.S. App. LEXIS 32154 (11th Cir. 12-9-99) (secured taxes of this type excepted from discharge); In re Victor, 121 F.3d 1383 (10th Cir. 1997) (post-petition, preconfirmation interest on secured taxes of the kind and periods described in B.C. § 507(a)(8) not excepted from discharge). Our position is that the Eleventh Circuit has the better reasoned view on this matter.

petition date by perfected federal tax liens which attached to the individual debtor's excluded, exempted, or abandoned property (property that is not generally dealt with by the plan for purposes of B.C. § 1141(c)). The confirmed plan also does not provide for full payment of the secured tax debt from bankruptcy estate property or from non-estate property otherwise dealt with by the plan. The Service ordinarily would take the position that its prepetition, perfected federal tax liens remain enforceable against the debtor's excluded, exempted, or abandoned property outside of the plan. See In re Isom, 901 F.2d 744 (9th Cir. 1990) (decided in a Chapter 7 context). Since the confirmed Chapter 11 plan assumed in this scenario does not provide for full payment of the surviving secured tax debt, the Service would again argue that it is not prohibited by the confirmed plan from attempting to collect the tax outside of the plan from the individual debtor's excluded, exempted, or abandoned property. The Service should not rely on a suspension of the collection limitation period while the plan is in effect with respect to this secured tax, at least for any amount of secured tax in excess of the amount the plan promises to pay.

(5) A post-petition income tax is incurred by the individual debtor (rather than by the individual debtor's I.R.C. § 1398 estate) before plan confirmation. The Service may not ordinarily file a bankruptcy proof of claim for this post-petition tax of the individual debtor, but the Service takes the position that the post-petition income tax is not discharged by confirmation of the debtor's Chapter 11 plan. See In re Johnson, 190 B.R. 724, 727 (Bankr. D. Mass. 1995); In re Wood, 240 B.R. 609 (C.D. Cal. 1999). The Service has successfully resisted efforts by individual debtors in these circumstances to enjoin the Service from collecting the debtor's post-petition tax while the individual debtor's Chapter 11 plan is in effect and not in default. In these circumstances, the Service should not ordinarily rely on any suspension of the collection limitation period for the individual debtor's post-petition tax liability while the plan is in effect.

There may be exceptions to the above conclusions. The Chapter 11 plans of individual debtors may provide different treatment than that occurring if the issue is not specifically addressed in the plan. Some individual Chapter 11 debtors or the bankruptcy courts considering confirmation of these debtors' plans may choose to provide for full payment through the plan of these types of surviving tax debts or liens that are otherwise not required to be paid through a confirmed Chapter 11 plan. For this reason, the Service should examine the terms of an individual debtor's confirmed Chapter 11 plan before determining whether the federal tax debt or a portion of the federal tax debt may be collected outside of the plan and whether the Service may safely rely on a suspension of the collection limitation period with respect to the particular tax debt while the plan is in effect.

Issue #2: What alternatives (to reliance on our above answer to question #1) should the Service consider to ensure that the collection limitation period is either suspended or extended during a proposed, lengthy Chapter 11 plan payout period?

Answer #2: Discussed below are three alternative strategies that the Service may wish to consider pursuing with Chapter 11 debtors in the process of confirming Chapter 11 plans whenever there is a long payout period proposed under a plan. First, the Service should insist that it be paid by Chapter 11 plans in full within the time frames required by the Bankruptcy Code. Second, the Service may ask that appropriate language be inserted in a Chapter 11 plan or in the order confirming a plan which specifies that the collection limitation period under the Internal Revenue Code will be suspended for particular tax debts for so long as the plan is in effect and not in substantial default, and for six months thereafter, specifically referencing I.R.C. § 6503(h)(2). Third, the Service may ask that the bankruptcy court enter a separate judgment in a contested matter proceeding while the plan is being confirmed, in order to reduce specific assessed federal tax debts to a judgment that extends the collection limitation period for so long as the judgment is enforceable, in accordance with the final sentence of I.R.C. § 6502(a) (which is unchanged by the RRA 98 revisions to other parts of section 6502(a)).

