Number: 199948029 **UIL: 9999.98-00**
Release Date: 12/3/1999 **CC:EL:GL:B2**

GENERAL LITIGATION BULLETIN

Department of the Treasury *Internal Revenue Service*

Office of Chief Counsel

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BULLETIN NO. 469 ***OCTOBER 1999***

Perfection
Unsuccessful Garnishments Sufficient to Perfect Creditor's Lien

Jack Schulman, an independent insurance agent for Primerica Life Insurance Company, died intestate on June 30, 1996. Primerica paid Schulman on commission, including commissions for policy renewals that continue to be paid to Schulman's estate. The amount of commission income to the estate is between $10,000 and $15,000 per month. Primerica will continue to pay commission income to Schulman's estate as long as policies he issued or managed continue to be renewed. The estate owes federal taxes on 1991, 1992, 1995 and 1996 tax assessments against Schulman, [1] although the 1995 and 1996 assessments were made after his death. The 1991 and 1992 taxes, totaling about $245,000, are secured by notices of federal tax lien filed in 1993. The 1995 and 1996 taxes, assessed on July 6, 1998 and totaling about $138,000, are unsecured.

KS Financial Group, Inc., (KS) obtained a default judgment in 1993 for $124,217.67 against the Schulmans. Although the Schulmans lived in Georgia, the judgment was granted in Texas, where Schulman had worked from 1981 until his retirement in 1987. On March 29, 1996, KS issued a garnishment summons against Schulman in Texas. KS did not receive any payment from this garnishment. [2] In addition to KS' claim, Judye Schulman claims $212,802.84 for twelve months widow's support from the estate.

On October 6, 1997, KS filed a garnishment suit in Georgia state court (which was removed to federal district court) against commission income withheld by Primerica. The parties agreed that the 1991 and 1992 federal tax liens had first priority to the funds of the insolvent estate. The parties disagreed as to whether KS, Judye Schulman, or the United States had priority to the remaining funds.

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[1]Schulman's surviving spouse, Judye Schulman, is jointly liable for the 1991 and 1992 taxes.

[2]The district court for Harris County, Texas, dissolved this garnishment September 26, 1997, on the grounds that Tex. Prop. Code § 42.001 exempts commission income from garnishment.

In its decision entered September 28, 1999, the district court found the garnishment summons issued by KS properly perfected its judgment lien, and thus gave KS priority to the remaining funds. Under the reasoning of United States v. Estate of Romani, 523 U.S. 517 (1998), a perfected judgment lien takes priority over an unsecured federal tax debt to the assets of a decedent's estate, despite the priority otherwise provided by the Insolvency Statute, 31 U.S.C. § 3713(a). The Government unsuccessfully argued that KS' judgment lien was unperfected because the Texas garnishment was invalid. [3] The court was unpersuaded, finding instead that KS had done all it could under Texas law to perfect its lien. The fact that the garnishment was unsuccessful did not alter the priority afforded under I.R.C. § 6323(a). **KS Financial Group, Inc. v. Schulman, 1999 U.S. Dist. LEXIS 15806 (N.D. Ga. Sept. 23, 1999)**. **LIENS: Priority over Judgment Lien Creditor**

1. BANKRUPTCY CODE CASES: Collection of Tax: Assets in Court

In re Beam, 1999 U.S. App. LEXIS 25605 (9th Cir. Oct. 15, 1999) - Service filed proof of claim for $137,000 against debtors in Chapter 13 bankruptcy, causing court to deny plan confirmation. Debtors then filed a motion to withdraw their case, and demanded the return of $24,000 they deposited in anticipation of plan confirmation. When the court granted the dismissal, the Service levied on the funds, held by the trustee. The debtors argued that under B.C. § 1326(a)(2), the trustee was obligated to return the $24,000 to them. The court disagreed, holding that under I.R.C. § 6334(c), the only categories of property exempt from levy are those specified under section 6334(a). Since B.C. § 1326 is not a listed category, the court found it would frustrate Congressional intent to return the monies to the debtors.

2. BANKRUPTCY CODE CASES: Collection of Tax: Injunction Against LEVY: Retirement Benefits

Wood v. United States, 1999 Bankr. LEXIS 1292 (Bankr. M.D. Fla. Sept. 9, 1999) - Debtors, owing secured federal taxes, filed Chapter 7 bankruptcy on July 16, listing $50,000 IRA as exempt. On October 1, debtors deposited $55,440.10 into an investment account, from which they withdrew funds over the next eight days to pay various state taxes and other debts. Debtors then were discharged from Chapter 7 on October 20. By summons, the Service discovered where the payments were made, and levied each of the payee banks. One remitted funds, but they were funds earned by the debtors post-petition. The court found the federal levy did not attach to property of a debtor after the debtor's personal liability was discharged, and ordered the levied funds returned. However, due to the debtors' conduct in using exempt funds subject to a federal tax lien to pay other debts, the court refused to award sanctions for the improper levy.

