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From:
Sent: Thursday, October 14, 2010 1:57:20 PM
To:
Cc:
Subject: RE: SFR in Bankruptcy

Colleagues,

I would like to clarify a few of the points addressed in the e-mail, below. Counsel's position is that Notice 2010-16 does not represent a change in result from the government's longstanding litigating position. The Tax Division had generally been successful in arguing that a Form 1040 or other purported "return" filed post-SFR assessment that either reported the same amount or a lesser amount of tax liability was not a "return" for purposes of the exception to discharge found in Bankruptcy Code (B.C.) sec. 523(a)(1)(B)(i). This section excepts from discharge taxes for which a return was not filed. One noticeable exception was the Colsen decision in the 8th Circuit. Colsen held that a document (e.g., a Form 1040) filed post-assessment could be a "return" for these purposes. There was a separate issue involving whether an SFR itself was a "return" (note that section 6020(b)(2) provides that "any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes," which one could argue should include bankruptcy discharge purposes).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended the Bankruptcy Code in several relevant respects. For bankruptcy cases filed on or after October 17, 2005, BAPCPA clarifies that section 6020(a) returns, which are signed under penalties of perjury, are "returns" for purposes of the exceptions to discharge, while 6020(b) returns are not. Accordingly, it does matter whether the SFR assessment is "agreed" or "unagreed" (assuming by these terms we are referring to 6020(a) and 6020(b) returns, respectively).

Another BAPCPA change is found in the flush language following the numbered paragraphs of B.C. sec. 523(a). It provides that a "return" for these purposes "means a return that satisfies the requirements of applicable non-bankruptcy law (including applicable filing requirements)." Accordingly, the Service may have interpreted the statute to preclude any late-filed return from being a "return" for these exception to discharge purposes, regardless of whether the Service had prepared an SFR assessment. Notice 2010-16 explains that this is not the position of the Service. It goes on to say that regardless of whether a Form 1040 filed post-assessment is a "return," the amount already assessed is a debt with respect to which a return was not "filed." In other words, it is another way of concluding that the amount assessed pursuant to an unagreed SFR would continue to be nondischargeable, regardless of whether the taxpayer later filed a return. Note that this argument could have been made pre-BAPCPA and pre-Colsen. It is not dependent on any change in the statute or judicial precedent. Note also that the Service's position is that unagreed SFR assessments similarly would be non-dischargeable even in pre-BAPCPA bankruptcy cases.

The Service has long taken the position that additional amounts reported on Forms 1040 filed post-SFR assessment are potentially subject to discharge, and the notice does not affect this position.

The e-Counsel Newsletter appears to be a broad-brush outline of the exceptions to discharge. It does not contain a technical discussion and should not be treated as precedent. It may have been released as a

CCA, but I do not think that it came out of the National Office ( ). The sentence that was highlighted is inaccurate and likely contains a typo. It should read "6020(a)" instead of "6020(b)." Other sentences, if read in isolation, contain technical inaccuracies and I would not rely on it for substance or policy. The IGMs and Notice, if read in context, are a better sources of guidance.

Feel free to give me call directly if you have any questions or further want to discuss these matters.

Regards,