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Consumer Forum

Tax Pitfalls: Considerations for the Prudent Practitioner

Hon. Christopher J. Panos, Moderator

U.S. Bankruptcy Court | Boston

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Speakers:

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PINECONE'S PLIGHT

Silas "Pinecone" McGregor, a grizzled New Hampshire logger, has been in the timber business for over 30 years. He operates McGregor Logging & Hauling, LLC, a small company that fells trees and transports them to local mills. For tax purposes, McGregor Logging & Hauling, LLC has always **elected to be treated as an S corporation**. Silas is the sole owner and active manager.

He is also the sole member of Logger's Pizza, Inc., which, while remotely located near First Connecticut Lake, is well-known as the best source of gourmet pizza in the North Woods.



Business has been tough lately. A series of unusually wet springs has limited his logging days, and a major mill closure last year significantly reduced demand for his services. To keep his crew employed and cover operating costs, **Silas fell behind on his payroll taxes for the past 18 months, specifically the federal income tax and FICA taxes withheld from his employees' paychecks**. The IRS has sent several increasingly stern notices, and a Revenue Officer recently informed him they were preparing to assess the Trust Fund Recovery Penalty against him personally.

Silas is also **behind on his New Hampshire sales and use tax payments** ("Meals and Rentals Tax NH RSA 78-A") **due to the State and, having personally used those funds** for a new Pisten Bully groomer used by the local snowmobile club, has no ability to pay those amounts due to the State.



Silas's logging company also owns several pieces of heavy equipment, including a 20-year-old feller buncher and a skidder, both of which are fully depreciated on the company's books. He's been contemplating selling them to a younger logger in Aroostook County, Maine to generate some cash, but he's unsure of the tax implications given their zero book value.

In more prosperous times, Silas had invested in a few smaller ventures. One such venture, "New Hampshire Wood Products LLC," a partnership with his cousin that produced custom timber frames, incurred significant losses during the 2020-2022 recession. Silas believes he has substantial net operating loss carryforwards from his share of those losses, which he'd hoped to use to offset future income from McGregor Logging & Hauling.



A few months ago, the IRS filed a Notice of Federal Tax Lien against Silas personally for unpaid income taxes from 2021 and 2022, totaling \$75,000. This lien was filed shortly after he inherited his childhood home in Dixville Notch, New Hampshire, which he now occupies. He understands New Hampshire offers a generous homestead exemption, and he's hoping to protect the equity in his home if he has to file for bankruptcy.

Desperate to avoid bankruptcy, Silas had submitted an Offer in Compromise to the IRS six months ago, proposing to settle his entire outstanding tax liability for a fraction of the amount owed. He hasn't heard back yet, but he's worried that filing for bankruptcy might automatically terminate the offer or complicate matters further.



Just last week, one of his main clients, a large paper company, unexpectedly declared bankruptcy itself, leaving Silas with a \$50,000 unpaid invoice for timber delivered. This was the final straw. He's now seriously considering filing for individual bankruptcy under Chapter 7. He has some other creditors too, including a local bank for a loan on a newer forwarder, and several suppliers. He's heard that bankruptcy trustees have powers to claw back certain payments and sales made before the bankruptcy filing.

He's particularly concerned about a recent sale of an older, fully depreciated log loader to a friend at what he thought was a fair market price. He also vaguely remembers something about certain tax debts being "priority" in bankruptcy, and he's worried about how his various tax liabilities will be treated.



IRS COLLECTION PROCESS – 10 YEAR STATUTE

- Pursuant to IRC §6502 the IRS has 10 years to collect a tax debt
- The 10-year statute begins upon the date of assessment, not the date of filing
- There are a number of actions that will toll, or suspend, the collection statute





10 YEAR STATUTE

- Taxpayer files bankruptcy—IRC §6503(h)
 - The time for a bankruptcy plus six months!
- Filing of a Collection Due Process hearing request—Regulation §301.6330-1(g)
- Filing of an Offer in Compromise—Regulation §301.7122-1(i)
- Pending Installment Agreement — IRC §6331(i)(5)



TRANSCRIPTS

- This is why we pull transcripts
- How much time remains will drive the decision on how to resolve the tax debt
- Need to review the Transcripts for things the taxpayer has done that may have tolled (extended) the statute



RESOLVING AN OUTSTANDING DEBT



Installment Agreement

Uncollectable

Offer-in-Compromise

Bankruptcy



Don't forget about the state!

