NOT BICKETT ON BANKRUPTCY[1]

Submitted by:

Suzana K. Koch (OH: 0073743)
Assistant United States Attorney
United States Court House
801 West Superior Avenue, Suite 400
Cleveland, OH 44113
(216) 622-3600
(216) 522-4982 (facsimile)
Suzana.Koch@usdoj.gov

[1] This is not an official statement of the United States of America, the Department of Justice or the Internal Revenue Service. The information contained herein is provided solely for informational purposes and is intended to be used strictly as a basis for discussion and education. It is not intended to be a complete overview of the subject matter. Nor should it be construed as legal advice or does it represent an attorney-client relationship. Should you be in need of legal advice, consult a paid professional.

Assistant United States Attorney Suzana K. Koch is deeply indebted to James L. Bickett, Assistant U.S. Attorney (Retired) for this outline. AUSA Koch acknowledges that she has nowhere near the depth of experience in bankruptcy tax issues that Retired AUSA Bickett has, nor is she the "New Bickett" as she will never fill his shoes. AUSA Koch does, however, thank the bankruptcy bar for its patience, professionalism, and kindness as she adapts to her new role as an Assistant United States Attorney.

Please note, AUSA Steven J. Paffilas has contributed to prior versions of this outline, and many 2015 USAO summer law clerks worked to update it. That being said, please do your own legal research as this is quite an amalgamation of sources.

Index

I. Quick Tips on taxes and other matters

1. The burden is on the taxpayer to ensure that the tax return arrives at the IRS Service Center. The only exception in the Sixth Circuit to the physical delivery rule is registered mail. 26 U.S.C. § 7502; Carroll v. C.I.R. 71 F.3d 1228 (6th Cir. 1995); Surowka v. United States, 909 F.2d 148 (6th Cir. 1990). The Secretary is authorized to provide by regulations the extent to which the provisions with respect to prima facie evidence of delivery and the postmark date shall apply to electronic filing. Authorized IRS e-file Providers must comply with the provisions of Rev. Proc. 2007-40 and all publications and notices governing IRS e-file. An electronically filed return is not considered filed until the IRS acknowledges acceptance of the electronic portion of the tax return for processing. Publication 1345; See also, 26 CFR § 301.7502-1

2. If your clients have not filed their tax returns prior to filing their bankruptcy petition, send the returns (bearing original signatures) to IRS's local Insolvency Group. The Insolvency Group can process the returns and amend estimated proof of claims faster if the returns are filed with them rather than the Service Center. Since unfiled returns often show a refund is due when actually filed, remember that the taxpayers have a limited amount of time to claim refunds. 26 U.S.C. § 6511; U.S. v. Brockamp, 519 U.S. 347; 117 S.Ct. 849 (1997). The three year period is tolled for taxpayers who can show "financial disability" resulting from a medical condition, which is defined using Social-Security disability terms. 26 U.S.C. § 6511(h)(1); Abston v. C.I.R., 691 F.3d 992, 994 (8th Cir. 2012); see also Revenue Procedure 99-21 on ways to establish such a disability. No refundable overpayment exists where taxpayer mistakenly made estimated payments, but did not file returns for taxable years of payment until more than 3 years after due date for returns, and claims were filed on same date as returns. United States v Miller (1963, CA10 Wyo) 315 F2d 354, 63-1 USTC P 9374, 11 AFTR 2d 1170, cert den (1963) 375 US 824, 11 L Ed 2d 57, 84 S Ct 64.

3. Tax forms and instructions from 1992 to date can be accessed and downloaded at www.irs.gov. Simply click on forms and publications and then select the year in which you are interested.

4. Addresses for service on the United States are available on the Bankruptcy Court's website at http://www.ohnb.uscourts.gov. Bankruptcy Rule 5003(e).

5. If your client disputes the amount owed to the IRS, a motion to determine tax liability can be filed under 11 U.S.C. § 505. The Bankruptcy Court's ruling is binding on the IRS unless there has been a previous judicial determination of the liability.

6. Federal tax liens typically follow the rule "first in time - first in right," however beware that federal tax liens also attach to personal property. Consequently, when objecting to the secured value of an IRS claim, please note that the first thing examined by the government is the value of personal property [including exempt property] and IRAs, etc.. The IRS will not typically argue that ERISA qualified plans support a secured claim in bankruptcy.

7. In chapter 13 cases, you cannot split the tax year unlike Chapter 7 or Chapter 11 proceedings. If a petition is filed on December 31, the entire tax owed or refund to be received is

post petition for that year. If the petition is filed on January 1, then the entire previous years taxes or refund is prepetition.

8. Chapter 7 late-filed priority claims will still be paid as a priority claim if filed before the earlier of the date on which the trustee commences final distribution or the date which is 10 days after the mailing to creditors of the summary of the trustee=s final report. Consequently, if your client discloses a prepetition tax debt in an asset case, ask the IRS Collection Division - Insolvency Group to file a claim, even if late. 11 U.S.C. § 726(a)(1).

9. Where the assessment of a tax has been made within the applicable period of limitation, such tax may be collected by levy or a proceeding in court begun within ten years after assessment. 26 U.S.C. § 6502(a). The ten year collections statute applies without regard to bankruptcy, but note that such limitation is extended by any time in bankruptcy plus six months [26 U.S.C. § 6503(h)]. Further, note that if a tax lien is filed within the applicable period it will remain valid beyond the collections period. The running of the collections statute is also tolled by the pendency of a bankruptcy proceeding. In re Klingshirn 147 F.3d 526, 528 (6th Cir. 1998).

10. Debts discharged as a consequence of bankruptcy are excluded from the debtor=s income. 26 U.S.C. § 108(a)(A). IRS publication 908 explains the consequences of debt cancellation in bankruptcy or when the taxpayer is insolvent. This includes forgiveness of student loan debt pursuant to an income based repayment plan. Form 982 is used to exclude the income when a 1099 form is issued. Creditors are only required to file a 1099-C form reporting a discharge of indebtedness in bankruptcy if the creditor knows that the debt was incurred for business or investment purposes. 26 C.F.R. § 1.6050P-1. Cancelled debt arising from a foreclosure or loan modification on a principal residence may also be able to be excluded from income using form 982 without a bankruptcy filing. See pages 6 and 7 of IRS publication 4681 for a detailed explanation.

11. Social Security overpayments are dischargeable. Rowan v. Morgan etc. 747 F.2d 1052 (6th Cir. 1984). Representative payees are jointly liable for overpayments, but only the personal liability of the debtor can be discharged. Evelyn v. Schweiker 685 F.2d 351, 352 (9th Cir. 1982).

12. Overpayments of military bonuses and similar benefits are not dischargeable for five years after the date of termination of the contract or agreement on which the debt is based. In the absence of an agreement then it is five years from the date of the termination of the service on which the debt is based [typically leaving the armed forces]. 37 U.S.C. § 303a(e)(4). This can arise when the military or Department of Defense pays educational benefits and the debtor does not fulfill the promised obligation. 10 U.S.C. § 511; 10 U.S.C. § 2005; 10 U.S.C. § 2200a; In re Udell 454 F.3d 180 (3rd Cir. 2006).

13. Federal criminal fines and restitution orders are not dischargeable and liens filed to secure such orders are valid for 20 years and have the same attributes as tax liens. 18 U.S.C. § 3613(b)-(f); See also 11 U.S.C. § 724(d); 11 U.S.C. § 523(7) & (13); and 11 U.S.C. § 1328(a)(3). The Mandatory Victim=s Restitution Act does not yield to the fresh start policy of bankruptcy. U.S. v. Hyde 497 F.3d 103, 108 (1st Cir. 2007). 18 U.S.C. '3613(f) and 18 U.S.C. § 3664(m)(1)(A)

provide that an order of restitution may be enforced in the same manner as a fine. Id. at 108 fn. 9. The protective stay is not absolute, and allows enforcement of criminal laws and penalties incident thereto. 11 U.S.C. § 362(b)(1); 134 Baker Street, Inc. v. State of Georgia, 47 B.R. 379 (N.D.Ga.1984); In re Michalski, 452 F. App'x 656, 658 (6th Cir. 2011). Federal government can collect prepetition criminal restitution despite "any other federal law" – including the automatic stay. United States v. Robinson (In re Robinson), 764 F.3d 554, 559-560 (6th Cir. Aug. 22, 2014).

14. A judgment lien filed by the United States in accordance with the provisions of 28 U.S.C. § 3201 arises from non-tax civil judgments on debts such as student loans or administrative fines. It attaches to all of Debtor=s real property including after-acquired real property. 28 U.S.C. § 3002(12). There are also garnishment and attachment remedies available to enforce the judgments, however, the Debtor is entitled to the benefit of the exemptions established by Ohio law. 28 U.S.C. § 3014(a)(2)(A).

