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Evaluating Collection Alternatives: Whether to File for Bankruptcy or Request an Offer in Compromise

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Debt-saddled taxpayers frequently ask their tax advisors whether a Chapter 7 or Chapter 13 bankruptcy or an offer in compromise ("OIC") is the best option for resolving tax debts. The short answer is, not surprisingly, that "it depends," because one size does not fit all. Evaluating the alternative that best suits a client's needs requires familiarity with bankruptcy law, tax procedure, and evolving case law involving the overlap of the two. This article explores the considerations that inform the choice between seeking a bankruptcy or an OIC as a means of resolving tax debts.[1]

I. <u>OIC v. Bankruptcy: Overview</u>

The Bankruptcy Code, also known as Title 11 of the United States Code, allows eligible consumers and commercial enterprises to discharge some or all of their debts, including some tax debts, under the supervision of the appropriate United States Bankruptcy Court. For its part, as early as 1934, the United States Supreme Court endorsed bankruptcy as a mechanism to provide "the honest but

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unfortunate debtor ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[2]

In most cases, a debtor receives a discharge pursuant to 11 U.S.C. § 523. The discharge releases the debtor from personal liability for dischargeable debts.[3] In a Chapter 7 bankruptcy, all tax liabilities not defined in 11 U.S.C. § 523 are discharged as a matter of law.[4] But, as explained below, filing a bankruptcy to eliminate tax debt is not as simple as filing a bankruptcy petition. This is because only some tax debts can be discharged in bankruptcy. The following tax debts are not dischargeable in bankruptcy: (1) priority taxes;[5] (2) taxes for which a return was required, and was not filed or filed late; (3) taxes with respect to which the debtor made a fraudulent return; or (4) taxes which the debtor willfully attempted in any manner to "evade or defeat."[6] If a tax debt is not discharged in bankruptcy, the taxpayer will continue to owe it after the end of the bankruptcy case. For this reason, as discussed below, depending upon the tax liabilities at issue, a bankruptcy may be the less-preferred alternative.

By contrast, an OIC allows taxpayers to settle their tax liability with the Internal Revenue Service ("IRS" or "Service") for less than the full amount owed. There are three grounds on which an OIC can be made: doubt as to liability; doubt as to collectability; and effective tax administration. An OIC on the basis of doubt as to liability allows a taxpayer to compromise a liability if the taxpayer can establish "a genuine dispute as to the existence or amount of the correct tax liability under the law."[7] An OIC on the basis of doubt as to collectability allows a taxpayer to compromise a liability if the taxpayer's assets and income are less than the full amount of the liability.[8] An OIC on the basis of effective tax administration allows a taxpayer to compromise a liability if the taxpayer may be able to full pay the tax, but such payment would cause an economic hardship or there are compelling public policy or equity considerations.[9]

Regardless of the ground for the OIC, it is important to note that an OIC usually does not give the taxpayer relief from state income tax liabilities (though some states allow taxpayers to file a state-equivalent OIC) and does not help with the "usual" nontax debts and financial obligations.

II. <u>Practical Considerations in Deciding Between Bankruptcy and an OIC</u>

A number of practical situations arise that make a bankruptcy less preferable than an OIC. First, a taxpayer who has federal tax liabilities attributable to unfiled returns, late-filed returns, or substitute for returns prepared under section 6020(b) of the Internal Revenue Code ("IRC") is not able to discharge these liabilities through bankruptcy. These taxpayers should consider whether a bankruptcy achieves their tax objectives.

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Second, a taxpayer who owes trust fund liabilities will not be able to discharge these liabilities in bankruptcy. As such, the taxpayer should strongly consider an OIC as an alternative to bankruptcy.

Third, with respect to liabilities that are attributable to an arguably fraudulent return or a return that may have been filed with the intent to evade tax, the IRS may assert in an adversary proceeding that these liabilities are not dischargeable. Thus, where criminal or fraudulent conduct is a consideration, a bankruptcy may be less preferred to an OIC.

Taxpayers who do not fall within one of the above-mentioned situations and their advisors must understand the key differences between bankruptcy discharges and OICs to properly evaluate which is the better alternative for discharging tax liabilities. The balance of this article discusses key considerations in determining which is the better option.

III. <u>Filing Fees</u>

A basic difference between bankruptcy petitions and OICs is the filing fee associated with each. For an OIC, to start, the taxpayer generally must submit a $186 processing fee, which the IRS typically will apply against the amount of the offer.[10] This processing fee does not apply to offers based on doubt as to liability. Furthermore, the fee can be waived for low-income taxpayers.[11] Normally, the fee will be applied against the amount of the offer, "unless the taxpayer requests that it be refunded, if the offer is accepted to promote effective tax administration; or accepted based on doubt as to collectability and a determination that collection of an amount greater than the amount offered would create economic hardship."[12]

