



OFFICE OF
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR DISTRICT COUNSEL, GULF COAST DISTRICT

FROM: Kathryn A. Zuba
Chief Branch 2 (General Litigation)

SUBJECT: Proofs of Claim in Mississippi Bankruptcy Cases

By way of a General Litigation Transmittal Memorandum dated September 16, 1998, your office asked for our review of your September 11, 1998, Memorandum to District Director regarding proofs of claim in Mississippi bankruptcy cases. For the following reasons, we recommend your memorandum be revised. This document is not to be cited as precedent.

Your memorandum reflects that your office became aware that in Mississippi the Service was using the last day of the tax year as the date income tax claims and refunds arise for purposes of filing proofs of claim and making setoffs of tax refunds. You stated that in Louisiana, the Service was using the date income taxes became payable, i.e. the date the return is due, as the date income tax claims and refunds arise. You stated the practice in Louisiana was based on the Fifth Circuit Court of Appeals holding in *In re Ripley*, 926 F.2d 440 (5th Cir. 1991). Because Mississippi, like Louisiana, is within the jurisdiction of the Fifth Circuit, you directed that in the future, the date the taxes become payable should be used as the date for determining whether an income tax claim/refund is a pre-petition or post-petition claim/refund.

We do not find *Ripley* controlling on the issues you have addressed. The issue in *Ripley* was whether taxes "became payable" under § 1305 of the Bankruptcy Code when the taxpayers were required to file their return, or when estimated installment payments were due. 926 F.2d at 443. In pertinent part, § 1305 provides that, "A proof of claim may be filed by any entity that holds a claim against the debtor . . . for taxes that become payable to a governmental unit while the case is pending[.]" 11 U.S.C. § 1305(a)(1). Section 1305, found in Chapter 13 of Bankruptcy Code, is applicable only in Chapter 13 cases, and is an exception to the general rule that

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bankruptcy proceedings do not affect post-petition claims. See 926 F.2d at 443. Section 1305 provides a mechanism through which certain post-petition claims, including claims of governmental units for taxes that become payable post-petition, can be paid through a Chapter 13 plan. *Id.* This provision does not provide guidance as to the general pre-petition versus post-petition nature of a tax claim.

It has long been our position that income tax liabilities arise on the last day of the tax year for purposes of determining whether a particular tax is a pre-petition or post-petition claim. This position is reflected in the recently published Bankruptcy Handbook. See I.R.M. 5.9.4.3.1(1), 5.9.6.4.2(4)b. We recognize, however, that the three circuit court cases which have addressed the pre-petition/post-petition issue have held that petition year tax liabilities should be apportioned into pre-petition and post-petition claims, usually through a proration based on the number of days proceeding and following the petition date. *In re Pacific-Atlantic Trading Company*, 64 F.3d 1292 (9th Cir. 1995); *In re L. J. O'Neil Shoe Company*, 64 F.3d 1146 (8th Cir. 1995); *In re Hillsborough Holdings Corp.*, 116 F.3d 1391 (11th Cir. 1997). Accordingly, we have advised counsel to follow these authorities within their respective jurisdictions.

It is important to note that these cases involve only corporate tax liabilities. It is our position that outside these jurisdictions, and even within these jurisdictions in cases of individual Chapter 7 and Chapter 11 debtors who have not elected to split the tax year pursuant to I.R.C. § 1398, or Chapter 13 debtors, the Service should continue to assert the position that tax liabilities arise on the last day of the tax year. Because the Fifth Circuit is not one of these jurisdictions, we advise that the Service continue to assert this position in that circuit.

We also recognize that exceptions may be warranted. For example, in a large case it may be necessary for the Service to make a protective filing of a proof of claim which includes as a pre-petition claim an estimate of the pre-petition portion of petition year tax liability. Such a filing may be necessary to prevent the claim from being disallowed as untimely in the event the bankruptcy court were to follow the line of above referenced cases holding that the pre-petition portion of a petition year tax liability is a pre-petition claim and not a post-petition administrative expense.

Your memorandum also raises the issue of when a tax claim or refund arises for purposes of setoff pursuant to § 553 of the Bankruptcy Code. As you may be aware, it is also our position that pursuant to the mutuality requirement for § 553 setoff, both the claim of the Service against the debtor and the debt owing by the Service to the debtor must arise before the commencement of the case. Consistent with our position regarding the date used for filing proofs of claim, it is our position that for purposes of determining whether tax liabilities and tax refunds are pre-

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petition or post-petition in nature pursuant to the mutuality requirement for setoff, the last day of the tax year should be the date used.

In conclusion, the advice contained in the memorandum you asked us to review is not consistent with our position. We recommend that your advice be revised to reflect our position that tax claims arise on the last day of the tax year for purposes of filing proofs of claim and making setoffs. If you have any further questions, please call the attorney assigned to this matter in branch 2 at (202) 622-3620.