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THE DUTY OF A BANKRUPTCY TRUSTEE TO FILE FEDERAL INFORMATION RETURNS ON BEHALF OF A DEBTOR-PARTNERSHIP *

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The development of partnership law in the United States can be traced from the Roman rule of England through the establishment of the English common law and the American adoption of much of that law.¹ Today, the common law of partnership has generally been superseded by the Uniform Partnership Act ("UPA")² and the Uniform Limited Partnership Act ("ULPA")³ (and their revisions).⁴ These uniform laws have been adopted, in one form or another, by most states in an attempt to codify consistent laws governing the use and operation of partnerships.⁵

The development of tax law, as applied to partnerships and partners, closely followed the evolution and development of partnership law.⁶ "Prior to the enactment of the Internal Revenue Code of 1954 [IRC], the statutory framework for the taxation of partnership income . . . left most of the law to be worked out either in the courts or within the administrative process of the Treasury."⁷

Within the framework of these two areas of the law, a myriad of complex questions have been generated by the legislative process. One such question that has received no direct statutory and scant administrative attention is the duty of a trustee of a partnership in bankruptcy to file federal income tax returns on behalf of a debtor partnership.⁸

Part I of this Article briefly outlines the effect to a partnership's tax treatment when the partnership voluntarily commences a case under the Bankruptcy Code. The purpose of this discussion is to provide context to the issue of whether a trustee for a debtor partnership has a duty to file federal tax returns on behalf of the partnership. Part I also explores the concept of separate tax entities in bankruptcy. The frequently litigated question of whether the bankruptcy estate of a partnership is a separate taxable entity was directly addressed by the Bankruptcy Tax Act of 1980 ("BTA").⁹ It is now clear that the commencement of a bankruptcy case by a partnership does not create a new separate taxable entity.¹⁰ What is less clear is the precise meaning of this concept.

Part II analyzes a partnership's duty to file federal information returns under applicable nonbankruptcy law. In Part II, we begin with an examination of the historical treatment of trustees' returns and end with an examination of the trustee's present duty under federal law. We conclude that, under present law, a bankruptcy trustee for a debtor partnership does not have a duty to file federal information returns on behalf of the partnership.¹¹ Part III contains our suggestions for practice and reform in addressing this perplexing issue.

I. Commencement of a Partnership Case

In this Part, we discuss the termination of a partnership under both state law and tax law. The creation by the BTA of separate tax entities in bankruptcy for individuals but not partnerships is then discussed.¹² This creation of separate tax entities in individual cases and not in partnership cases provides one of the proofs that a trustee of a debtor partnership has no duty to file tax returns on behalf of the partnership.¹³

A. Termination of the Partnership

A partnership is the "relationship between two or more persons who join together to carry on a trade or business." ¹⁴ For federal tax purposes, a "partnership includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on." ¹⁵ A partner is "a member in such a syndicate, group, pool, joint venture, or organization." ¹⁶ A partnership, as such, is not subject to income tax; persons carrying on business as partners are liable for income tax only in their separate or individual capacities. ¹⁷

According to federal tax law, an existing partnership continues until it is terminated. ¹⁸ A partnership is considered terminated only if: (1) no part of any business, financial operations or venture of the partnership continues to be carried on by any of its partners in a partnership, or (2) if within a 12 month period, there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits, or (3) a partnership ceases to carry on all business and has concluded the winding up period with a distribution of all remaining assets. ¹⁹ The filing of a petition in bankruptcy by a partnership or any of its partners, therefore, does not terminate the partnership for federal tax purposes. ²⁰ The partnership is obligated to continue filing an informational return (Form 1065) ²¹ until it terminates according to the foregoing provisions. ²²

Under the UPA, when a partner or a partnership files a petition for relief under the Bankruptcy Code, ²³ the partnership is deemed dissolved. ²⁴ One must be cautious with the word "dissolution" in this circumstance. The UPA's unfortunate use of this word to describe what happens to a partnership when it or one of its partners files for relief under the Bankruptcy Code is greatly misunderstood. ²⁵ Dissolution does not mean to wind up the affairs of the partnership; it is not a termination of the partnership. ²⁶

For the purposes of any federal, state, or local income tax, the commencement of a bankruptcy case by either a partnership or a partner does not modify the taxpayer status of a partnership. Partnership income, therefore, continues to be taxed as though a bankruptcy case had not been commenced. ²⁷ Until terminated in accordance with tax law, the partnership continues to generate distributive shares of income and losses that the partners are required to include in their income. ²⁸ For federal tax purposes, the partnership continues to exist distinct from its bankruptcy estate, and its members remain "partners" until the partnership terminates. ²⁹ Moreover, when an individual partner files a petition in bankruptcy, her interest in a partnership is treated in the same manner as any other interest in property. ³⁰

B. Separate Taxable Entities in Bankruptcy

Upon filing a petition for relief under the Bankruptcy Code, an estate is created. ³¹ Under section 541(a), property of the estate includes all of a debtor's legal or equitable interest in property at the time of the filing of the petition wherever located and by whomever held. ³² Property subject to exemption under section 522 is included in the definition of property of the estate until it is, in fact, exempted from the estate as provided in section 522. ³³ Moreover, all the interest of a debtor and a debtor's spouse in community property under the sole, equal, or joint management of the debtor is included in the estate. ³⁴ Furthermore, inheritances received by a debtor within 180 days of filing a bankruptcy petition, interests in property because of a divorce decree or property settlement agreement with a debtor's spouse, proceeds from a life insurance policy or death benefit plan, and proceeds, rents, and profits from property included in the estate are all included in the definition of property of the estate. ³⁵ It is this property of the estate that is subject to administration under the Bankruptcy Code and is used to satisfy, among other things, prepetition claims. ³⁶

The general rule is that the creation of a bankruptcy estate under section 541 has no tax significance ³⁷ since any transfer of property by operation of law from a debtor to the bankruptcy estate, other than by sale or exchange, is a nontaxable event under the IRC. ³⁸ A bankruptcy filing is not, therefore, a recognition or realization event where gain or loss need be realized. ³⁹ Moreover, there is no change in the basis of any asset transferred. ⁴⁰ Although the transfer is technically a nontaxable event for the debtor, the debtor does lose the benefit of certain tax attributes that automatically inure to the bankruptcy estate. ⁴¹

A major exception to the general rule, however, exists where an individual debtor files for relief under either Chapter 7 or 11. Under IRC section 1398, the Chapter 7 or Chapter 11 estate of an individual debtor is a new taxable entity separate from the individual debtor. ⁴²

1. Individual Estates: IRC Section 1398

As part of the BTA, Congress enacted IRC section 1398.⁴³ Section 1398 applies to any case filed under either Chapter 7 or Chapter 11 where the debtor is an individual.⁴⁴ When applicable, section 1398 treats the bankruptcy estate as a separate taxable entity that may incur, and should pay its own tax liabilities.⁴⁵ However, if the case is later dismissed, section 1398 does not apply.⁴⁶ Consequently, upon dismissal of the bankruptcy case, a previously-made short-year election⁴⁷ is extinguished and all taxes incurred by the estate pass back to the debtor.⁴⁸

The transfer of property pursuant to IRC section 541(a),⁴⁹ other than by sale or exchange, from the debtor to the new section 1398 taxable entity (the bankruptcy estate) is not a taxable event.⁵⁰ The estate is treated as the debtor with respect to the transferred property. Thus, any gain or loss realized by the estate will have the same character as though the property were still held by the debtor.⁵¹ Furthermore, specifically enumerated tax attributes of the debtor pass to the estate under section 1398(g).⁵² Currently, these tax attributes include net-operating loss carryovers as determined under IRC Section 172;⁵³ excess charitable contribution carryovers as determined under IRC Section 170(d)(1);⁵⁴ recovery of tax benefit items determined under IRC section 111;⁵⁵ certain credit carryovers;⁵⁶ capital loss carryovers determined under IRC section 1212;⁵⁷ the basis, holding period, and character of property; the debtor's method of accounting; other tax attributes of the debtor to the extent provided in regulations carrying out the purposes of section 1398;⁵⁸ and passive activity losses and at-risk activity losses and credits.⁵⁹

After the petition is filed, a debtor may not use any of the tax attributes that were transferred to the estate.⁶⁰ The transfer of enumerated tax attributes recognizes that although the estate is responsible for the tax liability related to the debtor's assets, the bankruptcy estate also may use the debtor's tax attributes to reduce this liability.⁶¹

Note that section 1398 treatment applies only where an individual debtor files for relief under Chapter 7 or Chapter 11 of the Bankruptcy Code.⁶² Thus, only the bankruptcy estate of an individual debtor in cases under Chapter 7 or 11 is treated as a separate taxable entity.⁶³ A separate taxable entity is not created in chapters 12 or 13 or in any case where the debtor is not an individual.⁶⁴

Section 1398 furthers the fresh start policy embodied in the Bankruptcy Code for individual debtors.⁶⁵ Congress recognized that any expenses incurred by the estate should not burden a debtor's fresh start.⁶⁶ Thus, section 1398 requires that the income and losses of the bankruptcy estate as a separate taxable entity be computed separately from an individual debtor.⁶⁷ Moreover, any estate tax liability is generally confined to the estate and its assets. Thus, by making the short-year election, a debtor could shift at least part of his or her tax liability to the estate as a section 507(a)(8) priority claim.⁶⁸ The result is that the tax liability, as a priority claim, will be paid in full before any payments are received by the unsecured creditors.⁶⁹

Consistent with its separate entity status, an estate computes its own taxable income in the same manner as an individual.⁷⁰ The estate is taxed at the same rate as a married individual filing separately.⁷¹ The Chapter 7 or 11 trustee is required to file any returns required by law and to pay any taxes due.⁷² The trustee must file a return for each taxable year that the estate's gross income exceeds the basic standard deduction and the exemption amount.⁷³

In the case of a termination of a debtor's estate, the transfer, other than by sale or exchange, of an asset from the estate back to a debtor is not a taxable event.⁷⁴ Similarly, upon termination of a debtor's estate, a debtor succeeds to the unused tax attributes earlier passed to the estate.⁷⁵ Section 1398, however, is silent on what constitutes a "termination" of a debtor's estate.⁷⁶

2. Partnership Estates: IRC section 1399

Under IRC section 1399, no separate taxable entity is created for partnerships or corporations that file petitions for relief under the Bankruptcy Code.⁷⁷ There are two reasons that justify this treatment. First, these legal fictions are not of flesh and blood; thus, any rallying cry for a fresh start rings hollow. Second, there is no separation of postpetition income from the estate in non-individual debtor cases.⁷⁸ Unlike the treatment of individual debtors under Chapter 7 or 11,⁷⁹ postpetition earnings of a partnership or corporation are property of the estate.⁸⁰

II. Partnership's Continuing Duty to File Federal Tax Returns

In this Part, we analyze the general role of the bankruptcy trustee in filing tax returns, the concept of "agent" for the purposes of filing federal returns, and the IRS's position that a trustee of a debtor partnership has a duty to file federal informational returns on behalf of the partnership.⁸¹ We conclude that the IRS's present position is not supported by law.