15. Through the Federal Payment Levy Program (FPLP), Social Security benefit payments, Federal Old-Age, Survivors, and Disability Insurance Benefits, are subject to a 15-percent levy to collect a delinquent tax debt. 26 U.S.C. § 6331(h). However, certain other benefit payments, such as lump sum death benefits and benefits paid to children, will not be included in the FPLP. Additionally, Supplemental Security Income (SSI) payments, under Title XVI, and payments with partial withholding to repay a debt owed to Social Security will not be levied through the FPLP. However, in aggravated cases, the IRS has taken the position that it can levy Social Security Benefit Payments under 26 U.S.C. § 6331(a) and take the full amount of the check. Hines v. United States, 658 F. Supp. 2d 139, 146 (D.D.C. 2009) ("Plaintiff's right to receive periodic payments for his Social Security retirement benefits was a vested interest," and therefore did not have to comply with the 15% cap created under (h).)

16. Note that payments cannot be designated in a Chapter 7 or Chapter 13 case. In re Schilling, 177 B.R. 862 (Bankr. N.D. Ohio 1995). The Internal Revenue Service can apply an involuntary payment made through a bankruptcy or an overpayment to any liability of the taxpayer. In re Lazar 219 B.R. 212, 213 (fn 1)(Bankr. N.D. Ohio 1998). Bryant v. C.I.R. 2010WL4251118 (6th Cir. 2010).

17. The United States Supreme Court did not provide authority for the proposition that chapter 13 plan provisions can determine dischargeabilty of taxes without an adversary proceeding. United Student Aid Funds v. Espinosa 599 U.S. 260, 130 S.Ct. 1367 (2010).

II. Dischargeability of Taxes

Generally

Same Standards as Other Debt. Taxes are judged by essentially the same standards as other debts under Chapter 7 and Chapter 13 bankruptcies. Judicial Determination Not Required. Nondischargeability of taxes is statutory and does not need judicial determination. In re Mathews, 209 B.R. 218, 221 [fn4] (B.A.P. 6th Cir. 1997). The United States is not required to bring a complaint to determine nondischargeability before seeking to collect a nondischargeable tax debt. The automatic stay interrupts the IRS' collection efforts except as provided by 11 U.S.C. § 362(b)(9). In re Mathews, 209 B.R. 218, 221 [fn4] (B.A.P. 6th Cir. 1997).

IRS Must Participate to Discharge. IRS debt will not be discharged if the IRS was not given the opportunity to participate, such as when the IRS was not listed as a creditor or notified of the bankruptcy action. 11 U.S.C. § 1328(a)(2); 11 U.S.C. § 523(a)(3); In re Jenkins, 417 B.R. 462, 468 (Bankr. N.D. Ohio 2009).

Joint Returns Give Joint and Several Liability. Taxpayers who file jointly are jointly and severally liable for the tax debt and the discharge of one in bankruptcy will not excuse the debt for the other. 26 U.S.C. § 6013(d)(3).

Common Elements Between Chapter 7 [11 U.S.C. § 727(b)] and Chapter 13 [11 U.S.C. § 1328(a)(2)]

> Priority Taxes Nondischargeable. Priority taxes are not discharged under Chapter 13 or Chapter 7. 11 U.S.C. § 507. A priority tax is a tax which is required to be collected or withheld for the amount the debtor owes in any manner. 11 U.S.C. § 507(a)(8)(C).
>
> Non-Trust Fund Priority Taxes Dischargeable. Priority taxes for years in which returns were timely filed by the debtor can be discharged so long as they are not trust fund taxes. 11 U.S.C. § 1328(a)(2); 11 U.S.C. § 727(b).
>
> Most Recent Tax Returns Required. Debtors must provide copies of their most recent federal tax returns. 11 U.S.C. § 521. Debtors must provide a copy of their most recent federal income tax return to the trustee not less than seven days before the first 341 meeting and to a creditor who made a timely request. 11 U.S.C. § 521(e)(2). Failure to do so will result in dismissal of the case. A debtor in Chapter 11 bankruptcy must provide the court, the United States Trustee, or any party in interest with a copy of a federal income tax returned which was filed post-petition. 11 U.S.C. § 521(f). A case can be dismissed or converted at the request of a taxing authority if a debtor in Chapter 7 or 13 does not file within 90 days a tax return that became due after the petition date or failed to obtain an extension of that due date. 11 U.S.C. § 521(j). Penalties for Late Return or Attempted Evasion. A discharge in bankruptcy under Chapter 7 or 13 is disallowed when a tax return

is filed late or attempted to be defeated or evaded. 11 U.S.C. § 523. Late Return. If the IRS prepared a notice of deficiency which acted as a substitute for return under 26 U.S.C. § 6020(b), that return does not count as a filed return for calculating the nondischargeability period. 11 U.S.C. § 523(a) Attempted Evasion. Tax liability cannot be discharged when the taxpayer made a fraudulent return or willfully attempted to evade or defeat the tax. 11 U.S.C. § 523(a)(1)(C) The United States can object to the discharge in ad adversarial proceeding on those grounds. Stamper v. United States, 360 F.3d 551(6th Cir. 2004). A willful attempt to evade or defeat a tax requires a voluntary, conscious, and intentional evasion. In re Toti, 24 F.3d 806, 809 (6th Cir. 1994), cert. denied, 513 U.S. 987 (1994).

Chapter 7 [11 U.S.C. § 727(b)]

Priority Tax Defined. A tax which was not assessed before, but was able to be assessed after the commencement of the bankruptcy case is a priority tax regardless of age. 11 U.S.C. § 507(a)(8)(A)(iii) Priority Taxes Not Dischargeable. Priority taxes are not able to be discharged under Chapter 7. 11 U.S.C. § 523(a)(1). Assessments. Assessments are administrative determinations of a debtor's liability to the United States for taxes. 26 U.S.C. § 6501. The IRS' assessment may be delayed during an audit or up to three years by consent of the taxpayer, a Tax Court proceeding, or other reasons. 26 U.S.C. § 6501(c); 26 U.S.C. § 6503(a)(1). A debtor who contests the tax liability or is under audit may also apply this rule. United States v. Galletti, 541 U.S. 114 (2004) discusses assessment dates in secondary liability situations such as partnership debt.

Chapter 13 [11 U.S.C. § 1328(a)(2)]

All Tax Returns for 4 Years. A Chapter 13 debtor's obligation to file all applicable tax returns for a 4 year period. 11 U.S.C. § 1308. File Returns Before § 341 Meeting. 11 U.S.C. § 1308(a) requires debtors in Chapter 13 to file their required tax returns for a 4 year period ending on the date on which the petition was filed before the required § 341 creditors' meeting.

The 4 year period includes the tax return for the previous year even if the § 341 creditors' meeting is scheduled before April 15 or an extension of the due date has been granted and the return is not yet due. In re Cushing, 401 B.R. 528, 537 (B.A.P. 1st Cir. 2009); In re French, 354 B.R. 258 (Bankr. E.D. Wis. 2006). All federal, state, and local returns must be filed before the § 341 creditors' meeting. In re Perry, 389 B.R. 62, 66 (Bankr. N.D. Ohio 2008).

Due Dates and Extensions. 11 U.S.C. § 1308(b) concerns the due dates and the availability or court orders which extend time. 11 U.S.C. § 1308(b)(2)dictates that the court may grant an extra thirty days or an extension to the applicable extended due date if the debtor requests and obtains an order to that effect prior to the expiration date within 11 U.S.C. § 1308(b).

Tax Returns Defined. 11 U.S.C. § 1308(c) defines a tax return for the purposes of Chapter 13 filing, which includes those prepared under 26 U.S.C. § 6020. If the IRS prepares a substitute for return under 26 U.S.C. § 6020(b), then the requirement will be satisfied.

United Student Aid Funds, Inc. v. Espinosa

Application of Due Process. The Supreme Court applied due process related to a Chapter 13 plan's confirmation. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010). Facts involved a bankruptcy court confirming a Chapter 13 plan that allowed for the discharge of student loan debt. The creditor argued that due process required that an adversarial proceeding be filed to discharge such a debt, and that since such a filing was not done pursuant to 11 U.S.C. § 523(a)(8) and Rule 7001(6), that the debt was not able to be discharged and should be vacated according to Rule 9024 and Federal Rule of Civil Procedure 60(b). Id. The Court held that while 11 U.S.C. § 523(a)(8) and Rule 7001(6) do require such a filing to discharge student loan debt and that the bankruptcy court should have made a hardship determination before confirming, the confirmation did not deny Due Process. Id. at 272. Effect of the Judgment. Granted preclusive effect to a confirmation order, even when such order was not done according to proper procedure and there was clear error. Id. at 275.

