



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

December 4, 2001

Number: **200210032**
Release Date: 3/8/2002

CC:PA:CBS:Br2
GL-145709-01
UILC: 04.13.00-00
9999.98-00

MEMORANDUM FOR ASSOCIATE AREA COUNSEL, (SB/SE)
AREA 1, MANHATTAN

FROM: Lawrence Schattner, Branch Chief
Branch 2 (Collection, Bankruptcy & Summonses)

SUBJECT: Advisory Opinion—Form 872

This memorandum responds to a request for advice received from your office on September 7, 2001. You have asked us to consider whether a chapter 7 debtor or the Trustee should sign Form 872 to extend the time to assess pre-petition taxes. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent. This writing may contain privileged information.

ISSUES

1. When an individual debtor in a Chapter 7 bankruptcy case owes pre-petition income taxes for which the Service has filed a proof of claim, should the Service request the debtor or the Trustee to sign Form 872 to extend the time period in which to assess the taxes?
2. Are requesting the taxpayer to sign Form 872 and signing Form 872 acts in violation of the automatic stay?

CONCLUSION

1. The chapter 7 debtor should sign Form 872.
2. Neither requesting the taxpayer to sign Form 872, nor signing Form 872 violate the automatic stay.

BACKGROUND

You state this question arose when the taxpayer, an individual who recently filed for bankruptcy under Chapter 11 and then converted to Chapter 7, had unpaid income taxes due for a pre-petition year. The Service filed a proof of claim in the bankruptcy case, and now seeks to extend the time to assess, using Form 872. Both the Trustee and the debtor have expressed concern that signing Form 872 would violate the automatic stay, and you asked which should sign Form 872.

DISCUSSION

Bankruptcy Code § 362(b) establishes exceptions to the automatic stay, including, “the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment . . .” B.C. § 362(b)(9)(D). Thus, the automatic stay does not prohibit the Service from making an assessment and issuing notice and demand for payment. Form 872 is a consent to extend the time to assess a tax. Requesting a taxpayer to execute Form 872 and signing Form 872 are not acts in violation of the automatic stay because they are done as part of the assessment process. In addition, because the automatic stay does not prohibit making an assessment, under B.C. § 362(b)(9)(D), the statute of limitations for assessing taxes is not suspended under I.R.C. § 6503(h) by reason of the bankruptcy case. The removal of the prohibition against making assessments during the bankruptcy case and the running of the statute of limitations lead to the conclusion that the Service is authorized to request the taxpayer to sign Form 872. The assessment exception thus applies to the assessment of taxes, as well as signing Form 872. See I.R.M. 5.9.4.2.2.

Under I.R.C. § 6501(a), the Service must make an assessment within three years of filing of the tax return. Section 6501(c)(4) allows for extension of the three year period, provided both the Service and the taxpayer consent in writing prior to the expiration of the original period. Form 872, “Consent to Extend Time to Assess Tax” serves this purpose. In the present case, because the taxes arose pre-petition, the debtor would be the taxpayer; thus, the debtor would be the proper party to sign Form 872. Conversion of the Chapter 11 case to a Chapter 7 did not effect the nature of the prepetition liabilities. See B.C. § 348(a). Note also, that I.R.C. § 6501(c)(4)(B) requires the Service to notify the taxpayer of the right to refuse to extend the limitations period or to limit an extension to particular issues or a particular time period, each time the Service requests such an extension. I.R.M. 121.2.22.3 requires this notice to be given in writing, by providing the taxpayer both Letter 907 and Publication 1035.

If you have any further questions, please contact the attorney assigned to this matter at (202) 622-3620.