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INTERNAL REVENUE SERVICE
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MEMORANDUM FOR DISTRICT COUNSEL, INDIANA

FROM: Kathryn A. Zuba
Chief, Branch 2 (General Litigation)

SUBJECT: Offers-in-Compromise - Effect of Bankruptcy on Processability

This memorandum contains our supplemental response to your memorandum dated January 10, 2000. You ask that we pre-review your memorandum to Acting Chief, Special Procedures Branch, Indiana District. This document is not to be cited as precedent.

Your memorandum raised issues regarding the processability of offers in compromise ("OICs") that have not been accepted or rejected as of the date of the filing of the taxpayer's bankruptcy petition. In our prior response dated March 27, 2000, we agreed with your conclusion that such OICs can be returned as nonprocessable. Your memorandum also concluded that while the Internal Revenue Service ("Service") may consider OICs submitted by debtors in bankruptcy as nonprocessable, a Bankruptcy Court may not agree in light of the issues raised in In re Mills, 240 B.R. 689 (Bankr. S.D. W.V. 1999), and In re Chapman, 1999 Bankr. LEXIS 1091 (S.D. W.V. June 23, 1999). The court in Mills and Chapman held that the Service's refusal to consider OICs from taxpayers in bankruptcy violated § 525(a) of the Bankruptcy Code. In our prior response we advised that we were in the process of developing our litigating position with regard to the issues raised in Mills and Chapman, and that we would respond to you on these issues in a detailed memorandum after our final position is reached. The following is our supplemental response. For the reasons that follow we conclude that the Service's policy not to process OICs from taxpayers in bankruptcy does not violate the Bankruptcy Code, and that the Service may not be compelled by a court to consider OICs from taxpayers in bankruptcy.

ISSUE

Does the Service 's policy not to process OICs from taxpayers in bankruptcy violate the anti-discrimination provision of the Bankruptcy Code?

CONCLUSION

No, the Service's policy not to process OICs from taxpayers in bankruptcy does not violate the anti-discrimination provision of the Bankruptcy Code.

BACKGROUND

The Offer in Compromise Handbook provides that when an offer is received it is first reviewed for processability. IRM 5.8.3.1. OICs from taxpayers in bankruptcy or who have not filed required tax returns will be returned as nonprocessable. Id. Deviation from the not processable criteria may not be made without written authorization from the National Office. IRM 5.8.3.3.1. The instructions to Form 656, Offer in Compromise, rev. Jan., 2000, also explain that taxpayers are not eligible for consideration of an OIC on the basis of doubt as to collectibility or effective tax administration if they have not filed all federal tax returns or are involved in an open bankruptcy proceeding.[1]

An offer will not be considered until the conclusion or termination of the bankruptcy proceeding. IRM 5.8.10.2.1(2). In Chapter 7 cases, an offer in compromise will normally not be considered until a discharge is granted. IRM 5.8.10.2.2(1). If a Chapter 7 discharge has been granted, but the case is still pending, the Service may consider an offer, but the amount acceptable for the offer should include the amount the Service reasonably expects to recover from the bankruptcy in addition to what can be collected from the taxpayer on non-discharged liabilities or from the estate outside the bankruptcy. IRM 5.8.10.2.2(2). While the Service will not consider an offer in compromise in a Chapter 11 case, the manual authorizes the occasional acceptance of a “compromising plan” in a Chapter 11 case when it is in the Service’s best interest to do so. IRM 5.9.9.4.2(6). The manual does not authorize the acceptance of a compromising plan in a Chapter 13 case.

Where a determination is made to return offer documents because the offer to compromise was nonprocessable, the return of the offer does not constitute a rejection of the offer and does not entitle the taxpayer to appeal the matter to Appeals pursuant to I.R.C. § 7122(d). Temp. Treas. Reg. 301.7122-1T(e)(5). The Offer in Compromise Handbook further explains, "The Service will not consider an offer in compromise submitted by a taxpayer in bankruptcy. When a taxpayer files Bankruptcy, the Bankruptcy Code provides procedures resolving the Service’s claim." IRM 5.8.10.2.1(1). See also IRM 5.9.4.7.