In addition to the OIC processing fee, some taxpayers must submit a down payment. The amount of the down payment varies according to the type of offer into which the taxpayer proposes to enter. For lump-sum offers, in which the taxpayer proposes to pay the offered amount in five or fewer installments, the amount of the down payment is generally equal to 20 percent of the offered amount.[13] For periodic payment offers, in which the taxpayer proposes to pay the offered amount in more than five payments, the amount of the down payment is generally equal to amount of the first proposed installment.[14] The taxpayers must continue to make installment payments due under an OIC, because the failure to make an installment due while the OIC is being evaluated may be treated by the IRS as a withdrawal of the OIC.[15] Regardless of the type of OIC submitted, the application fee is generally not refundable.[16] Additionally, the down payment requirement may be waived in the case of low-income taxpayers.[17]

With regard to the filing fees for a Chapter 7 bankruptcy, the courts must charge a $245 case filing fee, a $75 miscellaneous administrative fee, and a $15 trustee surcharge.[18] Normally, the fees

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must be paid to the appropriate Clerk of the Court upon filing. With the Court's permission, however, individual debtors may pay the filing fee in installments or altogether have the fee waived.[19] If the debtor's income is less than 150 percent of the poverty level (as defined in the Bankruptcy Code), and the debtor is unable to pay the Chapter 7 fees even in installments, the Court may waive the requirement that the fees be paid.[20] For a Chapter 13 bankruptcy, the courts must charge a $235 case filing fee and a $75 miscellaneous administrative fee; however, with the Court's permission, the fees may be paid in installments.[21] Debtors should also be aware that failure to pay these fees may result in dismissal of the case.[22]

IV. <u>Factoring in Taxpayer Financials</u>

Another difference between bankruptcies and OICs is the extent to which the taxpayer's financial situation impacts his or her eligibility for relief. OICs factor in the debtor's income (and future income potential), while bankruptcies generally do not, and OICs factor in asset equity, including equity to which the IRS has no legal claim, while bankruptcies do not. Also, when looking to see if an offer has been made in good faith, the taxpayer's financial situation is again taken into consideration. In order to understand these key differences, it is important to understand key aspects of OICs. As mentioned above, the IRS may compromise a tax liability on three grounds: doubt as to liability; the promotion of effective tax administration; and doubt as to collectability ("DATC").[23] DATC is the most common reason cited as a ground for an OIC, and for this reason, this article will discuss the information the IRS typically requests in connection with a DATC offer.

For DATC offers, the decision to accept or reject usually depends on whether the amount offered reflects the reasonable collection potential ("RCP").[24] RCP is defined as "the amount that can be collected from all available means, including administrative and judicial collection remedies."[25] In sum, a taxpayer's RCP is the sum of (1) the amount collectible from the taxpayer's net realizable equity in assets, (2) the amount collectible from the taxpayer's expected future income after allowing for payment of necessary living expenses, (3) the amount the IRS could reasonably expect to collect from third parties through administrative or judicial actions, and (4) assets to which the lien will not attach, such as equity in assets located outside the country.[26] To determine the RCP of a taxpayer, the taxpayer must complete and file (as appropriate) Form 433-A (OIC), *Collection Information Statement for Wage Earners and Self-Employed Individuals*, or Form 433-B (OIC), *Collection Information Statement for Businesses,* with supporting documentation to substantiate the taxpayer's assets, liabilities, income, and necessary living expenses.[27] For an OIC on the ground of DATC effective tax administration, the taxpayer must also submit Form 656, *Offer in Compromise.*[28]

As noted, taxpayers may choose to pay the offer amount in a lump sum (referred to as a "lump sum offer") or in installment payments (referred to as a "periodic payment offer").[29] A "lump sum

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offer" is defined as an offer payable in five or fewer installments within five or fewer months after the offer is accepted.[30] The taxpayer must submit a payment equal to 20 percent of the offer amount, which is nonrefundable, meaning it will not be returned to the taxpayer even if the offer is rejected or returned without acceptance.[31] A "periodic payment offer" is defined as an offer payable in six or more monthly installments within twenty-four months after the offer is accepted.[32] When submitting a periodic payment offer, the taxpayer must include the first proposed installment payment along with the Form 656.[33] Payments submitted under a periodic payment offer are also nonrefundable.[34] Additionally, as noted, while the IRS is evaluating a periodic payment offer, the taxpayer must continue to make the installment payments provided for under the terms of the offer, or else the Service can treat the offer as withdrawn.[35] These periodic payments are also nonrefundable.[36]

One of the better arguments that attorneys who advise that filing for bankruptcy protection is a better course of action than filing an OIC for clients with large tax debts is the aforementioned financial information that the IRS factors in OICs. When filing for bankruptcy, by contrast, the taxpayer can avoid the headache of having to submit documentation to substantiate assets, liabilities, income, living expenses, and especially the potential for the non-refundable payment equal to 20 percent of the offer or the nonrefundable first installment payment. The taxpayer should be aware, however, that with regard to a Chapter 13 bankruptcy plan, that he or she will still need to make payments, as all or part of the debt needs to be paid off though a payment plan.