A. Historical Background of Trustees' Returns

Prior to 1954, the Secretary of the Treasury issued an Income Tax Regulation directing, in substance, that a receiver in charge of the business of a partnership must file a return on behalf of the partnership on Form 1065.⁸² However, after enactment of the Internal Revenue Code of 1954, no similar regulation has been issued.⁸³

Although there has been extensive litigation regarding related matters, the issue of whether a trustee of a partnership in bankruptcy is obligated to file the partnership's Form 1065 has not been squarely addressed.⁸⁴ In most reported cases related to trustees' income tax returns and bankruptcy estates, the issues litigated were whether the estate in bankruptcy is a separate taxable entity, requiring the trustee to file a fiduciary return on Form 1041 and pay the estate's income tax, or whether the estate is not a separate entity apart from its partners, and, therefore, the trustee must file a Form 1065.⁸⁵ One case, determined under the Bankruptcy Act of 1898, found that while the bankruptcy estate of a partnership is not a separate taxable entity under IRC section 641,⁸⁶ the trustee operating the business of the partnership was obligated to file returns and pay federal income taxes as either an individual or a corporation under 28 U.S.C. ("USC") section 960;⁸⁷ whichever was less burdensome.⁸⁸ Another case found not only that the bankruptcy estate of a partnership in liquidation was not a separate taxable entity,⁸⁹ but also that neither IRC section 6012⁹⁰ nor 28 USC section 960⁹¹ required the trustee to file any federal income tax return or pay a tax.⁹²

In light of disparate court decisions⁹³ the IRS ruled that bankruptcy estates of both individuals and partnerships were separate taxable entities required to file fiduciary returns (Form 1041) and pay taxes.⁹⁴ The basis of these rulings, and upon which some courts held that a partnership's bankruptcy estate was a separate entity required to file a Form 1041 fiduciary return and pay taxes, can be traced to the Bankruptcy Act of 1898. Under the Act, title to a debtor's property vested in the trustee and, "the intervention of the status of bankruptcy into the affairs of both an individual and a partnership create[d] an entity separate and apart from the individual or partnership bankrupt."⁹⁵ This rationale fails under the concept of "estate" as embodied in the Bankruptcy Code.⁹⁶

It is within this context that Congress considered the contents of the Bankruptcy Tax Act of 1980 ("BTA").⁹⁷ While the enactment of the BTA established rules which created a new separate taxable entity for individuals commencing a case under either Chapter 7 or Chapter 11,⁹⁸ Congress made clear that the bankruptcy estate of a partnership is not a separate taxable entity.⁹⁹ It appears that Congress hoped to resolve all the significant issues surrounding tax reporting and the payment obligations of bankruptcy trustees and estates.¹⁰⁰ It did not.

B. Partnership's Duty to File Returns

The IRC provides that every partnership shall make a return for each taxable year which must include a statement of the partnership's gross income and allowable deductions.¹⁰¹ The partnership shall include in the return the names and addresses of the individuals who would be entitled to share in the taxable income, if distributed, and the amount of such distributive income.¹⁰² Furthermore, the partnership information return must be signed by any one of the partners.¹⁰³ Each partnership required to file a return must provide each partner with a copy of the information shown on the return.¹⁰⁴ There is nothing, however, in the IRC authorizing the trustee of a partnership in bankruptcy to sign the partnership's returns.

Without doubt, when a partnership files a petition in bankruptcy, the IRS still is entitled to receive a Form 1065.¹⁰⁵ But who has the duty to prepare and file a Form 1065 on behalf of the partnership? Upon studying the IRC, Treasury Regulations, Revenue Rulings, and Revenue Procedures, the answer is rather obvious: only a partner of a partnership has the power and the duty to file the Form 1065. Notwithstanding the state of the law, the IRS states in its Internal Revenue Manual ("IRM"), that the trustee of a partnership in bankruptcy must file Form 1065 on behalf of the

partnership. ¹⁰⁶ Support in the law for this assertion by the IRS escapes us. We have found but one reference in support of the IRS's position buried in the committee reports accompanying the BTA. ¹⁰⁷ No other authority exists. We need not spell out in detail here the cogent reasons why resorting to legislative history for authority in the face of clear law to the contrary is generally unacceptable. ¹⁰⁸

The insertion of this duty into the IRM poses the question of what deference a court must pay, if any, to statements unsupported in the law but contained in the IRS's IRM. The Treasury Department and its subdivision, the IRS, issue a variety of different types of information as a part of their business of administering the revenue laws of the United States. ¹⁰⁹ The rules, statements, and interpretations issued by the Treasury Department range from legislative regulations, "[r]egulations issued pursuant to a specific authorization from or direction by Congress . . . under the particular statute by which Congress makes the delegation to the 'Secretary or his Delegate,'" ¹¹⁰ to a telephone conversation with an employee of the IRS taking an order for a particular form. ¹¹¹ These items are accorded varying degrees of deference as authority in determining a taxpayer's duty and liability depending upon the nature of the pronouncement. ¹¹² The authoritative weight to be given to any particular source of information depends, in general, upon the process by which the rule, regulation, or statement is promulgated and publicized. ¹¹³ The legislative regulations, at one extreme, are drafted by the Treasury Department following the dictates of the formal rule-making procedures required by the Administrative Procedure Act ("APA"). ¹¹⁴ The IRM, written for the guidance of IRS Office Auditors and Revenue Agents, and various IRS publications, written and published by the IRS as guidance for taxpayers in filing returns, are not drafted with any of the procedural safeguards contained in the APA and are not authority on which either taxpayers or the IRS may rely in litigating tax questions. ¹¹⁵ In fact, the IRM has less authoritative weight than Revenue Rulings, which the IRS drafts for the benefit of taxpayers and which are deemed to be but opinion of the IRS. ¹¹⁶ Revenue Rulings are clearly understood to be of limited precedential value and not binding on a court because, unlike regulations which are promulgated by the Treasury after notice and public comment, Revenue Rulings only represent the contention of the IRS. ¹¹⁷ Private Letter Rulings, IRS publications, and instructions to forms are promulgated with none of the APA safeguards and are of little authoritative value as well. ¹¹⁸

In one Private Letter Ruling, the IRS ruled that a trustee of a partnership in bankruptcy is not obligated to file delinquent partnership returns that were due for a taxable period that ended prior to the time of appointment as trustee. ¹¹⁹ We agree with this conclusion. The same trustee also sought another Private Letter Ruling relieving him of the duty to file current partnership returns, on the basis that he was unable to prepare accurate and complete current returns that greatly depended upon the characterization of transactions which would have been reported and/or calculated on the pre-appointment returns. ¹²⁰ The IRS response, Private Letter Ruling 85-35-015, found that the trustee, as the agent for the partners, was obligated to timely file returns on behalf of the partnership as accurately and completely as possible. ¹²¹ The ruling also stated that the partners were to cooperate and render any and all assistance the trustee may require. ¹²² We question whether this administrative fiat will induce partners, who often have the least desire and the most to gain by refusing to cooperate, to somehow feel compelled to comply with the trustee's requests. The trustee seeking the ruling, however, admitted the responsibility to file current returns on behalf of the partnership so that the relevant issue here was not contested. ¹²³

Private Letter Ruling 85-35-015 does not identify the authority for the conclusion that a trustee acts as an agent for the partners in respect to its obligation to file federal income tax returns. ¹²⁴ This conclusion was reached in spite of the fact that a trustee of the partnership estate and the partners are in adverse positions; a trustee is the fiduciary of the estate with fiduciary obligations to the creditors, but has no such obligations to the partners. ¹²⁵ In fact, section 723 of the Bankruptcy Code usually places the trustee at odds with the general partners of the debtor partnership. Section 723 provides that a Chapter 7 trustee of a debtor partnership has the right to assert a deficiency claim on behalf of the creditors of the partnership against the partners where there are insufficient partnership assets to pay all the partnership allowed claims. ¹²⁶ The Private Letter Ruling exposes a fundamental lack of understanding of bankruptcy law and partnerships by the IRS.

Treasury Regulation 1.6012 provides that an agent may file a return for an individual:

if the taxpayer requests permission, . . . , and [the] district director determines that good cause exists for permitting the return to be so made Whenever a return is made by an agent it must be accompanied by a power of attorney (or copy thereof) authorizing him to represent his principal in making, executing, or filing

the return. ¹²⁷

Treasury Regulations related to a partnership's obligation to file a return do not contain any rules governing an agent's filing such return. ¹²⁸ While regulations requiring the partnership's return to be signed by a partner indicate that the partnership may grant power of attorney authorizing someone other than a partner to sign on its behalf, any power of attorney must meet requirements similar to those established for individuals by Treasury Regulation 1.6012. ¹²⁹

A power of attorney is not required, however, in the case of a trustee in bankruptcy; instead, the IRS may require the submission of a certificate of appointment and qualification of the trustee from the court and verification that such authority has not been terminated. ¹³⁰ These regulations are not the authority by which a trustee becomes an agent of the partners as asserted by the IRS in Private Letter Ruling 85-35-015. ¹³¹ The IRS, by means of Revenue Rulings, and the Treasury Department, by means of Treasury Regulations, may provide that a taxpayer's filing obligation (or a non-taxpaying reporting obligation, in the case of a partnership) may be fulfilled by a third person, an agent, with or without a power of attorney, as stated in the administrative rules and regulations cited above. ¹³² But the IRS or Treasury cannot, by administrative fiat, create a filing obligation where one does not exist in law.

Legislative or substantive regulations, those issued under a particular statute by which Congress makes a delegation of the authority to draft regulations to the "Secretary or his delegate," are binding only if they are "(1) within the granted power of the agency; (2) issued pursuant to proper procedure, and (3) reasonable." ¹³³ Interpretative regulations, those issued without the benefit of a delegation of authority but which explain or construe the meaning of a statutory provision, are not controlling on a court. ¹³⁴ Anything less than a Treasury regulation is a mere opinion of the IRS. ¹³⁵ Because of the adverse positions of the trustee and the partners, ¹³⁶ the imposition of some form of "constructive" agency would be highly inadvisable. In light of the fact that partnership returns frequently are extremely complex and could be prepared only at a cost to the estate disproportionate to any benefit derived, the mere requirement of preparing such returns, alone, would create an apparent conflict. Furthermore, since the partners are still obligated to file the partnership's return, the imposition of a "constructive agency" is unnecessary. ¹³⁷

Private Letter Ruling 85-35-015 ¹³⁸ stating that the trustee was required to file the returns for the taxable years of the partnership's bankruptcy and that the partners would cooperate to such end is directly contrary to the proper conclusion we urge in this Article. Based on the present state of the law, a partnership is required to continue filing returns in bankruptcy. The returns must be signed by a partner, and the trustee of its estate must cooperate in supplying any necessary information to the partners. ¹³⁹

The position has been taken that a trustee operating the business of a partnership has the duty to file the partnership's Form 1065 Information returns under the authority of section 960, title 28, United States Code. ¹⁴⁰ Section 960 provides simply that: "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." ¹⁴¹

Reliance on section 960 is misplaced for several reasons. First, as indicated by the special reference, section 960 fails to mention businesses operated by partnerships, demonstrating that Congress intended that partnerships should continue filing their own Form 1065 returns in the same manner as partnerships conducting business outside of bankruptcy. ¹⁴² Second, and more importantly, the purpose of section 960 is to ensure that businesses operating under the protection of a bankruptcy court are not given an unfair tax advantage over nondebtor businesses, equalizing the competitive positions of businesses operating in or out of bankruptcy by affirming the tax liability of those operating under court supervision. ¹⁴³ Thus, it was not designed to address the tax issue here. Third, a partnership is not a taxpayer, rather, it is a "pass-through entity" and does not pay federal income taxes as individuals and corporations do. This is a compelling reason for the omission of partnerships from the ambit of section 960. ¹⁴⁴ The failure to include partnerships in section 960 is not an oversight.

