DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR ASSOCIATE AREA COUNSEL,

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

SUBJECT: Equitable Tolling of Bankruptcy Code Section 502(b)(9)

This memorandum responds to your request for assistance dated July 25, 2002. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent. This writing may contain privileged information.

LEGEND

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ISSUE

Whether, in light of Young v. United States, 122 S. Ct. 1036 (2002), a bankruptcy court may apply the principles of equitable tolling to allow a proof of claim filed after the 180-day period set forth in Bankruptcy Code ("B.C.") § 502(b)(9) when a Chapter 13 bankruptcy proceeding is dismissed and later reinstated prior to the expiration of such 180-day period.

CONCLUSION

Despite the Supreme Court's recent decision in Young, a bankruptcy court may not apply the principles of equitable tolling to allow a proof of claim filed after the 180-day period set forth in B.C. § 502(b)(9) when a Chapter 13 bankruptcy proceeding is dismissed and later reinstated prior to the expiration of such 180-day period.

Notwithstanding, it is our view that the strict language of the statutory filing deadline set forth in Section 502(b)(9) and the accompanying rules would not preclude a court from exercising its equitable powers under B.C. § 105(a) to allow an untimely proof of claim in certain limited circumstances and that any such exercise of equitable powers would be consistent with the analysis in Young.

BACKGROUND

The debtor filed a Chapter 13 bankruptcy petition on Date 1. The case was subsequently dismissed on Date 2 when the debtor's attorney failed to timely appear for a hearing and failed to produce certain income tax returns as directed by the court. The court reinstated the case on Date 3, and vacated the Date 2 Order dismissing the case. The Service was timely notified of the reinstatement of the case. Between the dismissal date and the reinstatement of the case in Month 1, 85 days elapsed. Based on the Date 1 filing of the petition, the 180-day period for filing a timely proof of claim expired on Date 4. The bar date set by the bankruptcy court for filing proofs of claim was Date 5. The Service filed its proof of claim on Date 6, after the expiration of the 180-day period (calculated from the original petition date) but before the expiration of the 180-day period if such period was tolled between dismissal and reinstatement and before the bar date set by the bankruptcy court.

LAW & ANALYSIS

Young involved debtors who filed a Chapter 13 bankruptcy proceeding, moved to dismiss the proceeding, and filed a Chapter 7 proceeding the day before their Chapter 13 case was dismissed. 122 S. Ct. at 1038. The Court held that the 3-year "lookback" period set forth in B.C. § 507(a)(8)(A)(i), which period is used to identify certain priority tax claims which are non-dischargeable pursuant to B.C. § 523(a)(1)(A), is equitably tolled "during the pendency of a prior bankruptcy petition," thus preventing the debtors from using consecutive bankruptcy petitions to render certain tax liabilities dischargeable in their subsequent Chapter 7 proceeding. Id. at 1043. In its analysis, the Court first determined that the 3-year "lookback period is a limitations period because it prescribes a period within which certain rights . . . may be enforced." Id. at 1039. The Court then recognized that it is a well established principle of law that limitations periods are generally subject to the remedy of equitable tolling, "unless tolling would be 'inconsistent with the text of the relevant statute.'" Id. at 1040 (quoting United States v. Beggerly, 524 U.S. 38, 48 (1998)). Furthermore, the court noted the circumstances under which it has permitted equitable tolling, including cases where a party's misconduct has caused another party to miss a filing deadline. Id. at 1041. The Court acknowledged, however, "that tolling might be appropriate in other cases." Id.

The Court ultimately decided that equitable tolling of the 3-year lookback period was appropriate and that the debtors failed to invoke any statutory provisions that displayed "an intent to preclude tolling." Id. In accordance with the Supreme Court's analysis in Young, we believe that equitable tolling may only be applied to allow a proof of claim

filed after the 180-day period set forth in B.C. § 502(b)(9) if the 180-day period is a limitations period, if application of equitable tolling is consistent with the text of B.C. § 502(b)(9) and the relevant rules and there are no provisions displaying an intent to preclude tolling, and if the facts of the case are such that application of equitable tolling would be appropriate.

