GENERAL LITIGATION BULLETIN

Department of the Treasury *Internal Revenue Service*

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WHITHER HAAS?
ELEVENTH CIRCUIT UPHOLDS BUT URGES EN BANC RECONSIDERATION

The Eleventh Circuit reluctantly held in **Griffith v. United States, 1999 U.S. App. LEXIS 8804 (11th Cir. May 12, 1999)**, that a debtor's fraudulent efforts to escape tax collection was not a willful "attempt to evade or defeat such tax" under B.C. § 523(a)(1)(C) and In re Haas, 48 F.3d 1153 (11th Cir. 1994). Reversing the lower courts, the Eleventh Circuit discharged the debtor from his tax debts, but urged an en banc reconsideration to narrow the scope of Haas.

The debtor, owner of several interrelated adult entertainment "S" corporations, was found by the Tax Court to have underpaid his taxes by about two million dollars. However, the Tax Court did not impose fraud penalties, finding the Government did not meet the clear and convincing evidence standard. Less than a month after the Tax Court's decision, the debtor formed a new corporation with his live-in girlfriend as sole shareholder. Eight months later, the debtor married his girlfriend, and in a prenuptial agreement transferred all assets from the "S" corporations to the new corporation or to himself and his bride as tenants by the entireties. Later, the debtor filed for Chapter 7 bankruptcy. Before the bankruptcy court, the Government successfully argued under B.C. § 523(a)(1)(C) that the tax debts were nondischargeable. On appeal, the debtor argued under the just-entered Haas decision that his taxes were dischargeable because the government had not proven that he willfully attempted to evade payment of the taxes. The district court disagreed. Distinguishing Haas, the district court found the debtor had done more than simple nonpayment of taxes.

The Eleventh Circuit, saying it was bound by Haas, reversed both lower courts. Discussing Haas, the court observed that section 523(a)(1)(c) contains both a mens rea requirement ("willfulness") and a conduct requirement ("attempting to evade or defeat such tax"). Haas concluded that section 523(a)(1)(C) applies only to conduct constituting evasion of the *assessment* of a tax, so it does not apply to conduct that involves evasion of the *payment* of a tax. Haas relied on the omission of the phrase "or the payment thereof" from section 523(a)(1)(C), in contrast to several sections of the I.R.C. where the applicable language reads essentially that the taxpayer "willfully attempts to evade or defeat any such tax or the payment thereof." The court in Haas felt Congress must have intentionally omitted "or the payment thereof", and so limited the exception to discharge in section 523(a)(1)(C) only to those cases where actions taken by the debtor affected the assessment of the tax. This, the Haas court felt, comported with the Congressional intent to permit the debtor a "fresh start."

Although finding Haas to be binding precedent, the Eleventh Circuit was troubled by its application to a debtor who fraudulently transferred assets to his wife to avoid the payment of his tax debts. The appeals court noted that the Tenth Circuit, in Dalton v. IRS, 77 F.3d 1297 (10th Cir. 1996), also had been faced with a debtor evading the payment rather than the assessment of taxes. The Tenth Circuit rejected the broad holding of Haas, finding instead that the "in any manner" language in section 523(a)(1)(C), coupled with the stated purpose of bankruptcy to relieve only "honest" debtors, evidenced Congress' intention to make a tax nondischargeable when the debtor attempts to evade the payment or collection of tax. Because it believed the phrase "or the payment thereof" was unnecessarily emphasized, causing Haas to be in conflict with other circuits, the Eleventh Circuit panel in this case urged en banc reconsideration. **BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523)**

SAUSA ALERT

JUSTICE AUTHORIZING PARTICIPATION IN ELECTRONIC BANKRUPTCY FILING PROGRAMS

Local bankruptcy courts are beginning to insist on electronic noticing and filing of documents through the Internet. As a large volume filer, the Service will be one of the first required by the court to become involved. To participate, however, SAUSAs need authorization from the Department of Justice. Justice has agreed to issue an authorizing letter to District Counsel to permit SAUSAs to take part.