Further, merely because the estate is subject to all federal, state and local taxes does not mean that the estate is a taxpayer required to pay taxes as a corporation or an individual, which would create a separate taxable entity. ¹⁴⁵ By enacting the BTA, Congress resolved the problem of whether or not a partnership estate was a separate taxable entity by explicitly providing that the commencement of a bankruptcy case would not create a separate taxable entity except

for individual cases under Chapter 7 and 11 of the Bankruptcy Code. ¹⁴⁶ To hold that section 960 requires trustees of partnerships in bankruptcy to file Form 1065 information returns because the bankruptcy estate is subject to taxation directly contradicts section 1399.

Perhaps the most significant flaw in the section 960 argument is that while it directs bankruptcy estates to pay taxes in the manner that other businesses pay taxes, ¹⁴⁷ section 960 is not an authority which requires taxpayers to file returns and pay taxes. ¹⁴⁸ Section 960 does not create any new tax paying or reporting obligations but merely affirms that bankruptcy estates must pay taxes. ¹⁴⁹ Moreover, the section is dependent upon other law which requires specific taxes be paid and that certain persons prepare and file returns. ¹⁵⁰

The issue was addressed in a related matter in *In re Samoset Associates* ¹⁵¹ where the bankruptcy court reached the proper result by construing pre-Bankruptcy Code and pre-BTA law. The court held that a trustee of a bankrupt partnership was not under any duty to file income tax returns for the partnership. ¹⁵² Although *Samoset Associates* was a pre-Bankruptcy Code case, the current applicable tax law is even more persuasive in light of the changes made by the BTA as discussed above. The issue, however, is clouded by less than precise language and inadequate analysis. For example, in *Estes & Hoyt v. Crake (In re Riverside-Linden Investment Co.)* ¹⁵³ the court concluded without analysis that a Chapter 7 trustee "simply is required to file informational tax returns for a debtor partnership for the period during which he is appointed." ¹⁵⁴ The court reached this conclusion in ruling on an objection to an accountant's fee application. ¹⁵⁵

It is internally consistent with general bankruptcy practice and procedure to recognize that a trustee of a debtor-partnership has no duty to file a Form 1065. Consider, for example, that a trustee of a partnership must, under certain circumstances, abandon property of the estate where the property is found to be unduly burdensome to the estate. ¹⁵⁶ This situation may arise where the partnership holds over-encumbered residential real estate that represents a potential source of liability because of the continuing need to insure and maintain the building. ¹⁵⁷ Upon abandonment of the property, in contrast with the abandonment of property from an individual debtor's estate, ¹⁵⁸ any tax consequences arising because of an eventual foreclosure of a lien by a secured creditor must be reported on the partnership's return and the tax consequences absorbed by the partners in the same manner as if the partnership were not in bankruptcy. ¹⁵⁹ As long as the partnership, as opposed to the estate, has property, the partnership has not terminated and the partners must report any income, gains, or losses incurred in regard to that property. ¹⁶⁰ After abandonment of the property, the trustee no longer has any control over any succeeding events and may not be privy to any information regarding the foreclosure; ¹⁶¹ for instance, where a partnership's bankruptcy case is closed before foreclosure is complete. In that case, a trustee cannot be responsible for reporting any taxable events occurring outside the estate which must be reported together with other taxable partnership transactions. ¹⁶²

In these circumstances, a trustee is required to provide an accounting of the estate's transactions to the partners, who will then compute the flow-through tax consequences of such transactions and their effect on the partners' bases in their respective partnership interests. ¹⁶³ The above procedure is analogous to the procedures used by a member of an affiliated group of corporations that have filed a consolidated return for the taxable year immediately preceding the taxable year in which a member of the group or the parent corporation files for bankruptcy relief. Unless an election to discontinue filing of a consolidated return has been made, the affiliated group continues to file consolidated returns. ¹⁶⁴ In such cases, the trustee of the debtor-subsidiary member corporation merely supplies the information regarding the transactions of the estate to the common parent corporation so that it is included on the consolidated return filed by the parent for the group. ¹⁶⁵

There are numerous additional reasons why the IRS's position is without merit. First, when a partnership files a bankruptcy petition, a non-taxable entity is created separate from, but related to, the partnership. ¹⁶⁶ The IRC requires that a partnership file a return for each taxable year setting forth certain specific information ¹⁶⁷ and also dictates that the partnership's return may only be signed by one of its partners. ¹⁶⁸ Since a trustee of a partnership in bankruptcy is the fiduciary of the estate and has not joined together with any of the partners as a member of the partnership, that trustee should not be considered either a "partner" or the "partnership." ¹⁶⁹ Because of the lack of persuasive authority directing or even allowing trustees to file partnership returns, trustees of partnerships in bankruptcy should pause before signing and filing such returns.

Second, the Bankruptcy Code requires a trustee of a partnership to "make any tax return otherwise required by State or local law to be filed by . . . [a] partnership" in bankruptcy.¹⁷⁰ Conspicuously absent from the IRC is any direct or indirect requirement that a trustee of a partnership in bankruptcy file the partnership's returns; even though such direction and authority is given to trustees of corporate debtors.¹⁷¹

Third, Congress amended IRC sections 6012(b)(3) and 6012(b)(4), incorporating language requiring trustees to file returns on behalf of corporations in bankruptcy and to file returns for estates of individuals in Chapter 7 and 11 cases under the newly adopted separate entity rules in IRC section 1398. No changes were made, however, in regard to a partnership trustee's reporting requirements; presumably, this was an intentional omission.

Fourth, Congress failed to require that partnership returns be signed by the trustee in the same manner as required of trustees of corporations under IRC section 6062. Form 1065 must be signed by one of the partners.¹⁷² The IRC provides: "In a case where a . . . trustee in a case under title 11 of the United States Code . . . has possession of or holds title to all or substantially all the property or business of a *corporation* . . . such . . . trustee . . . shall make the return of income for such corporation" ¹⁷³ No similar language exists in the IRC regarding partnerships in bankruptcy. More troubling, the execution of a partnership return represents not only that the person signing the form is a partner, but that "such partner [was] authorized to sign the return on behalf of the partnership." ¹⁷⁴

Fifth, the position of the IRS is somewhat anomalous in light of the IRC requirements for a document to constitute a "return" for federal tax purposes. A document which purports to be a return but which is not signed by the taxpayer is not a return for any purpose under the IRC, ¹⁷⁵ with the exception of returns made by the IRS for the assessment of taxes against taxpayers who have failed to file a return. ¹⁷⁶ The IRC provides that filing false returns is a felony. ¹⁷⁷ Anyone who signs a return which they know is not true as to every material matter may also be found guilty of a felony. ¹⁷⁸ Similarly, anyone who assists in the preparation or presentation of a false return or document may be found guilty of a felony. ¹⁷⁹ Civil penalties may also be imposed for filing a return found to be frivolous and for aiding or assisting in the preparation or presentation of a return or document while knowing that its use will result in the understatement of the tax of another. ¹⁸⁰ Under other circumstances, where the IRS is not actively seeking the information provided by trustees, a return filed by someone other than the taxpayer which contains information of questionable accuracy, could, quite possibly, attract the attention of the IRS with an eye towards imposition of some form of a penalty. This is because of the strong potential for prepetition transactions where the trustee is unaware of the transaction and the partners, acting in their best interest, fail to disclose the transaction to the trustee. It appears, however, that the IRS is willing to accept the trustee's partnership return as a valid return even though it lacks a proper signature and the accuracy of the information contained therein is likely to be marginal. ¹⁸¹

The IRS's refusal to acknowledge a total lack of authority for requiring trustees to file the partnership's Form 1065 is understandable. It is far more convenient to obtain the information that the partners are required to report from the trustee, even though what is filed is not a "return," than by pursuing the partners to obtain the information directly from them. ¹⁸² As long as a trustee prepares and files a Form 1065, ¹⁸³ even though it does not satisfy the requirements of the law for a "return," the IRS will be able to identify those partners who fail to report taxable distributions and/or distributive shares of income. This places the IRS in somewhat of a more advantageous position than with partnerships not in bankruptcy because it ensures the IRS of a more responsive source of information than some financially troubled partnerships may provide.

The law governing the requirement that partners must recognize their distributive shares of income ¹⁸⁴ is a double-edged sword. A partner must recognize and pay tax on his or her distributive share of taxable income even though she is totally unaware of its existence and even though such partner never receives any of the proceeds from the transactions which generated the taxable income. ¹⁸⁵ The partner is thus unable to avoid the taxation of partnership income by a mere denial of knowledge of its existence. ¹⁸⁶ However, if the IRS does not learn of such partner's omission of undiscovered income until the statute of limitations has lapsed on the partner's taxable year in which the distributive income should have been reported, the IRS is precluded from subsequently taxing such income in the year when, for instance, a partner's embezzlement in a prior taxable year is discovered or a judgment against such an embezzling partner is paid. ¹⁸⁷ The statute of limitations on assessing a tax with respect to a "partnership item" – generally any item the partnership is required to take into account for the taxable year – does not run until three years after the due date for such return or the date on which the return was filed, whichever is later. ¹⁸⁸ In the event the

return is not filed as required, the statute never begins to run on such "partnership items." ¹⁸⁹ The statute of limitations on assessing a tax may run as to all other items with respect to a partner's individual return except those which would have been reported on the partnership's Form 1065. ¹⁹⁰ It would seem, therefore, that the IRS is fully protected if trustees do not file returns on behalf of partnerships in bankruptcy.

When a partner files a bankruptcy petition, however, items that were formerly considered "partnership items" become "nonpartnership items" and a different statute of limitations on assessments applies. ¹⁹¹ A tax on a former "partnership item" must be assessed within the later of one year after it became a "nonpartnership item" or the time at which the statute of limitations runs on assessing taxes against the partner under the normal rules, generally three years from the due date of the return filed for the taxable year. ¹⁹² When a taxpayer files bankruptcy the normal statute of limitations on assessments is suspended. ¹⁹³ During this time, the IRS is prohibited from assessing taxes against the debtor. ¹⁹⁴ However, because of an apparent legislative oversight, the suspension of the statute of limitations because of bankruptcy does not operate to suspend the running of the one year period provided by section 6229(f). ¹⁹⁵ That is, section 6503(h) ¹⁹⁶ only refers to the running of the statutes under sections 6501 ¹⁹⁷ and 6502, ¹⁹⁸ which are the general rules for assessments and collections. ¹⁹⁹

As a matter of administrative convenience, therefore, the IRS has a great deal of interest in trustees continuing to file returns on behalf of partnerships in bankruptcy because the IRS is provided with the information it may otherwise have had to secure from reluctant partners, such as partners who filed bankruptcy and who may be inclined to attempt to avoid taxation on taxable income with no hope of cash distributions by attempting to silently wait out the statute of limitations. The desire of the IRS to be supplied information regarding a debtor partnership's transactions is not a persuasive argument for requiring trustees to file returns at the expense of the creditors in light of the total absence of any authority for such requirement.