V. Timing

Timing is an important consideration in determining whether to request a bankruptcy discharge, but less important in the context of an OIC. There are three primary timing rules which may affect a bankruptcy. First, under the so-called "three-year rule," for a taxpayer to discharge his or her back income taxes, the taxes must become due at least three years before the bankruptcy petition is filed.[37] Simply put, determining whether a tax debt is dischargeable in bankruptcy is a matter of adding three years to the due date with respect to the return reporting the tax to be discharged. Importantly, to be dischargeable, the tax must be reported on a timely filed tax return. Courts have been unsympathetic to debtors owing taxes which are outside the three-year rule. For example, in *Severo v. Commissioner*,[38] the Court held that the debtor was not discharged from claims for income tax due for a tax year for which the due date for the return was within three years of the filing of the petition in bankruptcy.[39]

A second important timing rule to consider when seeking a bankruptcy discharge is the so-called "two year rule." This rule applies to returns that were filed late, and it allows the taxpayer to discharge his or her taxes, even if the tax forms were filed late, as long as they were filed at least two years before filing for bankruptcy.[40]

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A third important timing rule to consider is that a taxpayer must wait at least 240 days after a tax assessment is made for the tax to be eligible for a discharge.[41] It is important to keep in mind that if a correction is filed or a change results from an IRS audit, the assessment date may be later.[42] Furthermore, when an OIC has been submitted within the aforementioned 240-day period, the bankruptcy filing will also be delayed by the amount of time the OIC is pending, plus thirty days.[43]

In contrast to these bankruptcy timing rules, there are no time constraints that limit when an OIC can be submitted. However, there are some rules regarding processability that must be adhered to. For example, in order to qualify for an OIC, the taxpayer must have filed all tax returns, made all required estimated tax payments for the current year, and made all required federal tax deposits for the current quarter if the taxpayer is a business owner with employees.[44]

In addition to the above rules, the taxpayer should also be aware of how often a bankruptcy can be filed or an OIC can be submitted. With regard to an OIC, there are no limits to how often one can be submitted. However, if the taxpayer files an OIC for purposes of delay or based on a frivolous position, he or she can be subject to the assessment of penalties.[45] In contrast, after receiving a Chapter 7 bankruptcy discharge, the taxpayer must wait eight years to receive another Chapter 7 bankruptcy discharge.[46] If the taxpayer wants to request a Chapter 13 bankruptcy discharge after receiving a Chapter 7 bankruptcy discharge, the taxpayer must wait four years to file the Chapter 13 bankruptcy petition.[47] Subsequent to the filing of a Chapter 13 bankruptcy petition and receiving a discharge, the taxpayer must wait six years to file a Chapter 7 bankruptcy,[48] and if the taxpayer elects to file another Chapter 13 petition after receiving a discharge, the waiting-period is two years to re-file.[49] These time periods between bankruptcies are measured from the date the petition is filed.

In sum, the taxpayer may be put in a position where the options have to be weighed: the risk of collection while waiting for a bankruptcy versus what would be paid if a compromise was filed without waiting.

VI. <u>Effect on IRS Seizures and Levies</u>

A. Impact of OIC on Seizures and Levies

Another issue to consider when advising a client to file an OIC or file for bankruptcy is the effect one of these alternatives has on the IRS seizures and levies, and whether the IRS can continue engaging in actions to collect past-due taxes. According to the Treasury Regulations, the IRS typically will not

> levy against the property or rights to property of a taxpayer who submits an [OIC], to collect the liability that is the subject of the offer, during the period the offer is

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> pending, for 30 days immediately following the rejection of the offer, and for any period when a timely filed appeal from the rejection is being considered by Appeals.[50]

However, the IRS may (and often does) file a lien to protect its interest during the time that a levy is prohibited. During these periods in which the IRS cannot enforce collection by way of a levy, the statute of limitations is also tolled.[51] This prohibition does not apply if the IRS believes that collection of the liability is in jeopardy (i.e., in the case of jeopardy assessments).[52]

B. Impact of Bankruptcy on Seizures and Levies

With regard to the IRS conducting collection activities during a bankruptcy proceeding, when a bankruptcy petition is filed, the IRS is automatically stayed from pursuing collection of outstanding taxes, regardless of whether the underlying tax is dischargeable.[53] The automatic stay provisions operate regardless of whether the tax is dischargeable and operate to prevent IRS collection from the date the bankruptcy petition is filed until the earliest of when the bankruptcy is closed or dismissed or a discharge is granted or denied.[54] Alternatively, the IRS may request relief from the automatic stay in certain circumstances; namely, if the IRS can prove it lacks adequate protection to assure that its interest in the bankruptcy estate will not decline in value during the bankruptcy.[55]

C. Recent Developments

Furthermore, regarding collection activities during bankruptcy, and more specifically post-discharge, there is a recent federal District Court opinion that deals with the tension between the anti-injunction act ("AIA") of the IRC and the injunctive remedies available to bankruptcy judges.[56] In *In re Horstemeyer v. United States*,[57] the debtor received a discharge after filing for bankruptcy and subsequently filed an adversary proceeding against the IRS asking that the Court determine that any personal liability of the debtor for the taxes at issue was discharged.[58] The Court held that the AIA is applicable in bankruptcy courts; thus, a preliminary injunction should not be issued barring collection of the taxes.[59] This holding demonstrated that in most jurisdictions, "post-discharge when the automatic stay has been lifted, the IRS is free to take collection action without interference from the bankruptcy court; however, if the underlying taxes were discharged in the bankruptcy case, the IRS does so at its financial peril because of the right of the debtor to seek damages."[60]

