



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SB/SE:5 (St. Paul)

FROM: Lawrence H. Schattner
Chief, Branch 2 (Collection, Bankruptcy and Summonses)

SUBJECT: Filing NFTL for Post-Petition Liabilities after Chapter 13
Confirmation

This Chief Counsel Advice responds to your request for advice in response to a question posed to you by your local insolvency unit. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

ISSUES

1. Whether filing a Notice of Federal Tax Lien ("NFTL") for post-petition taxes after a plan has been confirmed in a Chapter 13 bankruptcy violates the automatic stay.
2. Whether a Collection Due Process ("CDP") hearing under section 6320 of the Internal Revenue Code seeking to review the filing of a NFTL for post-petition taxes violates the automatic stay.

CONCLUSIONS

1. No, although the Chapter 13 estate continues to exist after plan confirmation, the federal tax lien only attaches to property of the debtor and not property of the estate.
2. No, a CDP hearing to review the filing of a NFTL for post-petition taxes does not violate the automatic stay.

LAW AND ANALYSIS

The automatic stay bars "any act to create, perfect, or enforce any lien against property of the estate." B.C. § 362(a)(4). The stay remains in effect until the property is no longer part of the estate or until the case is closed, dismissed, or

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converted. B.C. § 362(c)(1). Thus, as long as property remains part of the bankruptcy estate, a creditor cannot attempt to perfect a lien against the property unless the action is excepted from the automatic stay.

Filing a bankruptcy petition creates an estate that consists of the property described in section 541 of the Bankruptcy Code. In a Chapter 13 bankruptcy, the estate also includes property acquired after commencement of the case but before the case is closed, dismissed, or converted. B.C. § 1306. These provisions seem to contemplate that the Chapter 13 estate will continue to exist and hold property after the plan is confirmed and until the case is finished. In apparent conflict, however, another provision of the Code states that, “except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.” B.C. § 1327(b).

Courts have recognized this apparent conflict between sections 1306 and 1327 and have come up with several different ways of harmonizing the two sections. Some courts hold that on confirmation all property vests with the debtor and the estate ceases to exist, unless the plan provides otherwise. See, e.g., In re Toth, 193 B.R. 992, 996 (Bankr. N.D. Ga. 1996); In re Petruccelli, 113 B.R. 5, 15 (Bankr. S.D. Cal. 1990); In re Mason, 45 B.R. 498, 500 (Bankr. D. Or. 1985). Under this theory, the debtor’s property is not protected by the automatic stay. These decisions are based, in part, on a policy choice to favor post-petition creditors in order to make it easier for debtors to obtain post-petition financing. See In re Mason, 45 B.R. at 500.

Other courts hold that all property remains property of the estate during the pendency of the bankruptcy so that creditors must seek relief from the stay in order to pursue collection action. See, e.g., In re Schewe, 94 B.R. 938, 945 (Bankr. W.D. Mich. 1989); In re Aneiro, 72 B.R. 424, 429 (Bankr. S.D. Cal. 1987). These decisions are based on a policy choice to favor debtor protection in order to encourage financial rehabilitation. See In re Schewe, 94 B.R. at 945.

Another group of courts have recently held that on confirmation all property in the estate reverts in the debtor and is no longer property of the estate. All property acquired post-confirmation automatically becomes property of the estate whether or not it is necessary to fund the plan. See, e.g., United States v. Holden, 258 B.R. 323, 327 (D. Vt. 2000); In re Rangel, 233 B.R. 191, 198 (Bankr. D. Mass. 1999); In re Fisher, 203 B.R. 958, 962 (Bankr. N.D. Ill. 1997). These decisions attempt to protect both the debtor’s ability to consummate a plan and post-petition creditors’ ability to deal freely with the debtor. See In re Rangel, 233 B.R. at 198.

A fourth group of courts hold that on confirmation all property not necessary to fund the plan becomes property of the debtor. After confirmation, only property needed to fund the plan becomes property of the estate. See, e.g., In re Leavell, 190 B.R.

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536, 540 (Bankr. E.D. Va. 1995); In re Thompson, 142 B.R. 961, 964 (Bankr. D. Colo. 1992); In re Root, 61 B.R. 984, 985 (Bankr. D. Colo. 1986). Like the decisions noted above, these cases try to strike a balance between protecting a debtor's ability to complete a plan and promoting post-petition lending. These decisions are based on a policy choice to favor debtor possession of property unless the property is necessary to effectuate the plan. See In re Leavell, 190 B.R. at 541.