DISCUSSION

I. The Mills and Chapman Opinions

[1] It is our understanding that the Service’s policy not to consider OICs from taxpayers in bankruptcy does not prohibit compromise of the Service’s claim based upon doubt as to liability.

In re Mills, 240 B.R. 689 (Bankr. S.D. W.V. 1999), was a Chapter 13 case in which the Service had over $110,000 in tax claims, of which over $60,000 were entitled to priority status. These taxes arose from the debtors' unpaid employment taxes of a failed convenience style grocery store. After a number of plans were rejected, the debtors submitted a Form 656 OIC, and filed another plan proposing to pay the Service $6,500 as a lump sum to pay the priority claims in full at confirmation. The Service objected to the use of an OIC as a basis for satisfying its priority tax claim, and did not process the OIC. The debtors then commenced an adversary proceeding in the bankruptcy court alleging that the Service violated § 525(a) of the Bankruptcy Code by refusing to consider their OIC. The facts were substantially the same in In re Chapman, 1999 Bankr. LEXIS 1091 (S.D. W.V. June 23, 1999). The debtors were represented by the same attorney, and the case was litigated before the same judge.

The bankruptcy court's legal analysis was identical in Mills and Chapman. The court concluded that while the Service cannot be compelled to accept OICs, its failure to even consider them from taxpayers based solely on their bankruptcy status constitutes discrimination prohibited by Bankruptcy Code § 525(a). 240 B.R. at 698. Section 525(a) provides in pertinent part:

> [A] governmental unit may not deny . . . a license, permit, charter, franchise, *or other similar grant* to . . . a person that is or has been a debtor under this title . . . solely because such bankrupt or debtor is or has been a debtor under this title[.]

(emphasis added). The court relied on the following portion of the legislative history of § 525 to support its conclusion:

> In addition, the section is not exclusive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the Perez rule.[2] This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtor's livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the unions's credit union . . . This

[2] Other portions of this legislative history show that when Congress wrote § 525, it "codified the result" of Perez v. Cambell, 402 U.S. 634 (1971), which held that a state law providing that a debtor's drivers license would not be renewed because a tort judgment resulting from an automobile accident remained unpaid, even though the debt had been discharged in bankruptcy, violated the Supremacy Clause of the United States Constitution because it frustrated the fresh start policy of the Bankruptcy Code.

> section is not so broad as a comparable section proposed by the Bankruptcy Commission . . . which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti-discriminations provision in pursuit of sound bankruptcy policy.

H.R. Rep. No. 95-595 at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323 (1978) (citations omitted). The court concluded that "[t]he statute and legislative history, when read together, clearly indicate that Congress did not intend § 525 to be all-inclusive, but instead intended to prohibit bankruptcy-based discrimination that can seriously affect the debtor's livelihood or fresh start." 240 B.R. at 695.

The court agreed with the Service's contention that it could not be compelled to accept an OIC because such a decision is within the discretion of the Service. However, the court found that the use of the word "shall" in I.R.C. § 7122(c)(1) indicates that consideration of the OIC is not discretionary. Id. at 696, citing United States v. Garden State National Bank, 465 F. Supp. 437 (D.N.J.1979). The court also recognized that § 7122(d) provides for an administrative review of rejected offers. The court reasoned that by not considering OICs from taxpayers in bankruptcy, bankruptcy debtors are denied additional protections available to taxpayers who are not in bankruptcy. 240 B.R. at 696.

The court rejected the Service's argument that because the Bankruptcy Code specifically provides that its priority claims will be paid in full, its refusal to consider OICs in bankruptcy does not affect debtor's rights in bankruptcy. The court countered that if the taxes were compromised, a lesser amount would be required to be paid under the Chapter 13 plan. Id. at 697.