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VII. Determinations on Dischargeability

A. Dischargeability of Debts with an OIC

According to the IRC, an OIC can be used to "compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense."[61] There are, however, certain debts that an OIC may not resolve: when a taxpayer owes (1) state income taxes; (2) credit card debt; (3) civil judgments; and (4) other financial obligations.[62] With regard to state income tax debts, in 2012, the IRS announced changes to the OIC program that allowed taxpayers to pay state and local delinquent taxes in certain circumstances.[63] Generally speaking, the IRS will look at the percentage basis of tax owed to the state and IRS and may allow payments for state and local taxes.[64]

B. Dischargeability of Debts in Bankruptcy

With regard to the issue of which taxes are dischargeable and which are not, generally, filing a bankruptcy petition and the Bankruptcy Court's entry of an Order of Discharge discharges all liabilities, including taxes, other than those specifically exempted from discharge.[65] Taxes that are exempted from a bankruptcy discharge are defined in 11 U.S.C. § 523 and include "priority tax" liabilities which are excepted from discharge whether a claim was filed or not.[66] Priority taxes are defined in 11 U.S.C. § 507(a)(8)(A) through (G) and include taxes "on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition;" unsecured property taxes assessed prior to the commencement of the bankruptcy case and last payable without penalty less than one year prior to the filing of the bankruptcy petition; "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;" certain employment taxes; certain excise taxes; and certain customs duties.

In addition to these priority taxes, there is also the trust fund recovery penalty which is prescribed by IRC § 6672. This penalty serves as an alternative means of collecting unpaid trust fund taxes when taxes are not fully collectible from the company or business that failed to pay them and is also a priority obligation.[67] Thus, as noted above, the trust fund recovery penalty is generally not dischargeable in bankruptcy.

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C. Chapter 7 Bankruptcy – "Means Testing"

The taxpayer should also be aware that on April 14, 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The BAPCA restricted the number of debtors who could file for Chapter 7 bankruptcy by subjecting them to a "means test" to determine if their income is low enough to file for Chapter 7 bankruptcy. This test only applies to bankruptcy filers with primarily consumer debts. To take the means test, the debtor must first determine whether his or her income is more or less than the median income in his or her state.[68] If the debtor's income exceeds the state median, then the debtor will be subject to the means test and will not be allowed to file for Chapter 7 bankruptcy.[69] If the debtor's income is below the state median, then the debtor may file for Chapter 7 bankruptcy, but may be subject to the Court determining that he or she is abusing the system if able to afford to pay a certain percent of the unsecured debt.[70] The means test will not be required if less than 50 percent of the debt is "consumer" in nature.[71]

An important issue that arises when dealing with the means test and consumer debts is whether IRS tax debts are consumer debts. Many bankruptcy courts have held that debts due to the IRS are not consumer debts.[72]

D. Debts Attributable to Fraud or Willful Attempt to "Evade or Defeat"

Another issue arising in the discussion of dischargeable taxes in bankruptcy relates to tax underpayments attributable to fraudulent returns and taxes where the debtor willfully attempts to "evade or defeat" taxes.[73] When discussing underpayments attributable to fraudulent returns, the United States has the burden of proof to show that a return was fraudulent.[74] The burden of proof in a bankruptcy proceeding to establish the exception to discharge is a "preponderance of evidence"—not the normal standard for fraud (clear and convincing evidence).[75] The U.S. Court of Appeals for the Eleventh Circuit in *United States v. Jacobs* reviewed the willfulness requirement, discussed examples of conduct that should be impermissible to a taxpayer looking to discharge tax debts in bankruptcy, and ultimately found that the taxpayer willfully attempted to evade or defeat his taxes within the meaning of that section.[76]

E. Recent Developments – Potential Circuit Split

There is also a potential circuit split on whether late tax returns should be considered returns for purposes of determining dischargeability and ultimately whether the taxes due on these returns should be dischargeable in bankruptcy.[77] The First, Fifth and Tenth Circuit Courts of Appeals have held that a tax return filed after the date by which the state required such return to be filed

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did not constitute a "return" under a literal interpretation of 11 U.S.C. § 523(a) and that unpaid taxes due under that return were not dischargeable in bankruptcy. Thus, a narrow majority of federal appellate circuit courts support the conclusion that a tax debt related to a late-filed return is not preferred, and instead, that an OIC should be pursued. In contrast, last month, the Bankruptcy Appellate Panel for the Ninth Circuit in *Martin v. United States* rejected the literal interpretation of 11 U.S.C. § 523(a) on which the other three aforementioned circuits relied.[78] If this case is appealed and if the Ninth Circuit affirms this ruling, a clear conflict will then exist between the circuits.

