



AMERICAN
BANKRUPTCY
INSTITUTE

2022 Consumer Practice Extravaganza

Working with State and Federal Taxing Authorities

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Disclaimer: AUSA Najah J. Shariff currently serves in the Tax Division of the United States Attorney's Office for the Central District of California. The views expressed in this presentation by AUSA Shariff are solely those of hers and do not necessarily represent the positions of the U.S. Department of Justice.

Najah J. Shariff*



- Assistant United States Attorney (AUSA) with United States Attorney's Office, Tax Division, in Los Angeles (May 2015 to the Present)
- AUSA Shariff represents the United States, on behalf of the IRS, in some of the biggest and most complex cases involving bankruptcy tax and civil tax litigation matters in the United States Bankruptcy Court, the United States District Court, and the Superior Court of California.
- Former Special Assistant United States Attorney (SAUSA) and Senior Tax Attorney with the IRS Office of Chief Counsel (March 2006 to May 2015) where she tried numerous cases in Bankruptcy Court and the United States Tax Court, involving complex, novel, and high-profile tax and bankruptcy issues.
- Ms. Shariff has developed an expertise in bankruptcy tax law, tax litigation, refund litigation, tax deficiency litigation, the assessment and collection of taxes, federal tax liens and levies, collection due process, summons enforcement, FBAR cases, surplus funds cases, foreclosure actions, complaint-in-interpleader actions, disclosure, privacy and FOIA issues.
- Ms. Shariff received her LL.M. in Tax from Georgetown University Law Center and her J.D. from Boston University Law Center.
- She is invited to speak regularly on bankruptcy and tax matters.

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Jolene Tanner

- Assistant United States Attorney at the U.S. Attorney's Office, Tax Division in Los Angeles California, where she primarily handles bankruptcy tax litigation in the Central District of California, in addition to tax litigation in District Court and California Superior court.
- AUSA Tanner is the Office's Criminal Bankruptcy Fraud Referral Coordinator.
- Ms. Tanner is a Certified Specialist in Bankruptcy Law by the State Bar of California.
- She is frequently sought after as a bankruptcy tax expert to present at bar events and trainings across the country.
- Ms. Tanner was selected by the National Conference of Bankruptcy Judges as a "Next Generation" attorney in 2020 and was recognized by the American Bankruptcy Institute in the 40 under 40 class for 2021.
- Prior to joining the U.S. Attorney's Office, Ms. Tanner was a judicial law clerk for the Honorable Mark D. Houle and the Honorable Deborah J. Saltzman. Ms. Tanner was Judge Houle's law clerk when he sat *pro tem* on the Ninth Circuit Bankruptcy Appellate Panel. Ms. Tanner externed for the Honorable Sheri Bluebond.
- Her law review article *Stern v. Marshall: The Earthquake That Hit the Bankruptcy Courts and the Aftershocks That Followed*, 45 Loy. L.A. L. Rev. 587 (2012), is cited in multiple publications including amicus curiae to the Ninth Circuit and Supreme Court.

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Steven L. Walker (walk-law.com)

- Steven L. Walker is an attorney at the Law Offices of Steven L. Walker, a Professional Law Corporation (San Jose). Mr. Walker's firm specializes in tax controversy and litigation, and bankruptcy tax matters.
- Mr. Walker received his B.S.E.E. degree from the University of California, Davis, and his J.D. degree and LL.M degree (Taxation) from McGeorge School of Law, University of the Pacific.
- Fellow of the American College of Tax Counsel and a Certified Taxation Law Specialist of the State Bar of California.
- Past chair of the Taxation Section of the State Bar of California (now California Lawyers Association).
- Adjunct Professor of Law at the University of San Francisco School of Law in the LL.M (Taxation) Program, where he teaches Bankruptcy Tax and Civil and Criminal Tax Penalties.
- Worked at the California Franchise Tax Board and attorney at the IRS Office of Chief Counsel.

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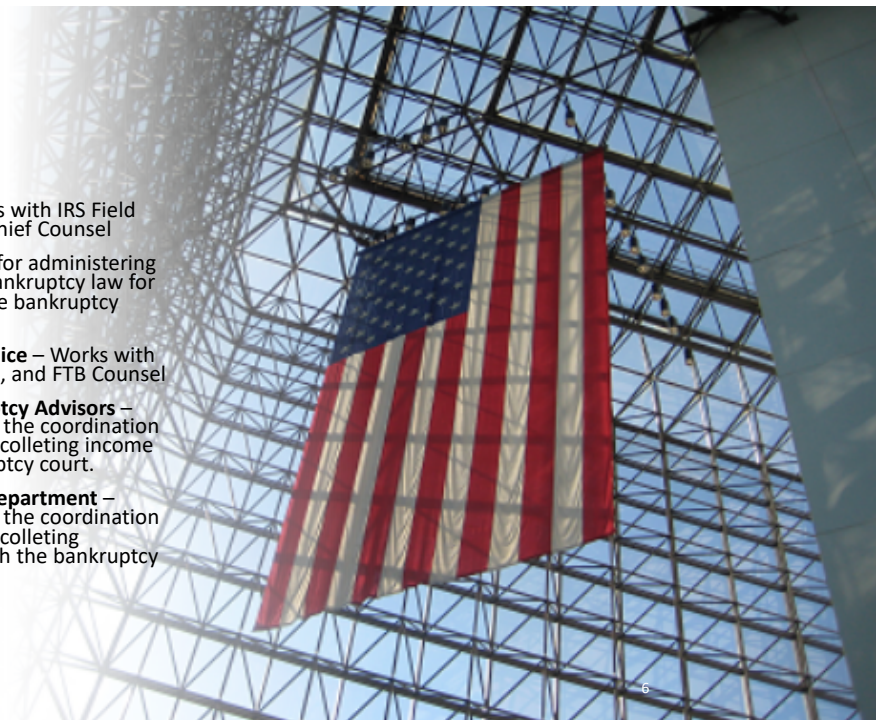
Today's Topics