1. More difficult to settle
2. Longer statute
3. Fewer taxpayer rights
4. More aggressive





CAN THIS BE RESOLVED THROUGH BANKRUPTCY?

- Chapter 7 Discharge
- Chapter 11 or 13 repayment plan:
 1. Strip off penalties
 2. Force an IA on an otherwise unwilling IRS

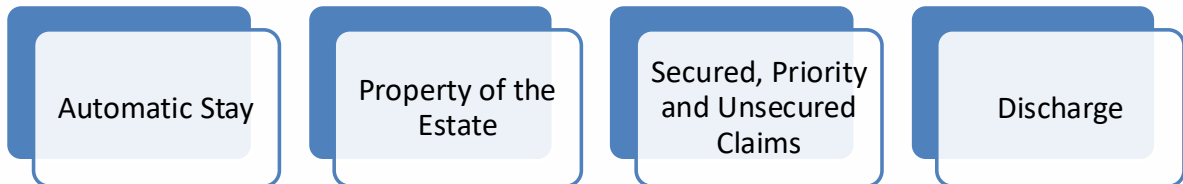


DISCHARGING TAXES IN BANKRUPTCY

- Can be used to resolve outstanding tax issues
- Some income taxes may be dischargeable
- Stop collection activity
- Force an installment agreement
- Discharge non-priority debt



KEY CONCEPTS IN BANKRUPTCY



CLASSIFICATION OF TAX DEBT IN BANKRUPTCY

- **Secured Tax Debt.**
 - Tax debt becomes secured when the taxing authority files a notice of federal tax lien on the land records *in the county where the real property is located* (or in CT, in the case of personal property, the Office of the Secretary of State).
 - Only the taxes listed on the lien are secured
 - Generally non-dischargeable, BUT, some exceptions!
 - If there is \$1 of equity above the homestead exemption, the lien remains
 - Wait until the Chapter 7 Trustee filed the No Asset Report
- **Priority Tax Debt.** Always non-dischargeable. End of story.
- **Unsecured/Nonpriority.** Sometimes dischargeable



AUTOMATIC STAY: WHEN DOES IT NOT APPLY?

What does it **NOT** stay:

- No stay regarding audits, either ongoing or that may be noticed during bankruptcy case
- No stay against non-debtor assessments, such as trust fund recovery investigations and assessments
- No stay against criminal investigations



AUTOMATIC STAY: WHAT IS STAYED?

What does it stay? Liens, Levies & Seizures

- Collection activities, such as filing liens, executing on levies or garnishments, or seizing assets of the debtor.
- If a debtor is already subject to a levy, that activity will also stop.
- If the IRS has seized assets in the 90 days before the Filing Date, whether they have to return them is dependent on whether the transfer is a "preference" and focuses on if the seizure enables the creditor to receive more than they would in a Chapter 7 liquidation, but for the transfer.
- Factors to consider:
 - Is the tax debt secured or priority?
 - What was seized?
 - When did the seizure occur?
 - Did other creditors have priority over the IRS in the asset?



DISCHARGING TAX DEBT

- Only income tax may be discharged
- Liability from a return which was due, with extensions, 3 or more years before filing
- Liability must be assessed 240 days or more before filing
- Late filed returns must be filed at least 2 years prior to filing



WHAT IS A “RETURN”?

A return that satisfies the requirements of applicable nonbankruptcy law **(including applicable filing requirements)**, including a return prepared pursuant to § 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to § 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

TEST: “Beard”

(1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax laws.”

**Beard v. Commissioner*, 82 T.C. 766 (1984) aff'd, 793 F.2d 139 (6th Cir. 1986).

Generally an SFR (6020(b) return) is not considered a return

EXCEPTION: If the debtor signs the SFR, that may constitute a “return”. 26 USC 6020(a)



3 YEAR RULE – 507(A)(8)(A)(I)

The critical date for the three year look back period to commence is when the return was last DUE, including extensions, *not* when the return was filed, which is immaterial (for this element of the statute).

**See United States v. McDermott (In re McDermott), 286 B.R. 913 (M.D. Fla. 2002)*

Court has no discretion, no equitable considerations. Deadlines are fixed. Court in *Moroney* would not deem tax returns filed 4-6 years late as "returns" when IRS had already assessed taxes based upon their own Substitute Return.