1. Reimbursement of Accountant Fees for Preparing Form 1065

The use of bankruptcy estate assets to pay for the preparation of the partnership Form 1065 has been questioned because of the lack of any benefit to the estate: not being a taxpayer, the partnership's information return only benefits the nondebtor partners who are obligated to report their distributive shares of income. ²⁰⁰ The refusal to approve expenditure of partnership funds to pay for the partnership's tax computations is consistent with the fact that such computations are only of use and benefit to the nondebtor partners. ²⁰¹ In contrast, the preparation of an income tax return on behalf of an individual debtor's or corporation's estate may ultimately be of value to the creditors because of the possibility of obtaining a tax refund, which may then be distributed in partial satisfaction of claims. ²⁰²

A bankruptcy court, however, in ruling on an accountant's fee application, stated that the Chapter 7 trustee is required to file information returns on behalf of the general partnership and approved the payment for the returns for the period during which the trustee served. ²⁰³ The issue of whether or not the preparation of the returns was really the trustee's obligation apparently was not considered. ²⁰⁴

The better line of authority holds that expenses incurred by the estate for the preparation of the information return are not entitled to administrative expense priority ²⁰⁵ since the fees incurred by the trustee to compile the return will never benefit the estate. ²⁰⁶ Recall that a partnership is not a tax paying entity under federal law; consequently, any benefit from the return, such as a tax refund, inures to the partners and not the partnership estate. ²⁰⁷ Based on this fact and the absence of any IRC or Bankruptcy Code authority directing a trustee of a debtor-partnership to file a Form 1065, our observation in this section of the Article becomes self-evident. A bankruptcy court should deny any request to seek payment of fees incurred to prepare a Form 1065 for a debtor-partnership. ²⁰⁸ There is no bankruptcy or tax principle furthered by requiring the unsecured creditors of the partnership estate to subsidize either the partners or the IRS.

2. Failure to File Form 1065 Penalties

The IRC provides that if any partnership fails to file its Form 1065 information return, the *partnership* shall be liable, unless reasonable cause is shown, for a penalty of fifty dollars per month for each partner for up to five months. ²⁰⁹ Since the partnership, and not the estate, is required to file the partnership's Form 1065, the estate is not liable for the failure to file penalty. Thus, the issue with regard to the imposition of a penalty is: Who is the partnership? While a

partnership may be a debtor,²¹⁰ neither the estate nor the trustee constitute the partnership.²¹¹ But as with a corporation, commencement of a bankruptcy case creates an estate consisting of the debtor's property;²¹² Although the corporation is an "entity," it is the "debtor," and while the estate is also an "entity," the corporate entity itself is not the estate.²¹³ Therefore, a penalty for failure to file a Form 1065 can not be assessed against the estate; it is a postpetition penalty and can only be assessed against the postpetition partnership—that is, the remaining partners if any. The estate and the partnership are two separate entities.²¹⁴

If a Form 1065 is not filed on behalf of a partnership for any taxable year as required by IRC section 6031,²¹⁵ a penalty is imposed upon and assessed against the partnership.²¹⁶ Not being "the partnership" or one of its partners, a trustee cannot be held responsible for failing to perform the duties required by the IRC.²¹⁷ Absent statutory authority requiring them to do so, trustees of partnerships in Chapter 7 bankruptcy cases may not be forced to file a partnership's federal returns. Even in Chapter 11 cases, trustees are only responsible for furnishing such information as the IRS may require and the trustees are not required to file the a debtor's delinquent returns.²¹⁸

Because of the "flow-through" nature of partnerships, a distinction must be made between postpetition claims against the partnership and postpetition claims against the estate for administrative expenses.²¹⁹ Inasmuch as the obligation to file the partnership's federal income tax returns is upon the partnership, any penalty arising because of a failure in that regard would be a postpetition claim against the partnership.²²⁰ Further, in the event there is an insufficiency of property in the partnership's estate to satisfy all the estate's administrative expenses, the general partners are obligated to pay in full all such administrative expenses and all claims against the partnership's estate.²²¹ The ultimate result is the same whether the penalty for failure to file a postpetition federal income tax return is deemed to be a claim against the estate or not; the general partners will likely be obligated in any event.²²²

As already noted, if any partnership fails to file its Form 1065, the *partnership* is liable for a penalty of fifty dollars per month for each partner for up to five months, unless reasonable cause is shown.²²³ May the IRS collect this penalty from the estate or the trustee if the trustee does not file the partnership's Form 1065? As demonstrated below, even if it is determined that the trustee of a partnership estate is required to file the partnership's returns, the penalty for failure to do so cannot be collected from the estate or the trustee, but must be collected, if at all, from the partners.²²⁴

In order to be paid as an administrative expense, tax penalties must relate to a tax incurred by the estate.²²⁵ No other penalties are allowed as administrative expenses. Because a partnership is not a tax paying entity, it cannot incur an income tax.²²⁶ Thus, the penalty for failure to file the partnership's Form 1065 is not a penalty related to a tax incurred by the estate.

Because the IRC section 6698(a) penalty is not an allowed administrative expense, it is not entitled to first priority administrative expense status in the scheme of distribution: only administrative expenses allowed under section 503(b) of the Bankruptcy Code are entitled to first priority status.²²⁷ Is such a penalty entitled to any other priority under section 507? Neither taxes nor tax penalties are entitled to priority under the second through the seventh or ninth paragraphs of section 507(a), leaving only section 507(a)(8). Accepting, but not conceding, the argument advanced by *In re Hillsborough Holdings Corp.*²²⁸ and *Towers v. United States (In re Pacific-Atlantic Trading Co.)*²²⁹ that a tax arising on a return filed postpetition may be incurred prepetition for priority determination purposes,²³⁰ which argument is inapposite in the case of a penalty assessed because of the failure to file a return due postpetition, the penalty cannot be allocated to a prepetition period according to when it "accrued" as did the *Hillsborough Holdings* and *Towers* courts. Even if, through some extreme distortion of the Code, it could be said that because the penalty was not assessed prepetition, it was still assessable after the commencement of the case within the meaning of section 507(a)(8)(A)(iii),²³¹ and that a penalty is a "tax" for the same purposes, the IRC section 6698(a)²³² penalty is not a "tax on or measured by income or gross receipts," entitled to eighth priority under subparagraph (A).²³³

While tax penalties are entitled to priority under section 507(a)(8), such penalties must be both related to a claim entitled to priority under some other subparagraph of paragraph (8), none of which apply, and must be compensation for actual pecuniary loss.²³⁴ The IRC section 6698(a) penalty is a purely punitive penalty, not related to any loss of revenue and not in compensation for any monetary loss of any kind; it is designed to punish those who fail to file the required returns and to instill a heightened sense of duty among other similar taxpayers in a tax system based on

voluntary compliance. ²³⁵

Inasmuch as the IRC section 6698(a) penalty is not entitled to priority, where does such penalty stand in the scheme of distribution from the Chapter 7 estate? Section 726 of the Bankruptcy Code specifies how the proceeds from the liquidation of the debtor's assets must be made. ²³⁶ It also provides that certain penalties shall receive fourth priority status, after claims entitled to priority under section 507 of the Bankruptcy Code, prepetition claims filed under section 501(a) of the Bankruptcy Code, and certain prepetition claims determined to have been tardily filed under section 501(a). ²³⁷ However, claims for those penalties which are paid fourth are those arising before the earlier of the order for relief or the appointment of a trustee. ²³⁸ Since the IRC section 6698(a) penalty in question is being asserted as the estate's liability because the trustee failed to file a debtor-partnership's Form 1065, it cannot be said that it arose before the appointment of such trustee. In order to lay the blame at the trustee's feet, the trustee has to have been appointed prior to the time at which the penalty arose.

The next question in determining if the IRS is fourth in line in the order of distribution of property of the estate is whether the penalty arose prior to the order for relief. In a voluntary case the commencement of the case itself constitutes the order for relief. ²³⁹ If an involuntary petition is controverted, an order for relief is entered against the debtor only after trial, ²⁴⁰ prior to which a trustee may or may not have been appointed. ²⁴¹ Even in an involuntary case in which a trustee has been appointed, an IRC section 6698(a) penalty can only be paid fourth in the order of distribution from the estate if such penalty arose prior to the appointment of the trustee. ²⁴² The section 6698(a) penalty must be denied distribution rights under paragraph four of section 726(a) in any case, because the penalty cannot arise prior to the appointment of the trustee in order to assert that the trustee is responsible for filing the Form 1065 related to the asserted penalty. ²⁴³ The IRS, therefore, cannot collect the section 6698(a) penalty from the estate.

The Bankruptcy Code specifies that the remaining property of the estate, after payment of penalties entitled to distribution under paragraph four of section 726(a), shall be distributed in payment of interest on claims entitled to receive distribution and whatever is left over must be returned to the debtor. ²⁴⁴ The only question remaining is whether the IRS may collect the section 6698(a) penalty from the trustee? Trustees may be surcharged for penalties which are incurred because of discrete losses to the estate as a result of a failure to perform required acts if it is shown that such trustee had a duty to perform. ²⁴⁵ However, because there is no authority directing trustees to file federal income tax returns on behalf of partnerships in bankruptcy, ²⁴⁶ as is required, for example, in the case of state partnership income tax returns, ²⁴⁷ the trustee does not have a duty to file the Form 1065. The IRS clearly understands that it is the debtor-partnership's obligation to file its own Form 1065, ²⁴⁸ "responsibility and liability for the filing of accurate, complete, and timely returns ultimately rests with the partners" ²⁴⁹ Because the responsibility and liability rests with the partners, the section 6698(a) penalty is, in reality, incurred by the debtor and therefore the trustee is not personally liable for any such penalty in favor of the United States. ²⁵⁰

