OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL (SBSE), AREA 4 (CLEVELAND)

FROM: Kathryn A. Zuba
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Determination of Priority in Bankruptcy Cases pursuant to Palmer v. United States, 219 F.3d 580 (6th Cir. 2000)

This responds to your request dated October 12, 2000, requesting our review of your draft memorandum to the Cleveland Insolvency Group containing recommended guidelines for applying tolling to bankruptcy cases filed in the Northern District of Ohio in light of the Sixth Circuit's decision in Palmer v. United States, 219 F.3d 580 (6th Cir. 2000). Palmer held that priority periods are not tolled automatically during prior bankruptcy cases but are only tolled on a case-by-case basis pursuant to B.C. § 105(a). This document is not to be cited as precedent.

We concur with your draft memorandum insofar as it addresses the classification of taxes on proofs of claim. Our position is that under Palmer taxes can be claimed as priority on proofs of claim based on tolling so long as the Service determines that tolling is justified on a case-by-case basis, and the Service's reliance on tolling is indicated on the proof of claim. We believe that the precise factors relied upon to select cases for which tolling will be claimed should be developed by the local counsel offices based on local case law and other relevant considerations. Your draft memorandum is consistent with our position.

We make the following suggestions regarding your proposed guidelines for selecting tolling cases. Regarding number 1, "Debtor has filed two or more prior bankruptcy petitions," we believe that additional criteria establishing that debtor is abusing the bankruptcy system by filing multiple bankruptcy petitions within certain time periods will be helpful. For example, the two prior bankruptcy petitions were filed within the past X years, or only X months lapsed between each dismissal or refiling. We also suggest that you may want to consider an additional criteria for identifying tolling cases to include cases where a bankruptcy petition is filed shortly after the Service issues collection notices or commences collection action. We also suggest that it might be helpful to add to add a general catch-all criteria such as "other facts exist which

establish that the debtor is using bankruptcy solely to evade his or her federal tax responsibilities."

We do not concur in your memorandum insofar as it suggests that the Service can collect a tax based on the administrative determination that the tax is nondischargeable due on tolling. Our position has been that if pursuant to the law of the circuit tolling is not automatic but occurs on a case-by-case basis pursuant to section 105(a), then the Service should not take collection action based on the administrative determination that a tax is nondischargeable due to tolling, without first obtaining a ruling as to dischargeability from the bankruptcy court. Otherwise, if the court disagrees with the Service, the Service risks being subject to damages and attorney's fees for violating the injunction against collecting discharged taxes. See B.C. § 524(a)(2). Additionally, the fact that the Service took unilateral collection action may influence a court to rule against the Service in determining whether tolling is justified under section 105(a). In the Sixth Circuit, collection action should not be taken based on the assumption that priority periods will be tolled.

Please contact this office at (202) 622-3620 if you have any questions or comments.

cc: Area Counsel (SB/SE), Area 3 (Jacksonville)
Area Counsel (SB/SE), Area 4 (Chicago)