Moroney v. United States (In re Moroney), 352 F.3d 202 (4th Cir. 2003)



2-YEAR RULE – 11 U.S.C. § 523(A)(1)(B)(II)

Taxpayer Must Self-File a Return

"[I]n order for a document to be considered a 'return,' under either the bankruptcy or the tax laws, it must (1) purport to be a return; (2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax laws." *Moroney v. United States (In re Moroney), 352 F.3d 202 (4th Cir. 2003); Beard v. Commissioner, 82 T.C. 766 (1984) aff'd, 793 F.2d 139 (6th Cir. 1986)*



LATE FILED RETURNS: 2 YEAR RULE

§ 523(a)(1)(B) of the Bankruptcy Code:

Excepts from *discharge* a tax debt “with respect to which a return, or equivalent report or notice, if required – (i) was not filed or given; or (ii) was filed or given after the date on which such return... was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.”



What is a “Return” has resulted in the “*One Day Late Rule*” – circuit split among the courts.

First, Fifth, Tenth Circuits: “the applicable filing requirements” mean the filing deadline so one day late = no discharge.

Majority of Courts continue to follow *Beard*, including the Second Circuit. These Courts focus on the “honest and reasonable effort” language. Typically, a post assessment late filed return will not qualify.



What is good tax policy?

- The tax in question must have been assessed more than 240 days prior to the bankruptcy (plus any period of time during which an offer in compromise was pending, plus 30 days).
- An amended return is a new assessment.
- Installment agreements do not toll this period.
- Offers in compromise made prior to the assessment do not toll the 240-day period. See *United States v. Aberl (In re Aberl)*, 78 F.3d 241 (6th Cir. 1996); *In re Colish*, 239 B.R. 670 (Bankr. E.D.N.Y. 1999).
- Each assessment must be reviewed separately for this determination.



LIEN STRIPPING IN BANKRUPTCY

- A NFTL perfects the government's interest against third-parties.
- An NFTL can reach exempt or excluded property (i.e., a 401 (k) or IRA), since the IRS is not bound by state exemption laws
- States have different rules for perfection of security interests
- Some require only one filing
- Some require 2 filings: the local land records for real estate and a central authority (i.e. secretary of the state) for personal property
 - For example, Connecticut law (Conn. Gen. Stat. § 49-32a) requires: "Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the United States and for costs and damages payable to the United States and certificates and notices affecting such liens shall be filed in the office of the Secretary of the State in accordance with subsection (1) of § 42a-9-403."



It is often said that bankruptcy cannot disturb liens and that security interests pass through bankruptcy. This is particularly important in the context of a Federal Tax Lien ("FTL") since the FTL will pass through bankruptcy and attach to the debtor's future interests. Thus, while the underlying tax debt may be sufficiently old to be discharged in bankruptcy, if the FTL remains and the debtor owns or later acquires lienable property (i.e. their home) the IRS will still be able to execute on its tax lien. See, *IRS v. Orr (In re Orr)*, 180 F.3d 656 (5th Cir 1999).



- The Tax Lien can be stripped in Bankruptcy. 11 U.S.C. § 506(a).
- Pursuant to §506(a), "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extend of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent of the value of such creditor's interest of the amount so subject to setoff is less than the amount of such allowed claim."



- To summarize – if the Debtor has no non-exempt property, the lien comes off!
- Caveat – This is **NOT** automatic. The Debtor needs to commence an Adversary Proceeding, which is a lawsuit with the bankruptcy case, to obtain this relief.
- In *Dewsnup v. Timm*, 502 U.S. 410 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992), the Supreme Court held that a Chapter 7 debtor could not strip down a partially secured lien. The basis of the holding was that liens are supposed to emerge from bankruptcy unaffected, except as specifically set forth in the Bankruptcy Codes, such as under § 522(f).
- In *re McNeal*, 477 Fed. Appx 562 (11th Cir. 2012) held that a chapter 7 debtor could strip off a *wholly unsecured lien*. In such a case, a FTL filed against an underwater property, could be avoided.



The fun is over!

