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

June 4, 2001

OFFICE OF
CHIEF COUNSEL

Number: **200137010**
Release Date: 9/14/2001
CC:PA:CBS:BR1

UILC: 6213.09-00

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR LOS ANGELES ASSOCIATE AREA COUNSEL, SBSE

FROM: Assistant Chief Counsel (Collection, Bankruptcy & Summonses)
CC:PA:CBS

SUBJECT: Validity of an assessment made during a bankruptcy case where statutory notice of deficiency was previously issued during the same bankruptcy case

This Chief Counsel Advice responds to your memorandum dated February 16, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Taxpayer =

Year 1 =

ISSUES

1. Is the Year 1 assessment valid, where the statutory notice of deficiency was issued and assessment was made during the taxpayer's uninterrupted Chapter 11 bankruptcy proceeding?

2. If the assessment is invalid, on what basis should the case be decided?

CONCLUSIONS

1. The assessment is invalid because the 90-day period during which the taxpayer could file a petition with the Tax Court was suspended by the bankruptcy proceeding. Therefore, when the assessment was made, the 90-day period had not expired.

2. We should enter into a stipulated decision that the Year 1 liability is $0, based on the invalidity of the December 2, 1996 assessment.

FACTS

The taxpayer is challenging the accuracy of her Year 1 liability in a Tax Court petition seeking review of a notice of determination issued by the Internal Revenue Service (Service) Office of Appeals pursuant to I.R.C. § 6330(d). The relevant facts are as follows.

The taxpayer filed a Chapter 11 bankruptcy case on May 24, 1996. While the case was pending, the Service sent her a statutory notice of deficiency for the Year 1 tax liability on July 3, 1996, an act permitted by the express language of 11 U.S.C. § 362(b)(9). However, the taxpayer was precluded by the automatic stay, 11 U.S.C. § 362(a)(8), from filing a petition with the Tax Court based on the statutory notice, unless she obtained an order from the bankruptcy court lifting the stay. The docket sheets from the Chapter 11 proceeding do not show that the taxpayer applied to lift the stay to bring a proceeding in the Tax Court. On December 2, 1996, the Service assessed the deficiency against the taxpayer. The Chapter 11 case was dismissed on January 29, 1997, thereby lifting the stay. No plan of reorganization was ever confirmed by the court. On March 13, 1997, forty-three days after the dismissal, an involuntary Chapter 7 case was filed against the taxpayer. The Chapter 7 case was dismissed on April 6, 1998, thereby lifting the stay.

LAW AND ANALYSIS

The general rule is that if a taxpayer does not file a petition within 90 days after the notice of deficiency is mailed, the deficiency may be assessed. I.R.C. § 6213(a). However, because of 11 U.S.C.§ 362(a)(8)'s prohibition on the filing of a Tax Court petition, I.R.C. § 6213(f) suspends the 90-day period for 60 days, plus the period the automatic stay is in effect. Guerra v. Commissioner, 110 T.C. 271, 275 (1998); Thompson v. Commissioner, 84 T.C. 645, 648 (1985); Douglass v. Commissioner, T.C. Memo 1997-272, 1997 Tax Ct. Memo LEXIS 332.

The first 43 days of the 90-day period ran between the dismissal of the Chapter 11 case and the filing of the Chapter 7 petition. The remaining 47 days, plus the 60 days added by section 6213(f), began to run after the dismissal of the Chapter 7 case on April 6, 1998. Therefore, the taxpayer had until July 22, 1998, to petition the Tax Court. In other words, the time for filing a Tax Court petition had not expired when the deficiency was assessed on December 2, 1996.

An assessment made prior to the expiration of time to petition the Tax Court is invalid. Philadelphia & Reading Corp. v. United States, 944 F.2d 1063, 1070-1071 (3d Cir. 1991); Maxwell v. Campbell, 205 F.2d 461 (5th Cir. 1953); United States v. Yellow Cab Co., 90 F.2d 699 (7th Cir. 1937); Ventura Consolidated Oil Fields v.

Rogan, 86 F.2d 149, 153-154 (9th Cir. 1936); cf. Johnson v. United States, 990 F.2d 41 (2nd Cir. 1993). But see Lyddon & Co. v. United States, 141 Ct. Cl. 545, 158 F. Supp. 951 (1958); Lehigh Portland Cement Co. v. United States, 90 Ct. Cl. 36, 30 F. Supp. 217 (1939). Because the time for the taxpayer to file a petition had not expired when the Year 1 assessment was made, we conclude the assessment is invalid.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

Considering the three year statute of limitations for assessment under I.R.C. § 6501(a), including the suspension of the statute of limitations pursuant to I.R.C. § 6503(a)(1) during the bankruptcy cases, plus 60 days, the time to reassess the deficiency under section 6501(a) has passed. Even if the deficiency can be reassessed under some other provision, such as section 6501(e), the I.R.C. § 6330 petition should be conceded.

In the notice of determination, the Appeals officer determined pursuant to I.R.C. § 6330(c)(2)(B) that the taxpayer could not challenge her Year 1 liability because she had been given an opportunity to challenge the deficiency when she received the statutory notice of deficiency. Notwithstanding the correctness of the Appeals officer's determination under section 6330(c)(2)(B), he should have determined under I.R.C. § 6330(c)(1) that the assessment is invalid. Because the taxpayer's sole challenge in her petition is to the Year 1 assessment, and because the assessment is invalid, we should enter into a stipulated decision that the Year 1 liability is $0. However, care should be taken in drafting the decision document so as not to prevent reassessment of the liability in the event some statutory exception to the three-year statute of limitations is applicable.

Please call if you have any further questions.

GARY D. GRAY
By: ALAN C. LEVINE
Chief, Branch 1
CC:PA:CBS:BR1