- Key Players
- Problem 1 –Litigating Tax Claims in Bankruptcy Court—the Section 505 and 502 Issues
- Problem 2- Discharging taxes in Chapter 7 or 13
- Problem 3 - Section 363 Sale of Assets
- Problem 4 - Federal and State Tax Liens
- Problem 5 – IRS Enforcement Post Discharge

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Key Players

- **U.S. Attorney's Office** – Works with IRS Field Insolvency and IRS Office of Chief Counsel
- **IRS Insolvency** – Responsible for administering the coordination of tax and bankruptcy law for collecting tax debts through the bankruptcy court.
- **California Department of Justice** – Works with FTB Bankruptcy Advisors, EDD, and FTB Counsel
- **Franchise Tax Board, Bankruptcy Advisors** – Responsible for administering the coordination of tax and bankruptcy law for collecting income tax debts through the bankruptcy court.
- **Employment Development Department** – Responsible for administering the coordination of tax and bankruptcy law for collecting employment tax debts through the bankruptcy court.



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Resources Page

- **IRS website.** www.irs.gov.
- **IRS Publication 908** - This publication explains the basic federal income tax aspects of bankruptcy. www.irs.gov/pub/irs-prior/p908--2022.pdf
- **Publication 5082**, What You Should Know About Chapter 13 Bankruptcy and Taxes. <https://www.irs.gov/pub/irs-pdf/p5082.pdf>
- **IRS Practitioner Priority Service.** 866-860-4259
- **Internal Revenue Manual, Part 5.9** - discusses Bankruptcy and Other Insolvencies. www.irs.gov/irm/part5/irm_05-009-001r#idm140114856124720

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Problem 1: Litigating Tax Claims in Bankruptcy Court

- Debtor files for bankruptcy and owes a substantial amount to the IRS and state taxing authorities. Can the Debtor ask the bankruptcy court to determine the taxes?
- How does the Debtor do this?
- Is this a good idea?
- What tools do you need to go against the IRS?
- What if one of the years on the claim is pending in the United States Tax Court?

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Meet Michael

Michael is talking about bankruptcy. How would bankruptcy help Michael?

- 2014 1040 (IRS filed their SFR prior to the client filing their tax return): \$50,000
- 2016-2020 1040 \$25,000/year
 - 2016 \$25,000
 - 2017 \$25,000
 - 2018 \$25,000
 - 2019 \$25,000
 - 2020 \$25,000
- Trust fund recovery penalty, First Quarter, 2018, IRC 6672 \$25,000

Total liability: \$200,000



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Getting a Second Bite of the Apple - Determining Tax Liability in Bankruptcy Court.

- The court may determine the amount or legality of any tax, fine or penalty, whether or not the IRS has not assessed the taxes or the taxes were paid. [11 U.S.C. 505(a)(1)]
- The court may not determine the amount of a tax, fine or penalty if such amount or legality was **contested before and adjudicated by a judicial or administrative tribunal** of competent jurisdiction before the commencement of the case under this title.” [11 U.S.C. 505(a)(2)]
- So, if the **Tax Court** decided the issue, you can’t relitigate it.
- **It’s almost like a second or third bit of the apple!**

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Additional Ways to Resolve Tax Disputes in Bankruptcy

