DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE CHIEF COUNSEL ADVICE

MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SB/SE) CC:SB:5:PNX

FROM: Chief, Branch 1 (Disclosure and Privacy Law) /s/ David L. Fish
CC:PA:DPL:B01

SUBJECT: Bankruptcy Disclosure Questions

This Chief Counsel Advice responds to your inquiry dated October 12, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

You requested advice regarding potential disclosure problems pertaining to typical recurring issues and problems relating to bankruptcy matters, rather than to any particular taxpayers. You posed eight scenarios in this regard, which we address in turn. We need additional information with regard to one part of Scenario 2 and will issue a supplemental response shortly.

Scenario 1

In most Chapter 7 bankruptcy cases, the debtor's attorney is not involved in the determination of dischargeable debts. Generally, the court orders that all "dischargeable" debts are discharged, and individual creditors are left to make their own determination as to whether debts owed to them have been discharged. After the bankruptcy court case has been closed, the Internal Revenue Service (IRS) will often receive an inquiry from the debtor's attorney seeking information as to which tax debts have been discharged. May the IRS disclose the information sought after the bankruptcy case has been closed?

Response to Scenario 1

Since the information sought constitutes confidential return information under I.R.C. § 6103(a), as return information is defined in § 6103(b), there must be a statutory exception to the confidentiality requirement in order to disclose return information to the debtor's attorney at any point in time. In this case, there are two possibilities. The first is I.R.C. § 6103(e)(6), which authorizes disclosures of return information to a taxpayer's attorney. Usually, this section contemplates execution of a Power of Attorney, generally

on IRS Form 2848. However, where an attorney has entered a notice of appearance in bankruptcy court on behalf of a taxpayer-debtor, or has filed a petition on behalf of a taxpayer-debtor, this is the functional equivalent of a power of attorney and the IRS may disclose return information to the debtor's attorney on this basis. The second possibility is I.R.C. § 6103(h)(4), which permits disclosures in a tax administration proceeding. Not every bankruptcy proceeding is a tax administration proceeding. When there is a tax issue, as, for example, when the IRS is listed by the petitioner as a creditor, or where the IRS has filed a proof of claim of indebtedness, then the bankruptcy proceeding is also a tax administration proceeding.

Under this scenario, however, the bankruptcy case has been closed. As such, there is no current bankruptcy case, nor any tax administration proceeding. Due to the fact that the proceeding has ended, the notice of appearance of the debtor's attorney no longer serves as the functional equivalent of a power of attorney. For the same reasons, even if the bankruptcy case had been considered a tax administration proceeding, there is no longer any proceeding "in" which to make disclosures.[1]

Therefore, IRS should have on file either a power of attorney pursuant to § 6103(e)(6), or a consent (for example, on IRS Form 8821) pursuant to section 6103(c) in order to be authorized to disclose return information to the person who was the debtor's attorney during the bankruptcy proceeding.

Scenario 2

In Chapter 7 bankruptcy cases, the IRS often receives inquiries from the trustees as to whether tax debts have been discharged. The inquiries are often received after an order of discharge has been issued but before the court case has been closed. (a) May the IRS disclose the information sought? (b) If the inquiries are received after the court case is closed, may the IRS disclose the information sought?

Response to Scenario 2

If the debtor is an individual, then I.R.C. § 1398 applies, and, in turn, I.R.C. § 6103(e)(5) authorizes the disclosure of returns (and, by application of § 6103(e)(7), the return information)[2] of the taxable year in which the case is commenced, and of any preceding taxable year, to the trustee, insofar as the trustee is acting as trustee in an open case. We need more information and will issue a supplemental response with regard to cases

[1] I.R.C. § 6103(h)(4) permits disclosures "in a ... proceeding pertaining to tax administration ... ."