Bank of Am., N.A. v. Caulkett, 135 S. Ct. 1995, 1996-97, 192 L. Ed. 2d 52 (2015) ("A debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under § 502 of the Bankruptcy Code.")

- What if the debtor asked the court to overrule *Dewsnup*?



Chapters 11 and 13 provide more flexibility for lien stripping.

- *C.I.R. v. Johnson*, 415 B.R. 159, 170 (W.D. Pa. 2009) (allowing lien stripping in a Chapter 11 *post-Dewsnup*)
- *In re Brinson*, 485 B.R. 890 (Bankr. N.D. Ill. 2013) (allowing lien stripping in a Chapter 13 *post-Dewsnup*)
- *In re Blendheim*, 2015 WL 5730015, at *12 (9th Cir. Oct. 1, 2015) (*post Caulkett*, Chapter 20s still allowed)





Trust Fund Taxes, Tax Return Issues, Tax Claims

ABI Consumer Bankruptcy Forum

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Disclaimer

This presentation is intended for informational purposes only. It represents some positions on limited issues based on the law in effect at the time of the presentation and Department interpretation thereof, as well as the opinions and conclusions of its presenter.

For the current status of any tax law, practitioners and taxpayers should consult the source documents (i.e., Revised Statutes Annotated, Rules, Case Law, Session Laws, etc.) for independent verification.



"I want to consolidate all my little threatening letters for back city, state, and Federal taxes into one big threatening letter."

What are Trust Fund Taxes?

- Taxes collected from a customer or employee for the purpose of paying them to the government are, upon collection, held in trust for the governmental entity.
- The Trust is created at the moment the taxes are collected from the customer or at the moment an employee is paid and the taxes are withheld.
 - “We conclude, therefore, that AIA created a trust within the meaning of § 7501 at the moment the relevant payments (from customers to AIA for excise taxes and from AIA to its employees for FICA and income taxes) were made.” Regier v. IRS, 496 U.S. 53, 58 (1980)(citing 26 USCS 7501 and 7512).
- Typical Tracing Rules do Not Apply:
 - “Unlike a common-law trust, in which the settlor sets aside particular property creates a trust in an abstract amount – a dollar figure not tied to any particular assets – rather the Trust is created at the moment the taxes are collected from the customer and at the moment an employee is paid but the taxes are withheld. Regier v. IRS, 496 U.S. 53, 59 (1980)(citing 26 USCS 7501).
 - LIBT (Lowest Intermediate Balance Test) - roots in trust law – rejected by the Supreme Court in Regier
 - Nexus Test – Regier v. IRS - voluntary payments

Trust Fund Tax Examples



Federal Trust Fund Taxes

- Income taxes withheld by employers
- Employment taxes
 - Social Security taxes (EE portion)
 - Medicare Taxes (EE portion)



State Trust Fund Taxes

- Income Tax
- Sales tax (ad volarem = based on price of item sold)
 - General Sales tax
 - Meals and Rentals tax (NH)
- Excise taxes (typically based on unit sold)
 - Tobacco tax
 - Alcohol tax
 - Gasoline tax
- Utilities (sometimes ad volarem (UPT))
(sometimes based on usage)

Personal Liability For Trust Fund Taxes - Federal

- Trust Fund Recovery Penalty (TFRP) – 26 U.S.C. § 6672

“Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.”

Income, Social Security and Medicare taxes, Railroad Retirement taxes, Excise taxes

The responsible person may be one or more of, but not limited to, the following:

- Officer or employee of a corporation
- Partner or employee of a partnership
- Employee of a sole proprietorship
- Corporate director
- Shareholder
- Another corporation
- Surety lender
- Limited Liability Company, member, manager, or employee
- Trustee or agent with authority over the business funds
- Other person or entity outside the delinquent business

TFRP may be assessed against any person who is responsible for collecting or paying withholdings

Personal Liability For Trust Fund Taxes - State

States with Sales Taxes impose responsibility on other parties when the business does not pay the tax.

