

A GUIDE TO COMMON TAX ISSUES INCIDENT TO FILING BUSINESS BANKRUPTCY

*Paul Asofsky**

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I. INTRODUCTION

This article sets forth a number of routine tax procedural items of which any company considering bankruptcy filing should be aware. It deals with return filing requirements, the effect of bankruptcy filing on tax audits, the bankruptcy claims resolution process, and the payment of taxes determined in the bankruptcy proceeding. It does not (except perhaps incidentally) touch on substantive tax issues such as discharge of indebtedness and net operating loss carryovers.

II. EFFECT OF CHAPTER 11 FILING ON TAX STATUS OF A CORPORATION

Upon the filing of a Chapter 11 petition, an entity called the “estate” comes into being for bankruptcy law purposes, and property of the debtor becomes “property of the estate,” a

* Partner, Weil, Gotshal & Manges; Harvard Law School, LL.B.

technical bankruptcy term.¹ However, this has no effect upon a corporation for tax purposes.² This rule applies even if a trustee is appointed.³

A number of consequences flow from this continuation of a corporate entity. First, and most important, the taxable year of the corporation does not close on the commencement of the Chapter 11 case. No tax return is required for any short period beginning on the first day of the taxable year and ending with a bankruptcy filing, and the corporation has no election to close its taxable year.⁴ The corporation must await the end of the taxable year and file a tax return in the normal course on the normal due date.⁵

Any consolidated group of which the debtor is a member is not affected. The bankruptcy filing itself does not effect a change in ownership of the debtor, and whether the filing corporation is the common parent or one of its subsidiaries, the affiliated group continues. This follows from the general rule that once a consolidated return is elected, the group must continue to file consolidated returns unless permission to discontinue filing is granted by the Internal Revenue Service (the "Service") based upon good cause.⁶ In a number of published and private rulings, the Service has made clear that it will not grant such permission solely on the basis that one or more corporations is in bankruptcy.⁷ The Service maintains this position even in a case where one or more of the members files a Chapter 7 (liquidation).⁸

1. 11 U.S.C. § 541 (2000).

2. This is distinguished from the case of an individual, where the creation of an estate for bankruptcy law purposes also creates a separate taxable entity for income tax purposes in Chapter 7 and Chapter 11. *See* I.R.C. § 1398 (2000).

3. *See* I.R.C. § 1399 (2000).

4. As will be seen in a discussion below, there are cases holding that any tax liability for the taxable year must be divided for bankruptcy law purposes between a prepetition component and a postpetition component. *See infra* p. 5 and note 18. However, even in jurisdictions which adhere to this rule, there is no closing of a taxable year with a consequent duty to file a tax return for a short period.

5. The trustee, if one is appointed, must file the return on behalf of the corporation. I.R.C. § 6012(b)(3). If no trustee is appointed and the debtor operates the business as a debtor-in-possession, the debtor-in-possession has the duties of the trustee. 11 U.S.C. § 1107(a).

6. Treas. Reg. § 1.1502-75(c) (2003).

7. *See* Rev. Rul. 63-104, 1963-1 C.B. 172; Priv. Ltr. Rul. 87-13-005 (Dec. 10, 1986); Priv. Ltr. Rul. 84-44-063 (July 31, 1984).

8. *See* Priv. Ltr. Rul. 84-44-063 (July 31, 1984); Treas. Reg. § 1.1502-75(d) (2003).

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III. FILING OF TAX RETURNS

As will be seen, the debtor should file all of its tax returns of whatever kind in the normal course. In some cases, it might even be advisable to file tax returns or make payments before the returns are actually due. This might be the case, for example, if trust fund taxes are involved. Most states' sales and use tax statutes treat sales taxes collected from customers in the ordinary course of business as trust funds, similar to tax withholdings on employee wages.⁹ Responsible corporate officers may be personally liable for these taxes if they are not remitted.¹⁰ In a number of cases involving large retailers, state and local taxing authorities have sought to squeeze the debtor corporation into seeking bankruptcy court approval for turnover of collected sales taxes postpetition by pursuing corporate officers for personal liability.¹¹ Bankruptcy courts probably do not have jurisdiction to prevent states from pursuing officers in this way, regardless of the injustice that ensues. Accordingly, many large retailers with significant trust fund liabilities have paid current and past-due trust fund taxes to appropriate taxing authorities on the eve of bankruptcy to avoid this problem.¹² Other tax returns should be filed in the ordinary course of business even after the bankruptcy has commenced.¹³ This applies to all federal, state, and local tax returns.