Payment of Priority Claims.

A priority claim must be paid in full unless the holder otherwise agrees. The plan must provide for the payment in full and in deferred cash payments to all priority claims, unless the holder of a priority claim agrees to a different treatment. 11 U.S.C. § 1322(a)(2); 11 U.S.C. § 1325(A)(1). The plan must provide for the payment of the full amount of priority tax claims, without post-petition interest in order to satisfy the Internal Revenue Code and 11 U.S.C. § 1325(a)(1). In re Monahan, 497 B.R. 642 647-48 (B.A.P. 1st Cir. 2013); In re Mitrano, 2008 WL 4280391 (Bankr. E.D. Va. 2008). Failure to provide for the payment of priority claims makes a plan unenforceable *per se*. In re Shilling, 2012 WL 1565257, at *2 (Bankr. D. N.J. 2012).

Payment Inside the Plan.

IRS priority claims must be paid inside the Chapter 13 plan, not outside of it. In re Ballard, 4 B.R. 271, 278 (Bankr. E.D. Va. 1980); In re McDonald, 437 B.R. 278, 284 (Bankr. S.D. Ohio 2010); In re Driskell, 2000 WL 1902253 (Bankr. M.D. Ga. 2000).

1305(a) Claims. A Chapter 13 plan may attempt to pay post-petition taxes which came due through the plan, but it is the IRS' choice to seek payment of such taxes through a bankruptcy case. Section 1325 requires that secured tax claims are provided for in the plan. In re Shelly, 458 B.R. 749, 743 (Bankr. N.D. Ohio 2011) (citing Shaw v. Aurgroup Fin. Credit Union, 552 F.3d 447, 455 (6th Cir. 2009)).

Surrender of Property Under 11 U.S.C. § 1325(a)(B). IRS can not agree to surrender.

Background of IRS Levy Exemptions. A federal lien is imposed on property and rights thereto which belong to a delinquent taxpayer. 26 U.S.C. § 6321. The lien is automatic upon assessment and attaches to property owned or thereafter acquired by the debtor. 26 U.S.C. § 6322; Glass City

Bank v. United States, 326 U.S. 265, 267-68 (1945). The lien is broad and is intended to reach every asset the debtor might have. Glass City Bank, 326 U.S. at 267. Liens Not Self-Executing. Federal tax liens are not self-executing. Nat'l Bank of Commerce, 472 U.S. at 720. The government may, through the Attorney General and the request of the Secretary of the IRS, file a civil action in district court to enforce a tax lien or subject property to the payment of that liability. Id.; 26 U.S.C. § 7403(a). The IRS may seek to collect delinquent taxes through an administrative levy, which includes the power of distraint and seizure. Nat'l Bank of Commerce, 472 U.S. at 720; 26 U.S.C. § 6331(a); 26 U.S.C. § 6331(b). Common Exemptions. When a levy is authorized by 26 U.S.C. § 6331, there are certain exemptions from that levy under the Internal Revenue Code. 26 U.S.C. § 6334.

Exempt Property May Not Be Surrendered. A proposed surrender of exempt property which the IRS cannot levy or otherwise collect does not constitute a surrender under 11 U.S.C. § 1325(a)(5)(C). In re White, 487 F.3d 200, 201 (4th Cir. 2007) (proposed surrender of exempt personal property); In re Reitberger, 456 B.R. 406, 407 (Bankr. D. Minn. 2001)(federal tax liens are not subject to surrender provisions of 11 U.S.C. 1325(a)(5)(c)). Exempt personal property is not deemed to be surrendered because there are significant legal problems with collecting the property. In re White, 340 B.R. 761, 766 (E.D.N.C. 2006). The IRS cannot levy a principal residence because it must first obtain a court order, otherwise the residence is exempt, and therefore the residence is precluded from being surrendered. Id.

Surrender Requires Mutual Agreement. The surrender of collateral requires mutual agreement between the parties and occurs when there is the consent of both. In re Losak, 375 B.r. 162, 164 (Bankr. W.D. Pa. 2007)(concerning Chapter 7); In re Service, 155 B.R. 512, 514 (Bankr. E.D. Mo. 1993). The Internal Revenue Code does not define on the meaning of the term "surrender" in Chapter 13, but surrender of collateral requires mutual agreement. In re Robertson, 72 B.R. 2, 4 (Bankr. D. Colo. 1985); In re Williams, 70 B.r. 441, 443 (Bankr. D. Colo. 1987) (citing Robertson definitions of abandonment and surrender with approval); In re Rimmer, 143 B.R. 871, 876 (Bankr. W.D. Tenn. 1992) (debtor cannot surrender collateral in a confirmed plan without secured creditor consent). Contra. In re Harris, 244 B.R. 556, 557 (Bankr. D. Conn. 2000)(held that consent of the secured creditor is not a necessary component); In re White, 282 B.r. 418, 422 (Bankr. N.D. Ohio 2002) (secured creditor's consent not required). The IRS does not consent to surrender.

III. Priority Taxes

Trust Fund Taxes. This is a 100% penalty which is also known as the Trust Fund Recovery Penalty, and qualifies as a priority claim. 11 U.S.C. § 507(a)(8)(C); 26 U.S.C. § 6672. Trust Fund Taxes Cannot be Discharged. Trust fund taxes cannot be discharged, no matter the time elapsed since their filing. 11 U.S.C. § 507(a)(8)(C).

Failure to Pay Over Tax or Withhold. Penalty imposed for a person who was liable to pay over an amount in tax and willfully failing to do so. This includes a responsible officer. 26 U.S.C. § 6672. Penalty applies to failure to withhold employment taxes. 11 U.S.C. § 507(a)(8)(c); Gust v. United States, 197 F.3d 1112 (11th Cir. 1999). Penalty applies to a willful failure to withhold payroll taxes as required by I.R.C. § 6672. 11 U.S.C. § 507(a)(8)(c); In re Fernandez, 130 B.R. 757, 767 (Bankr. W.D. Mich. 1991). Interest Subject to Priority. The interest on the 100% penalty also has priority status. Prepetition interest on a priority tax claim is entitled to the same priority as the tax upon which it was based. Bates v. United States, 974 F.2d 1234, 1237 (10th Cir. 1992); In re Suburban Motor Freight, Inc., 36 F.3d 484 (6th Cir. 1994); Jones v. United States, 955 F.2d 16 (5th Cir. 1992); In re Larson, 862 F.2d 112, 119 (7th Cir. 1988); In re Hovan, 96 F.3d 1254 (9th Cir. 1996). The same priority for claims which arose because of an erroneous refund or credit applies as would have been allowed for the tax upon with the refund or credit arose. 11 U.S.C. § 507(c). It is important to correctly determine the priority status of the underlying tax so that the claim for refund or credit will be properly classified for proof of claim purposes.

Income Taxes

Due Date Determines Priority. The due date, including extensions, is what determines priority status, not the filing date. 11 U.S.C. § 507(a)(8). Income Taxes Given Priority For 3 Years. Income taxes are given priority status for three years from the date when the taxes were due. Potential Problems. Two areas can create problems. Extensions can push the due date beyond the normal April 15th deadline, so the taxes were due three years from the due date, including any extensions. 11 U.S.C. § 507(A)(8)(i).

Excise Taxes. Excise taxes are treated differently than trust fund taxes. Governmental claims are prioritized to the extent that they are excise taxes. 11 U.S.C. § 507(a)(8)(E). Excise taxes can be discharged after three years. Illinois Dept. of Revenue v. Haysell/Judy Oil, 426 F.3d 899, 902 (7th Cir. 2005). Dual Status Taxes. Taxes can be both excise taxes and trust fund taxes. A tax which is also a trust fund tax cannot be discharged, regardless of age.

IV. Tax Liens

The statutory language authorizing the tax lien is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. U.S. v Craft,535 U.S. 274 (2002), 122 S.Ct. 1414, 1422 (2002). "A common idiom describes property as a 'bundle of sticks'--a collection of individual rights which, in certain combinations, constitute property. State law determines only which sticks are in a person's bundle. Whether those sticks qualify as 'property' for purposes of the federal tax lien statute is a question of federal law." U.S. v Craft,535 U.S. 274 (2002), 122 S.Ct. 1414, 1418 (2002). In determining property interests for federal tax law purposes, the definition of underlying property interests is left to state law and the consequences that attach to those interests is a matter left to federal law. U.S. v. Barr,617 F.3d 370, 373 (6th Cir. 2010); U.S. v. Winsper,--- F.3d ----, 2012 WL 1623163 (6th Cir. 2012).