II. Does the Bankruptcy Code Require that the Service Consider Offers in Compromise from Taxpayers in Bankruptcy?

The first court of appeals case to address the scope of the "license, permit, charter, franchise, or other similar grant" in § 525(a) was In re Goldrich, 771 F.2d 28 (2nd Cir. 1985). In Goldrich, the debtor challenged the State of New York's refusal to guarantee debtor's student loans because debtor had obtained bankruptcy discharges of previous student loans. The court considered the legislative history, and concluded that § 525 does not promise protection against consideration of the prior bankruptcy in post-discharge credit arrangements. Id. at 30. The court reasoned:

> A credit guarantee is not a license, permit, charter or franchise; nor is it in any way similar to those grants. Had Congress intended to extend this section to cover loans or other forms of credit, it could have included some term that could have supported such an extension. We

> are reluctant to probe beyond the plain language of the statute. Although the exact scope of the items enumerated may be undefined, the fact that the list is composed solely of benefits conferred by the state that are unrelated to credit is unambiguous. Congress' failure to manifest any intention to include items of a distinctly different character is also unambiguous. In the absence of ambiguity, no further inquiry is required.
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> While Congress may have intended to allow expansion of the scope of protection described in section 525, it clearly also intended that such expansion would be limited to situations sufficiently similar to Perez to fall within the enumeration. The extension of credit is manifestly different from both examples given in the Senate Report: licensing and exclusion from a union. The fact that expansion must be permitted within the bounds of the statute's undefined terms may not be interpreted to require similar amplification outside of those bounds.

Id. at 30-31.

Two courts of appeals cases followed Goldrich, but with varying results. In In re Exquisito Services, Inc., 823 F.2d 151, 153-155 (5th Cir. 1987), the court ostensibly adopted the narrow approach articulated in Goldrich, reasoning that the application of § 525(a) should be limited to situations analogous to those enumerated in the statute, i.e., licenses, charters, franchises, and other similar grants. The court held that participation in a Small Business Administration Program under which minority businesses are given preferential treatment in selection for government contracts constituted a "franchise" as defined by Blacks' Law Dictionary. Thus, the court held that the Air Force's refusal to renew a SBA contract with a debtor because of its Chapter 11 status violated § 525(a).

In In re Watts, 876 F.2d 1090 (3rd Cir. 1989), the debtors challenged a provision of a state program that provided loans to homeowners in financial difficulty to prevent imminent mortgage foreclosure. Under the terms of the program, no loan payments would be made at any time the mortgagee was prohibited from instituting foreclosure proceedings against the mortgagor. Because the automatic stay prevented such foreclosure, loan payments were not provided to bankruptcy debtors during its duration. The court held that the loan simply is not a "license, permit, charter, franchise or other similar grant" per § 525(a). The court continued, "[I]t seems perfectly clear that the items enumerated are in the nature of indicia of authority from a governmental unit to the authorized person to pursue some endeavor. Thus, a 'similar grant' should be given the same meaning." 876 F.2d at 1093.

While the narrow interpretation in these cases follows the language of the statute, Congress was not pleased with the result in Goldrich. In the Bankruptcy Reform

Act of 1994, Congress overruled Goldrich through the addition of § 525(c). Section 525(c) provides that student loans or grants may not be denied based upon a debtor's past or present bankruptcy status. The language in the legislative history indicates that the provision was only intended to "clarify" the anti-discrimination provisions of the Bankruptcy Code to ensure that applicants for student loans are not denied those benefits due to a prior bankruptcy. It further remarked:

> This section overrules [Goldrich], which gave an unduly narrow interpretation to Code section 525. Like section 525 itself, this section is not intended to limit in any way other situations in which discrimination should be prohibited. Under this section, as under section 525 generally, a debtor should not be treated differently based solely on the fact that the debtor once owed a student loan which was not paid because it was discharged; the debtor should be treated the same as if the prior student loan had never existed.

140 Cong. Rec. H 10771 (Oct. 4, 1994).[3]

This legislative history arguably leaves unclear the scope of § 525. Though the language quoted above would indicate that the Goldrich court's reasoning was mistaken, and that § 525 should be interpreted more broadly, the very narrow remedy employed by Congress indicates otherwise. That is, had Congress truly envisioned a much broader scope of § 525, it could have expanded the scope of prohibited acts in § 525(a) rather than specifically adding § 525(c).