The Service's first alternative is to insist that the taxpayer's Chapter 11 plan conform with the debt payment requirements of the Bankruptcy Code. For prepetition tax debts that are entitled to priority treatment, B.C. § 1129(a)(9)(C) requires that a Chapter 11 plan provide for full payment of these taxes within six years of the date of assessment of such taxes. If a priority tax must be paid no later than within six years of the assessment date or by the plan effective date (if there is no deferral of payment), then the ordinary collection limitation period of 10 years, pursuant to I.R.C. § 6502(a)(1), will require no suspension or extension.[7]

With respect to prepetition tax debts that are genuinely entitled to secured claim treatment, a Chapter 11 plan should provide for full payment of the debt in a feasible manner, including a reasonable period of time for payment under the circumstances. See I.R.C. § 1129(a)(11); In re Haas, 162 F.3d 1087 (11th Cir.

[7] Even if B.C. § 1129(a)(9)(C) is amended, as proposed in bills still pending in Congress, to require full payment of priority taxes by a Chapter 11 plan within five years of the petition date, the Service still will not require any suspension or extension of the collection limitation period, except in the case of trust fund taxes or trust fund recovery penalties that were assessed at least five years before the taxpayer filed bankruptcy. This is because these are the only two types of priority federal taxes that could have been assessed more than five years before the debtor filed for bankruptcy which would still be entitled to priority claim treatment under B.C. § 507(a)(8), not including serial bankruptcy filings where the priority claim periods and the collection limitation periods should both have been suspended by the prior bankruptcy case.

1998). The Service should generally insist that a Chapter 11 plan provide for full payment of the Service's genuine secured tax claims before the collection limitation period for the debt is due to expire (not including any by law suspension period while the Chapter 11 plan payments are being made as required by the plan) or that the plan be modified to provide the Service with the specific assurances described below that the collection period will not expire for a reasonable period of time after the plan payments are either completed or the plan payments of the tax debt fall into substantial default.

The Service's second alternative is to insist that the taxpayer's Chapter 11 plan or the order confirming the plan specifically provide that the collection limitation period under the Internal Revenue Code will be suspended for particular tax debts for so long as the plan is in effect and not in substantial default, and for six months thereafter, specifically referencing I.R.C. § 6503(h)(2). Appropriate model plan or plan confirmation order language to accomplish this suspension result by a final order (in addition to the result arising by operation of law) could be worded along the following lines:

> The period allowed to the Internal Revenue Service (IRS) under the Internal Revenue Code, 26 U.S.C. § 6502(a), to collect the assessed [income, employment, excise, and/or trust fund] taxes, plus interest, penalties, and any other additions thereon, which are still owed by the debtor(s) after the plan effective date for the periods specified in the [secured, priority, or general unsecured] allowed claim(s) of the IRS shall be suspended for the period of time that payment of these tax debts is made according to the plan, unless and until a substantial default of these plan payments for tax debts shall occur, and for six months thereafter, in accordance with 26 U.S.C. § 6503(h)(2). A substantial default regarding plan payments of a tax debt to the IRS shall have occurred when a payment of the tax debt required by the plan has not been timely made, the IRS has provided the reorganized debtor(s) with a written notice of the default, and the reorganized debtor(s) has/have failed to cure the default within [14, 30, or another specified number of] days of the IRS mailing the written notice of default to the reorganized debtor(s).

If possible, the Service should next detail in the plan its administrative remedies for collecting the debtor's unpaid taxes following a substantial default under the plan. We suggest model language along the following lines:

> If the reorganized debtor(s) substantially default(s) on the payments of a tax debt due to the IRS under the plan, then the entire tax debts still owed to the IRS, shall become due and payable immediately and the IRS may collect these unpaid tax liabilities through the administrative collection provisions of the Internal Revenue Code.