Federal law governs the *priority* of a tax lien against other claims to property. In re Terwilligers Catering Plus, Inc., 911 F.2d 1168, 1176 (6th Cir. 1990), cert. denied, 501 U.S. 1212 (1991); Atlantic States Constr. v. Hand, 892 F.2d 1530 (11th Cir. 1990). A federal tax lien attaches to "all property and rights to property, whether real or personal, belonging to such person." 26 U.S.C. § 6321. Filed tax liens also attach to exempt property. See, 11 U.S.C. § 522(c)(2); American Trust v. American Community Mutual Insurance Company et al.,142 F.3d 920, 925 (6th Cir. 1998); U.S. v. Barbier, 896 F.2d 377, 379 (9th Cir. 1990); In re Schilling, 177 B.R. 862 (Bankr. N.D. Ohio 1995). Tax liens attach to ERISA qualified pension plans. United States v. Sawaf,74 F.3d 119, 122 [FN3] (6th Cir. 1996); In re Berry, 268 B.R. 819, 824 (Bankr. E.D. Tenn. 2001). Tax liens attach to property owned as tenants by the entirety. U.S. v. Winsper --- F.3d ----, 2012 WL 1623163 (6th Cir. 2012). Even lawsuits, as choses in action, are personal property subject to attachment by the United States. United States v. Stonehill 83 F.3d 1156, 1159 (9th Cir. 1996).

Federal tax liens arise at the time that the taxpayer is assessed. 26 U.S.C. § 6322; In re Walter, 45 F.3d 1023, 1027 (6th Cir. 1995). Because the Bankruptcy Code does not grant hypothetical possession to a hypothetical bona fide purchaser, the trustee in this case may not avoid, under Bankruptcy Code § 545(2), the federal tax liens on debtors' motor vehicle. Id. at 1034.

Further, federal tax liens attach to property and all rights to property acquired by the taxpayer after the lien arises. United States v. Big Value Supermarkets 898 F.2d 493, 496 (6th Cir. 1990). Properly filed federal tax liens follow a taxpayer and continue to attach to his after acquired personal property even when he relocates to a different state or county. In re Eschenbach 267 B.R. 921, 924 (Bankr. N.D. Texas 2001).

A tax lien attaches to whatever equity interest the taxpayer has in a property subject to a land contract. The value of the equity interest depends on the fair market value of the property, and is measured by reducing the fair market value of the property by the amount due on the land contract and any liens superior to the federal tax lien, e.g., local tax liens. Cardinal v. U.S., 26 F.3d 48, 49 (6th Cir. 1994)

26 U.S.C. § 6323(f) establishes the location for filing a tax lien.

(1) Place for filing.--The notice referred to in subsection (a) shall be filed-- (A) Under State laws.B

(i) Real property.--In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and

(ii) Personal property.--In the case of personal property, whether tangible or intangible, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated, except that State law merely conforming to or reenacting Federal law establishing a national filing system does not constitute a second office for filing as designated by the laws of such State....

Priority among a federal tax lien and other lien holders is determined by § 6323 of the Internal Revenue Code. Section 6323(a) states that a federal tax lien "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" until proper notice is filed. If proper notice is filed, then the resolution of the conflicting claims is controlled by the traditional "first in time, first in right" principle. Woods v. Simpson 46 F.3d 21 (6th Cir 1995); In re Terwilligers Catering Plus, Inc. at 1176; Interstate Funding Corp. v. Direct Cable, 826 F. Supp. 437, 438 (11th Cir. 1993); Urban Indus., Inc. v. Thevis, 670 F.2d 981, 984 (11th Cir. 1982). Some later perfected security interests can come ahead of the IRS tax lien such as a purchase money security interest created before the tax lien is filed and perfected within 45 days of the notice of tax lien filing. 26 U.S.C. § 6323(c). § 6323(c) accords first lien status to account receivables secured by a party arising prior to or within 45 days of the tax lien filing. After the 45 day window, the United States has first priority in all newly created account receivables. See Vinson v. Ford Motor Credit 2003 WL 173074 (6th Cir. 2003); In re Dorrough, Parks & Company 185 B.R. 46 (Bankr. E.D. Tennessee 1995); Bremen Bank and Trust v. United States 131 F.3d 1259, 1263 (8th Cir. 1997).

26 U.S.C. § 6323(a)(8) places an enforceable contingent fee contract or attorney=s lien ahead of a tax lien where the attorney=s work procured the judgment or settlement.

A federal tax lien is subordinate to a purchase-money mortgagee's interest notwithstanding that the agreement is made and the security interest arises after notice of the tax lien. Slodov v. U.S. 436 U.S. 238, 259 fn 23 (1978).

Where Congress has not prescribed a different rule, however, the basic rule is "first in time, first in right". Rodriguez v. Escambron Development Corp. 740 F.2d 92, 97 (1st Cir. 1984) Section 6323 should be reviewed for its complete list of exceptions. Also see Reed v. Civello Case No. 5:02CV0711 (U.S. District Court N.D. Ohio 2004) when there is a question of priority between a state tax lien and a federal tax lien. The date of assessment of the federal tax lien is controlling.

One Court has held that the debtor in a Chapter 11 may not designate which part of a secured tax claim is being paid through the plan. Debtor attempted to have the priority tax portion of the secured claim paid first so that the balance of the claim deemed to be unsecured would be treated as a general unsecured rather than a priority claim. In re Haas 162 F.3d 1087 (11th Cir. 1998); In re Southeast Waffles, LLC 460 B.R. 132, 140 fn. 6 (6th Cir.BAP 2011). The fraudulent-transfer statutes were not meant to provide debtors with either a means to avoid tax penalties legitimately imposed or a means to recover prepetition payments made in satisfaction of those penalties. In re

Southeast Waffles, LLC 702 F3d 850 (6th Cir. 2012); See also United States v Energy Resources 495 U.S. 545 (1990) for a general discussion of designating payments in a Chapter 11 case.

Once a tax lien has attached [assuming proper filing], the lien cannot be extinguished simply by a transfer or conveyance of the interest. United States v. Rodgers 461 U.S. 677, 691 fn. 16 (1983); United States v. Big Value Supermarkets 898 F.2d 493, 497 (6th Cir. 1990).

Tax liens are valid and remain attached to prepetition property even if the underlying tax debt is discharged. Verran v. United States Treasury Department 623 F. 2d 477, 479 (6th Cir. 1980). The in personam liability may be discharged, but the in rem liability remains enforceable. In re Frengel 115 B.R. 569, 571 (Bankr. N.D. Ohio 1989). A secured creditor is not even required to file a proof of claim in order to preserve his right to recover from the estate. Waldman v. Stone 698 F.3d 910 (6th Cir. 2012). Completion of a Chapter 13 plan will not extinguish a tax lien unless it is Aprovided for@ in the plan. 11 U.S.C. § 1327(c); In re Deutchman 192 F.3d 457, 461 (4th Cir. 1999).

Note that 11 U.S.C. § 1325(a)(5) provides that the IRS will retain its lien until the earlier of payment of the debt determined under applicable nonbankruptcy law or discharge under 11 U.S.C. § 1328. This makes clear that the lien will survive discharge if the tax debt is not discharged.

Even when perfected and secured, certain claims get paid ahead of tax liens in Chapter 7 cases. 11 U.S.C. § 103(b); 11 U.S.C. § 724(b)(2). Senior liens which have been perfected are paid ahead of tax liens. Other claims paid ahead of the IRS include domestic support obligations, unpaid wages and certain deposits. 11 U.S.C. § 724(b)(2); 11 U.S.C. § 507.

Certain administrative expenses including trustee fees can be paid out of proceeds of property which is subject to tax liens. For Chapter 7 Trustee fees, follow 11 U.S.C. § 724(b)(2) to 507(a)(1) to 503(b)(2) to 330(a). In re Darnell 834 F2d 1263, 1266 (6th Cir. 1987); In re K.C. Machine & Tool Company 816 F.2d 238, 244 (6th Cir. 1987). 11 U.S.C. section 726(a)(4) provides that IRS fines or penalties whether secured or unsecured are paid in fourth priority. Note, however, that if the tax lien is a judicial lien rather than a statutory lien, then the lien is not subordinated by 11 U.S.C. § 724(b)(2). In re Markair 308 F.3d 1038, 1046 (9th Cir. 2002). Also, before subordination can occur, all unencumbered assets of the estate must be exhausted and secured claims must be surcharged the costs of preserving and disposing of the secured property. 11 U.S.C. § 724(e).

Statutory federal tax liens are not avoidable under 11 U.S.C. § 522(f). In re Frengel 115 B.R. 569, 571 (Bankr. N.D. Ohio 1989); In re Khoe 255 B.R. 581, 588 (Bankr. E.D. California 2000).