IV. PAYMENT OF TAXES

The Bankruptcy Code generally distinguishes between prepetition liabilities, *i.e.*, those that arise prior to the filing of the bankruptcy petition, and administrative liabilities, *i.e.*, those that come into existence after the filing of the bankruptcy

9. *See, e.g.*, TEX. TAX CODE ANN. § 111.016 (Vernon 2001).

10. *See id.*

11. *See, e.g., In re Cooley*, 166 B.R. 85 (Bankr. S.D. Tex. 1993); *In re Rainey*, 257 B.R. 792 (Bankr. W.D. Va. 2001).

12. This does not necessarily have to be done. If it is not, the debtor can seek a court order permitting it to pay over the trust fund taxes to the appropriate taxing authority on the ground that these amounts are trust funds and therefore are not "property of the estate" to be administered by the court. Such an order will usually be issued in the normal course. However, if payment of trust fund taxes is not made prior to the filing of the bankruptcy petition, at the very least, sufficient cash should be set aside in segregated bank accounts that are earmarked as deposits to pay these liabilities in the normal course. Such a segregation will enable the debtor and the taxing authorities to argue that the segregation and earmarking of the funds in a separate bank account actually creates a trust res, which some courts have determined is necessary to find the existence of an actual, as opposed to an implied, trust. *See Begier v. IRS*, 496 U.S. 53 (1990).

13. *See* 28 U.S.C. § 960 (2000).

petition. Although the general concept is easy to state, there is sometimes controversy over whether a particular tax is prepetition or postpetition. The distinction can be extremely important. In general, under the Bankruptcy Code, a prepetition debt cannot be paid prior to distributions, if the case is a Chapter 7 case, or prior to the time fixed for payment in the confirmed plan of reorganization, if the case is a Chapter 11 case, unless the bankruptcy court orders otherwise. On the other hand, in general, administrative period taxes are paid in the ordinary course of business.¹⁴ More importantly, the Bankruptcy Code has a special provision allowing prepetition taxes to be paid over a period of six years beginning on the date of assessment.¹⁵ Thus, an income tax liability, including a deficiency, for a prepetition period may be subject to the six year stretch-out provided by the Bankruptcy Code. The specific rules relating to this deferral will be set forth below.¹⁶

V. THE STRADDLE YEAR

Some recent controversy has arisen about the status of tax liabilities for the taxable year in which the petition is filed. Tax authorities generally take the position that the liability for such taxable year is an administrative claim because the obligation to pay the tax does not arise until the last day of the taxable year, a date after the filing of the bankruptcy petition. In addition, the amount of the liability for that taxable year cannot be known until the last day of the taxable year when all items of income and deduction for the year will have been paid or accrued.¹⁷

Debtors, on the other hand, have argued that if the events giving rise to the tax liability occur prior to the petition filing, any tax liability created by those events should be a prepetition tax liability. Three Courts of Appeals have accepted this argument over the vigorous objection of tax authorities involved in those cases.¹⁸ Although only one of these cases involved federal corporate income taxes, it is generally agreed that there

14. If the estate is administratively insolvent (*i.e.* its assets are not sufficient to pay all of its administrative expenses), it is probably not necessary to pay administrative period taxes so that the estate's funds will be available to be distributed *pari passu* among all administrative creditors.

15. See 11 U.S.C. § 1129(a)(9)(C) (2000).

16. See *infra* notes 61–66 and accompanying text.

17. As noted above, the filing of the bankruptcy petition does not close a corporate debtor's taxable year. See *supra* notes 4–5 and accompanying text.