3. The Debtor's Action for Declaratory Judgment

In an unusual bankruptcy case, *In re Pflug*, an individual debtor argued that the trustee was obligated to file income tax returns on behalf of the estate, reporting gross income realized as a result of the foreclosure against property held by partnerships in which the debtor held various interests. ²⁵¹ What is not apparent from reading the *Pflug* opinion is why the court heard the matter at all. Clearly, the debtor did not have standing to ask the court for an order directing that the estate file an income tax return and report certain income—in essence, asking the court to rule that the estate was obligated to report the distributive shares of income from the partnerships, not the debtor. While the bankruptcy court has jurisdiction over almost any tax question concerning or related to the bankruptcy estate, this grant of jurisdiction does not give the bankruptcy court the authority to enter a declaratory judgment regarding the debtor's taxes. ²⁵² As a general rule, bankruptcy judges can only resolve actual cases and controversies, whether the matter before the court is a core or non-core proceeding. Although the Declaratory Judgment Act ²⁵³ gives special treatment to actions brought under section 505(a), "it does not remove the case or controversy requirement" for that section. ²⁵⁴ Therefore, the debtor's proper course of action was to have filed his personal income tax return, omitting any reference to income from the partnerships, if in fact it was income to the estate. ²⁵⁵ In addition, the tax matters partner ²⁵⁶ should have been advised to report receipt of the distributive income to the estate by issuing a Form K-1 to the bankruptcy estate using the estate's taxpayer identification number, if available. ²⁵⁷ If the Form K-1 had been in the debtor's name and social security number, then the distributive income could have been disclosed on the face of his individual return

and a statement attached describing the facts and theory upon which it was determined that the income was not taxable to the debtor.²⁵⁸ If the trustee determined that the estate should not be required to report and pay tax on the distributive income, the trustee could then seek a determination of the estate's tax liability under section 505(a).²⁵⁹ Pursuant to this procedure, the debtor should be allowed to participate because his personal return will be the return of a related party.²⁶⁰

In sum, the trustee is liquidating the assets of the partnership as the agent for the estate and not the partners.²⁶¹ The tax reporting entity, however, continues to be the partnership.²⁶² Although bankruptcy has not created a new separate taxpayer,²⁶³ it has in fact created a separate division of the partnership in which the liquidation is carried on.²⁶⁴ The trustee operating this separate division has no managerial powers over the partnership other than those powers that may affect the affairs of the estate, the property of the estate, and prepetition claims.²⁶⁵ However, the bankruptcy estate is not liable for any postpetition taxes generated by the partnership.²⁶⁶ These taxes are the partners' concern individually. As such, a penalty for the failure to file a Form 1065 partnership return for a taxable period ending after commencement of the case is a postpetition liability of the partnership and can only be collected from the partners.²⁶⁷

III. Proposal

The IRS insists that a trustee of a debtor-partnership is required to file an annual information return.²⁶⁸ This rule reverses prior IRS practice, which required a trustee to file a fiduciary tax return (Form 1041).²⁶⁹ The IRS concedes that there is no duty on the trustee to file delinquent partnership returns for taxable periods that ended prior to the time the trustee was appointed.²⁷⁰ According to the IRS, a failure to file a partnership information return for the prior taxable year does not absolve a trustee of his or her responsibility to file a partnership return for the current year.²⁷¹ However, we believe that a trustee should undertake reasonable good faith efforts to facilitate the filing of the delinquent returns.²⁷² The IRS insists that the current partnership return should be based on all available information²⁷³ and that amended returns should be filed if the partnership receives additional information after the current partnership return is filed.²⁷⁴

We think the IRS's position that the trustee of a partnership has a duty to file the information return²⁷⁵ is suspect. Based on the present state of the law, the trustee should refrain from filing the information return since he or she lacks the authority to sign the return and there exists no clear authority directing that trustees file such returns.

The filing of the bankruptcy petition by a partnership does not terminate the partnership for federal tax purposes.²⁷⁶ Thus, the partnership is obligated to continue to file the Form 1065.²⁷⁷ Conspicuously absent from the IRC is any direct requirement that the trustee of a partnership in bankruptcy file returns on behalf of the partnership.²⁷⁸ Sections 6012, 6012(b)(3), and 6062 direct the trustee of a debtor corporation to file income tax returns.²⁷⁹ The BTA amended section 6012(b)(4) to require the trustee to file returns on behalf of the estates of individuals under Chapter 7 and 11 cases, under the newly-adopted separate entity rules codified in IRC section 1398.²⁸⁰ Thus, specific authority exists under the IRC for trustees to file tax returns on behalf of corporations and individuals.²⁸¹ However, when the BTA was amended, there were no changes made regarding partnership trustee obligations; section 6031(a) contains no mention of a trustee's duty to file returns on behalf of the partnership.²⁸²

The trustee's signing of the return for a corporate debtor under IRC section 6062²⁸³ was specifically authorized by Congress. Contrast this with Form 1065, the information return, which must be signed by one of the partners pursuant to IRC section 6063.²⁸⁴ The execution of a partnership return represents that the person signing the form is a partner, who has been authorized to sign the return on behalf of the partnership.²⁸⁵ It is quite a stretch to presume that the partnership has extended that power to the trustee.

Our analysis evidences the need to curb the tendencies of an aggressive IRS in the bankruptcy process. We make three observations for consideration. First, a trustee should undertake reasonable good faith efforts to marshall information concerning postpetition transactions that she is aware of and provide that information to the partners and others as required by the Bankruptcy Code.²⁸⁶ The trustee should also cooperate with the partners to aid partners in the collection of tax information. Second, a trustee should provide to the managing partner, general partner, tax matters partner, or whomever is responsible for the bankruptcy, work papers providing information with respect to the estate's transactions. Third, we entertain serious doubt whether a trustee may and should sign the Form 1065.²⁸⁷ Since no

authority supports the IRS requirement, their present position is fundamentally flawed. By signing the form, a trustee may be suggesting that she has taken on the role of a partner for tax purposes. We suggest, however, that if a trustee were to choose not to sign the Form 1065, she should attach a concise statement to the Form 1065 stating her belief that she lacks the authority to sign the return.

IV. Conclusion

Congress should move to clean up this area of law. As recanted above, the present law runs contrary to bankruptcy principles which seek, in some instances, to give a debtor a "fresh start," and in others, to maximize the value of the estate, thus affording creditors a more equitable distribution of their claims. The law suggests that because the filing of a bankruptcy petition does not affect the status of a partnership as a taxable entity, the partners must continue filing partnership and individual returns. Despite the IRS claims to the contrary, there is no support in the law for transferring or imposing such a duty on the partnership trustee. Requiring such duty does not benefit the estate, and it results in reducing the assets available to the creditors. While we realize that the IRS has a legitimate concern, the convenience of obtaining such information from the trustee, otherwise attainable only by pursuing the partners, cannot alone serve to impose a duty upon the trustee. The proposal in the Article clarifies the role of a partnership trustee and imposes on the trustee the limited duty of cooperation with the partners in facilitating the collection of tax information. The proposal addresses the IRS's concerns that those liable for the taxes pay them while effectuating traditional notions of bankruptcy policy.

FOOTNOTES:

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¹ Daniel V. Davidson et al., *Business Law: Principles and Cases* 714 (4th ed. 1993). *See generally* Larry E. Ribstein, *Business Associations* 12 (2d ed. 1990) (recognizing development of general partnership under English law during Middle Ages); Francis M. Burdick, *The Law of Partnership* 5 (1983) (noting that by imperial fiat, Roman Empire mandated this corporate form to accommodate needs of commerce for stability and uniformity in its merchant laws); Harry G. Henn & John R. Alexander, *Laws of Corporations* 14 (3d ed. 1983) (placing the emergence of partnership form at around time of Code of Hammurabi in 2083 B.C.).[Back To Text](#)

² Unif. Partnership Act § 5, 6 U.L.A. 19 (1914).[Back To Text](#)

³ Unif. Ltd. Partnership Act § 28, 6 U.L.A. 617 (1916).[Back To Text](#)

⁴ Rev. Unif. Partnership Act § 107, 6 U.L.A. 236 (1993); Rev. Unif. Ltd. Partnership Act § 1101, 6 U.L.A. 535 (1976).[Back To Text](#)

⁵ Colorado, Georgia, Minnesota, New York, Oklahoma, Pennsylvania, Vermont and the United States Virgin Islands have applied the ULPA in some form. *See* 6 U.L.A. 295 (Supp. 1995). All states except Louisiana and Vermont have adopted some variant of Revised Uniform Limited Partnership Act ("RULPA"). *Id.* at 346–47. Most states have adopted RULPA while retaining a version of Uniform Limited Partnership Act (1976). *Id.* at 352. Commentators predict that RULPA will spread throughout the states. William L. Cary & Melvin A. Eisenberg, *Cases and Materials on Corporations* 31 (7th ed. 1995).[Back To Text](#)

⁶ Henn & Alexander, *supra* note 1, at 36.[Back To Text](#)

⁷ Bernard Wolfman, *Federal Income Taxation of Business Enterprise* 967 (2d ed. 1982).[Back To Text](#)

⁸ Compare In re Samoset Assocs., 14 B.R. 408, 410 (Bankr. D. Me. 1981) (holding that trustee of bankrupt partnership has no duty to file income tax returns for ordinary partnership) with In re Pflug, 146 B.R. 687, 689 (Bankr. E.D. Va. 1992) (finding that Chapter 7 trustee has general obligation to file tax returns for bankruptcy estate when gross income reaches threshold amount). [Back To Text](#)

⁹ Pub. L. No. 96-589, 94 Stat. 3389 (1980) (codified as amended in scattered sections of IRC and 11 U.S.C.). [Back To Text](#)

¹⁰ I.R.C. §§ 1398(b)(2), 1399 (1988). [Back To Text](#)

¹¹ The conclusion reached in this Article does not apply to publicly traded partnerships, as defined in I.R.C. § 7704(b)–(d), which are generally treated as corporations for tax purposes. I.R.C. § 7704(a) (1988). [Back To Text](#)

¹² See generally Jack F. Williams, The Tax Consequences of Abandonment Under the Bankruptcy Code, 67 Temp. L. Rev. 13, 19–20 (1994) [hereinafter Williams, *Tax Consequences of Abandonment*] (describing creation of separate taxable entity under Chapter 7 or Chapter 11 of Bankruptcy Code); Jack F. Williams, The Federal Tax Consequences of Individual Debtor Chapter 11 Cases, 46 S.C. L. Rev. 1203, 1211 (1995) [hereinafter Williams, *Federal Tax Consequences of Individual Debtor*] (discussing property of individual debtor's bankruptcy estate). [Back To Text](#)

¹³ Holywell Corp. v. Smith, 503 U.S. 47, 51 (1992) (requiring liquidating trustee in Chapter 11 bankruptcy proceeding to file tax returns for liquidating trust and pay income taxes due). [Back To Text](#)

¹⁴ IRS Publication 541, Tax Information on Partnerships 2 (for 1992 returns). See generally William S. McKee et al., *Federal Taxation of Partnerships and Partners* ¶ 3.01[1], [2] (1990). [Back To Text](#)

¹⁵ I.R.C. § 7701(a)(2) (1988). [Back To Text](#)

¹⁶ Id. [Back To Text](#)

¹⁷ I.R.C. § 701 (1988); Schulde v. Commissioner, 372 U.S. 128, 129 n.1. (1963); Mallory v. United States, 238 F. Supp. 87, 89 (D.C. Ga. 1965). [Back To Text](#)

¹⁸ I.R.C. § 708(a) (1988). See generally Jerry S. Williford et al., *Uncertainty Clouds the Tax Consequences of the Bankruptcy of a General Partner*, 12 J. Partnership Tax'n 26 (1993) (analyzing impact of bankruptcy on termination of partnership). [Back To Text](#)

¹⁹ I.R.C. § 708(a) (1988); Treas. Reg. § 1.708-1(b)(1)(i)–(ii) (1960). [Back To Text](#)