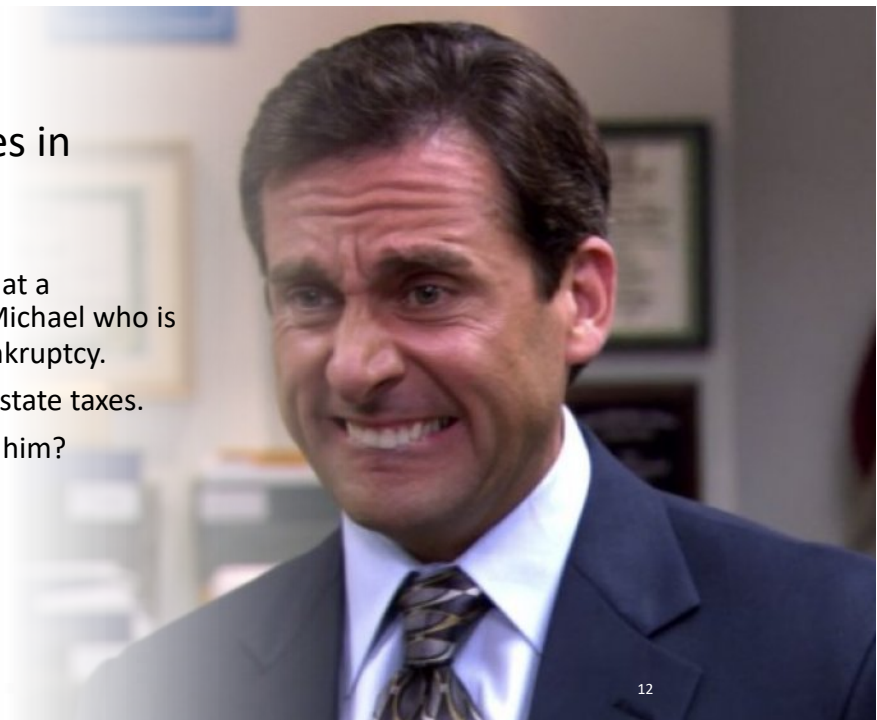
- Section 502(b) of the Bankruptcy Code wherein the Debtor objects to the IRS's proof of claim
- Debtor prior to filing the bankruptcy filed a petition in Tax Court to determine tax liability
- Debtor would like to file a petition in Tax Court to determine his tax liabilities after filing for Bankruptcy
- Automatic Stay and Tax Court litigation
- Working with IRS Revenue Agents/ IRS Audit and reconsideration to Resolve Tax Issues
- Resolving Tax Issues via Stipulations and 9019 Motions



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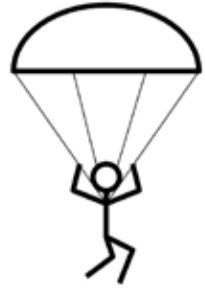
Problem 2. Discharging taxes in bankruptcy

- We are going to look at a hypothetical client, Michael who is considering filing bankruptcy.
- He owes federal and state taxes.
- Will bankruptcy help him?



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Nondischargeable Taxes in Chapters 7, 11



- A **Chapter 7** discharge does not include certain debts that are nondischargeable under § 523. [B.C. § 727(b)]
- A discharge under **Chapter 11** “does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.” [11 U.S.C. § 1141(d)(2)]

Nondischargeable Taxes in Chapter 13

- Section 1328 provides that a court shall grant a debtor a discharge of all debts provided for by the plan except a debt for **trust fund taxes** [§ 507(a)(8)(C)], **unfiled or late-filed returns** [§ 523(a)(1)(B)], and **fraudulent returns** [§ 523(a)(1)(C)].
- Section 1322 provides that the plan shall provide for **full payment**, in deferred cash payments, of all claims entitled to **priority under § 507**. This means that you must determine whether the IRS has a priority claim, and if so, the plan must full pay the balance due.

Nondischargeable debts under 523(a)(1)

Section 523(a) sets forth the exceptions to a discharge in a Chapter 7, Chapter 11, and a hardship discharge under Chapter 13. [11 U.S.C. § 523(a), § 1141(d)(2), § 1328(b)].

- **Eighth Priority Taxes.** For a tax of the kind specified in § 507(a)(8), whether or not the debtor filed a return or filed the return late. [11 U.S.C. § 523(a)(1)(A)]
- **Unfiled Returns.** [11 § U.S.C. 523(a)(1)(B)(i)]
- **Late-Filed Returns.** For a tax with respect to which a return, or equivalent report or notice, if required was not filed, or was filed after the due date, and after two years before the date of the filing of the petition. [11 § U.S.C. 523(a)(1)(B)(ii)]
- **Fraudulent Returns.** For a tax with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat the tax. [11 U.S.C. § 523(a)(1)(C)]

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8th Priority Taxes under 11 U.S.C. 507(a)(8)

- Prepetition priority income taxes or gross receipt taxes
 - The three-year rule
 - The 240-day rule
 - Tax liabilities that are assessable, but not yet assessed.
- Property taxes
- Trust fund taxes
- Penalty related to a tax claim and in compensation for actual pecuniary loss



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The Three-Year Rule

- The required tax return was last due (including extensions) within three years of the petition date [11 U.S.C. § 507(a)(8)(A)(i)]. To determine whether an unsecured tax claim qualifies under the three-year rule, ask the following questions:
 - What is the due date for filing the return?
 - What is the three-year lookback period?
 - Does the due date for the return fall within the lookback period?



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Michael is looking to file bankruptcy in early 2022

Which years meet the 3-year rule (extensions filed)?

Year	Amount	Due Date of the Return	3 year rule (look for tolling events on transcripts)
2014 1040	\$50,000	10/15/2015	Met.
2016 1040	\$25,000	10/15/2017	Met.
2017 1040	\$25,000	10/15/2018	Met.
2018 1040	\$25,000	10/15/2019	Not yet.
2019 1040	\$25,000	10/15/2020	Not yet.
2020 1040	\$25,000	10/15/2021	Not yet.
1 st Qtr 2018 6672	\$25,000	NA	NA. Will discuss later.




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Things you need to know

- IRS filing deadline
- IRS Account Transcripts
- State filing deadlines - There can be both income tax filing deadlines, and other tax filing deadlines, such as sale and use tax deadlines. Check your state rules.