The only court of appeals opinion addressing § 525(a) since the 1994 amendments did not mention the legislative history. In re Toth, 136 F.3d 477 (6th Cir. 1998), cert. den. 524 U.S. 954 (1998). In Toth, the debtors challenged the state's policy of requiring at least three years to lapse after the date of a bankruptcy discharge before processing a loan application under a low income home improvement loan program of the United States administered by the state. The court refused the opportunity to construe § 525(a) broadly to further the fresh start policy of the Bankruptcy Code, and instead agreed with the analysis in Watts and Goldrich. 136 F.3d at 480. The court further explained:

> The items enumerated in the statute – licenses, permits, charters, and franchises – are benefits conferred by government that are unrelated to the extension of credit. They reveal that the target of § 525(a) is government's role as a gatekeeper in determining who may pursue

[3] This is taken from the section by section description of the Bankruptcy Reform Act of 1994, which was inserted into the record in floor statements attributed to the Speaker of the House pro tempore and makes up the entirety of the legislative history of the Act.

> certain livelihoods. It is directed at governmental entities that might be inclined to discriminate against former bankruptcy debtors in a manner that frustrated the "fresh start" policy of the Bankruptcy Code, by denying them permission to pursue certain occupations or endeavors. The intent of Congress incorporated into the plain language of § 525(a) should not be transformed by employing an expansive understanding of the "fresh start" policy to insulate a debtor from all adverse consequences of a bankruptcy filing or discharge.

Id. Thus, the Toth court's limitation of the types of prohibited government action is perhaps the narrowest to date, limiting § 525 to situations where the government discriminates in its role as a gatekeeper in determining who may pursue certain livelihoods. Although the Toth court failed to address the legislative history relating to the passage of § 525(c), resort to the legislative history was not necessary considering the plain language of § 525(a).

An alternative view is reflected in a leading treatise's criticism of Toth, Watts, and Goldrich:

> While the conclusion that section 525 does not apply to extensions of credit may be generally correct, the courts did not adequately consider whether the state programs involved were in fact more in the nature of benefits conferred upon needy applicants, without regard to their credit worthiness, and therefore more similar to a franchise or similar grant, rather than an extension of credit.

4 Collier on Bankruptcy § 525.02[5], 525-16 (15th ed. 1999). Such an interpretation could be supported by a number of lower court decisions which have had little trouble finding government subsidy programs to be within the § 525 language. Courts have held that a public tenant may not be denied the continued right to live in his or her apartment, and thus denied the subsidy inherent in public housing, because of unpaid rent which is discharged or dischargeable, or because a bankruptcy has been filed, even if the bankruptcy had the effect of causing rejection of the preexisting lease. See In re Curry, 148 B.R. 966 (S.D.Fla. 1992); Gibbs v. Housing Auth. of City of New Haven, 76 B.R. 257 (D.Conn. 1983); In re Day, 208 B.R. 358 (Bankr. E.D.Pa. 1997); In re Szymecki, 87 B.R. 14 (Bankr. W.D.Pa. 1988). See also In re Rose, 23 B.R. 662 (Bankr. D. Conn. 1982) (state program offering mortgage assistance cannot deny benefits based upon the filing of bankruptcy or upon the automatic stay provided by a bankruptcy filing).

We disagree with the position espoused by Collier. The assertion that "benefits conferred on needy applicants" is somehow a like a "license, permit charter, franchise, or other similar grant" is not tenable. As the Watts and Toth courts concluded, the targeted government actions concern government's role as a gatekeeper to pursue some occupation of endeavor. It is not so broad as to include benefit programs. Even so, we do not think even Collier's position is so broad as to encompass the Service's OIC program. The compromise of tax liabilities to reflect collection potential and enhance voluntary compliance with the Tax Code is not the type of "benefit conferred upon needy applicants" that even Collier envisioned.

We also disagree with the conclusion of the Mills and Chapman court that § 525(a) and its legislative history, when read together, indicate that Congress intended to prohibit bankruptcy-based discrimination by governmental units that can seriously affect the debtor's livelihood or fresh start. As the courts in Goldrich, Watts, and Toth have recognized, the plain language of § 525(a) reveals that Congress did not in fact prohibit all forms of discrimination that affect a debtor's fresh start. Congress only prohibited the discrimination with respect to a "license, permit, charter, franchise, or other similar grant," or employment. See also United States v. Ron Pair, 489 U.S. 235, 242 (1989) ("The plain language of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters").