²⁰ Preston v. United States (In re 4100 North High Ltd.), 3 B.R. 232, 238 (Bankr. S.D. Ohio 1980); McKee, *supra* note 14, ¶ 12.01. In some jurisdictions, state law provides that even though the bankruptcy of a partner causes dissolution of the partnership, the partnership is not terminated upon such dissolution, but continues until winding up of its affairs is complete. See, e.g., Cal. Corp. Code §§ 15030, 15031(5) (West 1994); In re Gibson, 67 B.R. 957, 958–59 (Bankr. E.D. Mich. 1986) (finding that under Michigan law, as then in effect, and UPA § 30, partnerships continued to exist during dissolution; termination only occurred after winding up was complete). [Back To Text](#)

²¹ White v. United States, 22 Cl. Ct. 734, 737 (1991) (requiring partnership to file informational returns on Form 1065 to enable IRS to properly identify and assess taxes against partners). [Back To Text](#)

²² See note 22 and accompanying text (describing IRC requirements for termination as enumerated in Treas. Reg. § 1.708-1(b)(1)(i)–(ii) (1960)); see also Fuchs v. Commissioner, 80 T.C. 506, 508–09 (1983) (describing partnership's continued filing of tax returns after dissolution but during five year wind-up period). A partnership should file its final return upon termination. Sirring Bldg. No. 1 v. Commissioner, 69 T.C.M. (CCH) 2476 (1995) (indicating customary practice of filing final return). [Back To Text](#)

²³ 11 U.S.C. §§ 101–1330 (1994).[Back To Text](#)

²⁴ Unif. Partnership Act § 30, 6 U.L.A. 367 (1914).[Back To Text](#)

²⁵ See id. § 31, 6 U.L.A. 376 (1914) ("Dissolution is caused . . . by the Bankruptcy of any partner or the partnership."). The filing of a petition under Chapter 11, as opposed to a filing under Chapter 7, does not constitute a dissolution of the partnership under § 31(5) of the UPA. In re Safren, 65 B.R. 566, 569 (Bankr. C.D. Cal. 1986) (reasoning 'bankruptcy' in UPA does not refer to reorganization case under Chapter 11 of Code). Some courts have found that the filing of a Chapter 11 petition by a general partner of a limited partnership causes a dissolution of the partnership. In re Sunset Developers, 69 B.R. 710 (Bankr. D. Idaho 1987); In re Minton Group Inc., 27 B.R. 385, 391 (Bankr. S.D.N.Y. 1983), *aff'd*, 46 B.R. 222 (S.D.N.Y. 1985). The Revised Uniform Partnership Act made a slight improvement by replacing "dissolution" with "dissociate." See RUPA §§ 601–603, 6 U.L.A. at 322–28 (1995).[Back To Text](#)

²⁶ See supra notes 18–20.[Back To Text](#)

²⁷ See 11 U.S.C. § 346(c)(1) (1994) ("The commencement of a case . . . concerning partnership does not effect a change . . . for imposing a tax"); I.R.C. §§ 1398(b)(2), 1399 (1988); see also *Schindler v. Walker (In re Harbor Village Dev.)*, 95–1 U.S. Tax Cas. (CCH) ¶ 50,032 at 87,127–28 (Bankr. D. Mass. 1994) (noting that commencement of debtor's bankruptcy case does not create separate federal or state tax entity).[Back To Text](#)

²⁸ I.R.C. § 708(a) (1988) (noting that partnership continues to exist for tax purposes until termination); Treas. Reg. § 1.708–1(a), (b)(1)(i) (1960); *cf. Rodeck v. Olszewski (In re Olszewski)*, 124 B.R. 743, 747–48 (Bankr. S.D. Ohio 1991) (holding debtor's interest in partnership is included in debtor's estate, but not partnership assets).[Back To Text](#)

²⁹ I.R.C. § 708(a); Treas. Reg. § 1.708–1(a), (b)(1)(i).[Back To Text](#)

³⁰ I.R.C. § 1398(b)(2) (1988). *But see Jonas v. Newman (In re Comark)*, 53 B.R. 945, 947–948 (Bankr. C.D. Ca. 1985) (granting injunction to protect property interests of general partners from enforcement of judgment creditor's claim).[Back To Text](#)

³¹ 11 U.S.C. § 541(a)(1)–(a)(7) (1994).[Back To Text](#)

³² Id. § 541 (1994); In re Linderman, 20 B.R. 826, 829 (Bankr. W.D. Wa. 1982) (assenting debtor's solely-owned corporation acquired equitable interest in debtor's realty by virtue of mortgage payments paid by corporation and became property of corporation's bankruptcy estate); Goldberg v. Scanlon (In re Scanlon), 10 B.R. 245, 248 (Bankr. S.D. Cal. 1981) (holding accrued right of debtor on fully performed service contract becomes property of estate).[Back To Text](#)

³³ See 11 U.S.C. § 522(d) (1994) (providing list of federal exemptions that debtor may choose). Debtor may also elect or be required to use exemptions provided by state law. Id. § 522(b); see, e.g., Tex. Prop. Code Ann. § 41 (West 1995) (allowing debtor to choose between federal and state exemptions); *cf. Ga. Code Ann. § 44–13–100(b)* (prohibiting Georgia residents from applying federal exemptions).[Back To Text](#)

³⁴ See In re Fingado, 113 B.R. 37 (Bankr. D. N.M. 1990) (holding strong presumption that properties held by debtor and wife as joint tenants were community property and were part of debtor's estate could not be overcome by wife); *Ragan v. Commissioner*, 69 T.C.M. (CCH) 2470 (1995) (holding refund claim became property of husband's bankruptcy estate when petition was filed).[Back To Text](#)

³⁵ 11 U.S.C. § 541(a)(5), (6) (1994); see also In re Miller, 167 B.R. 202 (Bankr. C.D. Cal. 1994) (holding that where marriage dissolved prepetition postpetition division of couple's community property was property of bankruptcy estate on petition date); In re Lonstein, 950 F.2d 77 (1st Cir. 1991) (determining that debtor's interest in undistributed testamentary bequest was property of Chapter 7 estate at time of commencement of case); In re Monahan, 171 B.R. 710 (Bankr. D. N.H. 1994) (concluding insurance policies, including their cash surrender value and debtor's power to

change beneficiaries, became property of estate upon debtor's bankruptcy filing). [Back To Text](#)

³⁶ See 11 U.S.C. § 726(a)(1)–(a)(6) (1994). [Back To Text](#)

³⁷ See I.R.C. § 1398(f)(1) (1988). [Back To Text](#)

³⁸ Id.; cf. Johnston v. Webster (In re Johnston), 49 F.3d 538 (9th Cir. 1995) (holding abandonment of property inconsequential in value and benefit to estate is permitted while specifically reserving consideration of whether abandonment is taxable event); In re Popp, 166 B.R. 697, 699 (Bankr. D. Neb. 1993) (finding abandonment of farm equipment and machinery a nontaxable event); Samore v. Olson (In re Olson), 121 B.R. 346, 348 (Bankr. N.D. Iowa 1990), aff'd, 930 F.2d 6 (8th Cir. 1991) (concluding abandonment of property of estate was not "sale or exchange" of property and not subject to federal tax liability). [Back To Text](#)

³⁹ I.R.C. § 1398(f)(1) (1988). The realization requirement embodied in the Internal Revenue Code and in relevant case law provides an administrative trigger for the imposition of tax. Thus, what constitutes a realization event for tax purposes is generally within the power of Congress to decide. See Joseph M. Dodge, *The Logic of Tax* 154 (1989); see also I.R.C. § 1001(a), (c) (1988) (requiring realization gains and losses to be taxed when realized, not as they accrue). [Back To Text](#)

⁴⁰ The basis of an asset is generally its historic cost. I.R.C. § 1012 (1988). Essentially, the function of basis in the context of realization of gain or loss is to prevent the same dollars from being taxed twice. Dodge, supra note 39, at 6. Adjusted basis is the historic cost increased by capital expenditures, such as improvements to the asset, and decreased by allowed depreciation. I.R.C. § 1016(a) (1988). [Back To Text](#)

⁴¹ See I.R.C. § 1398(g) (1988). [Back To Text](#)

⁴² See id. § 1398(a). [Back To Text](#)

⁴³ Pub. L. 96–589, 94 Stat. 3389, 3397–3400 (1980). [Back To Text](#)

⁴⁴ I.R.C. § 1398(a)–(b)(2) (1988) (stating that partnership is not individual for § 1398 purposes but individual debtor's interest in partnership is treated in same manner as other property of debtor). [Back To Text](#)

⁴⁵ See id. § 1398(c) (1988). For an analysis of tax consideration in bankruptcy, see Blake D. Rubin, *Tax Planning for the Debtor in Bankruptcy*, 19 J. Real Est. Tax'n 322, 326 (1992). [Back To Text](#)

⁴⁶ I.R.C. § 1398(b)(1) (1988). [Back To Text](#)

⁴⁷ For an explanation of the short-year election under I.R.C. § 1398(d)(2) (1988), see C. Richard McQueen & Jack F. Williams, *Tax Aspects of Bankruptcy Law and Practice* § 18.16–18.22 (2d ed. 1994); see also James I. Shepard, *The Trustee's Bankruptcy Tax Manual*, 249–55 (1995). [Back To Text](#)

⁴⁸ See Paul B. Geilick, Essentials of Bankruptcy Tax Law, 66 Am. Bankr. L.J. 323, 329 (1992) (explaining tax consequences of bankruptcy dismissal). [Back To Text](#)

⁴⁹ I.R.C. § 541(a) (1988). [Back To Text](#)

⁵⁰ Id. § 1398(f)(1); see also Rev. Rul. 90–25, 1990–1 C.B. 10. [Back To Text](#)

⁵¹ I.R.C. § 1398(g)(6) (1988). [Back To Text](#)

⁵² For a more detailed explanation, see McQueen & Williams, supra note 47, § 18.14–.15; Shepard, supra note 47, at 93–103, 180–86, and 234–47. [Back To Text](#)

⁵³ I.R.C. § 172 (1988), as amended by Omnibus Budget Reconciliation Act of 1993, 28 U.S.C.A. § 172 (West Supp. 1995). [Back To Text](#)

⁵⁴ Id. § 170 (d)(1), as amended by Omnibus Budget Reconciliation Act of 1993, 28 U.S.C.A. § 170 (West Supp. 1995). [Back To Text](#)

⁵⁵ Id. § 111. [Back To Text](#)

⁵⁶ Id. § 1398(g)(4). [Back To Text](#)

⁵⁷ Id. § 1212. [Back To Text](#)

⁵⁸ See McQueen & Williams, supra note 47, at § 18.14–18.15 (explaining listed attributes). Because the tax attributes that pass from a debtor to his or her estate must be identified in I.R.C. § 1398(g) or in a regulation, the list of attributes may become stale. Id. [Back To Text](#)

