OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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MEMORANDUM FOR T. KEITH FOGG
DISTRICT COUNSEL, VIRGINIA-WEST VIRGINIA
CC:SER:VWV:RCH

FROM: GARY D. GRAY
Assistant Chief Counsel CC:EL:GL

SUBJECT:

This is in response to your memorandum dated August 27, 1998. This document is not to be cited as precedent.

LEGEND:

Debtor X
Date A
Date B
Date C
Date D
Date E
Date F
Date G
Date H
Taxes
Amount A
Amount B
Amount C
Amount D
Amount E
Amount F

ISSUE:

Whether, in a case where the debtors have completed their Chapter 13 plan payments and have been granted a discharge, an allowed priority tax claim is nondischargeable because it was provided for in the plan in an amount less than in the proof of claim timely filed by the Internal Revenue Service (Service).

CONCLUSION:

[redacted]

FACTS:

On Date A, the debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code. The Service did not receive notice of the bankruptcy until the debtors amended their schedules to include the Service as a creditor. Notice of the amended schedules was mailed on Date B, and received by the Service the following day. The notice allowed the Service until the later of 30 days or the last date fixed by the notice of the first meeting of creditors (the B.C. § 341 notice) to file a proof of claim. Pursuant to the B.C. § 341 notice, the last day for filing claims was Date C.

On Date D, the Service timely filed a proof of claim for Taxes in the total amount of Amount A, of which Amount B was classified as priority. The claim was largely estimated because debtor Debtor X had not filed returns for most of the years at issue. The debtor did not subsequently cooperate with the Service, and the liabilities had to be determined under the substitute for return procedures. As a result of those procedures, on Date E, the Service filed an amended proof of claim, which increased the amount of the Service's entire claim to Amount C and the amount of its priority claim to Amount D.

Meanwhile, on or about Date F, the debtors filed a Chapter 13 plan. The plan provided for payment to the Service as a priority creditor, in the amount of Amount E, an amount substantially less than the amount provided even in the Service's initial proof of claim. The plan also provided for a distribution to unsecured creditors. The plan was confirmed on Date G, which, as in most Chapter 13s, was well before the deadline for filing claims. On Date H, the debtors were granted a discharge under B.C. § 1328(a). During the course of the case, the Service received Amount F from the trustee, an amount substantially less than the amount claimed as priority in the initial proof of claim and more so regarding the amended claim.

LAW AND ANALYSIS:

Bankruptcy Code section 1328(a) provides in relevant part:

> As soon as practicable after completion by the debtor of all payments under the plan, ... the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 . . ..

The statute goes on to list exceptions to discharge, none of which is relevant here.

Here, the debtors have completed plan payments and have been granted a discharge. If the debt is considered "provided for" under B.C. § 1328(a), then it has been discharged under that provision. In Matter of Gregory, 705 F.2d 1118 (9th Cir. 1983), the court determined that the term "provided for" in B.C. § 1328(a) required that "for a claim to become dischargeable the plan must 'make a provision for' it, i.e., deal with it or refer to it."

[redacted] As you note, however, the court in Gregory was addressing the issue whether an unsecured nonpriority claim had been provided for. [redacted] as required by B.C. § 1322(a)(2), which provides in relevant part as follows:

> The plan shall--
>
> > (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; . . ..

[redacted] Although B.C. § 1322(a)(2) is clearly mandatory, [redacted] Cf. In re Vlavianos, 71 B.R. 789 (Bankr. W.D. Va. 1986)(applying the Gregory definition to determine whether a priority claim had been provided for). It simply states that debts provided for in the plan are discharged. Relevant legislative history does not speak to the issue.

[redacted]

[redacted] There is a strong policy favoring finality of confirmed Chapter 13 plans recognized by the courts. In re Szostek, 886 F.2d 1405 (3d Cir. 1989) (confirmed policy favoring finality of confirmation is stronger than the obligation of the bankruptcy court and trustee to verify a plan's compliance with the Code); Gregory, supra (creditor's failure to object to confirmation precludes post-confirmation attack on plan as not in good faith); see also, 8 Collier on Bankruptcy § 1327.01[c] (Lawrence P. King, 15th ed. rev. 1998) (binding effect of the Chapter 13 plan extends to any issue necessarily determined by the confirmation order, including whether the plan complies with B.C. §§ 1322 and 1325). [redacted]

[redacted] Certainly, where a priority claim is not provided for in full, B.C. § 1322(a)(2) prohibits the court from confirming a plan over the priority creditor's objection. In re Stewart, 172 B.R. 14 (W.D. Va. 1994). We realize that as a practical matter it may have been difficult for the Service to object to confirmation in this case because the plan was confirmed less than three weeks after the Service received notice of the case. [redacted]

[redacted] As you know, in In re Joseph, (Bankr. E.D. Va. Nov. 4, 1998), the bankruptcy court denied the Government's motion to vacate or modify a confirmed plan that did not provide for payment of the Service's priority tax claim. In Joseph, the Service's claim was filed timely, but after plan confirmation. The Service did not move to modify or vacate the plan until eight months after confirmation. [redacted]

[redacted] In Escobedo, the Seventh Circuit found a confirmed and completed Chapter 13 plan invalid for failing to include the mandatory provisions of 1322(a)(2) and, accordingly, affirmed the district court's

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[1] In Joseph, supra, the court refused to follow Escobedo. We take issue with the court on this point as well as its refusal to modify the plan.

dismissal of the plan. Id. at 35; see also Ekeke v. U.S., 133 B.R. 450 (S.D. Ill. 1991) (the mandatory language of 1322(a)(2) provides additional "cause" for dismissal of a Chapter 13 plan under B.C. § 1307). [redacted]

For the foregoing reasons, [redacted] Moreover, the dollar amount at stake here is not significant.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:

[redacted], we see no risks or hazards in the position stated above .

If you have any further questions, please call us at (202) 622-3630.

cc: Assistant Regional Counsel (GL), Southeast Region