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Internal Revenue Service
United States Department of the Treasury

What You'll Receive: Account Transcript

Account Transcript

Request Date: 09-15-2017
Response Date: 09/18/2017
Tracking Number:

FILE NUMBER: 1040
TAX PERIOD: Dec. 31, 2007

TAXPAYER IDENTIFICATION NUMBER:
DEBITOR TAXPAYER IDENTIFICATION NUMBER:

***** OWNER OF RETURN/TAX INFORMATION AUTHORIZATION (POA/ITA) OR FILER(S) *****
--- ANY NOTES SHOWN BELOW INDICATE A CREDIT AMOUNT ---

ACCOUNT BALANCE: 339,977.64
ACCOUNT INTEREST: 29,879.92 AS OF 09/01/07, 02, 2017
ACCOUNT PENALTY: 0.00 AS OF 09/01/07, 02, 2017

ACCOUNT BALANCE WITH INTEREST
(ONLY IF NOT A PAYOFF AMOUNT): **339,977.64**

*** INFORMATION FROM THE RETURN OR AS ADJUSTED ***

EXEMPTIONS:
FILING STATUS:
ADJUSTED GROSS INCOME:
TAXABLE INCOME:
TAX AND RETURN:
OR TAXABLE INCOME TAXPAYER:
OR TAXABLE INCOME SPOUSE:
TOTAL EMPLOYMENT TAX:

RETURN DUE DATE OR RETURN RECEIVED DATE (WHICHEVER IS LATER): Dec. 15, 2008
PROCESSING DATE: Dec. 29, 2008

This transcript covers Form 1040 for the year 2007. There is a separate transcript for each tax period. Make sure your POA covers all forms and all period!

This tells you the balance due, but it's not the payoff amount.

The IRS received the tax return on Nov. 10, 2008, and processed the return on Dec. 29, 2008. (This may not be the filing date.)

240-Day Rule

- Even if the governmental unit passes the Three-Year Rule, the tax claim nevertheless may be classified as an eighth priority if the claim satisfies the 240-day rule.
- Any income taxes and gross receipts taxes **assessed within 240 days** prior to the filing of a petition will be classified as eighth priority, nondischargeable tax liabilities in Chapter 7 and 11. [11 U.S.C. § 507(a)(8)(A)(ii)]
- **Analysis**
 - Calculate the 240 Day lookback period from the petition's filing date, considering any tolling.
 - During the 240-day lookback period, determine whether the governmental unit made any tax assessments.
 - Tolling of 240-day rule (offer in compromise, bankruptcy, CDP hearing)

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Michael is looking to file bankruptcy in early 2023

- Which years meet the 240-day rule?

Year	Amount	Assessment Date	240-day rule
2014 1040	\$50,000	5/15/2017	Met.
2016 1040	\$25,000	11/21/2017	Met.
2017 1040	\$25,000	12/7/2018	Met.
2018 1040	\$25,000	11/7/2019	Met.
2019 1040	\$25,000	11/15/2020	Met.
2020 1040	\$25,000	11/18/2021	If filing early 2022, not yet.



Things to Know About 240-Day Rule

- **IRS assessment dates**
 - **Liabilities Based on Returns** - When assessed under the Internal Revenue Code (i.e., when the summary record is signed by an assessment officer). [26 U.S.C. § 6203; 26 C.F.R. § 301.6203-1]
 - **Liabilities of Deficiencies** - The amount determined by the Tax Court, which is final, shall be assessed. [26 C.F.R. § 301.6215-1]
- **State taxing agency assessment dates** – Similar rules exist

Tax Liabilities that are Assessable, But Not Yet Assessed

- The third rule under 11 U.S.C. 507(a)(8)(A) grants priority status to an unsecured governmental unit claim for taxes that were not assessed but are assessable (under applicable law or by agreement) after the filing of the petition.

Examples:

- IRS civil examinations and administrative appeals
- FTB audits, protests, and appeals before the California Office of Tax Appeals
- Trust fund recovery investigations by the IRS. [26 U.S.C. § 6672]
- Responsible person investigations for withholding taxes by the Employment Development Department. [Cal. Unemp. Ins. Code § 1735]
- Personal liability of corporate officers for sales and use taxes. [Cal. Rev. & Tax Code § 6829]

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Things to know . . .

- The key to determining whether the governmental unit can assess taxes after the debtor has filed bankruptcy is knowing the **statute of limitations** for assessing taxes. The rules are complex and detailed, but below are a few highlights:
 - **Statute of Limitations - IRS**
 - Generally, the IRS must assess the tax within **three years** after filing the return. [26 U.S.C. § 6501(a)]
 - A **six-year limitation** period applies when a taxpayer omits more than 25 percent of gross income stated in the return. [26 U.S.C. § 6501(e)(1)]
 - **No statute of limitations** applies if a taxpayer files a false return or engages in a willful attempt to evade tax, or files no return. [26 U.S.C. §§ 6501(c)(1)-(3)]
 - **Statute of Limitations – State** (know your state rules)

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Payroll Taxes

- Michael holds himself out as the boss and is the person who signs the checks for payroll and for the vendors such as the rent. But his official is manager.
- Michael uses the limited cash to pay creditors to keep the company operating and only pays net wages to employees without setting aside the trust fund portion.
- Michael took this action with the expectation that things would turn around, and the IRS would be paid.
- Was Michaels' action willful?