[2] The disclosure of returns under section 6103(e)(1)–(5) requires a written request. The disclosure of return information under section 6103(e)(7) does not require a written request.

that are closed. If the debtor is not an individual, then I.R.C. § 1398 does not apply, and I.R.C. § 6103(e)(5) does not apply. If there is a trustee appointed in a non-individual Chapter 7 or 11 case, then I.R.C. § 6103(e)(4) applies, and the IRS may disclose returns (and, by application of section 6103(e)(7), return information) of the current and prior years to the trustee, but only if the trustee has a material interest which will be affected by the information to be disclosed – as when the trustee is responsible for the filing of returns and for the payment of taxes.

Scenario 3

Most Chapter 7 and Chapter 13 trustees have a staff of employees who actually do the casework. Some Chapter 13 trustees have a staff of 15 or more caseworkers and/or staff attorneys. Trustees may handle thousands of cases, and may be personally involved in only a few of the cases. The caseworkers and staff attorneys frequently call us to request or confirm information regarding tax debts. The information sought may be for either pre-petition or post-petition years[3] in cases where a plan has given the trustee some right regarding post-petition refunds. If return information is disclosable directly to the Chapter 7 and Chapter 13 trustees, may the IRS disclose the same information to the trustees' caseworkers and staff attorneys?

Response to Scenario 3

When disclosure of returns and return information to a trustee is authorized, there is no automatic authority to disclose the return information to the trustee's staff, be they caseworkers or staff attorneys. However, pursuant to Treas. Reg. § 301.6103(c)-1T(e)(4), a trustee who is authorized to receive returns and return information from the IRS may consent to the disclosure of returns and return information to third parties. Permissible designees for this purpose could include individual attorneys on the trustee's staff, or could include anyone in the trustee's office, depending on the trustee's preference. See Treas. Reg. § 301.6103(c)-1T(e)(5) (permissible designees). For non-tax administration purposes, such a consent must be in a separate written document meeting the requirements of Treas. Reg. § 301.6103(c)-1T(b) (IRS Form 8821 has been designed for this purpose). Where, as evidenced by the facts and circumstances, the disclosure is for assisting the trustee in resolving a tax matter, then a consent to third parties may be either written or oral pursuant to Treas. Reg. § 301.6103(c)-1T(c), and the requirements for these types of consents are somewhat less stringent. If the underlying facts justify an oral consent, it would be prudent to document such consent in the file.

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[3] Note that in individual Chapter 7 and 11 cases, the disclosure of returns and return information to trustees under section 6103(e) (5)/(7) is only permitted for the year the petition is filed and prior years. Returns and return information regarding post-petition years is not permitted.

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Scenario 4

This pertains to all chapters of the Bankruptcy Code. IRS frequently receives inquiries from staff members working for debtors' attorneys. The inquiries relate to such matters as the status of return processing, nature of tax liability, the reason for classifying a tax debt in a particular way on a claim, how the value of a secured interest was determined, lien priorities, etc. Such inquiries clarify issues, prevent the unnecessary filing of motions and other legal proceedings, reduce administrative time, and allow rapid corrections of errors that might otherwise result in appropriate dismissals of claims of indebtedness. In most cases, IRS employees must research issues and later respond to inquiries. (a) May IRS leave a message with debtors' attorneys' secretaries, clerks, and staff attorneys? (b) May IRS leave voicemail and answering machine messages that respond to the original inquiries?

Response to Scenario 4

When disclosure of returns and return information to an attorney under a power of attorney is authorized pursuant to section 6103(e)(6), there is no automatic authority for the IRS to disclose the return information to the attorney's staff. The power to substitute another representative, to delegate authority to another representative, or to execute section 6103(c) consents to disclose to third parties, must be specifically authorized in the power of attorney. See Form 2848 (rev. 1/2002); Treas. Reg. § 301.6103(c)-1T(e)(5). In order to disclose to the staff of the debtor's attorney, that debtor's attorney must have been specifically delegated one of the authorities noted above, and must also have exercised that authority, i.e., the debtor's attorney must have been given redelegation or disclosure consent authority and must also execute a Form 2848 or section 6103(c) consent to disclose to his/her staff. Absent authority to disclose returns and return information to an attorney's associates or an attorney's secretary, the IRS may not disclose return information for the purpose of leaving a message for an attorney.