18. See *In re Hillsborough Holdings Corp.*, 116 F.3d 1391, 1395–96 (11th Cir. 1997); *In re Pac.-Atl. Trading Co.*, 64 F.3d 1292, 1304 (9th Cir. 1995); *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146, 1151 (8th Cir. 1995).

is no basis for distinguishing those taxes from state and local income and franchise taxes, and to the extent that these cases would be followed in a given jurisdiction, the liability bifurcation would apply to federal taxes as well as state and local taxes.¹⁹

The practical effect of these decisions is that the portion of the liability attributable to the prepetition period is a prepetition tax liability subject to the six year stretch-out; the portion of the liability attributable to the postpetition period is a postpetition liability.²⁰ Therefore, if the bifurcation rule applied, and a corporate debtor had a tax liability on a return for a period ending after the petition date, the corporation would determine the portion of the liability that was prepetition and not pay that portion with the return, and would determine the portion of the liability that was postpetition, and would pay that portion with the return.²¹

VI. DETERMINATION OF PREPETITION LIABILITIES

Upon the filing of a Chapter 11 petition, a so-called “automatic stay” goes into effect.²² The purpose of the automatic stay is to place a hold on most legal proceedings against the debtor and bring all prepetition claims within the purview of the bankruptcy court so that they can be determined expeditiously and in a rational manner to provide for a fair distribution of assets among creditors in accordance with the priorities set forth in the Bankruptcy Code. The automatic stay sets forth a list of actions that may not be pursued or continued once a petition is filed and another list of actions that may be pursued or continued notwithstanding the stay. Among other things, the filing of the petition operates as a stay against “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor” to recover a claim that arose before the commencement of the case;²³ “the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case”;²⁴ an “act to obtain possession of property of the estate or of property from the

19. See 11 U.S.C. § 507(a)(8)(establishing priority for taxes claimed by “governmental units” in general).

20. See *Hillsborough Holdings Corp.*, 116 F.3d at 1395–96; *Pac.-Atl. Trading Co.*, 64 F.3d at 1304; *L.J. O’Neill Shoe Co.*, 64 F.3d at 1151.

21. See *Hillsborough Holdings Corp.*, 116 F.3d at 1395–96; *Pac.-Atl. Trading Co.*, 64 F.3d at 1304; *L.J. O’Neill Shoe Co.*, 64 F.3d at 1151.

22. See 11 U.S.C. § 362(a) (2000).

23. 11 U.S.C. § 362(a)(1).

24. 11 U.S.C. § 362(a)(2).

estate or to exercise control over property of the estate”;²⁵ “any act to create, perfect or enforce any lien against property of the estate”;²⁶ “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case”;²⁷ and “the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.”²⁸ Among the actions not stayed by these general prohibitions are “an audit by a governmental unit to determine tax liability”;²⁹ “the issuance to the debtor by a governmental unit of a notice of tax deficiency”;³⁰ a “demand for tax returns”;³¹ or “the making of an assessment for any tax and the issuance of a notice and demand for payment of such an assessment.”³²

In short, the most important consequences of these sets of do’s and don’ts placed on the government are that (1), while the taxing authority cannot proceed directly against the debtor to enforce collection of a tax, it can start or continue any audit to determine the debtor’s tax liability;³³ and, (2) while the Tax Court loses the ability to try any pending case or even to continue pretrial proceedings, the government is not barred from mailing a notice of deficiency.³⁴ This will ensure that any ultimate obstacle to Tax Court jurisdiction will be cleared, but, so long as the bankruptcy case is proceeding, all litigation will be in the bankruptcy court, as hereinafter described, unless the bankruptcy court moves the case on to the Tax Court. Finally, the taxing authority is not barred from making an assessment of a tax.³⁵ This is supposedly a harmless procedural step,³⁶ as it does not entitle the government to take any enforcement action and does not impinge on the debtor’s rights to contest the validity of any tax claim in the bankruptcy court.

In the case of any tax audit that is pending on the date the petition is filed, in addition to the formal notice sent to every tax

25. 11 U.S.C. § 362(a)(3).

26. 11 U.S.C. § 362(a)(4).

27. 11 U.S.C. § 362(a)(6).

28. 11 U.S.C. § 362(a)(8).

29. 11 U.S.C. § 362(b)(9)(A).

30. 11 U.S.C. § 362(b)(9)(B).

31. 11 U.S.C. § 362(b)(9)(C).

32. 11 U.S.C. § 362(b)(9)(D).

33. See 11 U.S.C. § 362(b)(9)(A). The reason for this entitlement should be obvious. The government will have to file a proof of claim for taxes in the case, and unless it can make an audit of the tax returns, it will not know how much to claim.

