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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSOCIATE AREA COUNSEL, SB/SE:8 (SAN DIEGO)

FROM: Lawrence Schattner
Chief, Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Effect of the Bankruptcy Automatic Stay on a Subsequently Executed Form 900 (Tax Collection Waiver)

This memorandum responds to your request for advice dated February 19, 2002. This document may not be cited as precedent.

LEGEND:

Date 1

ISSUE:

Whether the securing of a Form 900 waiver that extends the statute of limitations for the collection of a pre-petition tax liability (a "Tax Collection Waiver"), while the automatic stay is in effect, violates the automatic stay and therefore voids the Tax Collection Waiver.

CONCLUSION:

The securing of a Tax Collection Waiver for a pre-petition tax liability, while the automatic stay is in effect, does not violate the automatic stay. Therefore, an otherwise effective Tax Collection Waiver secured by the Service while the automatic stay is in effect is valid. [redacted]

BACKGROUND:

On August 8, 1991, the debtors filed a Chapter 7 bankruptcy petition. Subsequently, on November 2, 1991, while the bankruptcy automatic stay was in effect, the Service

secured a Tax Collection Waiver purportedly to extend the collection statute of limitations ("SOL") under Internal Revenue Code ("I.R.C.") § 6502(a) for the debtors' 1990 income tax year to December 31, 2006. The automatic stay was lifted when the debtors received a discharge from bankruptcy on Date 1. You noted that the collection SOL under I.R.C. § 6502(a) for the debtors' 1990 income tax liability would expire on April 4, 2002 should the Tax Collection Waiver be deemed ineffective. This liability is one of several liabilities included on an offer-in-compromise recently submitted by the debtors. A recent amendment to I.R.C. § 6331(k) suspends the SOL beyond the April 4, 2002 date.[1] Therefore, the tax collection SOL currently is suspended by the pending offer-in-compromise and did not expire on April 4, 2002, regardless of the validity of the Tax Collection Waiver secured during the bankruptcy automatic stay.[2]

LAW & ANALYSIS:

The bankruptcy automatic stay is described in section 362 of the Bankruptcy Code ("B.C."). Pursuant to this section, the filing of a bankruptcy petition operates as a "stay, applicable to all entities," of the various actions set forth therein. B.C. § 362(a). More specifically, section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." The stay arises by operation of the law, and not by judicial action. In addition, pursuant to the applicable law in the Ninth Circuit, any action that violates the automatic stay is deemed void. In re Schwartz, 954 F.2d 569 (9th Cir. 1992). Thus, if the securing of a Tax Collection Waiver for a pre-petition tax liability constitutes an "act to collect, assess, or recover a claim against the debtor," or any other action set forth in section 362(a), then any Tax Collection Waiver obtained while the automatic stay is in effect would be rendered invalid.

Although it appears that there are no reported cases specifically addressing this issue, various cases have discussed whether a creditor's solicitation of a debtor to reaffirm dischargeable debts violates the automatic stay. See In re Duke, 79 F.3d 43 (7th Cir. 1996); see also In re Jefferson, 144 B.R. 620 (Bankr. D. R.I. 1992); see also In re Bassett, 255 B.R. 747 (B.A.P. 9th Cir. 2000). These cases stand for the proposition that, absent coercion or harassment, creditors may solicit debtors for the reaffirmation of dischargeable debts without violating the bankruptcy automatic stay. These cases

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[1]I.R.C. § 6331(k)(3) was amended to provide, in part, for a suspension of the tax collection SOL under I.R.C. § 6502(a) during the time that the Service is prohibited from levying by a pending offer-in-compromise as set forth in I.R.C. § 6331(k)(1). Job Creation and Worker Assistance Act of 2002 § 416(e).

[2]We note that by reason of section 3461 of the Internal Revenue Service Restructuring and Reform Act of 1998, the Tax Collection Waiver is not effective after December 31, 2002.

also seem to illustrate a tendency by the courts to less rigidly interpret the scope of creditor action prohibited by the provisions of B.C. § 362(a).

For example, in In re Duke, the Chapter 7 debtor argued that the creditor violated B.C. § 362(a)(6) by sending the debtor's attorney (with a copy to debtor) a letter referencing the debtor's outstanding account balance and enclosing a proposed reaffirmation agreement. In re Duke, 79 F.3d at 44. In its analysis, the court acknowledged that "[t]aken to its logical extreme, § 362 could be construed to prohibit all contact between creditors and debtors after a petition has been filed, with respect to dischargeable debts. The courts have not pushed it that far, however . . . ." The court then noted a comment from the Third Circuit Court of Appeals "that the respite provided by § 362 'is not from communication with creditors, but from the threat of immediate action by creditors, such as a foreclosure or a lawsuit.'" Id. at 45 (quoting Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 86 (3d. Cir. 1988)). The court ultimately rejected the debtor's argument and agreed with the "majority of the bankruptcy courts [that] have found that these actions do not violate § 362(a)(6) as long as the letter is nonthreatening and non-coercive." Id.