Statutory tax liens are also not subject to avoidance as a preference if perfected prepetition. 11 U.S.C. § 547(c)(6); Federal tax liens arise automatically when the tax liability is assessed and is made valid against third parties by the filing of a notice of federal tax lien. 26 U.S.C. ' 6323(a); In re Darnell, 834 F.2d 1263, 1265 n. 5 (6th Cir.1987); In re Putnam County Canning Co.,35 B.R. 482, 484 (Bankr. N.D. Ohio 1983). The proper inquiry is whether a statutory lien is enforceable against a bona fide purchaser as of the date the petition is filed. 11 U.S.C. § 545(2). In re Walter, 45

F.3d 1023, 1029 (6th Cir. 1995). 11 U.S.C. § 545(2) limits the bona fide purchaser exception with regard to federal tax liens to those enumerated in 26 U.S.C. § 6323.

An IRS tax lien need not perfectly identify the taxpayer. The critical issue in determining whether an abbreviated or erroneous name sufficiently identifies a taxpayer is whether a reasonable and diligent search would have revealed the existence of the notices of the federal tax liens under these names. In re Spearing Tool and Manufacturing Co., 412 F.3d 653, 656 (6th Cir. 2005).

26 U.S.C. § 7425(a)(2) provides that if the Service's Notice of Federal Tax Lien is not filed at the time the judicial foreclosure is commenced the Service's lien will not attach to the property at issue.

11 U.S.C. § 511 fixes the interest rate on tax claims at the applicable nonbankruptcy rate. Thus, the IRC section 6601 rate applies to federal tax claims. For confirmed plans, the applicable rate in the month of the confirmation is to be used.

11 U.S.C. § 506(2) determines the value of personal property on petition date as replacement value without deduction for costs of sale or marketing. The value of an asset shall be determined in light of its disposition or use. In re LTV Steel, 285 B.R. 259, 268 (Bankr. N.D. Ohio 2002); Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997). Consequently, values will not be reduced for liquidation costs.

V. Prepetition or Postpetition Tax Debt

The income tax liability for the year in which the petition is filed will be a postpetition tax. In re Chavis, 47 F.3d 818, 819 n.4 (6th Cir 1993); In re Hudson, 158 B.R. 670, 673 (Bankr. N.D. Ohio 1993); In re Epstein, 200 B.R. 611, 613 (Bankr. S.D. Ohio 1996); In re Thompson, 312 B.R. 876, 878 (Bankr. W.D. Tenn. 2004). The income tax liability for the year previous to the year in which the petition was filed will be a prepetition tax regardless of when the return is due. In re Hight, 670 F.3d 699 (6th Cir 2012). A refund is potential as of January 1for individuals as the tax year ends December 31. In re Nolan, 205 B.R. 885, 894 (Bankr. M.D. Tenn. 1997).

11 U.S.C. § 1308 is entitled AFiling of prepetition tax returns@. 11 U.S.C. § 1308(a) defines prepetition returns as "all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition." Individuals are calendar year filers and the taxable period ends on midnight of December 31. If the petition is filed on January 2, the prior year's taxable period already ended and it would be prepetition.

11 U.S.C. § 362(b)(26) also uses the end of the tax year as establishing the existence of both income tax refunds and liabilities when allowing for their offset as an exception to the automatic stay.

Note that tax refunds can be disposable income in a chapter 13 or an estate asset in chapter 7. In re Freeman, 86 F.3d 478 (6th Cir. 1996). Earned Income Credit for year in which petition was filed is property of estate in a Chapter 7 case. In re Johnston, 209 F. 3d 611, 613 (6th Cir. 2000). The amount of a refund attributable to an earned income credit is subject to an offset for debts owed to the United States. In re Scales 476 B.R. 512, 515 (Bankr. N.D. Ohio 2012).

Postpetition tax claims can be filed by the government in a chapter 13 under ' 1305. However, the debtor may not file a ' 1305 claim on behalf of the creditor. In re Epstein 200 B.R. 611, 614 (Bankr. S.D. Ohio 1996). § 1305 claims must be paid before a discharge is granted. In re Estrada 322 B.R. 149 (Bankr. E.D. California 2005). This can be a problem when the § 1305 claim is filed late in the life of the plan.

In a case converted from one chapter to another, the original filing date is the petition filing date for purposes of determining whether a tax is prepetition or postpetition. In re Hudson, 158 B.R. 670, 673 (Bankr. N.D. Ohio 1993).

Tax years may be split in Chapter 7 or Chapter 11 proceedings. The Code does not provide for the splitting of the tax year under Chapter 13. The first tax year ends on the day before the petition is filed and the second tax year runs from the petition date to December 31. To qualify there must be an asset estate and the election must be made by the 15th day of the fourth month following the end of the tax year. The election is irrevocable. See, 26 U.S.C. § 1398; 26 U.S.C. § 1399.

VI. Setoff - 11 U.S.C. § 362(b)(26) & 11 U.S.C. § 553

INCOME TAX: Section 362(b)(26), authorizes the setoff of an income tax refund for a tax period ending before the petition date against an income tax liability for a tax period ending before the petition date. If setoff is not permitted under nonbankruptcy law because of a pending challenge to the amount or legality of the tax liability, the IRS or other taxing authority is allowed to freeze the refund unless, after notice and hearing, the bankruptcy court orders its release because "adequate protection" within the meaning of section 361 is provided. The IRS can also freeze a postpetition refund and manually process the refund after reviewing the matter to determine if any action is appropriate if the time involved is reasonable. Harchar v. U.S., 694 F3d 639 (6th Cir. 2012).

OTHER SETOFF: 11 U.S.C. § 553 governing setoff in bankruptcy does not create a right to setoff, but rather preserves the right where it exists under applicable nonbankruptcy law. In re Whitaker, 173 B.R. 359, 361 (Bankr. S.D. Ohio 1994).

26 U.S.C. § 6402 requires the Internal Revenue Service, upon receiving notice from any Federal agency of a debt to that agency, to reduce the "amount of any overpayment payable to such person by the amount of such debt." 31 U.S.C. § 3720A(a) requires the United States Department of Agriculture to request a reduction of a tax overpayment for any "past-due, legally enforceable debt." Neither the IRS Commissioner nor the United States Department of Agriculture possesses the power to repeal or amend the enactments of the legislature. National Life & Acc. Ins. Co. v. U.S. 524 F.2d 559, 560 (6th Cir 1975). Debtor's contingent right was in the potential tax refund not in the dollar amount claimed on her return. In re Sissne, 432 B.R. 870, 881 (Bankr. N.D. Georgia 2010); In re Scales 477 B.R. 679, 685 (Bankr. N.D. Ohio 2012). After the credit has been applied only then does a taxpayer have a refund. In re Siebert Trailers, Inc., 132 B.R. 37, 40 (Bankr. E.D. Cal. 1991); In re Orlinski, 140 B.R. 600, 602 (Bankr. S.C. Ga. 1991); In re Whitaker, 173 B.R. 359 (Bankr. S.D. Ohio 1994). The overpayment is not a refund nor property of the estate until the statutory offsets have been made. In re Lyle 324 B.R. 128 (Bankr. N.D. California 2005); In re Pigott 330 B.R. 797, 802 (Bankr. S.D. Alabama 2005); In re Baucom 339 B.R. 504, 507 (Bankr. W.D. Missouri 2006). "The Internal Revenue Code leaves to the Commissioner's discretion whether to apply overpayments to delinquencies or to refund them to the taxpayer. 26 U.S.C. § 6402(a). Until the Commissioner exercises this discretion, the taxpayer has no right to payment." In re Gould, 401 B.R. 415, 424 (9th Cir BAP, 2009). Only the net refund can become property of the estate and a claim of exemption in a non-existent asset is of no legal consequence. In re Houchens, 384 B.R. 472, 476-47 (Bankr. W.D. Kentucky 2008).

11 U.S.C. § 553 establishes the conditions necessary for a setoff. The obligations to be setoff must both be prepetition or postpetition mutual debts. In re Larbar Corporation, 177 F.3d 439, 445 (6th Cir. 1999). For purposes of determining mutuality of the debt, the agencies of the United States constitute a single governmental unit as defined in 11 U.S.C. § 101(27). In re HAL, Inc. 122 F.3d 851, 853 (9th Cir. 1997); United States v. Maxwell 157 F.3d 1099, 1102 (7th Cir. 1998). Congress authorized non-tax agencies to deduct from a taxpayers overpayment the amount of debt owed to that agency if proper notice is given. 31 U.S.C.§ 3720A.