34. See 11 U.S.C. § 362(b)(9)(B).

35. See 11 U.S.C. § 362(b)(9)(D).

36. However, we will see that this action, among other things, starts the clock running on the six-year period for deferred payment.

authority notifying it of the commencement of the bankruptcy case, the bankruptcy debtor should send a less formal letter to the agent or other person in charge of any audit so that such person can bring the case to the attention of any agency or attorney who must participate in the claims process within the federal or state bureaucracy. With respect to the Service, new personnel will immediately become involved once the case is filed. Although the examination division will remain involved, it will lose its autonomy. The Special Procedures Function of the Collections Division will formally become involved in the case, as it is the one that must prepare the Service's proof of claim. Also, the division of labor among federal government attorneys is altered. In the usual situation, the Department of Justice, through the local United States Attorney's Office, represents the Service in federal court. District Counsel represents the Service in the United States Tax Court. However, for reasons that have little to do with logic and more to do with practicality, responsibility for representing the Service in the bankruptcy court is dispersed differently in different districts. In some districts, the United States Attorney represents the Service in the bankruptcy court as it would in the United States district court. In other districts, the so-called "Houston plan" has been adopted, in which IRS district counsel lawyers are sworn in as special assistant United States attorneys to represent the Service in the bankruptcy court.³⁷ Finally, in other districts where the Justice Department has an active local branch of the tax division, the Department of Justice represents the IRS directly in the bankruptcy court. Later in the case, when a proof of claim has been filed and the debtor objects to the proof of claim, it is not unusual for the Department of Justice to step in. It is not usual for District Counsel to become involved in an examination at the audit stage outside of bankruptcy, although there are a growing number of exceptions to this general rule. Nevertheless, the Service has shown increasing sensitivity to bankruptcy cases, in which coordination among various IRS functions is required and expedited procedures must be invoked. Accordingly, the Service has a Significant Bankruptcy/Insolvency Case Program under which criteria are set forth for early referral of cases to District Counsel.³⁸

The Service and other taxing authorities have 180 days to

37. See COLLIER ON BANKRUPTCY ¶ TX 5.02[4] (Myron M. Sheinfeld et al. eds., 15th ed. 2002).

38. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, INTERNAL REVENUE MANUAL § 34.10.3(2) (1999), available at <http://www.irs.gov/irm/page/0,,id=22658,00.html>.

file a proof of claim,³⁹ unless the 180-day period is extended by the court. Such extensions are generally routinely granted. However, if the tax authority fails to file a proof of claim within the statutory deadline or the extended deadline, it will generally be barred from filing a proof of claim later in the case and will lose its rights.⁴⁰

In large cases, the Service rarely completes its examination by the end of the 180-day period. Among the reasons for this is that the Service, which is undoubtedly behind in the audit cycle, will probably, in the case of a large corporation, be in the process of auditing years that are several years prior to the petition date and will not have even commenced an audit of the most recent years. The general practice of the Service has been that, after a review of all of the open years, it will file an estimated proof of claim in which it disallows every conceivable deduction not yet reviewed, and, therefore, its proof of claim will be far in excess of any amount that the debtor will conceivably owe. There does not appear to be any prohibition in the Bankruptcy Code on such a practice, and it has become commonplace. This does not by itself present a problem, other than it has a tendency to alarm the creditor constituencies when they hear the Service has a huge potential claim. The practical effect of this practice is to force the debtor to make the Service speed up its audit process because it will be impossible to confirm a plan of reorganization if the Service has a huge tax claim outstanding at the close of the case that has not been resolved.

It is my experience that it is wise to attempt, immediately after the case is filed, to get a meeting with the relevant IRS, and perhaps state tax, officials. For example, we might try to bring together in a meeting the Examination Division, Special Procedures, and an attorney from the office that will handle the case. Ironically, we may be the instrumentality for bringing all of these people together. It would have happened within some number of months anyway, but it is in our interest to get the process started so that it gets moved along expeditiously.

As in the case of any other IRS audit, there will be numerous Information Document Requests and other less formal calls for production of information. Tax department personnel will be severely strained in dealing with all of the matters that must be attended to during the case. However, it is critically important to keep information flowing to the tax authorities conducting their

39. 11 U.S.C. § 502(b)(9).

40. See *id.*; If the taxing authority has a claim which is already secured by a filed tax lien, it may be in a better position.