Consideration of an OIC is not similar to a "license, permit, charter, or franchise." Black's Law Dictionary (6th ed. 1991) defines "license" in pertinent part as "[a] permit, granted by an appropriate governmental body . . to pursue some occupation or to carry on some business subject to regulation under the police power. A license is not a contract between the state and licensee, but is a mere personal permit." A permit is "[i]n general, any document which grants a person a right to do something. A license or grant of authority to do such a thing." Id. A charter is "[a]n instrument emanating from sovereign power, in the nature of a grant, either to the whole nation, or to a class or portion of the people, to a corporation, or to a colony or dependency, assuring them of certain rights, liberties, or powers." Id. A franchise is "[a] special privilege to do certain things conferred by government on [an] individual or corporation, and which does not belong to citizens generally of common right; e.g., right to offer cable television service." In contrast, an accepted OIC is a contract to settle the taxpayer's tax liabilities. See, e.g., United States v. Feinberg, 372 F.2d 352 (3rd Cir. 1967); United States v. Lane, 303 F.2d 1 (5th Cir. 1962). When the government enters into a contract with the debtor in compromise of existing tax liabilities, it is not engaging in the type of regulatory conduct that is similar to a license, permit, charter, or franchise. Thus, § 525(a) does not apply. Toth, Watts.

Further, the legislative history cited by the Mills court does not in fact support the court's conclusion. The passage provided in pertinent part that "[t]his section permits further development [of case law] to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions" (emphasis added). The passage then cites two examples of government units that perform licensing functions: a state bar association or a medical society, and a union. Thus, this portion of the legislative history only shows that Congress intended courts to broadly prohibit other forms of discrimination by governmental units that do licensing functions, not to extend the prohibition to any function performed by governmental units.

When quoting the legislative history the court skipped over another portion of the legislative history which shows the intended effect of § 525:

> The effect of the section, and of the further interpretations of the Perez rule, is to strengthen the anti-affirmation policy found in section 524([c]). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to expressed policy.

H.R. Rep. No. 95-595 at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323 (1978). Thus, Congress was primarily concerned that debtors would be forced to reaffirm discharged debts because of conditions made by licensing-type governmental units, though the statute clearly intended to prohibit other forms of discrimination by these entities.

The concern evidenced by the legislative history is quite distinguishable from the issue at hand. The governmental power at issue is not its right to regulate under the police power provided for under non-bankruptcy law, but is the power to collect taxes as provided in the Internal Revenue Code and the Bankruptcy Code itself.

When Congress wrote the Bankruptcy Code it engaged in a complex balancing of various interests. Interpreting B.C. § 525(a)[4] so as to require that the Service consider compromise of its claims, notwithstanding the provisions of the Bankruptcy Code that provide for full payment of priority and secured claims,[5] is inconsistent with the statutory scheme and has the effect of rewriting the Bankruptcy Code on a legislative level.[6] Courts may not reorganize the priorities established by Congress on a legislative level. United States v. Noland, 517 U.S. 535 (1996) (even where statute contemplated equitable subordination of tax claims, bankruptcy court could not exercise the discretion in such a general way as to reorder the priorities

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[4] The same would be true had the court relied upon § 105. The court did not specifically address the issue under this section, having found that § 525 applied.

[5] A debtor would generally not need to compromise its tax liabilities with the Service if the Service did not have priority or secured claims in amounts that exceed the offer.

[6] Also, "it is a commonplace of statutory construction that the specific governs the general." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-5 (1992), citing Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 445 (1987). The rights granted under §§ 1322(a)(2) and 1325(a)(5) are more specific than the general (and inapplicable) prohibitions contained in § 525.

established by Congress, because doing so would be impermissibly acting on legislative level). See also Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy court must and can only be exercised within the confines of the Bankruptcy Code").

Because the plain language of the statute does not allow for a broad reading of the types of governmental actions that can be subject to scrutiny under § 525(a), we conclude that the Service's policy of not processing OICs from taxpayers in bankruptcy does not violate § 525. Further, we see no mechanism in the Bankruptcy Code whereby a court could order a governmental unit to consider compromise of its claim.