Individual districts should feel free to modify the model plan or plan confirmation order language discussed above, as necessary or appropriate, to fit local practice or the circumstances of a particular case. However, if the collection limitation period is close to expiring (for a secured or trust fund priority tax claim) when the taxpayer files for bankruptcy, then the suspension period provided by law and/or by the model plan language suggested above may not provide the Service with much time after the taxpayer defaults on the plan to collect the tax at issue. In these circumstances, the Service may sometimes extend the collection limitation period for a sufficient additional time (indefinitely) by pursuing the third alternative described below.

A third alternative is to ask that the bankruptcy court enter a separate judgment in a contested matter proceeding at the same time the plan is being considered for confirmation, in order to reduce specific assessed federal tax debts to a "judgment" and thereby extend the collection limitation period for as long as the judgment remains enforceable, in accordance with the final sentence of I.R.C. § 6502(a). Once a federal tax is reduced to judgment, the lives of the judgment and of the tax lien are extended indefinitely and remain enforceable at any time, although refiling of a Notice of Federal Tax Lien (NFTL) for the debt will likely be required to maintain the NFTL's priority against other liens under state law. See United States v. Overman, 424 F.2d 1142, 1146-7 (9th Cir. 1970).

The confirmation of a Chapter 11 plan is a "core" proceeding, for which bankruptcy judges are authorized to enter appropriate orders or judgments. See 28 U.S.C. §§ 157(b)(1) and (b)(2)(L); Official Bankruptcy Form 15 (Order Confirming Plan). Bankruptcy judges typically enter a simple "order" confirming a plan and the order ordinarily binds the debtor and the Service to the terms of the plan. However, a Chapter 11 plan or the order confirming the plan is not an appropriate vehicle or document for fixing the amount of a disputed tax claim against a debtor. See In re Taylor, 132 F.3d 256 (5th Cir. 1998); In re DePaolo, 45 F.3d 373 (10th Cir. 1995). On the other hand, bankruptcy judges are authorized to and often do enter core proceeding "judgments" with respect to a creditor's bankruptcy claims which are contested as to amount or dischargeability, pursuant to 28 U.S.C. §§ 157(b)(1), (b)(2)(B), and (b)(2)(L). See In re Porges, 44 F.3d 159, 162-165 (2nd Cir. 1995); In re Kennedy, 108 F.3d 1015, 1017-8 (9th Cir. 1997); In re McLaren, 3 F.3d 958, 965-6 (6th Cir. 1993); In re Hallahan, 936 F.2d 1496, 1507-8 (7th Cir. 1991).

In order for a bankruptcy court ruling regarding the correct amount of a federal tax debt to represent a "judgment" that indefinitely suspends the collection limitation period applicable to the federal tax debt, we believe the court's ruling should conform to B.R. 9021 ("Entry of Judgment") and the other rules referenced therein. This means the judgment should result from an adversary or contested matter proceeding, with an identified "plaintiff" and "defendant." The judgment should be set forth on a separate document. See Bankruptcy Procedural Form B 262, showing a sample "Notice of Entry of Judgment." The judgment should be dated

and entered on the bankruptcy court's docket, and the Service should request that a copy of the judgment be indexed with the civil judgments of the district court. See B.R. 5003(a) and (c). The judgment should also state a sum certain due by the taxpayer for any tax years involved in the proceeding. See F.R.C.P. 58. Words along the following lines may be appropriate for the judgment document:

> Ordered, Adjudged, and Decreed, that the indebtedness owed by the Debtor(s) to the Internal Revenue Service is (Non-Dischargeable or Not Discharged) and Judgment is entered in favor of the United States of America, against Debtor(s) [Name(s)], in the amount of $ (amount) , representing a [tax year, type of tax (e.g., income, excise, trust fund), and type of claim, (e.g., secured or priority)] tax debt, as well as accruing interest ("and penalties," if applicable) from the date of ("the debtor's bankruptcy petition" or "the debtor's plan effective date," depending on what the debtor will still owe the Service).[8]

The judgment alternative described above should extend the collection limitation period for a federal tax debt indefinitely. It may be appropriate for the Service to consider this alternative in at least two circumstances: (1) where the ordinary collection limitation period was close to expiring when the debtor filed bankruptcy, and six months following a substantial plan default will likely not be enough time to put the Service's collection efforts back on the right track; and (2) when the motion for a judgment is coupled with a feasibility objection by the Service to a Chapter 11 plan that provides for an overly long payout period for the Service's secured claim (in order to make the Service's potential peril with respect to plan feasibility more clear to the debtor and to the court). In other circumstances, we understand that pursuing this potential judgment remedy may expend more of the Government's limited resources than is cost effective.