The Service's position, consistent with the last group of cases, is that the post-confirmation bankruptcy estate is limited to the portion of earnings or other property necessary to fund the plan. IRM 5.9.6.2.2(1). Under section 1327 property is generally vested in the debtor on confirmation. Section 1306 provides for a limited post-confirmation estate consisting of after-acquired property described in section 1322(a)(1).¹

Although a limited post-confirmation estate exists, a NFTL filed against property of the debtor does not attach to property of the estate. When a debtor fails to pay a post-petition liability after notice and demand a federal tax lien attaches to all of the debtor's property and rights to property. I.R.C. § 6321. A federal tax lien under section 6321 only attaches to property belonging to the debtor and not to property of the estate. Although the Chapter 13 bankruptcy estate is not a separate taxable entity, it is a separate entity for purposes of holding and distributing property. See B.C. §§ 541, 1306 & 1327(b). Thus, a lien for the debtor's post-petition liabilities does not attach to property of the Chapter 13 bankruptcy estate. Because the federal tax lien does not attach to property of the estate, notice of the lien would not violate section 362(a)(4).

The filing of a NFTL triggers certain taxpayer protections, specifically the taxpayer's right to request a CDP hearing with the Office of Appeals. I.R.C. § 6320. When the Service files a NFTL it sends to the taxpayer a letter 3172, Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC 6320. Enclosed with the

¹ Case law within the Eighth Circuit supports this position. Although the Eighth Circuit has not directly addressed the question of what property is part of the estate, it has held that the estate continues to exist after confirmation. Security Bank of Marshalltown v. Neiman, 1 F.3d 687, 690 (8th Cir. 1993). Most importantly, the court favorably cited In re Root, which, as discussed above, holds that the post-confirmation estate "consists of the property and future earnings of the debtor dedicated to the fulfillment of the Chapter 13 Plan." 61 B.R. at 985. Further, the Eighth Circuit determined that the Service's post-confirmation levy against funds held by a Chapter 13 trustee and committed to paying attorney's fees did not violate the automatic stay. Laughlin v. United States, 912 F.2d 197 (8th Cir. 1990) (discussing the purposes of the automatic stay but not whether the funds were property of the estate).

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letter is Publication 1660, Collection Appeal Rights; Publication 1450, Instructions on Requesting a Certificate of Release of Federal Tax Lien; Form 668Y, Notice of Federal Tax Lien; and Form 12153 Request for a Collection Due Process Hearing. These documents simply inform taxpayers that a NFTL has been filed and describes the steps they can take to contest that action. The purpose of the automatic stay is not to prevent all communication with a debtor, but to protect the debtor “from the threat of immediate action by creditors, such as foreclosure or a lawsuit.” Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 86 (3d Cir. 1988). The documents sent after a NFTL has been filed do not threaten collection action, and therefore do not violate the automatic stay. See In re LTV, 264 B.R. 455, 472 (Bankr. N.D. Ohio 2001) (notice of jeopardy assessment that informed debtors collection will begin without further notice violated automatic stay); In re Convington, 256 B.R. 463 (Bankr. D. S.C. 2000) (sending notice of intent to levy and right to collection due process publication violated the automatic stay).

At the CDP hearing itself, the taxpayer may raise:

any relevant issue relating to the unpaid tax . . . including -

- (i) appropriate spousal defenses;
- (ii) challenges to the appropriateness of collection actions; and
- (iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, and installment agreement, or an offer-in-compromise.

The person may also raise at the hearing challenges to the existence or the amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

I.R.C. § 6330(c)(2). A CDP hearing under section 6320 seeks review of an action that does not itself violate the automatic stay.² Because filing a NFTL does not violate the automatic stay, a hearing to review the propriety of that lien would not violate the stay.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Even though the CDP hearing itself does not violate the automatic stay, the Service must be careful in discussing and accepting collection alternatives. Before the Service accepts a collection alternative, such as an offer in compromise, it should determine if there are sufficient assets to fund the alternative that are not already

² We make no comment on the impact of a collection due process hearing related to a proposed levy action.

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committed to funding the plan. The Service should be careful not to accept funds that are property of the estate. See B.C. § 362(a)(3).

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any further questions please call the attorney assigned to this matter at (202) 622-3620.