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[3] Texas law provides an exemption from garnishment for the amount of monthly commission payments that the estate was receiving.

3. BANKRUPTCY CODE CASES: Compromise or Settlement

IRS v. Pattullo, 1999 U.S. Dist. LEXIS 16494 (D. Az. Sept. 30, 1999) - In debtor's Chapter 7 bankruptcy, Service stipulated to amount of its amended claim as less than $250,000. Debtor then filed Chapter 13, and the Service tried to have the case dismissed for exceeding the $250,000 jurisdictional limit of B.C. § 109(e). The district court, affirming the bankruptcy court, agreed that the Service was estopped from changing the valuations in an agreed order signed only seven months previously.

4. BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523)

Krik v. IRS, 1999 Bankr. LEXIS 1288 (Bankr. E.D. Pa. Sept. 29, 1999) - Debtor, after receiving a tax levy, reduced his pay to a bare minimum while substantially increasing his wife's pay. He made some tax payments, but when his company went into financial distress, he filed for Chapter 7 bankruptcy. The court found the debtor's taxes to be dischargeable because he tried to cooperate with the Service by filing returns and seeking an offer in compromise. Therefore, the court concluded that the debtor did not willfully seek to evade or defeat his tax liability under B.C. § 523(a)(1)(C).

5. BANKRUPTCY CODE CASES: Exceptions to Discharge (§ 523): No, late or fraudulent returns

United States v. Weiss, 237 B.R. 600 (Bankr. E.D. Penn. 1999) - Under the test of In re Fegeley, 118 F.3d 979 (3d Cir. 1997), the bankruptcy court determined the debtor (1) had a duty to file tax returns and, as an attorney, (2) knew of this duty. As to the third standard, whether the debtor voluntarily and intentionally violated that duty, the court found that the debtor's ex-wife had stolen his tax records for 1986 and 1987, and so for those years the debtor did not voluntarily and intentionally fail his duty. However, after 1987, the debtor had access to his records and had the ability to pay the taxes. The court did not accept the debtor's payment of what he thought he owed, nor his excuse that continuing marital difficulties and a "nightmare" house construction made it impractical to file correct returns, as a sufficient defense to the third Fegeley standard.

6. BANKRUPTCY CODE CASES: Jurisdiction of Bankruptcy Court

Kieslich v. United States, 1999 U.S. Dist. LEXIS 15875 (D. Nev. Sept. 28, 1999) - While in Chapter 7 bankruptcy, debtor initiated an adversary proceeding to determine tax liability. This adversary action basically lay dormant until after the Chapter 7 case was closed. Following an adverse decision by the bankruptcy court, the United States on appeal first raised the issue of subject matter jurisdiction. The district court found the fact that the parties earlier stipulated to jurisdiction irrelevant, because subject matter jurisdiction cannot be created where it does not exist. The court then found that, although the determination of tax liability was non-core, it was related to the bankruptcy case, and so the bankruptcy court had jurisdiction at the time the adversary suit was filed. However, because judicial economy, convenience and fairness disfavored retention of the case at the time the bankruptcy was closed,

subject matter jurisdiction ceased to exist and the bankruptcy court should not have heard the case.

7. BANKRUPTCY CODE CASES: Jurisdiction of Bankruptcy Court

In re Pecovsky, 1999 Bankr. LEXIS 1330 (Bankr. M.D. Penn. Sept. 14, 1999) - Debtor, a sole proprietor, used his Social Security Number instead of his Employer Identification Number on his Chapter 7 bankruptcy petition. The Service, not discovering the business debts, did not file a proof of claim. The debtor then attempted to convert the case to Chapter 13. The court, while denying the conversion because of jurisdictional debt limits, stated in dicta that notice to the Service was deficient, and would have allowed a late filed proof of claim.

8. BANKRUPTCY CODE CASES: Jurisdiction of Bankruptcy Court

In re Sullivan, 1999 U.S. Dist. LEXIS 16634 (N.D. Fla. Sept. 29, 1999) - Court held that eligibility for Chapter 13 under B.C. § 109(e) was determined by what the debtor actually owed to the Service, not what she claims the Service told her was owed. Although the court found a delay of ten months for the Service to raise this eligibility issue was not unreasonable, it would not accept the Service's argument that eligibility was jurisdictional and could thus be raised at any time.