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audits. At some point in the case as we are nearing the plan stage, we will either want to litigate the tax claims or to put the heat on all of the tax authorities to amend their proofs of claim to realistic levels. To the extent that tax authorities can argue that their audit is delayed because of the debtor's failure to supply information, it will be more difficult to accomplish that objective.

VII. OTHER FUNCTIONS WITHIN THE SERVICE

Although there is not time to go through the normal procedure of Revenue Agent's Report, protest, and Appeals Office consideration, the Service has been experimenting with a bankruptcy appeals process.⁴¹ This is currently the subject of a test program in a few districts, *viz.*, Houston, Indiana, New England (Massachusetts bankruptcy courts only), and Southwest (Arizona bankruptcy courts only).⁴² The Manual also envisions expedited requests to the National Office for technical advice.⁴³ Finally, the filing of a bankruptcy case does not do away with the necessity of Joint Committee review of certain large refunds.⁴⁴

VIII. JURISDICTION OF THE BANKRUPTCY COURT

The bankruptcy court has wide jurisdiction to determine tax liabilities. The procedures are slightly different depending upon whether the liability involved is a prepetition or an administrative tax liability. So long as the tax liability was not actually contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case, the bankruptcy court can determine the liability.⁴⁵ This means that the debtor may have a tax claim heard in the bankruptcy court even if he has lost his rights to have it determined under local procedures, for example, because the statute of limitations for commencing a contest has expired. The debtor can invoke this jurisdiction by commencing an adversary proceeding in the bankruptcy court during the pendency of the case, or can simply invoke the claims objection procedure, generally after confirmation of the plan, and then have the tax liability adjudicated in the bankruptcy court.

41. I.R.S. Announcement 91-111, 1997-47 I.R.B. 15, available at <http://www.irs.gov/pub/irs-irbs/irb97-47.pdf>.

42. *Id.*

43. See INTERNAL REVENUE SERV., DEPT OF THE TREASURY, *supra* note 38, § 8.15.1.3.6.

44. See I.R.C. § 6405 (2000); INTERNAL REVENUE SERV., DEPT OF THE TREASURY, *supra* note 38, § 8.15.1.3.5.

45. 11 U.S.C. § 505(a) (2000).

Special rules apply to administrative period taxes. Since these must be paid not later than confirmation, they must necessarily be determined before the effective date of the plan. Section 505(b) of the Bankruptcy Code has a procedure under which a debtor may, with respect to an administrative period tax, notify a taxing authority of his intention to seek a bankruptcy court determination accepting a tax return as filed. In general, the taxing authority has 60 days to notify the debtor whether it intends to select the return for examination.⁴⁶ If it fails to notify the debtor within such 60-day period that it will select the return for examination, the debtor's tax liability will be finally determined. If the taxing authority selects the return for an audit, it will have a total of 180 days within which to notify the debtor that it does not agree with the tax return.⁴⁷ In this case, the bankruptcy court will then determine the tax liability in a contested proceeding.

This opportunity to force the hand of the tax authority can be a valuable tool. The Bankruptcy Code itself sets forth no requirements as to the manner in which a taxing authority is to receive notice or what such notice must contain. The Service has issued Revenue Procedure 81-17,⁴⁸ which sets forth in detail a procedure for a taxpayer to invoke its rights under Section 505(b) of the Bankruptcy Code against the Service. In general, the notice is sent to the Special Procedures Section together with a copy of the tax return with specific language highlighting that it is a request under Section 505(b) of the Bankruptcy Code. Therefore, this will not go unheeded at the Special Procedures Section. The state and local tax authorities, on the other hand, have not reached that level of sophistication. It has become customary for debtors to routinely file Section 505(b) notices as an attachment to their tax returns during the bankruptcy case, and in many situations, the state and local tax authorities lose their rights to audit the return because they do not respond to the notice within the 60-day period.