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[8] In a typical non-bankruptcy action in district court to reduce assessed taxes to judgment, the United States would compute the judgment amount to the date of judgment (e.g., including all prejudgment interest owed). In a bankruptcy case, the Service's proof of claim for taxes being reduced to judgment would include interest and penalties only until the petition date. However, since post-petition interest is also non-dischargeable for underlying tax debts that are non-dischargeable in an individual's debtor's Chapter 11 case and such interest should also be paid when the Service's claim is over-secured, the United States would want its judgment to reflect this post-petition interest still owed by the debtor to the Service from the petition date. On the other hand, for dischargeable or undersecured tax debts provided to be paid in installments by a Chapter 11 plan, the debtor's liability for post-petition interest on the unpaid tax debt would not generally resume until the plan effective date (for interest after that date).

Issue #3: As a back-up argument to the above positions, do we stand by our published advice in a prior case (involving an expired assessment statute after confirmation) that a confirmed Chapter 11 plan also generally provides the Service with contract rights that are superadded to (rather than substituted for) the tax debt collection rights that arise for the Service under the Internal Revenue Code?

Answer #3: Yes. In your request for advice, you noted our prior advisory opinion for GL:Br2-0605-93. See General Litigation Bulletin Advisory Opinion Summary (October 1993), GL:Br2-0605-93, answer #3 (publicly released on July 22, 1999, pursuant to I.R.C. § 6110 as amended by RRA 98 and reproduced at 1993 GLB LEXIS 3). The Service should not automatically concede that it must return to a taxpayer any Chapter 11 plan payments that it has received or is due to receive for a tax debt where the collection limitation period under the Internal Revenue Code is expired. If the collection limitation period for the tax debt had not expired before the plan confirmation date,[9] then we believe the confirmed Chapter 11 plan itself gives the Service "contract" remedies against the taxpayer that are separate from and "superadded" to (rather than substituted for) the remedies flowing from the debt's continued character as a "tax." As with other collection remedies or security instruments (such as bonds or mortgages) which the Service receives outside of the Internal Revenue Code to supplement the Service's ability to collect a tax debt, the expiration of the collection limitation period for collecting the tax debt under the Internal Revenue Code does not terminate the Service's ability to receive payment or collect the debt pursuant to its supplemental rights provided by the confirmed Chapter 11 plan. See United States v. John Barth Co., 279 U.S. 370 (1929) (involving a security bond); United States v. Martin Hotel Co., 59 F.2d 549 (8th Cir. 1932), cert. denied, 287 U.S. 651 (1932) (involving an escrow agreement) ; Golub v. United States, 74-2 U.S.T.C. ¶ 9566 (Ct. Cl. 1974) (involving a collateral agreement incident to an offer in compromise); Julicher v. IRS, 95-2 U.S.T.C. 50,379 (E.D. Pa. 1995), aff'd., 92 F.3d 1171 (3rd Cir. 1996) (involving a letter of credit); United States v. Citizens Bank, 50 F.Supp.2d 107 (Mag. Op. D.R.I. 1999), adopted, 83 A.F.T.R.2d 99-768 (D.R.I. 3-30-99) (involving a promissory note and mortgage).

We are sorry for the delay in reducing this advice to writing and hope that we have addressed all of your concerns. If you have any questions regarding this advice or if we can be of further assistance, please contact the attorney assigned to this case at 202-622-3620.

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[9] Testing whether the collection limitation period had expired by the "petition" date should ordinarily produce the same result as testing on the "confirmation" date, due to the undisputed suspension of the collection limitation period while the automatic stay is in effect.

cc: Assistant Regional Counsel (General Litigation)