Overall, when evaluating which debts can be discharged or compromised, taxpayers should be cognizant of the rules and restrictions above, take the type of tax debts they face into consideration, and see which option would best suit them to discharge the liabilities.

VIII. Discharge of Penalties and Interest

In the context of bankruptcy proceedings, the discharge of penalties generally occurs in two circumstances: either the penalties have to do with dischargeable taxes, or the events that created the penalties happened more than three years before the bankruptcy.[79] For example, in *In re Roberts*, the debtors failed to file income tax returns, and five years later they filed for Chapter 7 bankruptcy protection.[80] The Court ruled that since the penalties were imposed with respect to a transaction or event that occurred more than three years pre-petition, they were dischargeable.[81] In *McKay v. United States*, the court has even gone so far as to say that in cases involving taxes that were non-dischargeable due to the debtor's fraud; the penalties related to those taxes, however, were dischargeable since they met the aforementioned criteria under 11 U.S.C. § 523(a)(7).[82]

With regard to the discharge of interest, the courts take the stance that the debtor will not be able to discharge the interest if the related taxes are non-dischargeable.[83] In the case of *In re Garcia*, a Chapter 13 debtor provided for priority payment of pre-petition tax liabilities, but not for pre-petition interest on those tax liabilities.[84] The Court found that per sections 507 and 523 of the Bankruptcy Code, interest is an integral part of an allowed claim, so the interest had the same priority as the actual tax and was also not dischargeable.[85]

The IRS may be less restricted than the Bankruptcy Courts in compromising liabilities for interest and penalties which have accumulated from the taxpayer's tax liability. This is because Treasury Regulations state in relevant part that "an agreement to compromise may relate to a civil or criminal liability for taxes, interest, or penalties."[86] Hence, if a taxpayer has accumulated significant penalties and interest and has run into issues with discharging the same in bankruptcy, an OIC may be a more holistic remedy to consider.

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IX. Nontax Considerations

It is also important for taxpayers to keep in mind key nontax differences between OICs and bankruptcies. OICs neither resolve state income tax debts, nor help with the "usual" nontax debts, whereas bankruptcies do. While taxes may be a motivating factor for some taxpayers to declare bankruptcy, many more taxpayers are seeking to resolve both tax and nontax debts. These taxpayers must understand that an OIC is limited to tax debts, and in this regard, it may not provide the holistic remedy offered by a bankruptcy.

X. Conclusion

A debt-saddled taxpayer's decision to file for bankruptcy or an OIC is not easy and needs a lot more analysis than meets the eye. The above-referenced provisions of the Internal Revenue Code and Bankruptcy Code should all be taken into consideration when advising a client which is the best option for resolving tax debts. The myths that with an OIC, taxpayers owing $10,000 or more can very easily avoid all these problems via a settlement for "pennies on the dollar," or that via bankruptcy, the taxpayer is the one with all the control, are largely fictions created by a lack of unbiased and in-depth analysis of the above code sections and cases referenced in this article.

Footnotes:

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1. This article does not address the Chapter 11 bankruptcy of individuals due to the cost and limited application. Chapter 11 generally and Chapter 11 Plans, particularly liquidating plans, provide illiquid taxpayers a place (and a very orderly process) to liquidate assets without the normal administrative overlay to release or to discharge tax liens.
2. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
3. 11 U.S.C. § 523.
4. 11 U.S.C. § 727(b).
5. Priority taxes are defined in 11 U.S.C. § 507(a)(8)(A) through (G) to generally include the following liabilities:
   (1) Taxes "on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition;"
   (2) Unsecured property taxes assessed prior to the commencement of the bankruptcy case and last payable without penalty less than one year prior to the filing of the bankruptcy petition;
   (3) "A tax required to be collected or withheld and for which the debtor is liable in whatever capacity;"
   (4) Certain employment taxes;
   (5) Certain excise taxes; and
   (6) Certain customs duties.