III. Does I.R.C. § 7122 Compel the Service to Consider OICs from Taxpayers in Bankruptcy?

Though the Mills court agreed with the Service's contention that it could not be compelled to accept an OIC because such a decision is within the discretion of the Service, the court found that the use of the word "shall" in I.R.C. § 7122(c) indicates that consideration of the OIC is not discretionary.[7] 240 B.R. at 696, citing United States v. Garden State National Bank, 465 F. Supp. 437 (D.N.J.1979), aff'd on other grounds 607 F.2d 61 (3rd Cir. 1979). The court also recognized that I.R.C. § 7122(d) provides for an administrative review of rejected offers. The court reasoned that by not considering OICs from taxpayers in bankruptcy, bankruptcy debtors are denied additional protections available to taxpayers who are not in bankruptcy. 240 B.R. at 696.

Section 7122 clearly states that the Secretary "may" compromise any civil or criminal tax case prior to referral to the Department of Justice, in accordance with applicable procedures. 26 U.S.C. § 7122(a), (c); 26 C.F.R. § 301.7122-1. See also Boules v. Commissioner, 810 F.2d 209 (D.C.Cir. 1987), cert. denied, 484 U.S. 896. The decision to accept or reject an OIC is discretionary and cannot be compelled. See In re Davison, 156 B.R. 600, 602 (Bankr. E.D. Ark. 1993) (courts are not authorized to make or compel settlement for the parties under any construction of § 7122); Carroll v. Internal Revenue Service, 14 A.F.T.R. 2d 5564 (E.D. N.Y. 1964). As the court in Carroll noted, "[t]he decision to accept or reject a compromise offer by its nature involved the discretion of administrative authority and cannot be compelled by any action for a mandatory injunction." To compel acceptance of, or, indeed, consideration of, a proposed compromise of a tax liability amounts to injunctive action with respect to the collection of a tax barred by IRC § 7421. See generally Enoch v. Williams Packing and Navigation Co., 370 U.S. 1 (1962).

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[7] Section 7122(c)(1) provides that the Service "shall" prescribe guidelines for OICs, "shall" make allowances for living expenses, and the Service "shall not" reject an OIC solely on the basis of the amount of the offer.

The only authority the court cited to support its contention that the Service must consider OICs was Garden State. Garden State was a summons enforcement case. The opinion contained language that the Service's refusal to consider compromises before a decision whether to refer the case to the Department of Justice for criminal prosecution was evidence that the summons was unenforceable as it was issued in bad faith. The court held that bad faith was not shown in that case because the taxpayer had not actually requested a conference to negotiate a compromise. However, the court also stated that the outcome might be different had there been a request for compromise met only by pro forma efforts by way of lip service to the negotiation process.

The Mills and Chapman court did not mention that the language in Garden State was dictum, and was rejected on review by the Court of Appeals, 607 F.2d at 66, 73. The Third Circuit stated, "[T]he refusal of the Service to enter into compromise negotiations, standing alone, does not amount to 'bad faith.'" Id. Indeed, the trial court itself later stated, "Garden State was by way of hope or expectation that since I.R.S. has complete jurisdiction to compromise and settle all aspects of a 'tax case', both civil and criminal, before referral to the Attorney General . . . the comment might induce both taxpayers and I.R.S. to undertake good faith negotiations for resolution of any disagreement without generating avoidable litigation." "Pseudonym Taxpayer" v. Miller, 497 F. Supp. 78 (D.N.J. 1980). The Garden State dicta was also rejected by the court in United States v. Smith, 1979 U.S. Dist. LEXIS 12471; 80-1 U.S. Tax Cas. (CCH) P91089; 45 A.F.T.R.2d (RIA) 1105 (S.D.N.Y. 1979). The Smith court accepted the Government's argument that Garden State is logically, practically, and legally unsound. The court also noted that the decision whether to discuss settlement and whether to issue a summons is a discretionary one that cannot be compelled by the court. Id., citing Leaonard v. Michell, 473 F.2d 709, 713 (2nd Cir. 1973) (mandamus cannot force a discretionary act).

CONCLUSION

For the foregoing reasons we conclude that the Service 's policy not to process OICs from taxpayers in bankruptcy is not prohibited by the Bankruptcy Code, and that a bankruptcy court cannot compel the Service to consider an OIC from a taxpayer in a bankruptcy case.

If you have any questions, please contact the attorney assigned to this matter at (202) 622-3620.

cc: Assistant Regional Counsel (GL), Southeast Region