⁵⁹ Treas. Reg. § 1.1398–1 to 1.1398–2 (1994). For an example of the harm to the estate resulting from the failure to include passive activity and at-risk activity losses and credits, see Richard M. Lipton, Proposed 1398 Regs. Raise Conflict Between Debtors and Bankruptcy Trustees, 79 J. Tax'n 12, 13 (July 1993). But see Shepard, supra note 47, at 142–45 (arguing that symmetry for abandonments is illusory). The regulations apply to all cases filed on or after November 9, 1992. Treas. Reg. 1.1398–1(f)(1) (1994). [Back To Text](#)

⁶⁰ See McQueen & Williams, supra note 47, § 23.06; Shepard, supra note 47, at 162–306. [Back To Text](#)

⁶¹ See Lipton, supra note 59, at 15. [Back To Text](#)

⁶² I.R.C. § 1398(a) (1988). [Back To Text](#)

⁶³ Id. [Back To Text](#)

⁶⁴ Id. §§ 1398(a), (b), 1399. [Back To Text](#)

⁶⁵ See Lipton, supra note 59, at 15. [Back To Text](#)

⁶⁶ Congressional Committee Reports recognized that the purpose of bankruptcy is to provide the ability for a debtor to begin anew his or her economic life. S. Rep. No. 1035, 96th Cong., 2d Sess. 24–25 (1980), reprinted in 1980 U.S.C.C.A.N. 7017, 7038. See generally Robert W. Van Amburgh, *Tax Considerations For An Individual Debtor Contemplating Bankruptcy*, Annals Bankr. L. 93, 121–28 (discussing bankruptcy estate's separate taxable entity status). [Back To Text](#)

⁶⁷ See Rubin, supra note 45, at 326. [Back To Text](#)

⁶⁸ See I.R.C. § 1398(d) (1988); see also 1A Collier on Bankruptcy ¶ 9.05 (Lawrence P. King ed., 15th ed. 1995); McQueen and Williams, supra note 47, at ch. 8 (discussing priority tax claims in bankruptcy). [Back To Text](#)

⁶⁹ See McQueen & Williams, supra note 47, at ch.8. [Back To Text](#)

⁷⁰ I.R.C. § 1398(c)(1) (1988); see also Rubin, supra note 45, at 326. [Back To Text](#)

⁷¹ I.R.C. § 1398(c)(2)–(c)(3) (1988). [Back To Text](#)

⁷² See Geilick, supra note 48, at 323–24. If the bankruptcy estate has gross income for the year of \$5,775 or more, it must file its own income tax return on Form 1041. Id. For a thorough treatment of a bankruptcy trustee's tax reporting and compliance duties, see McQueen and Williams, supra note 47, at ch. 17. [Back To Text](#)

⁷³ Van Amburgh, supra note 66, at 122.[Back To Text](#)

⁷⁴ I.R.C. § 1398(f)(2) (1988).[Back To Text](#)

⁷⁵ Id. § 1398(i). See Treas. Reg. § 1.1398-1 (1994) (governing reduction of passive activity losses and credits in individual's Title II case); Id. § 1.1398-2 (allowing reduction of § 465 losses). The IRS has been justifiably criticized for its delay in adding tax attributes to the § 1398 list. One distinguished commentator has pointed out items omitted from § 1398(g), including investment interest deductions, suspended S corporation losses, and percentage depletion carryovers. Lipton, supra note 59, at 13.[Back To Text](#)

⁷⁶ See Williams, Tax Consequences of Abandonment, supra note 12, at 49-50 (discussing trouble generated by failure to provide definition of "termination"); Shepard, supra note 47, at 245-47.[Back To Text](#)

⁷⁷ I.R.C. § 1399 (1988).[Back To Text](#)

⁷⁸ 11 U.S.C. §§ 541(a)(6)-(7) (1994); see also Priv. Ltr. Rul. 89-28-012 (Apr. 7, 1989) (separate entity rules do not apply to Chapter 12 estates).[Back To Text](#)

⁷⁹ See 11 U.S.C. § 541(a)(6) (excluding "proceeds, products, rents, or profits" from property of estate if earned by individual after case commences"); see also Williams, Federal Tax Consequences of Individual Debtor, supra note 13, at 1211 (analyzing § 541(a)(6) issues in individual debtor bankruptcy cases).[Back To Text](#)

⁸⁰ 11 U.S.C. § 541(a)(6) (1994) (including all, "proceeds, products, offspring, rents, or profits" in property of estate).[Back To Text](#)

⁸¹ For a full discussion of the tax issues for partnerships in bankruptcy, see Shepard, supra note 47, at 361-68.[Back To Text](#)

⁸² 26 C.F.R. § 29.142-4 (1943).[Back To Text](#)

⁸³ See In re Lister, 177 F. Supp. 372, 373 (E.D. Va. 1959). [Back To Text](#)

⁸⁴ See id. at 373 (holding that taxes incurred postpetition but not assessed prior to confirmation are obligations of debtor, therefore, Receiver properly filed Form 1065); In re Green, 182 B.R. 532, 533 (Bankr. C.D. Ill. 1995) (considering whether partnership may pay tax obligations of partners and observing that partnership files information return but is not a taxable entity); Kanna v. United States, 75-1 U.S. Tax Cas. (CCH) ¶ 9450 at 87,157 (D. Or. 1975) (distinguishing between trustees and receivers, the latter filing partnership returns).[Back To Text](#)

⁸⁵ See, e.g., Lister, 177 F. Supp. at 372-73 (finding that since Chapter 11 proceeding does not create two taxable entities, tax is rightly assessed to debtor as his obligation and receiver properly files Form 1065); Schindler v. Walker (In re Harbor Village Dev.), 95-1 U.S. Tax Cas. (CCH) ¶ 50,032 at 87,127-28 (Bankr. D. Mass. 1994) (concluding partnership is not separate taxable entity subject to federal income tax). But see In re Samoset Assoc., 14 B.R. 408, 412 n.8 and accompanying text (Bankr. D. Me. 1981) (citing In re Loer, 98 F.Supp. 402, 403 (E.D. Wis. 1950) as only case holding that partnership's filing of bankruptcy petition creates a separate taxable entity; Loer did not involve a partnership); Kanna v. United States, 75-1 U.S. Tax. Cas. (CCH) ¶ 9450 at 87,157 (D. Or. 1975) (distinguishing trustees and receivers, latter takes title to only portion of debtor's property and as such, files returns on Form 1065; trustees take title to all property and as fiduciaries, file Form 1041); see also Bavely v. IRS (In re Nab Foods Serv. Inc.), 25 B.R. 221, 223 (Bankr. S.D. Ohio 1982) (indicating that when Code requires filing of income tax return, person required to file return must pay tax); cf. Commons v. United States (In re Phase III, 730 Esplanade Ltd.), 80-1 U.S. Tax Cas. (CCH) ¶ 9353 at 83,908-909 (C.D. Cal. 1979) (finding no distinction between partnership cases under Chapter XI and those under XII; trustee properly filed Form 1065).[Back To Text](#)

⁸⁶ Preston v. United States (In re 4100 North High Ltd.), 3 B.R. 232, 235-39 (Bankr. S.D. Ohio 1980) (analyzing statutory construction of I.R.C. § 641 and concluding that partnership remains single taxable entity subsequent to

bankruptcy filing); *see also* In re Samoset, 14 B.R. 408, 411 (D. Me. 1981) (explaining that "estate" in § 641 is not defined in IRC but when read in *pari materia* with other sections, reveals that it does not encompass bankruptcy estates).[Back To Text](#)

⁸⁷ 28 U.S.C. § 960 (1988).[Back To Text](#)

⁸⁸ 4100 North High, 3 B.R. at 240. [Back To Text](#)

⁸⁹ Samoset, 14 B.R. at 412–14 (implying such conclusion by stating that partnership in bankruptcy is not an estate under I.R.C. § 641(a)).[Back To Text](#)

⁹⁰ I.R.C. § 6012 (1988).[Back To Text](#)

⁹¹ 28 U.S.C. § 960 (1988).[Back To Text](#)

⁹² Samoset, 14 B.R. at 414 (stating that a "true liquidating trustee" is not "conducting any business" and is not within scope of title 28 U.S.C. § 960).[Back To Text](#)

⁹³ *See supra* notes 85–92 and accompanying text.[Back To Text](#)

⁹⁴ Rev. Rul. 72–387, 1972–2 C.B. 632, 632; *see also* Priv. Ltr. Rul. 77–21–025 (Feb. 24, 1977) (agreeing with propositions of Rev. Rul. 72–387, I.R.C. § 6012(a)(3), and Treas. Reg. § 1.6012–3(a), wherein a trustee of individual in bankruptcy is required to file a Form 1041 for estate if gross income of estate is \$600 or more for taxable year); Rev. Rul. 73–94, 1973–1 C.B. 322 (holding that obligations of fiduciary of state law insolvent taxpayer's estate are consistent with those of bankruptcy trustee – they must file Form 1041 and pay taxes on behalf of estate).[Back To Text](#)

⁹⁵ Rev. Rul. 68–48, 1968–1 C.B. 301, 302; Kanna v. United States, 75–1 U.S. Tax Cas. (CCH) ¶ 9450 at 87,157 (D. Or. 1975) (stating that when trustee is appointed for a bankrupt partnership, title and possession of all of bankrupt's non-exempt property passes to trustee and new taxable entity is created) (citing Rev. Rul. 68–48, 1968–1 C. B. 301 at 302). *See generally* United States v. Grant, 971 F.2d 799, 80206 (1st Cir. 1992) (analyzing history of Doctrine of Relation Back in regard to vesting of title in trustee under Bankruptcy Act, in contrast with transfer of title to estate under Bankruptcy Code).[Back To Text](#)

⁹⁶ Williams, Tax Consequences of Abandonment, *supra* note 12, at 38–40; Shepard, *supra* note 47, at 126–161.[Back To Text](#)

⁹⁷ Bankruptcy Tax Act of 1980, Pub. L. No. 96–589, § 3(a)(1), 94 Stat. 3389, 3397.[Back To Text](#)

⁹⁸ I.R.C. § 1398 (1988).[Back To Text](#)

⁹⁹ Id. § 1399.[Back To Text](#)

¹⁰⁰ *See* 126 Cong. Rec. 33,914 (1980) (statement of Sen. Dole) (describing Bankruptcy Tax Act as product of years of effort addressing needs and interests of debtors, creditors, and bankruptcy practitioners alike).[Back To Text](#)

¹⁰¹ I.R.C. § 6031(a) (1988).[Back To Text](#)

¹⁰² Id. [Back To Text](#)

¹⁰³ Id. § 6063.[Back To Text](#)

¹⁰⁴ Id. § 6031(b) (known as a Form K–1).[Back To Text](#)

¹⁰⁵ See supra notes 18–23 and accompanying text.[Back To Text](#)

¹⁰⁶ II Int. Rev. Man. (Audit) (CCH) § 4583.21(14) (June 29, 1992) (providing that although commencement of bankruptcy does not create separate entity, trustee of partnership is required to file information returns); see also IRS Publication 908, Tax Information on Bankruptcy 19 (Rev. Sept 94).[Back To Text](#)

¹⁰⁷ See S. Rep. No. 1035, 96th Cong., 2d Sess. 26 (1980), *reprinted in* 1980 U.S.C.A.A.N. 7017, 7039; see also H.R. Rep. No. 833, 96th Cong., 2d Sess. 21 (1980) (indicating that pursuant to § 6031, trustee must file annual information returns).[Back To Text](#)