IX. BURDEN OF PROOF

The general bankruptcy rule is that a purported creditor adjudicating a claim against a debtor has the burden of proof with respect to the matters encompassed by the claim. Although the debtor may have some burden of going forward in initially

46. See 11 U.S.C. § 505(b)(1)(A).

47. See 11 U.S.C. § 505(b)(1)(B).

48. Rev. Proc. 81-17, 1981-1 C.B. 688.

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contesting a claim and placing the issue before the court,⁴⁹ the burden of persuasion is on the party seeking to enforce the claim.⁵⁰

Although the IRS Restructuring and Reform Act of 1998 placed the burden of proof in tax litigation on the Service in many cases, the benefit of this rule does not apply to many large corporations.⁵¹ Although such large corporations generally have the burden of proof outside of the bankruptcy court in any litigation with the Internal Revenue Service,⁵² at least three circuits of the United States Court of Appeals held that the general bankruptcy rule applied in the bankruptcy court,⁵³ and a governmental taxing authority asserting the claim had the burden of proof. Three other circuits applied the general tax rule and placed the burden of proof on the taxpayer.⁵⁴ The Supreme Court ended the split and sided with the government.⁵⁵ The debtor has the burden of proof on tax matters in the bankruptcy court.⁵⁶

X. PREPETITION TAX REFUNDS

The jurisdiction of the bankruptcy court to hear tax disputes extends to refunds as well as to deficiencies.⁵⁷ However, this jurisdiction has been severely limited as a practical matter in recent years by the Supreme Court's decisions under the Eleventh Amendment of the United States Constitution.⁵⁸ That

49. See *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992); *In re Fullmer*, 962 F.2d 1463, 1466 (10th Cir. 1992). See also cases collected at Lawyers Edition, Bankruptcy Service, § 6B20 (Clark, Boardman, Callaghan 1997).

50. See *Allegheny Int'l, Inc.*, 954 F.2d at 173. See also Henderson & Goldring, Tax Planning for Troubled Corporations, § 1013.4 (Panel 2003).

51. See I.R.C. § 7491(a)(2)(C) (2000).

52. See, TAX CT. R. 142(a). This general rule states:

The burden of proof shall be upon the petitioner, except as otherwise provided by statute or determined by the Court; and except that, in respect of any new matter, increases in deficiency, and affirmative defenses, pleaded in the answer, it shall be upon respondent.

Id. The most significant statutory exception is for fraud, which the Service must prove by clear and convincing evidence. See I.R.C. § 7454(a).

53. See *Franchise Tax Bd. v. Macfarlane (In re Macfarlane)*, 83 F.3d 1041, 1045 (9th Cir. 1996); *In re Placid Oil Co.*, 988 F.2d 554, 557 (5th Cir. 1993); *Fullmer*, 962 F.2d at 1466.

54. See *In re Landbank Equity Corp.*, 973 F.2d 265, 270–71 (4th Cir. 1992); *Resyn Corp. v. United States (In re Resyn Corp.)*, 851 F.2d 660, 662–63 (3d Cir. 1988); *United States v. Charlton*, 2 F.3d 237, 239 (7th Cir. 1993).

55. See *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 26 (2000).

56. See *id.*

57. 11 U.S.C. § 505 (2000).

58. See, e.g., *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96 (1989); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

Amendment generally protects states from suits by citizens in federal court, without the consent of the state.⁵⁹ This is the so-called “sovereign immunity” doctrine.⁶⁰ It is generally understood that notwithstanding the explicit grant of jurisdiction given by the Bankruptcy Code to the bankruptcy court to determine the amount of such refunds, the state is constitutionally protected from bankruptcy court jurisdiction if it does not choose to submit itself to such jurisdiction. Accordingly, if the debtor is seeking a refund of state taxes, rather than merely contesting a tax claim, it may be forced to go through state administrative and judicial procedures in order to establish its right to the refund. Although this may seem contrary to the purposes of the Bankruptcy Code, it is apparently a constitutional doctrine.

As previously indicated, the Joint Committee procedure continues to apply to large refund claims, even in bankruptcy.

XI. PAYMENT OF PREPETITION TAXES

Under present law,⁶¹ payment of a claim for unsecured prepetition taxes need not be made at confirmation, provided that “the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.”⁶² This sentence has several important components. First, the claim must be satisfied with deferred cash payments. Second, the payments must be made over a period not exceeding six years after the date of assessment of such claim. “Date of assessment” is a critical term. If the tax has already been assessed prior to the case, then the debtor does not have six years from confirmation in order to pay out the claim. Instead, it would only have a period ending six years after the date of assessment. Depending upon the facts, this may not be a very long time. Remember that notwithstanding the automatic stay, the taxing authority may assess the tax during the case.⁶³ As an example, suppose that the debtor files a tax return for the straddle year and does not pay the tax attributable to the portion

59. See *Seminole Tribe of Fla.*, 517 U.S. at 54.

60. See *id.*

61. Pending legislation would severely restrict the stretch out of prepetition taxes about to be described. It is uncertain at this moment whether this legislation will pass, and if it does, when it will be effective. See *H.R. 975, 108th Cong. § 710 (2003)*.