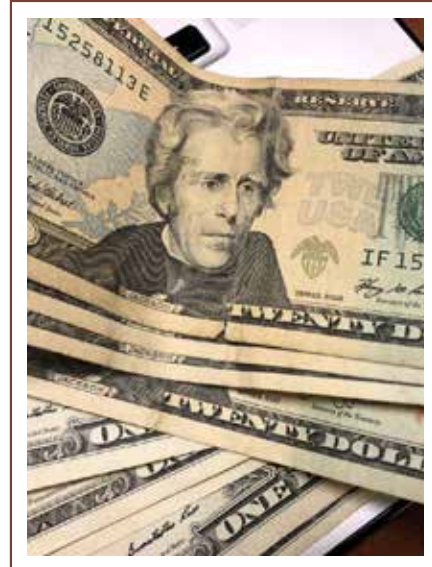


Trust Fund or Withholding Taxes

- Trust fund taxes are income taxes, social security taxes, and Medicare taxes you withhold from an employee's wages as their employer.
- **Federal:** Civil trust fund penalties are not dischargeable. [26 U.S.C. § 6672(a); 11 U.S.C. 507(a)(8)(C)]
 - *In re Mosbrucker*, 227 B.R. 434 (B.A.P. 8th Cir. 1998)/*IRS v. Campbell (In re Campbell)*, 242 B.R. 327 (W.D. Vir. 1999); IRS General Litigation Bulletin 1999 GLB LEXIS 3 *6 (Jan. 1999) (citing *In re Mosbrucker*).
- **State:**
 - Responsible person investigations for withholding taxes by the Employment Development Department. [Cal. Unemp. Ins. Code § 1735; 11 U.S.C. 5 § 507(a)(8)(C)]
 - Personal liability of corporate officers for sales and use taxes. [Cal. Rev. & Tax Code § 6829; 11 U.S.C. § 507(a)(8)(C)]

Tax Penalties

- Tax penalties are dischargeable if the penalty relates to a tax liability that does not fall within the exception to discharge under § 523(a)(1) (gap taxes, 8th priority taxes, no tax return filed, delinquent tax return, fraudulent return, willful attempt to evade or defeat tax). [11 U.S.C. § 523(a)(7)(A)]
- Tax penalties are also discharged if they relate to a tax year more than three years before filing the bankruptcy petition. [11 U.S.C. § 523(a)(7)(B)]
- **Example:** Michael owes \$150,000 in tax and \$25,000 in civil penalties to the IRS for the year 2014. If the taxes do not fall within the exception to discharge under section 523(a)(1), then taxes and penalties are dischargeable.



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Michael

- Michael is having a problem because he has unfiled tax returns and tax returns that he filed late.
- How is this going to impact his bankruptcy?



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Delinquent Returns

- A late-filed return is a tax return filed after the due date and expiration of any extension of time to file the return, and the return is filed two years before the filing of a bankruptcy petition. [11 U.S.C. § 523(a)(1)(B)(ii)].
- Treatment of late-filed returns can vary depending on where the debtor is located.
- Return filed one day late→ not eligible for dischargeability.
 - *McCoy v. Miss. State Tax Comm'n* (In re McCoy), 666 F.3d 924 (5th Cir. 2012)
 - *Mallo v. IRS* (In re Mallo), 774 F.3d 1313 (10th Cir. 2014).
 - *Fahey v. Mass. Dep't of Revenue* (In re Fahey), 779 F.3d 1 (1st Cir. 2015).
 - *Justice v. United States* (In re Justice), 817 F.3d 738 (11th Cir. 2016).

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Smith v. United States IRS (In re Smith), 2016 U.S. App. LEXIS 12859 (9th Cir. July 13, 2016)

- Return filed after the IRS assesses a Substitute for Return (SFR)→ the tax amount up to the SFR amount is not eligible for dischargeability; any excess of tax above the SFR amount could be dischargeable.
- “Here, Smith failed to make a tax filing until seven years after his return was due and three years after the IRS went to the trouble of calculating a deficiency and issuing an assessment. Under these circumstances, Smith’s “belated acceptance of responsibility” was not a reasonable attempt to comply with the tax code. Many of our sister circuits have held that post-assessment tax filings are not “honest and reasonable” attempts to comply and are therefore not “returns” at all.” *Id.* at 1097.
- Return filed late, but before the IRS finalizes an SFR→ can be dischargeable

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What is a Substitute for Return (SFR)?

- What is an SFR? How to know if one was filed on behalf of your client?
- If a debtor fails to timely file a return, the IRS can prepare a “substitute for return” (SFR) and assess the taxes typically based on information received from 3rd parties (i.e., wage and income transcripts).
- A tool that the IRS (and taxing agencies in general) have to deal with taxpayers who do not file required tax returns.
- Account transcripts will reflect an “SFR” indicator if a client has been selected for an SFR to be filed. Look to see if/when an actual return was filed. May need to submit a FOIA.