In addition to the case discussed above, In re Jefferson provides another example where the court recognized and upheld the general rule that mere solicitation of the reaffirmation of a dischargeable debt does not violate the automatic stay. 144 B.R. at 620. In this case, under circumstances factually similar to those of In re Duke, the court explained that "our review of the cases that have considered this issue indicates a fairly uniform pattern of results: that mere requests for payment are not barred by § 362(a)(6), *absent coercion or harassment* by a creditor." Id. at 623. As with In re Duke, the court in this case did not interpret the creditor's attempt to negotiate with the debtor regarding a reaffirmation agreement as an "act to collect, assess, or recover a claim against the debtor" in violation of the automatic stay. B.C. § 362(a)(6). This rule was also discussed and upheld in In re Bassett. 255 B.R. 747 (B.A.P. 9th Cir. 2000). The Ninth Circuit Bankruptcy Appellate Panel followed the general rule and held that "[a] creditor does not, absent some sort of harassment or coercion, violate the automatic stay by asking debtor to sign a reaffirmation agreement." Id. at 758.

As the above referenced cases involved reaffirmation agreements, we note that part of the policy underlying reaffirmation agreements is to encourage creditors to provide debtors with continued availability to a line of credit. See In re Duke, 79 F.3d 43, 45 (7th Cir. 1996). While this policy is not served by a Tax Collection Waiver, these cases support the notion that certain contacts with the debtor are not prohibited by the automatic stay. It is our view that merely securing a Tax Collection Waiver from the debtor does not amount to an "act to collect, assess, or recover a claim against the debtor" in violation of B.C. § 362(a)(6). The Tax Collection Waiver merely preserves the Service's rights to pursue enforced collection actions after the stay has been lifted by extending the collection SOL under I.R.C. § 6502(a). Simply stated, securing the execution of the Tax Collection Waiver is not an act to collect but merely an act to extend the SOL so that the Service may collect in the future. Thus, securing the

execution of the Tax Collection Waiver does not violate any of the actions prohibited by the bankruptcy automatic stay. See B.C. § 362(a).

This conclusion is consistent with our position prior to the enactment of B.C. § 362(b)(9) in the Bankruptcy Reform Act of 1994 that the execution of a waiver extending the assessment SOL did not violate the automatic stay. Prior to the enactment of this provision, "any act to . . . assess" was specifically prohibited by the automatic stay. B.C. § 362(a)(6). Nonetheless, we had argued that the execution of a waiver to extend the SOL on assessment did not amount to an act in violation of any of the actions prohibited by the automatic stay pursuant to B.C. § 362(a). As in the case of a Tax Collection Waiver, a waiver to extend the assessment SOL is not an act to assess but merely an act extending the period within which the Service may assess in the future. The procedures for assessing a tax are set forth in I.R.C. § 6203 and the regulations thereunder. On the other hand, the authority to extend the SOL for assessment is found in I.R.C. § 6501(c)(4). Thus, execution of a waiver to extend the assessment SOL is an act performed under the authority of section 6501(c)(4) and not an act pursuant to the procedures for making assessments under section 6203.

Notwithstanding the case law discussed above, we acknowledge that other courts have taken a more restrictive view of what creditor actions are permitted while the automatic stay is in effect. For example, in Gillilan v. Commissioner, the Tax Court, without much analysis of the issue, stated that "[i]t seems apparent, and respondent does not appear to contest, that respondent's purported acceptance of the [Form 870-L(AD)] was an impermissible act (i) to create a lien against either petitioner's husband's property or that of the estate, or (ii) to collect, assess, or recover a claim against petitioner's husband" in violation of the automatic stay. 66 T.C.M. (CCH) 398 (1993). Similarly, in In re Best Finance Corp., the court interpreted the execution of Puerto Rico Treasury Department Form SC2845, a Consent to Assessment and Waiver form of the applicable statute of limitations, as an invalid attempt to waive the provisions of B.C. § 362 and a violation of the automatic stay. 74 B.R. 243 (D. P.R. 1987). The court held that "[s]ince the general rule is that a debtor may not waive the provisions of 11 U.S.C. sec. 362, the consent for assessments signed by debtor *post petition* without being submitted for the approval of the other creditors of the estate are null, void, and without any binding legal effect. A debtor cannot waive the automatic stay . . . ." Id. at 245. See also In re Seelye, 243 B.R. 701 (Bankr. N.D. Ill. 2000) (distinguishing facts from facts in In re Duke and holding that the creditor violated the automatic stay in soliciting debtors' reaffirmation of a dischargeable debt).

While we disagree with Gillilan and In re Best Finance Corp., we note that these cases are factually distinguishable from the facts pertaining to this opinion. Both of these cases involved forms whereby the debtors, in part, consented to assessment. In contrast, this opinion discusses the securing of a Tax Collection Waiver, which merely extends the tax collection SOL and is not a consent to any assessment or collection action. [redacted]

[redacted]

If you have any questions, please contact the attorney assigned to this case at (202) 622-4208.