- The rules for personal liability are codified in each state naming the “responsible parties” and authorizing the state to assess against and make demand for payment from the responsible parties. Relevant Factors generally include whether the person is actively involved in operating the business or in deciding which financial obligations are paid, etc.
- NH RSA 78-A:20, I - Meals and Rental Taxes as Personal Debt to State
 - “All taxes required to be paid by operators, and all increases, interest, and penalty on the taxes, become from the time due and payable to the commissioner of revenue administration a personal debt from the operator liable to pay them to the state to be recovered in an action of debt.”
- NH RSA 78-A:3, XIII - Operator in NH is defined as:
 - "Operator" means any person operating a hotel, charging for a taxable meal, or receiving gross rental receipts, whether as owner or proprietor or lessee, or otherwise. The term operator shall include a rental facilitator and a room facilitator." "Charging for a taxable meal" is not defined by the statute and "person" is defined in RSA 78-A:3, XVI very broadly.

Personal Liability For Trust Fund Taxes – State (Continued)

NH RSA 21-J:38 - Transferee Liability

- “The liability, at law or in equity, of a transferee of property of a taxpayer for any tax administered by the department and any addition to tax, penalty or interest with respect to such tax, shall be assessed, paid and collected in the same manner and subject to the same provisions and limitations as in the case of the tax to which the liability relates, except as otherwise provided in this chapter.
- **Transferee liability shall arise in cases in which the transfer is without adequate consideration, would render the transferor insolvent, or would render the transferor without sufficient property in New Hampshire to cover the amount of his tax liability.**
- The term "transferee" includes, but is not limited to, donee, heir, legatee, devisee and distributee. If any person is deceased, the period of limitation for assessment against such person shall be the period that would be in effect had death not occurred.” (emphasis added)

Treatment of Trust Fund Taxes in Bankruptcy 11 U.S.C. Section 507, 523, 1141, 1192 (SubChptV), and 1328

ALL TRUST FUND TAXES ARE PRIORITY CLAIMS

- 11 U.S.C. § 507(a)(8)(C) – “a tax required to be collected or withheld . . . “

INDIVIDUAL DEBTORS DO NOT DISCHARGE TRUST FUND TAXES

- 11 U.S.C. § 523(a)(1)(A) – “A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt - (1) for a tax or customs duty
 - (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed.”
- 11 U.S.C. § 1328(a)(1) – “. . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt - (2) of the kind specified in section 507(a)(8)(C).”

Treatment of Trust Fund Taxes in Bankruptcy 11 U.S.C. Section 507, 523, 1141, 1192 (SubChptV), and 1328

INTEREST and PENALTIES ARE DISCHARGED IF THEIR RELATED TAX IS DISCHARGED

- 11 U.S.C. § 523(A)(7) –
- (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
 - (7) to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty –
 - (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
 - (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition.

This Means = A tax penalty is discharged if the tax to which it relates is discharged.

In re Burns, 887 F.2d 1541 (11th Cir. 1989);
McKay v. United States, 957 F.2d 689, 693-94 (9th Cir. 1992);
In re Giacchi, 213 BR 517, 520 (Bankr. S.D. Ohio 1997).

Treatment of Trust Fund Taxes in Bankruptcy 11 U.S.C. Section 507, 523, 1141, 1192 (SubChptV), and 1328

CORPORATE DEBTORS MAY DISCHARGE TRUST FUND TAXES only as provided for by the Plan

- 11 U.S.C. § 1141(d)(1)(A) – “Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan – (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title.”
- 11 U.S.C. § 1141(d)(2) – “A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.”

Tax Return Issues – Prepetition – Chapter 13

§ 1308(a) – no later than the day before the meeting of creditors, the debtor must file any returns it was obligated to file during the four-year period ending on the date of the filing of the petition.

In re Peter and Beverly Smith, 325 B.R. 498 (Bank D. NH 2005) – failed to list IRS debt on schedules or alert the court that its returns for the prior four years had not been filed.

- “As business owners and operators, the Debtors can reasonably be expected to have a higher level of experience with and knowledge of tax matters, both business and personal, than an unsophisticated debtor. . . . the fact that the Debtors did not object to the IRS's claim, but, instead, promptly amended their proposed chapter 13 plan to include the IRS obligation, indicates they had some knowledge of a tax obligation at the time of the petition. The Debtors' complete omission of any obligation to the IRS is indicative of, at worst, bad faith and, at best, a lack of reasonable diligence.” (Judge Deasy)

§ 1308(c) – tax returns means federal and state returns including Section 6020 returns, stipulations and final orders

§ 1307(e) – failure to file the Section 1308 returns is cause for conversion or dismissal