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Unfiled Tax Returns

- **Unfiled returns are not dischargeable.** Remember, even if the debtor late-files the return, the Bankruptcy Court could hold that the return is not an honest and reasonable attempt to comply with the law and therefore NOT A TAX RETURN!
- A tax with respect to which a return, or equivalent report or notice, if required, was not filed or given, is nondischargeable in a Chapter 7, 11 or 13. [11 U.S.C. 523(a)(1)(B)(i)]

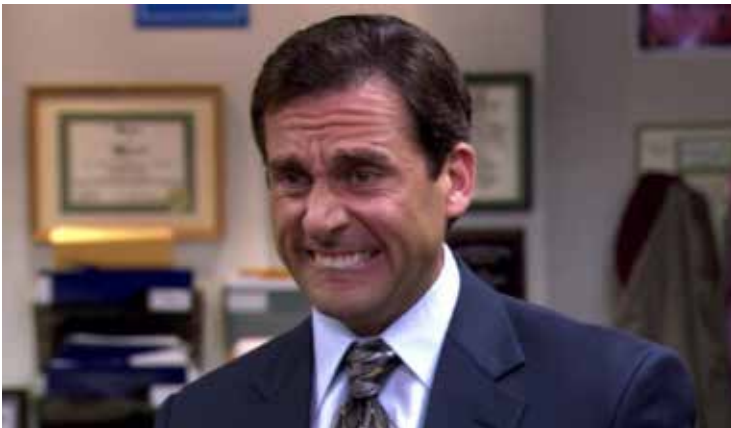
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Fraudulent Returns

- Any tax with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax. [11 U.S.C. § 523(a)(1)(C)]
- Look for civil fraud penalty under 26 U.S.C. § 6663.
- Willful attempts include declining to file tax returns, shifting assets to another person or a false bank account, shielding assets, and switching all financial dealings to cash. [Hawkins v. Franchise Tax Bd., 769 F.3d 662 (9th Cir. 2014)]
- Fraudulent failure to file tax returns and pay taxes can be a basis for nondischargeability. [*Toti v. United States (In re Toti)*, 24 F.3d 806, 808 (6th Cir. 1994) (Debtor's failure to file returns and to pay taxes were willful acts, and thus, he willfully attempted to evade or defeat his tax liability within the meaning of 523(a)(1)(C))]

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What We Learned Today



- Priority taxes under 11 U.S.C. 507(a)(8)
 - Prepetition income taxes
 - The Three-Year Rule
 - The 240-Day Rule
 - Tax liabilities that are assessable, but not yet assessed
 - Trust Fund Taxes
- Delinquent tax returns, unfiled returns, fraudulent return, and willful attempt to evade or defeat tax.
- If Michael fails to pass any of these rules, his taxes are not dischargeable.

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Post-Petition Compliance

- Chapter 13
 - 11 U.S.C. § 1308 – debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition, no later than the day before the 341(a) meeting.
 - Compliance with section 1308 is required for the chapter 13 plan to be confirmed. 11 U.S.C. § 1325 (a)(9)
 - Failure to comply with 1308 is cause to dismiss or convert the case, whatever is in the best interest of creditors. 11 U.S.C. § 1307 (e). Dismissal or conversion is mandatory. In re Cushing, 401 B.R. 528, 538 (1st Cir. BAP 2009); In re Kuhar, 391 B.R. 733, 739 (Bankr. E.D. Pa. 2008); In re Perry, 389 B.R. 62, 64-66 (Bankr. N.D. Ohio 2008); In re Forte, 2007 WL 2028894, at *2-4 (Bankr. E.D. Pa. July 06, 2007); In re McCluney, 2007 WL 2219112, at *3 (Bankr. D. Kan. June 22, 2007).
 - Dismissal for material default under plan and bad faith based on failure to file post-petition tax returns and pay post petition taxes. See 11 U.S.C. § 1307(c)(6).
- Subchapter V of Chapter 11
 - Failure to file pre-petition tax returns impacts feasibility and can prevent confirmation. See 11 U.S.C. § 1191.
 - Failure to file post-petition tax returns and pay post-petition taxes due is cause to dismiss or convert the case. See 11 U.S.C. § 1112(b)(4)(D).
- Look to the Tax Code - 26 U.S.C. § 6012 (generally requiring tax returns be filed by individuals having taxable year gross income which equals or exceeds the exemption amount) and 26 U.S.C. § 6654 (requiring some individuals to make estimated tax payments).

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Problem 3 – Federal and State Tax Liens

Michael owes taxes for year 2019, and the IRS has filed a Notice of Federal Tax Lien. How long does the lien last? What if the debtor moves to another state? What can the debtor do to remove the lien? What if the debtor transfers the property to a friend?

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How and When the Tax Lien Arises

- The lien is effective from the **date the Government assesses** the tax. Thus, if the taxpayer neglects or refuses to pay the assessed tax, then the lien is deemed to relate back to the assessment date. IRC § 6322.
- The Service is not required to file a **Notice of Federal Tax Lien (NFTL)** in order for the tax lien to attach.
- The Service may need to file a NFTL in order to have **priority** over the taxpayer's other creditors. See IRM 5.17.2.2.1 (09-19-2018)
- The act of filing protects the Government's **right of priority** as against certain third parties, typically a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor. IRC § 6323(a).