If IRS has the authority to disclose return information to a person, as described above, under defined circumstances, the IRS may leave return information for that person on an individual voice mail box or answering machine of that person only. The IRS is promulgating guidance for the use of answering machines for publication in section 11.3.11 of the Internal Revenue Manual.

Under section 6103(h)(4), disclosures are only authorized "in" a tax administration proceeding. Such disclosures would not include leaving messages with an attorney's secretary or office staff.

Scenario 5

In this district, the IRS automatically receives notice of all Chapter 13 bankruptcy petitions. IRS would like to provide the Chapter 13 trustees with an informal notice of the identification of the case and the debtor, a list of the relevant taxpayer identification numbers, and a list of all tax periods for which there is unpaid tax (but not dollar amounts of the unpaid tax), years for which no returns have been filed, or, when appropriate, indications that there are no tax liabilities for the tax periods. The purpose of providing this notice would be to insure that the trustee knows that the IRS has reviewed the case and to provide an indication of whether the IRS would be filing a proof of claim of indebtedness. May the IRS make these initial, *sua sponte*, disclosures even before the IRS is listed as a creditor and before the IRS has filed a proof of claim?

Response to Scenario 5

A Chapter 13 trustee is not a trustee for the purposes of I.R.C. § 6103(e)(4) or (5) and is not entitled to received confidential return information under those provisions. See generally, Chapter 6, Disclosure of Returns and Return Information in Bankruptcy Cases, Disclosure Litigation Reference Book, Document 8448, Rev. 4-2000 (http://www.irs.ustreas.gov/pub/irs-utl/doc8448-rev4-2000.pdf). The authority to make so-called "investigative disclosures," I.R.C. § 6103(k)(6), does not apply to this scenario because such authority is only for the purpose of obtaining information. When the IRS needs to obtain information for, among other things, tax collection activity, section 6103(k)(6) permits the disclosure of return information (but not returns) to the minimum extent necessary in order to obtain needed information that is not otherwise reasonably available. Since the purpose of the disclosures in this scenario is to provide information rather than to obtain information, section 6103(k)(6) does not apply. In short, there is no authority to make these disclosures prior to the bankruptcy proceeding being established as a tax administration proceeding.

Scenario 6

The IRS has up to 180 days from the date of a Chapter 13 bankruptcy petition within which to file a proof of claim of indebtedness with the court. IRS sends a copy of the proof of claim to the trustee, which permits the trustee to determine whether funding of a proposed plan is adequate. If the funding is insufficient, the trustee blocks confirmation of the plan in order to enforce the requirements of the Bankruptcy Code. While the Chapter 13 trustee's duties may vary somewhat from court to court, the duties of the trustee as defined in 11 U.S.C. §§ 1302 and 704 are significant and indicate the extent of the Chapter 13 trustees' interest in and responsibility for the cases. Many plans require future filing of tax returns and payment of taxes and confer upon the Chapter 13 trustee the power to move for dismissal if those requirements are not met. These requirements may be for periods for which the filing of post-petition claims under 11 U.S.C. § 1305 is not appropriate. Oftentimes, the Chapter 13 trustee will contact IRS and inquire whether post-petition returns required by the plan have

been filed and whether the debtor has made post-petition tax payments as required by the plan. May the IRS make such disclosures?

Response to Scenario 6

Since a Chapter 13 Trustee is not a trustee for the purposes of section 6103(e) (see Response to Scenario 5, above), a disclosure of returns or return information may be made only pursuant to section 6103(h)(4), if and to the extent that the bankruptcy case is a tax administration proceeding. A bankruptcy proceeding is a tax administration proceeding only with respect to the particular taxes that are at issue in the proceeding, generally (or at least initially) pre-petition taxes. Post-petition taxes may be placed at issue by the IRS by filing a claim under 11 U.S.C. § 1305, or by filing a motion to convert or dismiss the proceeding by reason of failure to pay post-petition taxes. The requirement in the plan to file post-petition tax returns and pay post-petition taxes does not automatically make the Chapter 13 case a tax administration proceeding with respect to those post-petition taxes. Should the IRS initiate one of the actions noted above with respect to post-petition taxes, the bankruptcy case will become a tax administration proceeding with respect to those taxes and disclosures in the proceeding would be permitted pertaining to those taxes. If this is not feasible, in those cases where post-petition non-compliance may be anticipated, the trustee can ask the debtor to execute a section 6103(c) consent.