Even if a party meets the requirements of § 553, setoff lies within the equitable discretion of the Court. In re Gordon Sel-Way, Inc., 270 F.3d 280, 292 (6th Cir. 2001). However, the presumption is in favor of setoff. In re Larbar Corporation, 177 F.3d 439, 447 (6th Cir. 1999); In re Sedlock, 219 B.R. 207, 211 (Bankr. N.D. Ohio 1998); In re Lazar, 219 B.R. 212, 213 (Bankr. N.D. Ohio 1998). Further, a creditor (such as IRS) can temporarily freeze an obligation owed to a debtor (such as a tax refund) while requesting permission of the Court to lift the automatic stay and permit the offset. Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 21; 116 S.Ct. 286, 290 (1995).

A prepetition obligation can become a postpetition obligation when the Plan of reorganization does not discharge the debt. In re Gordon Sel-Way, Inc., 270 F.3d 280, 287 (6th Cir. 2001). The postpetition debt appears to be limited to the amount which the creditor was to receive under the confirmed plan. Thus ensuring that creditors can not use setoff to gain priority over other prepetition creditors with superior claims. In re Gordon Sel-Way, Inc., 270 F.3d 280, 291 (6th Cir. 2001). Consequently, a creditor may be able to accelerate receipt of monies due it under the confirmed plan by offset, but can not increase the total due through offset.

A debtor's discharge does not affect the right of the IRS to offset a prepetition liability with a prepetition overpayment. The IRS has that right under non-bankruptcy law, and the Bankruptcy Code specifically preserves that power. In re Bryant, 399 B.R. 477, 479 (Bankr. W.D. Ky. 2009). The turnover of a tax refund is covered by 542(b) and is not required to be "turned over" to the extent such debt may be offset. Harchar v. U.S., 694 F3d 639 (6th Cir 2012).

SETOFF NOT PREFERENCE: As noted above, netting tax overpayments against liabilities pursuant to 26 U.S.C. § 6402 is not an offset, but even if it were an offset it is not a "transfer" as defined by 11 U.S.C. § 101(54). In re Rehab Project, 238 B.R. 363, 372 (Bankr. N.D. Ohio 1999). Offset may arise when a debt of one agency is set off against tax overpayment. For example, a liability from a social security overpayment or student loan debt can be offset against a tax refund. Offsets can only be recovered by a Trustee under 11 U.S.C. § 553(b) or derivatively by a Debtor under 11 U.S.C. § 522(g) & (h).

In the example of social security and a tax refund offset, Debtors nor the Trustee may utilize 11 U.S.C. § 553(b) to recover the prepetition setoff of the Debtors' income tax refund against the prepetition claim of the SSA for overpayment of social security benefits if the insufficiency on the date of the setoff was not less than the insufficiency ninety days before the date of the filing of the Debtors' petition. "Insufficiency" means the amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim. 11U.S.C. § 553(b)(2); In re Comer, 386 B.R. 607 (Bankr. W.D. Virginia 2008). In the example, if the insufficiency (amount owed to SSA less potential tax refund) on the date of the setoff and the insufficiency (amount owed to SSA less potential tax refund) ninety days before the date of the filing of the petition are identical or the amount is greater on the date of offset, the United States had no improvement in its position and a trustee in bankruptcy could not recover the setoff. A refund is potential as of January 1for individuals as the tax year ends December 31. In re Nolan, 205 B.R. 885, 894 (Bankr. M.D. Tenn. 1997).

VII. Immunity and Stay Applicability

The United States is immune from suit unless it waives immunity by statute. U.S. v. Dalm, 494 U.S. 596, 608 (1990). Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. F.A.A. v. Cooper, 132 S.Ct. 1441 (2012).

11 U.S.C. § 106 partially waives the immunity of governmental entities, however, it does not allow for the award of punitive damages against the United States. 11 U.S.C. § 106(b) only waives immunity if the claim filed by the government and the claim asserted against the government arise out of the same transaction or occurrence. Harchar v. U.S., 694 F3d 639 (6th Cir 2012).

As 11 U.S.C. § 106 is not a provision for relief standing alone, litigants must look to other provisions to pursue recovery against the United States. In re Hardy, 97 F.3d 1384, 1388 (11th Cir. 1996). 11 U.S.C. § 106(4) provides that the waiver of sovereign immunity is limited by the requirement any actions of the Bankruptcy Court be consistent with applicable nonbankruptcy law. In tax matters, the power of the Bankruptcy Court is limited by 26 U.S.C. § 7433.

26 U.S.C. § 7433(e) is the Exclusive Remedy for a Willful Violation of the 11 U.S.C. § 524 Discharge Injunction. In 1998, Congress amended § 7433 of the Internal Revenue Code by adding subsection (e) which states in part that if in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of 11 U.S.C. § 524 (relating to effect of discharge) such taxpayer may petition the bankruptcy court to recover damages against the United States. 11 U.S.C. § 7433(e). Section 7433(e)(2)(A) provides that notwithstanding 11 U.S.C. § 105, such petition shall be the exclusive remedy for recovering damages resulting from such actions. Kovacs V. U.S., 614 F. 3d 666, 672-673 (7th Cir. 2010).

A discharge in bankruptcy operates as an injunction against collection of any discharged debts. 11 U.S.C. § 524(a)(2). Congress has conditionally waived sovereign immunity for the IRS's willful violation of such a discharge. After exhausting administrative remedies, the taxpayer may petition the bankruptcy court for damages. 26 U.S.C. § 7433(e). However, litigation costs and administrative costs are not recoverable as actual, direct economic damages, but are instead recoverable under 26 U.S.C. § 7430. 26 C.F.R. § 301.7433-2(b)(2). Kuhl v. U.S., 467 F.3d 145, 147 (2nd Cir. 2006).

The exclusivity provision of 26 U.S.C. § 7433 applies notwithstanding 11 U.S.C. § 105. Section 7433(d) is mandatory. It is a congressionally established exhaustion imperative, not a judicially created one, and accordingly the courts lack discretion to waive it. Hoogerheide v. I.R.S., 637 F.3d 634, 639 (6th Cir. 2011).

Section 7433 also contains a two-year statute of limitations. 26 U.S.C. § 7433(d)(3). A cause of action under § 7433 accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action. 26 C.F.R. § 301.7443-1(g). In addition, a statute

of limitations begins to run once a plaintiff has knowledge that would lead a reasonable person to investigate the possibility that his legal rights had been infringed. Id. at 674.

A contempt remedy under 11 U.S.C. § 105 is available for willful violations of the automatic stay as delineated in 11 U.S.C. § 362(k)(1) (formerly ' 362(h)), however, recovery of costs is limited by 26 U.S.C. § 7430. 26 U.S.C. § 7433(e)(2)(B). It may also still be necessary to exhaust administrative remedies. 26 C.F.R. § 301.7433-2(d)(2) states that although an administrative claim should generally be filed first with the IRS before filing an action with the bankruptcy court, there is an exception when the "administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section...." Under such a factual predicate, the debtor need only file the administrative claim with the IRS, and then may immediately file an action with the bankruptcy court.

Damages and costs recoverable under 26 U.S.C. § 7433 are further defined in 26 C.F.R. § 301.7433-1.

The institution of a freeze by the IRS on all automated action involving taxpayers who filed for chapter 13 relief, which did not just have the effect of preventing the automatic mailing of any collection letters to the debtor-taxpayers, but which also delayed receipt of the debtors' income tax refund pending manual approval of the refund by an IRS agent, was held not to be a per se violation of the automatic stay, as an attempt to "exercise control" over estate property. In re Harchar, 393 B.R. 160, 174-175 (Bankr. N.D. Ohio 2008).

For "willful" violations of the stay in non-tax cases, attorneys= fees and actual damages can be awarded. In the Privacy Act context, the U.S. Supreme Court construed language similar to that in 11 U.S.C. § 362 as follows:

> When waiving the Government's sovereign immunity, Congress must speak unequivocally. Lane, 518 U.S., at 192. Here, we conclude that it did not. As a consequence, we adopt an interpretation of Aactual damages@ limited to proven pecuniary or economic harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires.

F.A.A. v. Cooper, 132 S.Ct. 1441, 1453 (2012).

Damage awards cannot be based on speculative evidence and mere conjecture. Archer v. Macomb County Bank 853 F. 2d 497, 499 (6th Cir. 1988). Debtor is not entitled to damages because she was "stressed out", "nervous" or "nauseous." In re Meis-Nachtrab 190 B.R. 302, 308 (Bankr. N.D. Ohio 1995). Punitive damages are not available against the United States. In re Herron, 177 B.R. 866 (Bankr. N.D. Ohio 1995). Attorney's fees are limited by 28 U.S.C. § 2412(d)(2)(A).