62. 11 U.S.C. § 1129(a)(9)(C).

63. See *supra* note 32 and accompanying text.

of the year prior to the time the bankruptcy petition is filed.⁶⁴ The IRS may immediately assess the tax shown on the return.⁶⁵ Assume that the case lasts two years after the assessment is made. The debtor may stretch out this prepetition liability for a period of only four years after the effective date. Third, the payments must have a value, as of the effective date of the plan, equal to the allowed amount of such claim. To give such payments such a value, a discount rate must be determined to arrive at a valuation of the stream of payments. Effectively, this means that interest must be paid on the tax beginning with the effective date of the plan. The Bankruptcy Code does not specify a rate of interest. Taxing authorities usually seek to have their statutory rate of interest on tax deficiencies apply. These may be reasonable in the case of federal taxes, but may be in the nature of penalties for certain kinds of state and local taxes, such as ad valorem real and personal property taxes. The weight of authority is that the interest rate does not slavishly follow statutory deficiency interest rates, but that a market rate of interest must be determined for each debtor. Nevertheless, as a practical matter, if the tax authority is not asleep at the switch, the federal tax deficiency interest rate, without the add-on for corporate deficiencies, is likely to be the rate actually used.

One question that the Bankruptcy Code does not answer (or even pose) is whether the payments must be periodic or level. Specifically, will the debtor comply with § 1129(a)(9)(C) of the Bankruptcy Code if it proposes a plan calling for a single balloon payment with interest at the end of the six year stretch out period? The conventional wisdom is that if there is some reason for uneven payments that might be acceptable, but proposing a balloon payment will be subject to the pig theory.⁶⁶ Nevertheless, the entitlement to a deferred payment of prepetition tax liabilities can have a substantial positive effect on the cash position of the company immediately after confirmation.

XII. POSTPETITION INTEREST ON TAX CLAIMS

Under general principles applicable to all unsecured claims,

64. See *supra* notes 17–21 and accompanying text.

65. See I.R.C. § 6201(a)(1) (2000).

66. Bulls make money, bears make money, pigs go broke. As one author has explained: “The pig theory is an informal metaphor used by tax pundits to identify any situation where the taxpayer, by taking too much, risks being reined in by the Internal Revenue Service even when the taxpayer, by focusing purely on the technical rules, has a reasonable argument.” Susan Pace Hamill, *The Taxation of Domestic Limited Liability Companies and Limited Partnerships: A Case for Eliminating the Partnership Classification Regulations*, 73 Wash. U. L.Q. 564, 588 n.109 (1995).

claims for “unmatured interest” accruing after the filing of the bankruptcy petition will not be allowed.⁶⁷ The effect of this general proscription is that interest stops running on an unsecured tax claim (most tax claims) the minute a petition is filed.⁶⁸ On the other hand, holders of secured tax claims are entitled to interest if the property securing the claim has a value, after allowance of certain costs, greater than the amount of the claim.⁶⁹ Thus, if the Service has filed a tax lien prior to the commencement of the case, and the lien is valid, interest will continue to accrue during the case to the extent that the value of the property will support the claim for principal and accrued interest.⁷⁰ Once the plan is confirmed, however, interest on unsecured or undersecured tax claims will once again begin to accrue to the extent that the claim is unpaid, and, as previously set forth, the requirement that a debtor deferring tax payments under the permissible six-year stretch out rule effectively gives the taxing authority accrued interest during the time that the debtor is paying down the liability.

67. 11 U.S.C. § 502(b)(2).

68. In the rare case where the debtor turns out to be solvent, the court may allow claims for postpetition interest to creditors before holders of equity receive a distribution.

69. 11 U.S.C. § 506(b).

70. *United States v. Ron Pair Enter.*, 489 U.S. 235 (1989).