This letter sets out requirements for participation. One requirement applies if support staff file pleadings. Since most courts consider an electronically filed document's User ID to constitute the signature of the attorney for purposes of federal law, the courts provide User ID and passwords to attorneys only. However, for support staff to be able to access the system, the letter recommends that the bankruptcy court, by local rule, allow for authorized agents and employees of the registered attorney to use the attorney's ID and password. In addition, Justice asks that participating District Counsel establish a written procedure to ensure that the correct version document is ready to be filed and that a record of the person who filed the document is maintained. The letter also sets out records retention requirements, detailing which documents to keep and which document retention format to use.

To get an authorization letter, or for more information, please call or e-mail Richard Charles Grosenick, (202) 622-4208.

1. **BANKRUPTCY CODE CASES: Automatic Stay (§ 362): Commencement or Continuation of Judicial, Administrative or Other Proceeding**
LIMITATIONS: Bankruptcy Code Proceeding, Effect of
Roberts v. United States, 1999 U.S. App. LEXIS 8411 (11th Cir. May 4, 1999) - The automatic stay in bankruptcy, B.C. § 362(a)(1) & (a)(8), does not stay the 90 day time period provided by I.R.C. § 7483 for filing a notice of appeal from a Tax Court decision.

2. **BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523)**
BANKRUPTCY CODE CASES: Priorities (§ 507)
In re Gust, No. CV 398-56 (S.D. Ga. April 12, 1999) - The debtor unsuccessfully argued that a secured tax claim was dischargeable under B.C. § 523(a)(1)(A), which, by referencing section 507(a)(8) addresses only unsecured taxes. The court disagreed with this contention, finding section 523(a)(1)(A) focuses on the type of tax rather than the type of claim. Therefore, a secured federal claim is not dischargeable under section 507(a)(8) in a chapter 7 bankruptcy.

3. **BANKRUPTCY CODE CASES: Returns by Trustee, Debtor In Possession or Debtor: Individual**
In re Farrell, No. 5-97-03837 (Bankr. M.D. Pa. April 12, 1999) - Bankruptcy court believes it has the power under B.C. § 105(a) to compel debtor to file income tax returns, but declines to exercise this power simply because debtor has not filed, without the Service demonstrating other extraordinary circumstances.

4. **BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension Under Bankruptcy Code (§ 108)**
In re Bair, 1999 Bankr. LEXIS 477 (Bankr. W.D. Tex. April 9, 1999) - Taxpayers' Chapter 13 bankruptcy was dismissed October 3, 1997, for failure to make plan payments. Taxpayers then filed a Chapter 7 petition on May 14, 1998, receiving their discharge August 9, 1998. The court found equitable tolling of the three year limitations period of B.C. § 507(a)(8)(A)(i) and the 240-day limitations period of B.C. § 507(a)(8)(A)(ii), was warranted under B.C. § 105(a), because the Service was prohibited from collection by the automatic stay, promptly attempted to exercise its collection rights once the stay was lifted, and because the debtors' conduct in filing successive bankruptcies evidenced a tax avoidance purpose.

5. **BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment: Suspension Under Bankruptcy Code (§ 108)**
Saunders v. United States, No. 96-6236-CIV-DIMITROULEAS (S.D. Fla. Feb. 25, 1999) - Debtor filed chapter 7 bankruptcy in 1994, more than 240 days after taxes were assessed, but voluntarily dismissed his petition. After the order was entered, but before it was docketed, the Service filed a notice of federal tax lien. The court first examined the issue of whether the time period for determining the dischargeability of the tax liabilities was tolled under B.C. § 108(c). Viewing Waugh v. IRS, 109 F.3d 489 (8th Cir. 1997) as representing the majority position, the court

held that the three-year priority period of B.C. § 507(a)(8)(A)(i) is suspended by B.C. § 108(c) and I.R.C. § 6503(b) & (h) for the time the automatic stay prevents the Service from collecting the tax debts. The court also ruled that the NFTL was valid because a court's order is valid when entered, not when docketed. Finally, the court refused to validate an earlier NFTL, filed in Washington, D.C. because the Service thought the debtor was living abroad, when the debtor in fact was residing in Florida. The court found I.R.C. § 6523(f)(2)(B) does not provide the Service can file an NFTL at the taxpayer's last known residence, but must be filed at his actual residence.