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Duration of the Federal Tax Lien

- The federal tax lien **continues until the liability** for the amount assessed is **satisfied** or becomes **unenforceable** by reason of lapse of time, i.e., passing of the collection statute expiration date (CSED). IRC § 6322.
- Generally, after assessment, the Service has **ten years** to collect the tax liability. IRC § 6502.
- However, there are some circumstances which may **extend or suspend** the ten-year collection period. See IRM 5.17.2.2.2 (03-27-2012).

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What if the Debtor Transfers Property?

- After the federal tax lien attaches to property, it remains on that property until the lien has expired, is released, or the property has been discharged from the lien. See *United States v. Bess*, 357 U.S. 51, 57 (1958); IRM 5.17.2.2.3 (01-08-2016).
- The transfer of property subsequent to attachment does not affect the lien. *Id.*

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These are the issues that we focus on when reviewing a NFTL:

1. Did the IRS properly file the lien?
2. Has the NFTL expired?

Recording Requested By Internal Revenue Service, when recorded not to.

INTERNAL REVENUE SERVICE
PO BOX 140685, STOP 84200
CINCINNATI, OH 45260-6885

DOCUMENT: 20985680

Page: 1

Fees: 5.00
Taxes:
Copies:
ART PAID: 15.00

REGINA ALONDRAS
SANTA CLARA COUNTY RECORDER
Recorded at the request of
Internal Revenue Service
Per Optional Use by Recording Office

REC # 814
12/02/2010
11:50 AM

Form 446 (Rev. 10/10) 1010 Department of the Treasury - Internal Revenue Service
Notice of Federal Tax Lien

NAME: SMALL BUSINESS/SELF EMPLOYED ASSES. BY: Serial Number
Lien Unit Phone: (800) 829-3923 12345678

As provided by section 6321, 6322, and 6323 of the Internal Revenue Code, we are giving a notice that taxes (including interest and penalties) have been assessed against the following-named taxpayer. We have made a demand for payment of this liability, but it remains unpaid. Therefore, there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties, interest, and costs that may accrue.

Name of Taxpayer: [REDACTED] IRC 6325(d)(1)(A) - In the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished.

Residence: [REDACTED]

IMPORTANT RELEASE INFORMATION: For each assessment listed below, unless notice of the lien is refiled by the date given in column (d), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(d).

Kind of Tax (a)	Tax Period Ending (b)	Identifying Number (c)	Date of Assessment (d)	Last Day for Refiling (e)	Unpaid Balance of Assessment (f)
1040	12/31/2006		03/16/2009	04/15/2009	21915.12
1040	12/31/2007		04/06/2009	05/06/2009	4786.50
1040	12/31/2008		11/09/2009	12/09/2009	3062.56

The 10-year collection statute may have run.

Lien for all three years are past their last day for refile. Did the IRS re-file the NFTL?

Place of Filing: COUNTY RECORDER
SANTA CLARA COUNTY
SAN JOSE, CA 95110

Total \$ 31763.78

This notice was prepared and signed at OAKLAND, CA, on this 29th day of November, 2010.

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Problem 4: Section 363 Sale of Assets

- The Chapter 7 Trustee wants to sell Michael's primary residence free and clear of all liens.
- Can the trustee do this with the tax liens in place?
- What considerations does the trustee have?
- Michael is expecting to receive \$100,000 as homestead exemption. Will he receive it?
- Does the result change in a chapter 13 or subchapter V of Chapter 11?

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Chapter 7 Trustee Sells Debtor's Home

- Is there an NFTL recorded or state tax lien? Check your state's recording statutes to confirm whether the taxing authority is secured.
- Section 363(f) – Sale Free and Clear
 - (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
 - (2) such entity consents;
 - (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
 - (4) such interest is in bona fide dispute; or
 - (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

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Chapter 7 Trustee Sells Debtor's Home

- If the IRS filed NFTL pre-bankruptcy, the money comes to the IRS and not the debtor. *See* 11 U.S.C. § 522(c)(2)(B).
- Debtor's homestead exemption is not valid against a tax that is non-dischargeable tax under § 523(a)(1), which includes all priority tax claims under 507(a)(8). 11 U.S.C. § 522(c)(1).
- The holder of a properly filed tax lien need not file an objection to a homestead exemption in order to challenge the homestead exemption. *In re Bolden*, 327 B.R. 657, 663 (Bankr. C.D. Cal. 2005) (citation omitted).
- If debtor receives homestead exemption, be aware of any reinvestment requirement in your state. *See, e.g.*, CCP 704.960.

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Section 363 Sale of Assets – Other Considerations

- As an asset sale, there may be taxable gain on the sale. Income tax on the sale is an administrative claim of the estate.
- There may be tax consequences to the buyer - the purchase price paid by the buyer (including amounts treated as liabilities for tax purposes) become[s] the tax basis of the acquired assets.
- Chapter 13 – Sections 363 and 522 apply
- Subchapter V of Chapter 11 – Sections 363 and 522 apply

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Problem 5: IRS Enforcement Post Discharge

- Michael filed a Chapter 7 and discharged his taxes.
- IRS sent a Letter 4068 (soft letter) stating that the IRS plan to collect the discharged taxes from certain property that the debtor owned when the bankruptcy case was filed.
- Now what? Michael thought this was over . . .

