



OFFICE OF
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR CENTRAL CALIFORNIA DISTRICT COUNSEL

Attn: John Chinnapongse

FROM: Alan C. Levine
Chief, Branch 1 (General Litigation) CC:EL:GL:Br1

SUBJECT:

This responds to your memorandum requesting our comments on your draft Notice of Intent to Levy and Notice of Your Right to a Hearing and draft letter, which would be sent to a taxpayer after he received a discharge in bankruptcy. This document is not to be cited as precedent.

ISSUE:

Whether the draft notice and accompanying form letter need to be modified to clarify that the federal tax lien does not attach to a taxpayer's post-petition property when the underlying tax liability is discharged in bankruptcy?

CONCLUSION:

The attached draft notice and accompanying letter should be modified to clarify that the federal tax lien does not attach to a taxpayer's post-petition property after the underlying tax liability is discharged in bankruptcy.

FACTS:

The Internal Revenue Service ("Service") filed a Notice of Federal Tax Lien prior to the taxpayer's petition in bankruptcy. Subsequently, the bankruptcy court discharged the taxpayer's tax liabilities. The Service is now considering levying on the taxpayer's prepetition property encumbered with the prepetition tax lien.

LAW AND ANALYSIS:

I.R.C. § 6330 provides the taxpayer with a collection due process hearing prior to levy. Prepetition liens pass through bankruptcy on the debtor's encumbered property, unless provisions of the Bankruptcy Code explicitly strip a lien from the property. Dewsnup v. Timm, 502 U.S. 410 (1992). If the Service files a Notice of

Federal Tax Lien prior to the petition date, the federal tax lien remains on the debtor's exempt property. B.C. § 522(c)(2)(B). E.g., Demarah v. United States, 62 F.3d 1248 (9th Cir. 1995). B.C. § 524(a)(3) permanently enjoins any action by a creditor to recover a discharged debt.

In the draft notice, the opening sentences are incorrect. These sentences provide as follows: "Your federal tax is still not paid. We previously asked you to pay this, but we still haven't received your payment." These sentences are problematic because they suggest that the taxpayer still has a personal liability for the tax, and the Service is trying to collect that liability. The taxpayer, however, has had his tax liability discharged in bankruptcy. We recommend that the entire first paragraph be deleted and the following paragraph be inserted in its place:

The Internal Revenue Service perfected its tax liens by recording Notices of Federal Tax Lien prior to the filing of your bankruptcy petition. Even though you received a discharge in your bankruptcy proceeding, that discharge does not prohibit the Service from enforcing its tax lien against property excluded, exempt, or abandoned from the bankruptcy estate. This letter is your notice of our intent to levy against that property under Internal Revenue Code ("I.R.C.") 6331 and your right to receive a hearing with an Appeals Officer under I.R.C. § 6330. Your schedules list the following properties that are affected:

The second paragraph of the draft notice should also be deleted. That paragraph provides as follows:

We may file a Notice of Federal Tax Lien at any time to protect the government's interest. A lien is a public notice to your creditors that the government has a right to current assets, including any assets you acquire after we file the lien.

The above paragraph is at best confusing. It begins by stating that "We may file" a lien, but the facts are that a Notice of Federal Tax Lien was filed prepetition. Indeed, the Service cannot now file a new tax lien for a discharged tax liability. The paragraph goes on to state the "government has a right to current assets, including any assets you acquire after we file the lien." This is incorrect. At most, after the tax liability has been discharged, the Service's prepetition lien encumbers the debtor's prepetition property. The prepetition lien does not encumber the debtor's property acquired post-petition. E.g., Dinatale v. United States, 235 B.R. 569, 574 (Bankr. D. Md. 1999) (listing cases holding that federal tax lien does not attach to post-petition property after tax liability discharged). This entire paragraph should be deleted. The effect of the prepetition federal tax lien is adequately explained in the first paragraph that we have rewritten.

The third paragraph of the notice contains the same defect as the second paragraph, i.e., it fails to clarify that the federal tax lien encumbers only the taxpayer's prepetition property. Thus, the statement that "we may take your property, or rights to property, such as real estate, automobiles, business assets, bank accounts, wages, commissions, and other income" is correct only if these items were prepetition assets. This sentence should be rewritten to state "If you don't pay the amount you owe, make alternative arrangements to pay, or request Appeals consideration within 30 days from the date of this letter, we may take your property that you acquired prior to bankruptcy." In light of the above changes, Letter 1058 is not appropriate for this situation.

Finally, the draft letter notice does not explain that the federal tax lien remains on exempt property. We recommend that you cite section 522(c)(2)(B) for this principle and the Ninth Circuit's decision in Demarah. This should clarify the situation for the debtor.

If you have any further questions, please let us know.

cc: Assistant Regional Counsel (GL) Western Region
Chief of Procedural Branch, CC:DOM:FS:PROC