6. **BANKRUPTCY CODE CASES: Trustee's Avoidance of Transfers (§ 548)**
United States v. Towers (In re Feiler), 1999 Bankr. LEXIS 137 (B.A.P. 9 February 9, 1999) - Debtors filed tax returns, electing to carry forward sizeable Net Operating Loss. Chapter 7 trustee sought to avoid the election and so receive a refund for the estate. The panel held that an I.R.C. § 172(b)(3) NOL election was an interest in property; the election was a transfer under B.C. § 548 because it disposed of the debtors' right to a current refund in exchange for the NOL carry forward; and the transfer was fraudulent as made while the debtors were insolvent, within one year of filing bankruptcy, without reasonably equivalent value, and where the United States benefitted by not paying a current refund. The panel disagreed with the Service that I.R.C. § 1398 limits the trustee's ability to avoid the election as a fraudulent transfer.

7. **BANKRUPTCY CODE CASES: Use, Sale or Lease of Property (§ 363): "Cash Collateral"**
In re Q-C Circuits Corp., 1999 U.S. Dist. LEXIS 4853 (E.D.N.Y. April 8, 1999) - Service did not receive notice from the bankruptcy court of cash collateral orders or sale of property on which first priority federal tax lien attached. The court ordered a third party bank to disgorge sums received from the sale of the property, including post-petition interest from the date of sale.

8. **DAMAGES, SUITS FOR: Against U.S.: Unauthorized Collection (§ 7433)**
Addington v. United States, 1999 U.S. Dist. LEXIS 4271 (S.D. W.Va. March 12, 1999) - I.R.C. § 7433 cannot be used to challenge assessment of taxes nor Service's rejection of taxpayers' offer in compromise.

9. **DISPOSITION OF PROPERTY ACQUIRED**
LEVY: Sale: Procedures
Cohn v. United States, 1999 U.S. Dist. LEXIS 6030 (D. Az. April 13, 1999) - Plaintiff attended administrative, sealed bid sale of residence, but did not bid at the sale. When the high bidder defaulted, the revenue officer contacted the next highest bidder and sold the property to him at his original bid price. Plaintiff objected, but the court found he lacked standing under the Administrative Procedures Act because he failed to bid at the sale. The right possessed by every

citizen, to require that the government be administered according to law, was insufficient by itself to invoke standing, the court ruled.

10. **LEVY: Exempt Property**

Hughes v. I.R.S., 1999 U.S. Dist. LEXIS 7079 (E.D. N.Y. April 22, 1999) - Service levied on bank account containing Social Security Disability payments. The court upheld the levy, holding I.R.C. §§ 6334(a)(10) & (11) exempts from levy only amounts "payable," and therefore "not yet paid" to the taxpayer. Once the disability payments are deposited into a bank account, the funds are subject to the Government's tax levy.

11. **LIENS: Priority Over Divorced Spouse**

Agents Pension Plan of Allstate Insurance Company v. Weeks, 1999 U.S. Dist. LEXIS 6289 (N.D. Ill. April 16, 1999) - Service filed Notice of Federal Tax Lien against taxpayer just before a divorce court ordered half his pension benefits be paid to his ex-wife as community property. The court here ruled that the taxpayer had an undivided one-half interest in the community property, including his pension, and that the Service's lien attached to that interest before entry of the Qualified Domestic Relations Order.

12. **LIENS: Priority Over Purchasers**

Sejax Warehousing, Ltd. v. United States, 1999 U.S. Dist. LEXIS 6011 (M.D. Fla. April 12, 1999) - The court held, under United States v. Creamer Industries, Inc., 349 F.2d 625 (5th Cir. 1965), that a federal tax lien had priority over a transfer of real estate which occurred before, but was not recorded until after, the NFTL was filed. The purchaser would be able to defeat the tax lien only by showing that it paid "adequate and full consideration," under I.R.C. § 6323(a).