Tax Return Issues – Prepetition – Chapter 11

Plan cannot be confirmed unless ALL prepetition AND post-petition returns are filed:

- 11 U.S.C. § 1106(a)(6) - (“A trustee shall . . . for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed in light of the condition of the debtor’s books and records and the availability of such information.”)
- 11 U.S.C. § 1107(a) - (“[A] debtor in possession . . . shall perform all the functions and duties . . . of a trustee serving in a case under this chapter”)
- 11 U.S.C. § 1184 (Subchapter V) - (“[A] debtor in possession shall . . . shall perform all functions and duties, except the duties specified in paragraphs (2), (3), and (4) of section 1106(a) of this title, of a trustee serving a case under this chapter . . .”)
- 11 U.S.C. § 1129(a)(2) - (Chapter 11 plan cannot be confirmed unless “[t]he proponent complies with the applicable provisions of this title.”)
- 11 U.S.C. § 1191(a) - (makes Section 1129(a)(2) applicable in Subchapter V.)

Post-Petition Tax Issues – Chapter 13

The Debtor is obligated to stay current with its post-petition tax obligations

Chapter 13 §1307(c)(1)-(2) – “[T]he court may convert a case under [chapter 13] to one under chapter 7 . . . or may dismiss a case [under chapter 13], whichever is in the best interests of creditors and the estate, for cause including.”

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) failure to start making payments under the plan. §1307(c)(1)-(2).
- Not exclusive. Court may consider matters other than those enumerated in the list. See Karamoussayan v. Mass. Dept. of Revenue (In re Karamoussayan), 656 B.R. 652 (B.A.P 1st Cir. 2024).
- Court can find that failing to file returns is unreasonable delay and bad faith.

Post-Petition Tax Issues – Chapter 11

Plan cannot be confirmed if debtor fails to pay post-petition tax liabilities:

- § 1112(b)(1) – “[T]he court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under [chapter 11], whichever is in the best interests of creditors and the estate, for cause . . .”
- § 1112(b)(1)(4)(I) – “For purposes of this subsection, the term “cause” includes –
 - “(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief.”
- § 1191(a) - (provides that requirements of section 1129(a) and, therefore 1112, apply in Subchapter V)
- 28 USC § 960 – debtors and trustees must pay taxes on time
 - (a) “Any officer and agents conducting any business under authority of the United States court shall be subject to all Federal, State and local taxes applicable to such business . . .”
 - (b) “A tax under subsection (a) shall be paid on or before the due date of the tax under applicable nonbankruptcy law . . .”
- 11 USC § 346(j)(1) and 26 USC § 108(a)(1) - the estate or debtor is not liable for cancellation of

Post-petition Tax Delinquencies Give Rise to:

Administrative Claims in chapter 11 bankruptcy

- § 503(b)(1)(A) – actual and necessary costs of preserving the estate, including . . .
- § 503(b)(1)(B) – any tax incurred by the BK Estate except a Section 507(a)(8) claim;
- § 503(b)(1)(C) – any fine, penalty, or reduction in credit relating to a tax listed in (B) above.

Section 1305(a)(1) claims in chapter 13 bankruptcy

- Pros and cons; Alternative, file a motion to dismiss
- 1007(c)(1) (Unreasonable delay); See Roberts v. Boyajian, 279 BR 396 (1st Cir. BAP 2000)

Priority status of post-petition trust fund taxes

- § 502(i) – claim entitled to priority under § 507(a)(8) but arising post-petition will be allowed or disallowed as if it arose pre-petition (See § 502(i)).
- § 507(a)(8)(C) – “a tax required to be collected or withheld and for which the debtor is liable in whatever capacity”

Automatic Stay – Tax Assessments and Appeals

Under §362(b)(9) the Automatic Stay does not apply to:

- Commencement or continuation of Tax Audits and Issuing Assessments
- Notices of tax deficiency and Demands for tax returns, or
- Administrative hold of accounts while seeking relief for setoff. Citizens Bank v. Stumpf 516 U.S. 16 (1995).

Debtor Appeals of tax notices and assessments – stayed or not stayed?

- What does your state's law say regarding appeals or petitions for reassessment (determination of tax due) during the bankruptcy?
 - §362(a)(1): stays only commencement or continuation of judicial, administrative proceedings against the debtor.
- The 1st, 3rd, 10th and 11th circuits hold that a tax appeal brought by the debtor is not an action against the debtor.
- Avoid multiple venues – making the debtor decide on the appeal or a claim objection.