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6. Wm. Robert ("Bob") Pope, Jr., Unpaid Federal Tax Liabilities – The Bankruptcy Option: The Taxpayer Controls! (Aug. 2014), at 47, 48 *available at* http://www.americanbar.org/content/dam/aba/multimedia/cle/materials/2014/08/t14dfdcm1.authcheckdam.pdf.
7. Treas. Reg. § 301.7122-1(b)(1).
8. Treas. Reg. § 301.7122-1(b)(2).
9. Treas. Reg. § 301.7122-1(b)(3).
10. I.R.C. § 7122(c)(2)(B).
11. Treas. Reg. § 300.3(b)(1)(ii).
12. Treas. Reg. § 300.3 (b)(2)(i)(ii).
13. I.R.C. § 7122(c)(1)(A)(i), (ii).
14. I.R.C. § 7122(c)(1)(B)(i).
15. I.R.C. § 7122(c)(1)(C)(ii).
16. IRS Topic 204, *Offer in Compromise* (Dec. 2015), *available at* https://www.irs.gov/taxtopics/tc204.html.
17. *Id.*
18. 28 U.S.C. § 1930(a)(1).
19. 28 U.S.C. § 1930(a)(7).
20. 28 U.S.C. § 1930(f).
21. 28 U.S.C. § 1930(a).
22. 11 U.S.C. § 1307(c)(2).
23. Treas. Reg. § 301.7122-1(b).
24. Internal Revenue Manual ("I.R.M."), pt. 5.8.4.3(2) (May 10, 2013).
25. *Id.*
26. I.R.M., pt. 5.8.4.3.1(1) (Apr. 30, 2015).
27. IRS Form 656 Booklet, *Offer in Compromise* (Jan. 2015), *available at* http://files.ctctcdn.com/f7d16a55201/c449163d-cceb-4419-84c0-24127a90559f.pdf.
28. For an OIC on the ground of doubt as to liability, the taxpayer must submit a Form 656-L, *Offer in Compromise (Doubt as to Liability*).
29. IRS Topic 204 *supra* note 16.
30. *Id.*; *see also* I.R.C. § 7122(c)(1)(A)(ii).
31. IRS Topic 204, *supra* note 16; *see also* I.R.C. § 7122(c)(1)(A)(i), (ii).
32. IRS Topic 204, *supra* note 16.
33. *Id.*
34. *Id.*
35. *Id*
36. *Id.*
37. 11 U.S.C. § 507(a)(8)(A)(i).
38. Severo v. Commissioner, 129 T.C. 160 (2007).
39. *Id.* at 165-66.
40. 11 U.S.C. § 523(a)(1)(B)(ii).
41. 11 U.S.C. § 507(a)(8)(A)(11).
42. *Id.*
43. 11 U.S.C. § 507(a)(8)(A)(ii)(I).
44. IRS Tax Topic 204, *supra* note 16.
45. I.R.C. § 6673; see also I.R.M., pt. 5.8.10.12(1) (Sept. 27, 2011).
46. I.R.C. § 727(a)(8).
47. 11 U.S.C. § 1328(f)(1).
48. 11 U.S.C. § 727(a)(9).
49. 11 U.S.C. § 1328(f)(2).
50. Treas. Reg. § 301.7122-1(g); *see also* I.R.C. § 6331(k)(1).
51. I.R.C. § 6331(i)(5).
52. I.R.C. § 6331(k)(3),(i)(3)(A)(ii).
53. 11 U.S.C. § 362(a).

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54. 11 U.S.C. § 362(c).
55. I.R.M., pt. 5.17.11.8(2) (June 16, 2015).
56. T. Keith Fogg, *Bankruptcy and the Anti-Injunction Act*, PROCEDURALLY TAXING, Dec. 29, 2015 *available at* http://www.procedurallytaxing.com/bankruptcy-and-the-anti-injunction-act/ (hereinafter, "PROCEDURALLY TAXING").
57. In re Horstemeyer v. United States, 116 A.F.T.R.2d 2015-6664, 2015 WL 6739721 (Bankr. D.S.C. Nov. 4, 2015).
58. *Id*. slip op. at *1.
59. *Id*. slip op. at *4.
60. PROCEDURALLY TAXING, *supra* note 56.
61. I.R.C. § 7122(a).
62. Larry Heinkel, *Eliminating IRS Tax Debts – Why Bankruptcy May Be Better Than an OIC to Resolve Your Client's Tax Debts,* 82 FLA. BAR J. (Apr. 2008) *available at* https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/A5A8B1243ACE001D8525741A00679007.
63. IRS Announces More Flexible Offer-in-Compromise Terms to Help a Greater Number of Struggling Taxpayers Make a Fresh Start, https://www.irs.gov/uac/IRS-Announces-More-Flexible-Offer-in-Compromise-Terms-to-Help-a-Greater-Number-of-Struggling-Taxpayers-Make-a-Fresh-Start (last reviewed or updated Apr. 17, 2014).
64. I.R.M., pt. 5.8.5.22.4(7) (Sept. 30, 2013).
65. 11 U.S.C. § 727.
66. 11 U.S.C. § 523(a)(1)(A).
67. 11 U.S.C. § 523(a)(1).
68. Jeanne Sahadi, *The new bankruptcy law and you*, CNN MONEY, Oct. 17, 2015, http://money.cnn.com/2005/10/17/pf/debt/bankruptcy_law/index.htm.
69. *Id.*
70. *Id.*
71. Richard S. Gendler, *Categorizing Tax Liabilities for the Applicability of the Means Test*, AM. BANKR. INST. J. (Aug. 2012).
72. In re Traub, 140 B.R. 286, 288 (Bankr. D.N.M. 1992); In re Reiter, 126 B.R. 961, 964 (Bankr. W.D. Tex. 1991); In re Harrison v. IRS, 82 B.R. 557, 558 (Bankr. D. Colo. 1987).
73. 11 U.S.C. § 523(a)(1)(C).
74. I.R.C. § 6663(b); Pope, at 48 *supra* note 6.
75. *Id.*
76. United States v. Jacobs, 490 F.3d 913 (11th Cir. 2007).
77. In re Fahey, 779 F.3d 1 (1st Cir. 2015); In re Mallo, 774 F.3d 1313 (10th Cir. 2014); In re McCoy, 666 F.3d 924 (5th Cir. 2012).
78. In re Martin, 116 A.F.T.R.2d 2015-7074, 2015 WL 9252590 (B.A.P. 9th Cir. Dec. 17, 2015).
79. 11 U.S.C. § 523(a)(7).
80. In re Roberts, 906 F.2d 1440, 1441 (10th Cir. 1990).
81. *Id.* at 1445.
82. McKay v. United States, 957 F.2d 689, 693 (9th Cir. 1992)
83. Leathley v. Commissioner, 100 T.C.M. (CCH) 197 (2010); In re Burns, 887 F.2d 1541, 1542 (11th Cir. 1989).
84. In re Garcia, 955 F.2d 16, 17 (5th Cir. 1992).
85. *Id*. at 19.
86. Treas. Reg. § 301.7122-1(a)(2).