Scenario 7

In a Chapter 13 proceeding, IRS has up until 180 days from the filing of the petition within which to file a proof of claim of indebtedness; yet the plan can be confirmed and payments start in as little as 45 days from the filing of the petition. Thus, the trustee needs indebtedness information from the Service as soon as possible. After the IRS files a proof of claim of indebtedness, the trustee may need to either get the debtor to modify the plan or to get the petition dismissed. Assuming that the Chapter 13 trustee collects all Chapter 13 payments from the debtor, makes distributions to creditors in accordance with the plan, and makes a final accounting of the monies to the court, a number of Chapter 13 plans contain language similar to the following:

> Trustee may file to dismiss this case if the Debtor incurs post-petition debts without the written consent of the Trustee, and if Debtor fails to keep payment of such obligations current.

Assuming that the filing of a proof of claim of indebtedness is not appropriate, does this language permit the IRS to notify the Chapter 13 trustee when the debtor incurs a post-petition liability?

Response to Scenario 7

Our response is the same as for Scenario 6, above. If this is a recurring problem, the solution is to seek during the bankruptcy proceeding the debtor's consent to disclose such returns and return information for the period of the chapter 13 plan as a condition of approval of the plan.

Scenario 8

Pursuant to 11 U.S.C. § 1305(a)(1), governmental entities may file certain post-petition claims for taxes that become payable while the case is pending. IRS often wants to investigate the feasibility of filing such post-petition claims prior to filing a claim, but it is almost impossible to conduct such an investigation without having a discussion with the Chapter 13 trustee that would necessitate the disclosure of return information concerning the post-petition years. Actually filing such a claim could render a plan unfeasible or cause a trustee to move to dismiss a petition. Apparently, it would be additionally burdensome to first file a claim, then discuss the claim with the trustee, then withdraw the claim, if necessary. (a) May the IRS make such disclosures of return information to the Chapter 13 trustee prior to actually filing a claim of indebtedness? (b) May the IRS disclose such return information to the debtor's attorney? (Because the attorney may have no present knowledge of a liability but may need to know of the liability in order to decide whether the debt should be within the bankruptcy (making it information the attorney is entitled to receive) or kept out of the bankruptcy (making it information the attorney is not entitled to receive absent a consent from the debtor.)

Response to Scenario 8

Our response as to disclosures to the trustee is the same as our response to Scenarios 6 and 7, above. As to the debtor's attorney, returns and return information of the debtor may be disclosed to the debtor's attorneys for tax periods covered by a power of attorney or for tax periods and matters that are at issue in a tax administration proceeding.

Minimum disclosures of return information pursuant to section 6103(k)(6) may be made for the purpose of obtaining needed information that is not otherwise reasonably available. However, the discussion that is contemplated by this scenario does not appear to be consistent with the limited disclosures permitted by section 6103(k)(6). If possible, the Service should discuss and develop with the Chapter 13 trustee generalized criteria for dealing with these cases. If there is additional factual data that the Service needs in deciding whether to file a proof of claim in a particular case, it can be obtained from the debtor, the debtor's attorney, or the trustee under section 6103(k)(6).

In the past, we have advised that if disclosures to the standing Chapter 13 trustee are desirable, that legislative changes should be sought detailing what information should be disclosed and the need for such disclosures.[4]

Please call me at (202) 622-4580 if you have any further questions.

[4] In this regard, we also note that the bankruptcy reform bill which has been pending for some time may have permitted some limited disclosure regarding prepetition fact of filing in Chapter 13 cases. This limited additional disclosure would not appear to be of assistance in any of the scenarios described above.