9. BANKRUPTCY CODE CASES: Statute of Limitations: On Collection After Assessment

COMPROMISE & SETTLEMENT: Bankruptcy

Colish v. United States, 1999 Bankr. LEXIS 1266 (Bankr. E.D.N.Y. Sept. 30, 1999) - Debtor submitted Offer in Compromise for 1991 taxes, after which the Service assessed the 1991 taxes. The debtor later amended the OIC, but the Service issued a rejection in 1993. In 1994, the debtor submitted a second OIC for the 1991 taxes. In May, 1993, the Service assessed 1992 taxes, and the debtor submitted an OIC for the 1992 taxes some 352 days later (which also was rejected). Also in 1994, the Service assessed 1993 taxes, and 169 days later the debtor submitted an OIC for the 1993 taxes (which was rejected as well). The debtor filed Chapter 7 bankruptcy in 1997. The bankruptcy court first found that B.C. § 507(a)(8)(A)(ii), which tolls the statute of limitations where an OIC is pending, did not apply to the 1991 taxes, because the debtor's OIC was submitted before the 1991 taxes were assessed. The court found unconvincing the Government's argument that the debtor's amended OIC constituted a new OIC. The court next held that since the debtor's OIC for the 1992 taxes was made more than 240 days after the 1992 tax assessment, the 1992 tax did not fall within the exception of section 507(a)(8)(A)(ii), and so was dischargeable. Finally, the court found in favor of the Government as to the 1993 taxes, which were made less than 240 days before the OIC was submitted. The court rejected the debtor's assertions that the Government's delay in processing the OIC was a constructive rejection, and that the Government should be equitably estopped from alleging the statutory time period had not run.

10. COMPROMISE & SETTLEMENT: Authority

Olcsvary v. United States, 1999 Bankr. LEXIS 1307 (Bankr. E.D. Tenn. Sept. 21, 1999) - The court held that the tax matters partner was authorized by partners in a tax shelter to extend the statute of limitations on assessment because there was no evidence that the tax matters partner was pressured to abandon his fiduciary duties. However, the court refused to enforce the partnership's closing agreements with the Service because they had not been signed by an official with proper authority. The court found no basis to enforce the agreements by estoppel, since the Service lost no legal right because the closing agreements were unenforceable.

11. DECEDENT'S ESTATES: Collection Procedures: Liability of Fiduciary
LEVY: Wrongful

Craig v. United States, 1999 U.S. Dist. LEXIS 16291 (S.D. Tex. Oct. 1, 1999) - Decedent left property to wife and son, naming the son as executor. The son opened an estate bank account in the son's name, using his own social security number, and reported interest generated by the account on his individual income tax return. However, the bank account was funded solely by estate assets, and never used for personal purposes. The wife and son had a falling out, and during their dispute the Service levied on the estate account for taxes owed by the son individually. The son then settled with his mother, but the bank paid over the estate account to the Service, prompting the son to file a wrongful levy action. The court found the levy wrongful, determining that although the son as a beneficiary (and after settlement with the wife, sole beneficiary) had an interest in the levied funds, and that the interest was sufficiently vested to provide a nexus for the levy, the estate had a superior right to the assets in the account at the time of the levy. Because the Service, by levy, had only the rights that the son as a taxpayer possessed, the Service could not have required the estate to make distribution, and so had no interest to levy on. The court found no authority to support the levy of an account simply because the fiduciary of the account was also the beneficiary.

12. LIENS: Actions to Quiet Title

Follum v. United States, 1999 U.S. App. LEXIS 26219 (2d Cir. Oct. 15, 1999) ***(unpublished)*** - In a summary opinion, the Second Circuit held the taxpayer's action to quiet title under 28 U.S.C. § 2410 due to alleged invalidity of the underlying assessments did not waive the Government's sovereign immunity. Although the Second Circuit recognizes an exception to section 2410 for a challenge to procedural irregularities, the court found the taxpayer intended to dispute the liability, not the timing of the assessment. The court also held that a suit for refund, after payment of the taxes, was not an inadequate remedy sufficient to create an exception under the Anti-Injunction Statute, I.R.C. § 7421(a). Therefore, the quiet title action was dismissed.

13. LIENS: Priority over State and Local Taxes

In re Johns, 1999 U.S. Dist. LEXIS 16272 (D. N.J. Oct. 7, 1999) - Taxpayers filed state tax returns, which were entered into the state's computers prior to the

assessment of federal taxes. The court found under New Jersey law the state taxes were properly assessed, and the state could have enforced its liens on the day the taxpayers filed their returns. Therefore, the state taxes were perfected ("choate") under United States v. City of New Britain, 347 U.S. 81 (1954) and had priority over the later filed federal taxes. However, under New Jersey law, penalties and interest must be assessed through a deficiency procedure, which was not done. Therefore, the liens for penalty and interest were not choate and were inferior to the federal taxes.

14. PENALTIES: Failure to Collect, Withhold or Pay Over
Hudson v. United States, 1999 U.S. Dist. LEXIS 15796 (E.D. Pa. Sept. 29, 1999)
- Taxpayer who exerted "monolithic command" over his company's finances was responsible for I.R.C. § 6672 Trust Fund Recovery Penalty, despite his claims that he made good faith efforts to repay the taxes. The court found a responsible person cannot avoid a finding of willfulness by taking reasonable steps to pay back money after he willfully failed to make payment when the taxes were due.