1. B.C. § 502(b)(9) is a Limitations Period

Bankruptcy Code § 502(b)(9) disallows proofs of claim that are not timely filed and provides that "a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide." Bankruptcy Rule 3002(c) discusses the time for filing proofs of claim in a Chapter 7, 12, or 13 proceeding. Bankruptcy Rule 3002(c)(1), which incorporates the 180-day period for a governmental unit to file a timely proof of claim, allows the court to extend this period "[o]n motion of a governmental unit *before the expiration of such period* and for cause shown." (Emphasis added.) Finally, Bankruptcy Rule 9006(b)(3) provides that a "court may enlarge the time for taking action under Rule[] . . . 3002(c) . . . only to the extent and under the conditions stated in [that] rule[]." This language, combined with the language in Rule 3002(c)(1) cited above, appears to create a rigid rule requiring that the Service file its proof of claim within 180-days from the filing of the bankruptcy petition in order to ensure that its claim be allowed as timely. The lone exception set forth in the rules is to grant the court some discretion to extend the period for cause shown when the Service files a motion to extend prior to the expiration of the 180-day period. See Bankruptcy Rule 3002(c)(1).

Following the Young analysis, in order to determine whether the principle of equitable tolling may be applied to allow a proof of claim filed after the 180-day period, a court would first have to decide whether such 180-day filing period is a limitations period. See 122 S. Ct. 1036. There is substantial authority in case law supporting the position that the 180-day period set forth in Section 502(b)(9) is akin to a statute of limitations. See Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.), 966 F.2d 1338 (10th Cir. 1992); see also Branch v. Fed. Deposit Ins. Corp., 223 B.R. 605 (D. Mass. 1998); see also Chapman III v. Charles Schwab & Co., 265 B.R. 796 (Bankr. N.D. Ill. 2001). According to one court, "[Bankruptcy Rule 3002(c)] is strictly construed as a statute of limitations since the purpose of such a claims bar date is 'to provide the debtor and its creditors with finality' and to 'insure the swift distribution of the bankruptcy estate.'" In re Nohle, 93 B.R. 13, 15 (Bankr. N.D. N.Y. 1988). If the 180-day period is properly regarded as a limitations period, then, as noted by the Supreme Court in Young, it would generally be subject to the remedy of equitable tolling. See 122 S. Ct. at 1040.

2. Equitable Tolling Applied to B.C. § 502(b)(9)

Even assuming that B.C. § 502(b)(9)'s 180-day period is a limitations period generally subject to equitable remedies, including equitable tolling, such period is subject to equitable remedies only to the extent consistent with the language of Section 502(b)(9) and the relevant rules. See Id.; cf In re Kontrick, 2002 U.S. App. LEXIS 13596 (7th Cir. 2002) (discussing whether filing deadlines set forth in Bankruptcy Rules 4004(a) and 4007(c) are subject to equitable defenses and holding that "[t]hese rule provisions are subject to equitable defenses, although those defenses must be applied in a manner consistent with the manifest goals of Congress . . . ."). In other words, "a bankruptcy court 'cannot use its equitable power to circumvent the law.'" In re Greenig, 152 F.3d 631 (7th Cir. 1998) (quoting Carlson v. United States, 126 F.3d 915, 920 (7th Cir. 1997)). Therefore, even if the 180-day period is deemed to be a limitations period generally subject to a court's equitable powers, the relevant question becomes whether application of equitable tolling to Section 502(b)(9)'s 180-day period is inconsistent with or precluded by the language of the statute and the relevant rules discussed above.

Section 502(b)(9) limits the Service to 180-days from the filing of the bankruptcy petition to file a timely proof of claim unless the Service files a motion to extend this period before the 180-day period expires. See Bankruptcy Rule 3002(c)(1). Moreover, Bankruptcy Rule 9006(b)(3) specifically prohibits any enlargement of this period by a court for any other reason, including excusable neglect. An argument could be made that application of equitable tolling to allow a proof of claim filed after the 180-day period when a bankruptcy case is dismissed and subsequently reinstated is not inconsistent with the language of B.C. § 502(b)(9) and the relevant rules. Equitable tolling of the time period between dismissal and reinstatement of the case arguably is not an extension or enlargement of the 180-day period but merely a preservation of the 180-day period during which the Service may file a proof of claim. However, the case law set forth below does not support this argument.