TAX NEWS: E-FILING AMONG TAX COURT'S PROPOSED AMENDMENTS TO ITS RULES

On January 11, 2016, the United States Tax Court announced proposed amendments to its Rules of Practice and Procedure. The Court proposed to amend its Rules to permit electronic filing of petitions. Until the final Rules are adopted, practitioners should continue to file petitions with original signatures at the Tax Court's business address in Washington, D.C.

Per the Court, "[i]t is envisioned that, after the necessary Rules amendments have been adopted and before the Court implements electronic filing of petitions and expanded electronic filing of other papers, detailed information regarding the electronic filing of petitions and other papers will be furnished in the Court's electronic filing guidelines on the Court's Web site."

For further information, see Press Release, United States Tax Court, *Proposed Amendments to the Tax Court Rules of Practice and Procedure to Modify the Signature and Filing Requirements for Pleadings and Other Documents Filed Electronically* (Jan. 11, 2016), *available at* http://www.ustaxcourt.gov/press/011116.pdf.

MONTHLY TAXPAYERS ASSISTANCE CORPORATION TIP: AVOIDING A TFRP VIA NONASSERTION FOR COLLECTIBILITY

The Trust Fund Recovery Penalty ("TFRP") is imposed on any *responsible person* who *willfully* fails to collect or to truthfully account for and pay over employment tax, or attempts in any manner to evade or defeat such tax or the payment thereof. To assess a TFRP under IRC § 6672, these elements of responsibility and willfulness must be met.[1]

However collectibility is another option that can relieve a responsible person from liability. In order to achieve this option, the revenue officer will conduct a collectibility investigation that includes completion of IRS Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*, or IRS Form 433-F, *Collection Information Statement*. All current compliance is also verified. Factors the IRS considers are: current financial condition, involvement in a Bankruptcy proceeding, income history and future income potential, and potential of increase and equity of assets. If the revenue officer determines that there is no present or future collection potential after review, nonassertion of the TFRP may be recommended with managerial approval. If nonassertion for collectibility is the direction of the case, it is advisable to discuss with the revenue officer early in the investigation. *See* IRM, pts. 5.7.5.2 (June 28, 2011), Collectibility; 5.7.5.3 (June 28, 2011), Verification of Ability to Pay; 5.7.5.3.1 (Nov. 22, 2014), Nonassertion Based on Collectibility.

- Desa Lazar, Esq., Taxpayers Assistance Corporation

1. For definitions of "responsible person" and "willfulness," see IRM, pts. 8.25.1.4.1, 8.25.1.4.2 (Dec. 7, 2012).

FIRM NEWS

A&A Attorneys on ABA Panels in Los Angeles

Attorneys from Agostino & Associates will participate in several panels at the ABA Tax Section 2016 Midyear Meeting at the J.W. Marriott Los Angeles L.A. LIVE next week.

On January 28, Lawrence Sannicandro will speak on a panel entitled, "Tax Court 101: Everything You Wanted to Know About Litigating Tax Cases," on behalf of the Young Lawyers Forum and Diversity committees. That same day, Jairo Cano will moderate a panel entitled, "Nuts & Bolts: The Administrative Tax Controversy Case from Examination to Appeals," which will discuss practical tools that tax practitioners may use in IRS Appeals conferences and other administrative tax controversy cases. Jairo will also moderate a panel on January 29, on "Ethical Issues in Federal Tax Practice – The Government Perspective," in which government officials will provide guidance on recent developments relating to professional responsibility.

Additionally on January 29, Frank Agostino will participate on a panel, "When the Past Is Not the Past: Cleaning Up Our Client's Past Bad Behavior," which will tackle issues of unreported income, misclassification, cash payments, and other possible red flags that might spur an IRS investigation. Frank will also be speaking on "Dealing with a Decedent's Tax Fraud: Cleaning Up Our Dead Client's Bad Behavior," relating to past individual mistakes or misdeeds that may haunt a taxpayer's estate during probate or afterward. The same day, Frank will participate on a panel titled, "Disclosure, FOIA and Tax Litigation," discussing the advantages and challenges associated with information-gathering in tax litigation.