13. **LIMITATIONS: Assessment and Collection: Suspension of Running**

Kirch v. United States, 83 AFTR2d ¶ 99-743 (S.D. Ohio March 31, 1999) - In 1986, taxpayers filed petition with Tax Court after receiving 30-day notice (Form 4549), but before Service issued Notice of Deficiency. Due to collateral litigation, the tax court case was not dismissed until 1994, and a new assessment was not made until 1995. The government unsuccessfully argued that the statute of limitations had been tolled by the tax court petition under I.R.C. § 6503(a)(1). The court disagreed, finding the statutory language "a proceeding in respect of the deficiency ..." clear. As the tax court suit predated the deficiency notice, the court observed, the Service was not precluded by I.R.C. § 6213(a) from making an assessment within the original statute of limitations.

14. **LIMITATIONS: State Law, Effect of**
TRANSFEREES AND FRAUDULENT CONVEYANCES: Uniform Fraudulent Conveyance Act

United States v. Boyce, 1999 U.S. Dist. LEXIS 6023 (S.D. Cal. April 8, 1999) - Service assessed taxes and attempted to foreclose on real estate previously

transferred by taxpayers to shell corporation. Service moved under Uniform Fraudulent Conveyance Act to set aside transfer of real estate, but corporation objected, arguing that the state statute of limitations had expired. Under United States v. Summerlin, 310 U.S. 414 (1940), the court ruled, the United States is not bound by state statutes of limitation.

15. **PENALTIES: Failure to Collect, Withhold or Pay Over: Responsible Officer TRUST FUND TAXES: Collection**
Harris v. United States, 1999 U.S. App. LEXIS 9774 (11th Cir. May 24, 1999) - Corporate vice-president in charge of sales argued that she was not a responsible person under I.R.C. § 6672 because she was unaware the company was delinquent in paying employment taxes; that although she could sign routine, recurring checks she needed approval from the corporate president to sign others; and that she did not own stock in the company nor did she have authority to hire or fire employees. The district court accepted her arguments and granted her summary judgment. On appeal, the Eleventh Circuit reversed and remanded, basing responsible person liability on "actual authority or ability" to pay taxes. Indicia of responsibility includes holding of corporate office, stock ownership, control of financial matters, ability to hire and fire and to disburse corporate funds. The Eleventh Circuit found the Government presented sufficient evidence on these points to raise issues of material fact, thus, summary judgment was improper.

16. **SUITS: Against the U.S. or Employees: Wrongful Levy**
Gothenburg State Bank & Trust Co. v. United States, 1999 U.S. Dist. LEXIS 7021 (D. Neb. April 9, 1999) - Action under I.R.C. § 7426(a)(1) for wrongful levy, dismissed as untimely under section 6532(c), may be subject to equitable tolling or equitable estoppel (but facts of this case did not support such a remedy).

17. **SUMMONSES: Defenses to Compliance: Privileges: Accountant-Client**
United States v. Frederick, 1999 U.S. App. LEXIS 7420 (7th Cir. May 18, 1999) - The Seventh Circuit slightly amended its opinion of last month to clarify an example of when the attorney-client privilege may attach in an audit proceeding. The amended opinion repeats the original decision that an attorney working with a revenue agent to verify the accuracy of a return is performing non-privileged work. The amended opinion then goes on to state that where the attorney has to deal with issues of statutory interpretation or case law in that same proceeding, the privilege may attach.

18. **SUMMONSES: Defenses to Compliance: Privileges: Work Product Doctrine**
Oneida Ltd. & Subsidiaries v. United States, 1999 U.S. Claims LEXIS 96 (Fed. Cl. May 6, 1999) - Taxpayer waived objection to summonsed documents by not objecting timely under Fed. R. Civ. P. 45(c), although objection was sustained as to Canadian expert's documents because the United States requested them by letter rather than formal discovery. The court also held that core work product information provided to a testifying expert witness should be discoverable unless

such materials bear no probative relationship to the opinion or testimony the expert is likely to give.