Claims - Late Claims

- Rule 3002(c)(1) - by motion when there's insufficient notice
 - Debtor's failure to give proper notice renders creditors claim timely and plan of reorganization not binding. In re Intaco P.R., Inc. 494 F2d 94, 99 (1st Cir. 1974); In re San Miguel Sandoval 327 B.R. 493, 507 (B.A.P. 1st Cir. 2005); In re Collier, 307 B.R. 20 (Bank. D. Mass. 2004).
- Chapter 7 - Getting the claim in prior to final distribution. § 726(a)(1)(A) & (B)
- Chapter 13 - § 1308 - Claims can be filed within 60 days after a required return is filed.
- Chapter 13 - § 1305 - Claims can be filed anytime the case is pending and post-petition taxes are due.
- Chapter 11 – Agreement by the parties to accept a late claim.
- Rule 9006 – Excusable neglect

Claims, Placeholders, Estimates, and Informals

- Tolling of Claim's Priority Status – Hanging paragraph in §507 appearing after 507(a)(8)(G)
 - Extended priority period if prior appeal prevented collections activities or
 - If the automatic stay under a prior bankruptcy prevented collections actions.
- Estimated Claims allowed under §502(c)
 - Contingent or Unliquidated claims.
 - Supporting your estimated claims and obtaining additional documentation.
- Informal claims may be amended with formal ones.
 - First Circuit acknowledges the doctrine of informal proofs of claim.
 - Belser v. Nationstar Mortg., LLC (In re Belser), 534 B.R. 228 (1st Cir. BAP 2015).



"Why can't I just give you seven of my oil wells? That way I could enjoy the other three."

Faculty

Cheryl C. Deshaies is the assistant revenue counsel at the New Hampshire Department of Revenue Administration in Manchester, N.H. She is responsible for advising the Commissioner's Office and the division directors on all matters arising from the statutory authority and relating to the tax types administered by the Department. Ms. Deshaies represents the Department before the Board of Tax and Land Appeals and in bankruptcy court. In addition, she manages the Department's participation in taxpayer-related bankruptcies and works with the Department of Justice on litigation matters. She also negotiates with taxpayers and their representatives to bring contested cases to resolution. Before joining the Department, Ms. Deshaies was a consumer bankruptcy attorney for 13 years in Exeter, N.H., where she represented debtors in bankruptcy, debt adjustment, collection defense, foreclosure defense and wrongful foreclosure actions, and related litigation. Her bankruptcy work included consumer and small business chapter 7 and 13 cases as well as individual and small business chapter 11 reorganizations. From 2000-10, Ms. Deshaies was an associate in the bankruptcy law group at McLane, Graf, Raulerson & Middleton, PA, now known as McLane Middleton, where she had an active creditor rights practice representing small to large financial institutions in and out of bankruptcy involving stay relief, foreclosure and secured party sales, creditor committee representation, negotiation of cash collateral and debtor-in-possession financing arrangements, defense of avoidance and lien-termination actions, objections to discharge and dischargeability, and third-party plans. She is licensed to practice before the state courts in New Hampshire and the Commonwealth of Massachusetts, as well as the U.S. Bankruptcy Court and the U.S. District Court for the District of New Hampshire and the First Circuit Court of Appeals. Ms. Deshaies received her B.S. from the University of New Hampshire and her J.D. from Vermont Law School, where she was a member of its law review.