Farewell, Lawrence Brody

The A&A team sends its best wishes to Lawrence Brody, who will be retiring at the end of the month. Larry chose tax law as a second career, having spent multiple decades as an engineer in global telecommunications. After earning his J.D. at Rutgers Law School, he joined A&A in 2008 and quickly became an expert in estate and gift tax and offshore disclosure matters. His colorful and memorable presence in the office will be missed.

Upcoming United States Tax Court Calendar Calls

All Calendar Calls Are Held at:

Jacob K. Javits Federal Building
26 Federal Plaza
Rooms 206, 208
New York, NY 10278

January 25, 2016 - Westbury, NY

February 1, 2016 - New York City

February 22, 2016 - Newark, NJ

February 29, 2016 - Newark, NJ & New York City

March 14, 2016 - Westbury, NY

We Are Hiring!

AGOSTINO & ASSOCIATES has an opening for a tax controversy professional (i.e., attorney, CPA, or EA) with a demonstrated interest in tax and tax controversy. Applicants must have strong research and writing skills, be computer literate and have a working knowledge of tax return preparation and tax controversy. Attorneys must be admitted in New Jersey. Non-attorneys must be willing to sit for the USTCP in November 2016. To apply, please email Fagostino@Agostinolaw.com: (a) your resume, (b) a recent writing sample, and (c) a cover letter, including your compensation requirements.

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AGOSTINO & ASSOCIATES

Bergen Community College

7th Annual Criminal Tax Enforcement Forum: 2016 Update for Tax Professionals

FREE NY & NJ CLE*, CPE†, AND EA CE Credits (4)

WHEN: Tuesday, January 26, 2016
7:30 AM – 12:00 PM
7:30 AM – Registration
8:00 AM – Program will begin

WHERE: Bergen Community College
Technology Center
400 Paramus Road
Paramus, NJ 07652

TOPICS:

Federal Tax Criminal Enforcement Update
- National Office – Priorities for 2016
- NJ & IRS Current Events

State Tax Criminal Enforcement Update
- Current Prosecution in New Jersey
- Conference Opportunities in Criminal Tax Cases

Employment Tax Investigations

Current Events in Bank Secrecy and Forfeitures
- Forfeiture and Whistleblower Updates

Federal Voluntary Disclosure Updates
- Updates to Offshore and Domestic VD Programs
- New York and New Jersey Voluntary Disclosures

PANELISTS:

Frank Agostino, Esq.
Agostino & Associates, P.C

Robert Beranger
Navigant Consulting, Inc. (invited)

Jairo Cano, Esq.
Agostino & Associates, P.C.

Melissa D'Ambrose, Esq.
IRS, Office of Chief Counsel (invited)

John Gagliardo, EA
Asset Forfeiture Consultant

Charles Giblin
NJ Office of Criminal Investigation

Robert Glantz
IRS, Criminal Investigation Division

Jeremy Klausner, Esq.
Agostino & Associates, P.C.

Jonathan Larsen, SAC
IRS, Criminal Investigation Division

Richard Sapinski, Esq.
Sills Cummis & Gross P.C.

Bryan Skarlatos, Esq.
Kostelanetz & Fink, LLP

KOSTELANETZ & FINK, LLP

Sills Cummis & Gross P.C.

IRS APPROVED CONTINUING EDUCATION PROVIDER

RSVP at goo.gl/8bfWbh

* This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 4 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law.
This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 4 credit hours.
† Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD.

EXPERT WITNESSES AND VALUATION IN PRE- AND POST-FILING TAX CONTROVERSIES

THREE FREE NY & NJ CLE*, CPE†, and EA CE CREDITS

WHERE:

Bergen Community College
Ciarco Learning Center
355 Main Street
Room 102/103
Hackensack, NJ 07601

WHEN:

Tuesday, February 2, 2016
6:00 PM – 9:00 PM

TOPICS:

Expert Opinion v. Lay Opinion
Definition of Fair Market Value
Valuation Discounts Affect on Tax
Qualified Appraisers and Qualified Appraisals
Qualified Appraisals v. Expert Reports
Penalties and Valuation Misstatements
Section 108 and Valuation
Form 433 and Valuation
Valuation on Form 706 and Form 709
Privileges/Waivers and Expert Witnesses

REGISTER @
goo.gl/gVWBt5

APPROVED CONTINUING EDUCATION PROVIDER

* This program has been approved by the Board on Continuing Legal Education of the Supreme Court of New Jersey for 3 hours of total CLE credit. Of these, 0 qualify as hours of credit for ethics/professionalism, and 0 qualify as hours of credit toward certification in civil trial law, criminal trial law, workers compensation law and/or matrimonial law.
This course or program has been approved in accordance with the requirements of the New York State Continuing Legal Education Board for a maximum of 3 credit hours.
† Based upon our interpretation of the regulations by the New York and New Jersey State Boards of Accountancy, this event will qualify for CPE credit. Our New Jersey CPE Sponsorship number is 20CE00213700. Our New York CPE Sponsorship number is 002405. Our Office of Professional Responsibility Sponsor Number is QVGWD.