3. Equitable Tolling Applied to Facts in Present Case

Even if application of equitable tolling is not viewed as either inconsistent with or precluded by Section 502(b)(9) and the accompanying rules, application of equitable tolling may not be appropriate where, as in the present case, a Chapter 13 bankruptcy proceeding is dismissed and later reinstated prior to the expiration of such 180-day period. Unlike the scenario in Young where, but for the Court's use of its equitable powers to toll the 3-year lookback period, the Service had no way to prevent the debtor from utilizing consecutive bankruptcy petitions to render certain tax liabilities dischargeable, the Service had other remedies readily available to it in the present case. See Bankruptcy Rule 3002(c)(1). More specifically, the Service could have filed a motion to extend the 180-day filing period pursuant to Rule 3002(c)(1). As noted in the facts above, the previously dismissed bankruptcy case was reinstated on January 8, 2002, nearly one month before the 180-day period would expire (as measured from the date the original bankruptcy petition was filed). In other words, after receiving a timely

notice of the reinstatement of the case, the Service still had nearly an entire month in which it could have either filed its proof of claim or, at the very least, filed a motion to extend the 180-day period pursuant to Rule 3002(c)(1). Instead, the Service did neither.

While we acknowledge that the Service may have been disadvantaged in its effort to timely file a proof of claim by the dismissal and subsequent reinstatement of the bankruptcy proceeding in the present case, we believe the appropriate remedy for the Service, in lieu of filing a proof of claim within the limited amount of time remaining before expiration of the 180-day period, was to file a motion to extend the 180-day period under Rule 3002(c)(1). As the Service arguably had sufficient time to file such a motion to extend, we believe a court would be very reluctant to apply the principles of equitable tolling where the Service failed to pursue other available remedies as in the present case. See Schunck v. Santos (In re Santos), 112 B.R. 1001, 1007 (B.A.P. 9th Cir. 1990) (where, in deciding not to apply equitable tolling to allow an untimely complaint under Bankruptcy Rules 4004 and 4007(c), the court noted that "[a] less onerous means for protecting the creditor's rights . . . is to liberally grant timely filed requests for extensions to the bar date . . . ."); see also United States v. Hambright (In re Hambright), 216 B.R. 781 (W.D. Mich. 1997).

4. Analysis of Relevant Case Law

The majority of the relevant case law decided prior to Young generally supports the conclusion that a court may not apply equitable tolling to extend the 180-day filing period. One recent decision addressing the issue is Gardenhire v. United States (In re Gardenhire). 209 F.3d 1145 (9th Cir. 2000). In re Gardenhire, like the present case, involved a bankruptcy proceeding which was dismissed and subsequently reinstated prior to the expiration of the 180-day proof of claim filing deadline. The Service received notice of the reinstatement only a few days before the statutory filing deadline and ultimately filed its proof of claim after the 180-day period. Id. at 1146. The debtors objected to the proof of claim as untimely. Id. The Service argued, in part, that its proof of claim was timely because the 180-day period was suspended during the time after dismissal and before reinstatement. The Ninth Circuit Court of Appeals disagreed and concluded that "application of equitable tolling to the 180-day period for governmental units to file proofs of claim pursuant to § 502(b)(9) of the Bankruptcy Code is inconsistent with the plain meaning of the Bankruptcy Code and Rules, applicable Ninth Circuit precedent, and the weight of authority from other jurisdictions." Id. at 1152. See also In re Coastal Alaska Lines, Inc., 920 F.2d 1428, 1432 (9th Cir. 1990) (holding in part that the argument that the bankruptcy court has discretion pursuant to its general equitable powers to enlarge the period for filing a timely proof of claim "is inconsistent with the express limitations imposed by Rule 9006(b)(3).")