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Tax Lien Survives the Bankruptcy

- Not all taxes are forgiven!
- Discharge does not apply to in rem
 - *In re Snyder*, 343 F.3d 1171, 1176-77 (9th Cir. 2003).
 - *In re Isom*, 901 F.2d 744 (9th Cir. 1990)
- So, if there is pre-petition property that survives the bankruptcy, and the taxes are not paid, even though the taxpayer technically has a discharge, the IRS can enforce the lien.
- For example, the taxpayer has exempt property such as a retirement account. IRS can take enforcement action outside of the bankruptcy and collect against the retirement account or house.

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IRS Can Take Collection Action

- A discharge of debt in bankruptcy relieves the debtor of any personal liability for the debt. However, the debt may still be collected from property encumbered by a pre-bankruptcy tax lien that remains enforceable after the case. IRM 5.9.17.2.
- The Service can collect discharged tax, discharged penalty and/or discharged interest from exempt, abandoned or excluded property (EAEP) after discharge. IRM 5.9.17.2.
- In our example, a Field Insolvency Caseworker will investigate the case and contact the debtor about taking steps to collect against the retirement funds and trust distributions.
- If you have a case where the IRS takes enforcement action after bankruptcy, read Internal Revenue Manual 5.9, Bankruptcy and Other Insolvencies. The Manual explains how to handle the case.

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Questions



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Faculty

Najah J. Shariff is an Assistant U.S. Attorney with the U.S. Attorney's Office in Los Angeles, where she represents the U.S., on behalf of the IRS, in some of the biggest and most complex bankruptcy tax and civil tax litigation matters in the U.S. bankruptcy court, district court and Superior Court of California in the Central District of California. As a former Special Assistant United States Attorney (SAUSA) and senior tax attorney with the IRS Office of Chief Counsel (March 2006-May 2015) in Los Angeles and Washington, D.C., Ms. Shariff has tried numerous cases in bankruptcy court and U.S. Tax Court involving complex, novel and high-profile tax issues. With nearly 17 years of experience representing the U.S. and the IRS, AUSA she has experience in bankruptcy tax law, tax litigation, refund litigation, tax-deficiency litigation, the assessment and collection of taxes, federal tax liens and levies, collection due process, summons enforcement, FBAR cases, surplus funds cases, and privacy and FOIA issues. Ms. Shariff is regularly invited to speak at bankruptcy and tax law conferences throughout the U.S. She received her B.A. in economics and international relations from Claremont McKenna College, her J.D. from Boston University School of Law and her LL.M. in taxation from Georgetown University Law Center.

Jolene Tanner is an Assistant U.S. Attorney in the Tax Division of the U.S. Attorney's Office in Los Angeles, where she primarily handles bankruptcy tax litigation in the Central District of California. She also serves as the Office's Criminal Bankruptcy Fraud Referral Coordinator. Ms. Tanner is frequently sought after as a bankruptcy tax expert to present at bar events and to train others, including law students, the IRS and other federal agencies, as well as chapter 7 trustees, chapter 13 trustees, subchapter V trustees, other AUSAs and private practitioners, on important bankruptcy matters. In addition, she has taught multiple courses on bankruptcy-related matters at the National Advocacy Center. Within her office, she takes an active mentorship role and assists in training the externs in the Tax Division. Prior to joining the U.S. Attorney's Office, Ms. Tanner was a judicial law clerk for Hon. Mark D. Houle and Hon. Deborah J. Saltzman in the U.S. Bankruptcy Court for the Central District of California. She was Judge Houle's law clerk when he sat *pro tem* on the Ninth Circuit Bankruptcy Appellate Panel. Her law review article "*Stern v. Marshall*: The Earthquake that Hit the Bankruptcy Courts and the Aftershocks that Followed," 45 *Loy. L.A. L. Rev.* 587 (2012), has been cited in multiple publications, including *amicus curiae* to the Ninth Circuit and U.S. Supreme Court. Ms. Tanner is a 2021 honoree of ABI's "40 Under 40" program. She received her B.A. *cum laude* from the University of California, Santa Barbara and her J.D. from Loyola Law School.

Steven L. Walker is an attorney at the Law Offices of Steven L. Walker, A Professional Law Corporation, a boutique firm in San Jose, Calif., specializing in tax controversy and litigation, as well as bankruptcy tax matters. He previously worked at the California Franchise Tax Board and is a former attorney at the IRS Office of Chief Counsel. Mr. Walker is a Fellow of the American College of Tax Counsel and a Certified Taxation Law Specialist of the State Bar of California. He is a past chair of the Taxation Section of the State Bar of California (now California Lawyers Association) and is an adjunct professor of law at the University of San Francisco School of Law in the LL.M. (Taxation) Program, where he teaches civil and criminal tax penalties and bankruptcy tax. Mr. Walker is a frequent writer and speaker on tax controversy and litigation and bankruptcy tax matters. He received

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