Immunity is also waived under § 106(b) where a governmental unit has filed a proof of claim and where a claim against the governmental unit arose out of the same transaction or occurrence. The "same transaction or occurrence" language will be liberally interpreted and merely demands a

"logical relationship" between the transactions in question. In re Gordon Sel-Way, Inc. 270 F.3d 280, 287 (6th Cir. 2001).

Past due child support may offset a tax refund, without violating the automatic stay. 11 U.S.C. § 362 (B)(2)(F). The IRS is under a mandatory duty to offset income tax refunds for child support when requested. 42 U.S.C. ' 664(a).

While finding that no private right of action to recover damages for violations of the discharge injunction exists (11 U.S.C. § 524(a)), the court held that a violation of the discharge injunction does expose a creditor to potential contempt of court and, if the contempt is established, the injured party may be able to recover damages as a sanction for the contempt. In re Motichko, 395 B.R. 25 (Bankr. N.D. Ohio 2008).

VIII. Codebtor Stay

The codebtor stay provisions of 11 U.S.C. § 1301 are not applicable to a tax debt. Such section applies only to consumer debts. A tax debt is not a consumer debt. In re Westberry, 215 F.3d 589 (6th Cir. 2000); In re Stovall, 209 B.R. 849, 854 (Bankr. E.D. Virginia 1997); In re Marshalek 158 B.R. 704, 707 (Bankr. N.D. Ohio 1993).

IX. Asserting the Fifth Amendment Privilege in Bankruptcy

The Fifth Amendment privilege against self-incrimination can be asserted in any civil action including bankruptcy. Bank One v. Abbe, 916 F.2d 1067, 1074 (6th Cir. 1990). Fifth Amendment rights are specifically granted to a Debtor in Chapter 7 proceedings and exercise of such privilege will not prevent a discharge. 11 U.S.C. § 727(a)(6); In re Girdaukas, 92 B.R. 373, 376 (Bankr. E.D. Wisconsin 1988). Guidance on when the Fifth Amendment privilege against self-incrimination can be claimed and how to pursue answers from debtors asserting such privilege can be found in Bank One v. Abbe, 916 F.2d 1067, 1074 (6th Cir. 1990). Debtors asserting their Fifth Amendment privilege in a Chapter 13 proceeding may find their cases dismissed. The burden is on debtors to prove that their plan is submitted in good faith and that they are eligible to be a Chapter 13 debtor. In re Caldwell, 895 F.2d 1123, 1126 (6th Cir. 1990). If a party moves to convert or dismiss the case using § 1307(c) then the burden to establish bad faith is on the moving party. In re Alt, 305 F.3d 413, 420 (6th Cir. 2002)

An adverse inference can be drawn as a consequence of Debtor's assertion of the Fifth amendment in a civil proceeding. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976); Sentinel Trust Co. v. Namer, 172 F.3d 873 (Table), 1998 WL 887287 (6th Cir. 1998).

Consequently, debtors in a Chapter 13 proceeding will find it difficult to meet their burden of proving that they are acting in good faith or defend against a motion to dismiss . In re Wincek 202 B.R. 161, 169 (Bankr. M.D. Florida 1996); In re Elisade, 172 B.R. 996, 1001 (Bankr. M.D. Florida 1994); In re Girdaukas, 92 B.R. 373, 376 (Bankr. E.D. Wisconsin 1988).

X. Evidentiary and Claim Litigation Issues

The burden of proof on a tax claim in bankruptcy remains where the substantive tax law puts it. Raleigh v. Illinois Department of Revenue, 530 U.S. 15, 120 S.Ct. 1951, 1953 (2000). Also, be aware of the limitations on a motion to determine tax liability where a refund is sought. First, the request must be timely made. 11 U.S.C. § 505; 26 U.S.C. § 7422(a). This is the later of 3 years from the time the return was filed or 2 years from the time the tax was paid. 26 U.S.C. § 6511; 26 C.F.R. § 301.6402-3(a)(2). Second, the suit for refund must be brought within two years of disallowance. 26 U.S.C. § 6532; In re Smythe, 306 B.R. 218 (Bankr. N.D. Ohio 2004).

Federal statutes that grant tax deductions are matters of legislative grace and are strictly construed in favor of the government. Chrysler Corp. v. Comm'r, 436 F.3d 644, 654 (6th Cir.2006). Therefore, taxpayers carry the burden of proving that they are entitled to tax deductions and credits. Schiff v. United States, 942 F.2d 348, 352 (6th Cir.1991).

Opinions, conclusions, and evaluations, as well as facts, fall within the Rule 803(8)(C) exception for public records and enjoy a presumption of admissibility. U.S. v. Midwest Fireworks, 248 F.3d 563, 566 (6th Cir. 2001). Another good summation of evidentiary issues and requirements for admissibility of government records is found in U.S. v. Petroff-Kline, 557 F.3d 285 (6th Cir. 2009).

A bankruptcy court's evidentiary rulings are reviewed on appeal for abuse of discretion. In a claim-estimation hearing, the bankruptcy court's task is to "arrive at a reasonable estimate of the probable value of the claim" not a mathematical certainty. U.S. Bank National Association v U.S., EPA 563 F.3d 199, 210 (6th Cir. 2009).

The fugitive disentitlement doctrine limits access to courts in the United States by a fugitive who has fled a criminal conviction in a court in the United States. The doctrine is long-established in the federal and state courts, trial and appellate. It does not matter that the court of conviction and the court from whose processes the fugitive is excluded are from different sovereigns. In re Prevot, 59 F.3d 556 (6th Cir. 1995). Consequently, the Court may dismiss a pending proceeding if Debtor is a fugitive.

A debtor need not reopen a closed case to obtain a discharge in a no-asset Chapter 7 case. If the debt is otherwise dischargeable, notice need only be given to the creditor when the omission is discovered. In re Madaj, 149 F.3d 467, 472 (6th Cir. 1998). In other cases, the IRS must be notified of the bankruptcy in time to file a claim or the tax debt will not be discharged. 11 U.S.C. § 1328(a)(2); 11 U.S.C. § 523(a)(3); In re Jenkins, 417 B.R. 462, 468 (Bkrtcy. N.D. Ohio, 2009).

The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The purpose of the Act is to permit the IRS to assess and collect taxes without judicial interference and to ensure that any dispute over the disputed funds in question be litigated in a suit for a refund. Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7 (1962). Courts have held that Congress does not intend the Bankruptcy Code to be an exception to the application of the Anti-Injunction Act. See In re American Bicycle Ass=n, 895 F.2d 1277, 1279 (9th Cir. 1990); In re LaSalle Rolling Mills, Inc., 832 F.2d 390, 394 (7th Cir. 1987); In re Dore & Assoc. Contracting, Inc., 45 B.R. 758, 764 (Bankr. E.D. Mich. 1985). The Bankruptcy Court's authority under § 105 of the Bankruptcy Code, although broad in order to enter orders necessary to carry out provisions of the bankruptcy code, does not waive the IRS's sovereign immunity nor trumps the Anti-Injunction Act. See, U. S. v. Carroll, et al. 423 B.R. 294 (E.D.Mich. 2010); In re Herbert R. Kuppin, Jr., 335 B.R. 675, 680 (S.D. Ohio 2005).

XI. Pension Issues in Chapter 13

Tax imposed on distribution from 401(k) plan was tax on "income." Consequently, rules regarding priority status of taxes apply. In re Alquist, 172 B.R.828, 829 (W.D.N.C. 1994); affirmed 60 F. 3d 820 (4th Cir. 1995). The Plan may not materially alter the terms of a loan from a 401(k). 11 U.S.C. § 1322(f). Voluntary contributions and loan repayments to ERISA qualified plans are excluded from disposable income. 11 U.S.C. § 1322(f); 11 U.S.C. § 541(7); In re Thompson, 350 B.R. 770 (Bankr. N.D. Ohio 2006). Contributions to IRAs are not given the same protection

and will not be reasonable and necessary expenses for determining disposable income. In re Johnson 241 B.R. 394, 399- 400 (E.D. Texas 1999). Tax liens attach to ERISA qualified pension plans. United States v. Sawaf, 74 F.3d 119, 122 [FN3] (6th Cir. 1996). The IRS, however, will not claim that tax liens which attach to an ERISA qualified pension plan support a secured claim of the United States. This is a national policy decision issued in 2004.

IRAs, and other non-ERISA plans will still be considered in setting the secured value of an IRS claim. IRAs may be exempt, but they are an asset of the estate. Rousey v. Jacoway, 544 U.S. 320, 125 S.Ct. 1561, 1565-1566 (2005). Educational IRAs may be excluded from the estate if certain conditions are met. 11 U.S.C. § 541(5).