While we recognize that In re Gardenhire may be factually distinguishable from the present case in that it was dismissed due to a clerical error while the present case was dismissed due to the debtor's (or debtor's attorney) failure to appear and produce

documents requested by the court, it nevertheless generally stands for the proposition that equitable tolling may not be applied to allow an untimely proof of claim. Also relevant is the fact the court suggested that even if equitable tolling was consistent with Section 502(b)(9) and the rules, application of the doctrine may not be appropriate where, as in the present case, the creditor has other remedies available. See id. at 1151-1152. More precisely, the court noted that

> [e]ven if the Bankruptcy Code and Rules and our precedents did not foreclose application of equitable tolling to § 502(b)(9), we have doubts as to whether application of the doctrine would have been appropriate under the specific facts of this case.
>
> . . . We wonder . . . whether the IRS did in fact act with reasonable diligence in filing its proof of claim. It appears that the IRS could have complied with the original 180 day period if it had only tried harder. The IRS still had 13 days left in which to file its proof of claim after being notified that the [debtors'] case had been reinstated.

Id. Given the above language and the fact that in the present case the Service had nearly an entire month left in which to either file its proof of claim or a motion to extend the 180-day period, we believe that, at least in the view of the Ninth Circuit, it would not be appropriate for a court to use equitable tolling to allow the untimely claim of the Service in the present case.

The Seventh Circuit has also addressed whether a court may use its equitable powers to allow proofs of claim filed after the statutory deadline. See In re Greenig, 152 F.3d 631 (7th Cir. 1998). In re Greenig involved a Chapter 12 bankruptcy proceeding where the creditor let the proof of claim filing deadline expire without filing a proof of claim because the debtors' confirmed Chapter 12 plan listed the creditor's claim. Id. at 632. Eventually, almost a year after the filing deadline had passed, the creditor moved for the court to allow it to file a proof of claim and the debtor objected. Id. at 632-633. After reviewing the language of Section 502(b)(9), Rule 3002(c), and Rule 9006(b)(3), the court stated that "considering that [Section] 502(b)(9) bars untimely proofs of claims where none of the [Rule] 3002(c) exceptions apply, we hold that [the creditor's] claim is barred." Id. at 634.

The court acknowledged the equitable powers possessed by a bankruptcy court but emphasized that such powers could not be used inconsistent with the law. Id. at 635. The court then noted that "[i]n this case, the trial court acted improperly in that it allowed [the creditor] to circumvent Rule 3002(c) and file an untimely proof of claim because of equitable considerations." The court also noted that while it had previously called attention to the issue, "we deferred the question of whether a court has equitable powers to allow a late-filed proof of claim outside the exceptions contained in Rule

3002(c) . . . . We answer that question today: a bankruptcy judge is not vested with such equitable power." Id.

At least one post-Young case has commented on the impact of the Young decision to the analogous issue of whether a court may apply equitable tolling to extend the 60-day period for filing a dischargeability complaint under Rule 4007(c), which rule contains similar language to Rule 3002(c)(1) and is also subject to Rule 9006(b)(3). See Ohio Farmers Ins. Co. (In re Leet), 274 B.R. 695 (B.A.P. 6th Cir. 2002). While acknowledging the Supreme Court's decision in Young, the court determined the bankruptcy court erred in allowing the creditors to file their complaint 2-days after the expiration of the 60-day filing period. Id. at 701. According to the court,

> [h]ad it been decided before submission of this appeal, the Creditors might have sought support in the Supreme Court's recent decision in [Young] . . . . Some may read that decision broadly, since the Court observed that "it is hornbook law that limitations periods are 'customarily subject to 'equitable tolling','" but that statement was finished with its own restriction, "unless tolling would be inconsistent with the text of the relevant statute.'" By analogy, the applicable Rule 4007(c) requires that any extension of the sixty-day limitation be sought within that time period; thus, the equitable tolling applied by the bankruptcy court in this case was inconsistent with the text of the relevant rule. *Our conclusion is not changed by [Young].*