Joanna M. Kornafel is a partner with Green & Sklarz LLC in New Haven, Conn., where she represents individuals and clients with complex financial and litigation needs in a wide array of industries such as health care, construction, horticulture, retail and hospitality. Her practice focuses on commercial bankruptcy, civil litigation matters, unfair trade practices (CUTPA), business torts, breach of contracts, debtor/creditor litigation, workouts, bankruptcy litigation and other commercial litigation matters. Ms. Kornafel has experience handling all aspects of bankruptcies and workouts, representing secured and unsecured creditors, debtors, bankruptcy trustees and acquirers of businesses in chapter 11 bankruptcies. In addition, she has represented clients in state and federal courts and has prosecuted and defended evidentiary hearings related to applications for preliminary injunctions, applications for prejudgment remedy, and contested matters in bankruptcy court. Ms. Kornafel is actively involved in the Connecticut Bar Association (CBA) and currently serves as the co-chair of the annual Connecticut Bankruptcy Conference. She is the current vice chair of the Connecticut Network of the International Women's Insolvency & Restructuring Confederation (IWIRC), and she was selected as a Fellow of the American Bar Association for Business Law (2019-21). She has been a Fellow of the American Bar Foundation since 2017. In 2020, Ms. Kornafel received the CBA's Vanguard Award, and she was listed as a *Connecticut Super Lawyers* "Rising Star" from 2019-21 and a "Super Lawyer" from 2024 in the area of business bankruptcy. Prior to attending law school, she worked for several years for the global management consulting firm McKinsey & Company. Ms. Kornafel is admitted to practice in Connecticut, Massachusetts, the U.S. District Court for the District of Connecticut, the U.S. Tax Court and the U.S. Supreme Court. She received her B.A. with honors from McGill Univer-

sity in Montréal and her J.D. from Boston College Law School. While in law school, she was selected for the London Study Abroad Program, where she interned in the General Counsel Division at the Financial Services Authority and attended classes at King's College London. She was also a student attorney in the Civil Litigation Clinic at the Boston College Litigation Assistance Bureau, where she represented clients with a variety of legal problems, including child guardianship issues, landlord/tenant disputes and Social Security disability appeals.

Hon. Christopher J. Panos is a U.S. Bankruptcy Judge for the District of Massachusetts in Boston, initially appointed on Sept. 21, 2015. He served as Chief Judge from 2018-22 and sits on the Bankruptcy Appellate Panel for the First Circuit. In 2022, the Chief Justice of the U.S. appointed Judge Panos to serve a three-year term on the Judicial Conference Committee on the Administration of the Bankruptcy System. Prior to his appointment as a bankruptcy judge, he had practiced at Craig and Macauley in Boston for more than 25 years and served as its managing director until 2014, when attorneys at that firm joined Partridge Snow & Hahn LLP to open its Boston office. He served as partner in charge of the Boston office until his appointment to the bench. Judge Panos had a diverse practice focusing on business restructuring and insolvency, mergers and acquisitions, commercial finance, business litigation, and general business law. He represented public and privately held companies, individuals, banks, hedge funds and private-equity funds in many different business areas, including financial services, life sciences, energy, pharmaceuticals, manufacturing, retail and real estate development. He was regularly recognized in peer-review publications such as *Chambers USA* and *The Best Lawyers in America*, and which named him Boston "Lawyer of the Year" for bankruptcy and restructuring in 2012 and 2016. *Law & Politics* and *Boston* magazine named him a "Super Lawyer" each year of publication of that list and several times named him a "Top 100 Attorney" in Massachusetts and New England. Judge Panos was elected as a Fellow of the American College of Bankruptcy in 2008 and served on its First Circuit council from 2012-15. He served as chair of the Bankruptcy Law Section of the Boston Bar Association and on the Board of Trustees of the Boston Bar Foundation. Judge Panos received his undergraduate degree from Georgetown University in 1985 and his J.D. *cum laude* from Boston University School of Law in 1989, where he taught courses in legal research, writing and advocacy.

Jeffrey T. Piampiano is co-chair of Drummond Woodsum's litigation department in Portland, Maine, and focuses his practice on bankruptcy matters and debtor/creditor litigation. His wide range of clients includes debtors in bankruptcy, creditors (including banks and credit unions), bankruptcy trustees, private-sector business clients, municipalities and other governmental bodies. Mr. Piampiano is a panel chapter 7 trustee in Maine, as well as a subchapter V trustee for Region 1. Twice serving as counsel to the bankruptcy trustees for Great Northern Paper Co., he helped recover millions of dollars to distribute to creditors in both Great Northern bankruptcy cases. He also has experience representing parties in commercial disputes before federal and state courts involving a variety of matters such as receiverships, collections, mechanics' liens and other statutory liens, as well as having served as debtor's counsel to help businesses reorganize in the retail, hospitality and service sectors. Mr. Piampiano received his A.B. in 1993 from Colgate University, his M.S. in 1996 from the University of Maine and his J.D. in 2000 from Northwestern University School of Law.