The IRS statutory lien whether perfected by filing or not will survive the bankruptcy. See Section IV above. This means that the IRS can levy on ERISA qualified plans using applicable nonbankruptcy law by either asking the Court to lift the stay or waiting until discharge. ERISA qualified plan assets are not property of the estate for determining secured claims, however, they also receive no protection from the bankruptcy proceedings so long as the tax lien is not paid in full inside the bankruptcy.

XII. Chapter 11 Proceedings.

The payment period under section 1129(a)(9) (relating to deferred cash payments of priority taxes under a chapter 11 plan) must comply with the following:

a. The payments must be made over a five-year period beginning with the petition date.

b. The payment schedule must be no less favorable than the payment schedule of the most favored class of nonpriority unsecured claims provided for by the plan (other than a class of nuisance claims)

c. The payment schedule for unsecured priority tax claims must also apply to tax claims secured by a lien that, if unsecured, would otherwise be described in section 507(a)(8).

d. Interest must be paid on the claim to ensure that the total value, as of the effective date of the plan, equals the allowed amount of the claim.

The debtor must comply with the applicable provisions of the bankruptcy laws including the filing of postpetition returns. 11 U.S.C. § 1129(a)(2); 11 U.S.C. § 1112(b)(4)(I); 11 U.S.C. § 521(j). Postpetition tax liabilities are entitled to be paid as an administrative claim. 11 U.S.C. § 503(b)(1)(B). The plan must provide for the curing or waiving of any defaults as required under 11 U.S.C. § 1123(a)(5)(G).

One Court has held that the debtor in a Chapter 11 may not designate which part of a secured tax claim is being paid through the plan. Debtor attempted to have the priority tax portion of the secured claim paid first so that the balance of the claim deemed to be unsecured would be treated as a general unsecured rather than a priority claim. In re Haas, 162 F.3d 1087 (11th Cir. 1998); In re

Southeast Waffles, LLC, 460 B.R. 132, 140 fn. 6 (6th Cir. BAP 2011). The fraudulent-transfer statutes were not meant to provide debtors with either a means to avoid tax penalties legitimately imposed or a means to recover prepetition payments made in satisfaction of those penalties. In re Southeast Waffles, LLC 703 F.3d 850 (6th Cir. 2012); See also United States v Energy Resources 495 U.S. 545 (1990) for a general discussion of designating payments in a Chapter 11 case.

Individual debtors do not get a discharge of any debt not dischargeable under 11 U.S.C. § 523. 11 U.S.C. § 1141(d)(2). There are also limitations on individuals receiving a discharge prior to completion of plan payments. 11 U.S.C. § 1141(d)(5). Prepetition tax liabilities that were excepted from discharge were not discharged upon confirmation of individual debtor's proposed Chapter 11 plan, even though these nondischargeable tax debts were "dealt with" in plan, so that the Internal Revenue Service (IRS) did not violate the discharge injunction by issuing postconfirmation notice of lien and notice of levy in effort to collect these prepetition tax liabilities. In re Newman, 399 B.R. 541, 546-547 (Bankr. M.D. Fla., 2008); 11 U.S.C. § 1141(d)(2).

11 U.S.C. § 1141(d)(6) specifically excepts any debt arising under the False Claims Act ("FCA"), 31 U.S.C. § 3739 et seq., from discharge. FCA cases brought by the United States may continue up to judgment as an exercise of the government's police powers under section 362(b)(4). United States v. Bourseau, 531 F.3d 1159, 1164 (9th Cir. 2008); Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.), 128 F.3d 1294, 1298 (9th Cir. 1997) ("[A] civil suit brought pursuant to the Federal False Claims Act is sufficient to satisfy the section 362(b)(4) exception."); Commonwealth Cos. v. United States (In re Commonwealth Cos.), 913 F.2d 518 (8th Cir. 1990); United States v. Worldwide Fin. Servs., Inc., 2007 WL 4180718 (E.D. Mich. 2007); United States v. Oncology Assocs., P.C., 2000 WL 1074304 (D. Md. 2000); United States v. X, Inc., 246 B.R. 817 (E.D. Va. 2000); United States v. Mickman (In re Mickman), 144 B.R. 259 (E.D. Pa. 1992); United States v. NBI, Inc., 142 B.R. 1, 3 (D.D.C. 1992) (permitting qui tam relator's action to fix attorney's fees, costs and expenses); United States v. Burton (In re Selma Apparel Corp.), 132 B.R. 968 (S.D. Ala. 1991).

Once a Chapter 11 plan is confirmed and substantially consummated, equitable mootness will likely prevent appeal or disruption of the business of the reorganized debtor. In analyzing the facts, the Court must weigh the following three factors: "(1) whether a stay has been obtained; (2) whether the plan has been 'substantially consummated'; and (3) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." City of Covington v. Covington Landing LP, 71 F.3d 1221, 1225 (6th Cir. 1995).

XIII. Treasury Offset Program and Exemptions

A individual's rights relative to a tax overpayment are addressed in 26 U.S.C. § 6402 which provides that "[i]n the case of any overpayment, the Secretary [of the Treasury], . . . shall, subject to subsection (c), (d), (e), and (f), refund any balance to such person." 26 U.S.C. § 6402(a). In the case of a tax refund being applied to reduce a tax debt, it is done at the discretion of the IRS and is not mandatory in nature as are reductions requested by other agencies. Pettibone Corp. v. U.S., 34 F.3d 536, 538 (7th Cir. 1994) ("The Internal Revenue Code leaves to the Commissioner's discretion whether to apply overpayments to delinquencies or to refund them to the taxpayer. 26 U.S.C. § 6402(a). Until the Commissioner exercises this discretion, the taxpayer has no right to payment.").

According to 26 U.S.C. § 6402(d), an individual's right to *recoup* a tax overpayment is contingent upon the application of the overpayment to a debt owed to another Federal agency. The definition of overpayment utilized in 26 U.S.C. § 6402 includes credits such as the earned income tax credit. Sorenson v. Secretary of Treasury of the U.S., 475 U.S. 851, 863-864; 106 S.Ct. 1600 (1986). 26 U.S.C. § 6402(g) applies only to offsets that are made mandatory by 26 U.S.C. § 6402(d) not the discretionary reduction of tax overpayments against tax liabilities provided for by 26 U.S.C. § 6402(a).

Debtor's contingent right is in a potential tax refund not in the dollar amount claimed on the return. In re Sissne, 432 B.R. 870, 881 (Bankr. N.D. Georgia 2010). The overpayment is not a refund nor property of the estate until the statutory offsets have been made. In re Lyle, 324 B.R. 128 (Bankr. N.D. California 2005); In re Pigott, 330 B.R. 797, 802 (Bankr. S.D. Alabama 2005); In re Baucom, 339 B.R. 504, 507 (Bankr. W.D. Missouri 2006). If the claimed refund never became property of the estate, a claimed exemption of the refund on Debtor's petition was of no legal consequence. In re Houchens, 384 B.R. 472, 476-77 (Bankr. W. D. Kentucky 2008).

XIV. Helpful Resources

The Service's Insolvency group is primarily responsible for monitoring bankruptcy cases for the Service. Currently, bankruptcy matters involving the IRS in our district are being coordinated by the Service's Centralized Insolvency Operation (CIO) in Philadelphia. Bankruptcy practitioners should feel free to contact the CIO obtain information on matters prior to confirmation such as the amount of tax the Service believes the debtor owes, the status of the debtor's tax returns, whether the Service has filed a tax lien against the debtor, or to obtain copies of transcripts of account detailing the debtor's tax history. Current address, telephone and fax numbers for the CIO are located on the **Attorney Information** tab, under **Register of Agencies** by following the link for the Centralized Insolvency Operation (CIO). The address for our local Insolvency group in Cleveland is: Internal Revenue Service, Insolvency Group 7, 1240 East Ninth Street, Rm. 493, Cleveland, Ohio 44199, and their fax number is (216) 522-2066.

Federal bankruptcy Rule 5003(e) allows the United States and the State of Ohio to file a statement designating its mailing address. The mailing address so filed is conclusively presumed to be the proper address. However, failure to use that address does not invalidate any notice that is otherwise effective under applicable law. For address updates, please check the Northern District of Ohio Bankruptcy Court web site at http://www.ohnb.uscourts.gov/ and look under "Attorney Information." The two useful lists are the "Register of Agencies" and "IRS Insolvency Info." The Register of Agencies has service addresses for both the United States and State of Ohio. The IRS insolvency information gives you the address and phone number for the Cleveland Insolvency group, along with telephone and fax numbers for the Philadelphia CIO, which should be the primary or initial point of contact. Please send delinquent tax returns while a bankruptcy is pending to the Cleveland Insolvency address.