Id. at 700 (Emphasis added). Collier also supports the position set forth in the above cited cases and states that a "court has no equitable power to extend the time fixed by Rule 3002(c)." 9 Collier on Bankruptcy ¶ 3002.03[1] at 3002-11 (Lawrence P. King, ed., 15th ed. 2002); see also In re Brogden, 274 B.R. 287 (Bankr. M.D. Tenn. 2001) (prohibiting resort to equitable remedies to allow an untimely proof of claim even when the Service had no notice of the bankruptcy proceeding); see also In re Bennett, 278 B.R. 764 (Bankr. M.D. Tenn. 2001). But see In re Stadaker, 1998 Bankr. Lexis 1914 (Bankr. M.D. Tenn. 1998) (applying equitable tolling to allow an untimely proof of claim where creditor received no notice of the bankruptcy proceeding).

5. Equitable Powers Under B.C. § 105(a)

A court may exercise its equitable powers under B.C. § 105(a) to allow an untimely proof of claim in certain limited circumstances and any such exercise of equitable powers would be consistent with the Supreme Court's analysis in Young. Section 105(a) of the Bankruptcy Code provides in part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title . . . shall be construed to preclude the court from . . . taking any action . . . to enforce or implement court orders or rules, or to prevent an abuse of process." A court is not prevented from using its equitable powers under B.C. § 105(a) to allow an untimely proof of claim where necessary "to enforce or implement

court orders or rules, or to prevent an abuse of process." See Nicholson v. Isaacman (In re Isaacman), 26 F.3d 629, 632 (6th Cir. 1994) (where the court, in concluding that a court has the authority to correct its own errors, stated that "[t]he inability of a bankruptcy court to sua sponte extend the time in which to file dischargeability complaints . . . does not prevent a bankruptcy court from exercising its equitable powers under [B.C. § 105(a)] in accepting an untimely filed complaint"). We do not believe that an appropriate exercise of equitable powers under Section 105(a) to allow an untimely proof of claim would be inconsistent with or precluded by B.C. § 502(b)(9) or the applicable rules. There are at least three circumstances regarding an untimely filing of a proof of claim where a court's exercise of equitable powers might be appropriate.

(a) Court may correct its own errors. In the present case the bankruptcy court set a bar date of Date 5, which was well after the 180-day statutory filing period (measured from the petition date). Therefore, although the Service filed its proof of claim on Date 6, after the 180-day statutory filing period, the proof of claim was filed well before the bar date set by the court. Where the court erroneously sets a bar date beyond the statutory period in a Chapter 13 proceeding, as in the present case, it could exercise its equitable powers under Section 105(a) of the Bankruptcy Code to correct its own error and allow the untimely proof of claim. There is general support for such a position in case law. See Anwiler v. Patchett (In re Anwiler), 1992 U.S. App. Lexis 6315 (9th Cir. 1992) (affirming Bankruptcy Appellate Panel's decision that "although Bankruptcy Rules 4004(a) and 4007(c) should be strictly applied, if a court had made a mistake upon which a party relied to its detriment, a court could use its equitable power to grant relief and correct its mistake"); see also Themy v. Yu (In re Themy), 6 F.3d 688, 689 (10th Cir. 1993) (holding that "[a]lthough the provisions of rules 4004 and 4007 are strictly enforced, courts have almost uniformly allowed an out-of-time filing when the creditor relies upon a bankruptcy court notice setting an incorrect deadline"); see also In re Moss, 289 F.3d 540 (8th Cir. 2002); see also Nicholson v. Isaacman (In re Isaacman), 26 F.3d 629 (6th Cir. 1994). Nevertheless, we recognize that notwithstanding a court's ability to correct its own error, a strong argument exists that the court should not allow an untimely proof of claim of the Service even when the court erroneously sets the bar date because the express language of Section 502(b)(9) and the rules provides the Service with sufficient notice of the filing deadline. Accordingly, it is our view that the Service should strictly adhere to the 180-day proof of claim filing period set forth in B.C. § 502(b)(9) even when the court sets a bar date extending beyond such period.

(b) Creditor receives no notice of bankruptcy case. A court could exercise its equitable powers to allow an untimely proof of claim when the Service receives notice of the bankruptcy case after the Section 502(b)(9) 180-day filing period has expired. There appears to be very little case law directly discussing this issue. However, as discussed above, even though the Seventh Circuit Court of Appeals held in In re Greenig that a bankruptcy judge does not have the equitable power to allow a proof of claim filed after the applicable statutory filing deadline, it specifically declined to decide whether the result would be the same when the creditor receives no notice. 152 F.3d at 634-635. In a footnote to the opinion, the court noted that "[i]t may seem unjust at first glance that

a creditor who receives no notice of bankruptcy proceedings would be bound by the 90-day rule, but this is not an issue in this case and we therefore need not examine it." Id. at 634.

United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087 (6th Cir. 1990), provides general support for this position. While Cardinal Mine was decided prior to the enactment of B.C. § 502(b)(9) and involved whether a late filed priority claim in a Chapter 7 proceeding may be subordinated to non-priority unsecured claims when the Service filed its claim tardily due to untimely notice of the bankruptcy proceeding, the case at least shows that the court recognized the importance of satisfying equitable concerns in cases of deficient notice to the creditor. See id. According to the court, "[d]ue process and equitable concerns require that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be permitted to file tardily when the creditor does so promptly after learning of the bankruptcy." Id. at 1089. Lower courts have disagreed on the issue of whether a court may exercise equitable powers to allow an untimely proof of claim in cases of deficient notice to the creditor. Compare In re Brogden, 274 B.R. 287 (Bankr. M.D. Tenn. 2001) (prohibiting resort to equitable remedies to allow an untimely proof of claim even when the Service had no notice of the bankruptcy proceeding), with In re Stadaker, 1998 Bankr. Lexis 1914 (Bankr. M.D. Tenn. 1998) (applying equitable tolling to allow an untimely proof of claim where creditor received no notice of the bankruptcy proceeding). See also Chapman v. Charles Schwab & Co. (In re Chapman), 265 B.R. 796 (Bankr. N.D. Ill. 2001) (holding that "implicit in Section 502(b)(9) and Rule 3002(c) is the assumption that the creditor has received notice of the bankruptcy.")

(c) 180-day period expires before the bankruptcy case is reinstated. A court could use its equitable powers under Section 105(a) to allow an untimely proof of claim when the bankruptcy case is dismissed and not reinstated until after the statutory filing deadline has expired. Under such circumstances, the Service, unlike the present case or the In re Gardenhire case discussed above, arguably would have no other viable remedies available to it for filing a proof of claim. Unless the Service had filed a proof of claim prior to the dismissal of the case, such a scenario would have the effect of preventing the Service from filing a timely proof of claim altogether. In our view, this result would amount to an abuse of process that should be remedied pursuant to B.C. § 105(a).[1] Although we have been unable to find case law directly addressing this issue, we believe the analysis in Young lends support to and is consistent with our view that under such circumstances a court could allow an untimely claim pursuant to its

[1]Also, we believe that, depending on the facts of the case and the circumstances associated with the dismissal and subsequent reinstatement of the case, the principle of equitable estoppel may be applied to prevent the debtor from objecting to the untimely proof of claim. Pursuant to B.C. § 502(a), a claim is "deemed allowed" unless the debtor objects. This principle may also be applicable when the debtor fails to provide the Service with timely notice of the bankruptcy proceeding.

equitable powers under Section 105(a) of the Bankruptcy Code “to enforce or implement court orders or rules, or to prevent an abuse of process.”

It is our view that in the above described circumstances a court could allow, consistent with the Supreme Court’s analysis in Young, an untimely proof of claim in a Chapter 13 proceeding pursuant to its equitable powers under Section 105(a) and that any such use of equitable powers to allow an untimely claim in these circumstances would not be inconsistent with or precluded by Section 502(b)(9) or the relevant rules.

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If you have any questions, please contact the attorney assigned to this case at [redacted].