¹⁰⁸ See In re Virtual Network Servs. Corp., 98 B.R. 343, 344–46 (N.D. Ill. 1989) (stating that legislative history can be used to explain statutory text, not contradict it; further, statutory text is binding law under Constitution, not congressional staff's explanation of it), *aff'd*, 902 F.2d 1246 (7th Cir. 1990); see also Bruce Fein, *Scalia's Way*, 76 A.B.A. J. Feb. 1990 38, 38–41 (1990) (commenting that use of materials outside statutory text fails to provide required "constitutional consensus needed for law making"). Relying on Committee Reports that take a position inconsistent with the law is a highly risky practice, especially in light of the Supreme Court's and other courts' occasional reluctance to accept such material as authority. The situation described here seems to engage in this practice; the committee reports support a proposition inconsistent with the law enacted. Compare S. Rep. No. 1035 (stating that estate of partnership in bankruptcy is not separate taxable entity but requiring partnership trustee to file information returns anyway) with Rev. Rul. 68–48, 1968 1 C.B. 301 (stating that partnership is separate entity required to file fiduciary returns).[Back To Text](#)

¹⁰⁹ See Michael I. Saltzman, IRS Practice & Procedure, ¶¶ 3.02[1]–3.04[a], at 3–1 to 3–82 (3d ed. 1991) (providing list of IRS sources and explaining authority of each).[Back To Text](#)

¹¹⁰ Id. ¶ 3.02[4][a], at 3–9 to 3–10.[Back To Text](#)

¹¹¹ Id. ¶ 3.04[9], at 3–79 to 3–82 (reviewing reliability of oral communications made with IRS).[Back To Text](#)

¹¹² Id. ¶ 3.01, at 3–3, 3–4 (indicating varying forms and degrees of formality used by IRS in stating policy, rules and regulations).[Back To Text](#)

¹¹³ Id.[Back To Text](#)

¹¹⁴ 5 U.S.C. § 553 (1994). See also Saltzman, supra note 109, ¶ 3.02[1], at 3–21 to 3–24. [Back To Text](#)

¹¹⁵ See Saltzman, supra note 109, ¶ 3.03[2][b], at 3–21 to 3–24 (distinguishing regulations from rulings; latter is not promulgated by Treasury pursuant to A.P.A. standards of notice and public comment).[Back To Text](#)

¹¹⁶ Estate of Lang v. Commissioner, 613 F.2d 770, 776 (9th Cir. 1980) (dismissing Tax Commissioner's argument that Tax Court erred in not deferring to relevant revenue ruling); Stubbs, Overbeck & Assocs. v. United States, 445 F.2d 1142, 1146–47 (5th Cir. 1971) (stating that revenue rulings are merely opinion of IRS lawyer and must be treated accordingly); Sims v. United States, 252 F.2d 434, 438 (4th Cir. 1958) (finding administrative interpretations are only helpful guidelines and are not absolute rules of law), *aff'd*, 359 U.S. 108 (1959); In re Mehr, 153 B.R. 430, 434 (Bankr. D. N.J. 1993) (noting that IRS revenue rulings are persuasive at best and are not binding on the court); see generally Saltzman, supra note 116, ¶ 3.03[2][b], at 3–21 to 3–24 (discussing when ruling may carry greater weight even though not binding on the court).[Back To Text](#)

¹¹⁷ Saltzman, supra note 109, ¶ 3.03, at 3–19.[Back To Text](#)

¹¹⁸ Saltzman, supra note 109.[Back To Text](#)

¹¹⁹ Priv. Ltr. Rul. 85–09–038 (Nov. 30, 1984). But see In re Riverside–Linden Investment Co., 85 B.R. 107, 114–15 (Bankr. S.D. Cal. 1988) (finding Private Letter Ruling 85–09–038 unauthoritative because rulings lack force of law)

and may not be cited as precedent pursuant to I.R.C. § 6110(j)(3)), aff'd, 99 B.R. 439 (Bankr. 9th Cir. 1989), aff'd, 925 F.2d 320 (9th Cir. 1991) (per curiam).[Back To Text](#)

¹²⁰ Priv. Ltr. Rul. 85-35-015 (May 31, 1985).[Back To Text](#)

¹²¹ Id.[Back To Text](#)

¹²² Id.[Back To Text](#)

¹²³ Id.[Back To Text](#)

¹²⁴ See id.[Back To Text](#)

¹²⁵ In re Riverside-Linden Investment Co., 85 B.R. 107, 113 (Bankr. S.D. Cal. 1988) (stating that trustee is fiduciary of estate, not of partners); see also Schechter v. Illinois Dept. of Revenue (In re Markos Gurnee Partnership), 182 B.R. 211, 216-17 (Bankr. N.D. Ill. 1995) (indicating that trustee has duty to estate).[Back To Text](#)

¹²⁶ 11 U.S.C. § 723 (1994).[Back To Text](#)

¹²⁷ Treas. Reg. § 1.6012-1(a)(5) (amended 1986).[Back To Text](#)

¹²⁸ Id. § 1.6031-1 (amended 1978).[Back To Text](#)

¹²⁹ Id. § 1.6012; see also Id. §§ 1.6063-1(a) (1960), 601.504(a)(6) (amended 1992) (the filing of power of attorney does not authorize person designated therein to sign tax return unless permitted under Treas. Reg. § 1.6012-1(a)(5) and it is specifically authorized in the power of attorney); Marcello v. Commissioner, 414 F.2d 268, 270 (5th Cir. 1969) (stating that a power of attorney is required to execute another's tax return); Kercher v. United States, 409 F.2d 814, 816 (8th Cir. 1969) (same); First Interstate Bank of Nevada v. United States, 874 F. Supp 286, 291 (D. Nev. 1994) (requiring power of attorney in order to qualify as "recognized representative" of taxpayer).[Back To Text](#)

¹³⁰ Treas. Reg. § 601.504(b)(3) (amended 1992).[Back To Text](#)

¹³¹ Priv. Ltr. Rul. 85-35-015 (May 31, 1985).[Back To Text](#)

¹³² See supra notes 125-27.[Back To Text](#)

¹³³ Saltzman, supra note 109, ¶ 3.02[4], at 3-9; see, e.g., I.R.C. § 1502 (1988) (delegating authority to Secretary of Treasury to prescribe such regulations may be deemed necessary in order to prevent avoidance of tax liability). Treasury regulations fall into this category and thus have the full force and effect of law. Fitzgerald Motor Co., Inc. v. Commissioner, 508 F.2d 1096, 1100 (5th Cir. 1975); Anderson, Clayton & Co. v. United States, 562 F.2d 972, 978-79 (5th Cir. 1977), cert. denied, 436 U.S. 944 (1978).[Back To Text](#)

¹³⁴ Saltzman, supra note 109, ¶ 3.02[4][b], at 3-10 to 3-11; see also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that although rulings, interpretations, and opinions of an administrative body are not controlling upon the courts, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").[Back To Text](#)

¹³⁵ See generally, Saltzman, supra note 109, ¶ 3.01, at 3-3, 3-4 (describing reliability of each IRS position statement).[Back To Text](#)

¹³⁶ See supra notes 124-26 and accompanying text.[Back To Text](#)

¹³⁷ Treas. Reg. § 1.6012-1(a)(5) (amended 1986) (creating agency situation between agent and person liable for making return).[Back To Text](#)

¹³⁸ Priv. Ltr. Rul. 85-35-015 (May 31, 1985).[Back To Text](#)

¹³⁹ See Preston v. United States (In re 4100 North High), 3 B.R. 232, 238 (Bankr. S.D. Ohio 1980) (holding that filing of petition in bankruptcy by partnership or any of its partners does not terminate partnership for federal tax purposes); 11 U.S.C. § 346(c)(1) (1994) (partnership still taxed as though bankruptcy not commenced).[Back To Text](#)

¹⁴⁰ Arnold Kaufman, Remarks at the Conference of the National Association of Bankruptcy Trustees 19 (Sept. 14, 1991) (on file with authors).[Back To Text](#)

¹⁴¹ 28 U.S.C. § 960 (1988).[Back To Text](#)

¹⁴² Id. § 960 (including "individual" and "corporation", but omitting "partnership").[Back To Text](#)

¹⁴³ See Palmer v. Webster & Atlas Nat. Bank, 312 U.S. 156, 163 (deciding whether trustees were required to pay taxes assessed upon debtor's property, court noted that "[w]hat Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the enterprise."), reh'g denied, 312 U.S. 714 (1941); In re I.J. Knight Realty Corp., 501 F.2d 62, 66 (1974) (stating that "purpose of § 960 was to equalize competitive situations of operating businesses") (citing Palmer v. Webster Bank, 312 U.S. 156, 163 (1941)).[Back To Text](#)

¹⁴⁴ Uniform Partnership Act § 201 (1944) ("A partnership is an entity distinct from its partners."); I.R.C. § 701 (1948) (holding partnership not subject to income tax except as filed in partners separate or individual capacities).[Back To Text](#)

¹⁴⁵ See supra notes 27-30 and accompanying text.[Back To Text](#)

¹⁴⁶ I.R.C. § 1399 (1988); *see also*, II Int. Rev. Man. ¶ 4583.21(14) (June 29, 1992) ("No taxable entity results from commencement of a bankruptcy case involving a partnership or corporation.")[Back To Text](#)

¹⁴⁷ 28 U.S.C. § 960 (1988).[Back To Text](#)

¹⁴⁸ See Id. § 6001 (prescribes that every person liable for any tax imposed by the IRC shall make returns and comply with such rules and regulations as the secretary may from time to time prescribe).[Back To Text](#)

¹⁴⁹ Id. § 960.[Back To Text](#)

¹⁵⁰ Id.; I.R.C. § 6012 (1988) (listing persons required to make returns).[Back To Text](#)

¹⁵¹ In re Samoset Assocs., 14 B.R. 408 (Bankr. D. Me. 1981).[Back To Text](#)

¹⁵² Id. at 410 (citing I.R.C. § 6012 for lack of authority in regard to partnerships while providing clear responsibility for individuals, fiduciaries and corporations).[Back To Text](#)

¹⁵³ 99 B.R. 439 (Bankr. 9th Cir. 1989), aff'd, 925 F.2d 320 (9th Cir. 1991) (per curiam).[Back To Text](#)

¹⁵⁴ Id. at 446.[Back To Text](#)

¹⁵⁵ Id. at 442.[Back To Text](#)

¹⁵⁶ Yadkin Valley Bank & Trust Co. v. Northwestern Bank (In re Hutchinson), 132 B.R. 827, 831-834 (Bankr. M.D. N.C. 1991) (remanding issue of whether or not trustee had breached her fiduciary duties by failing to preserve property of estate to Bankruptcy Court), on remand sub nom., Yadkin Valley Bank & Trust Co., v. McGee, 819 F.2d 74 (4th Cir. 1987), aff'd in part, 5 F.3d 750 (4th Cir. 1993); accord In re Nevin, 135 B.R. 652 (Bankr. D. Haw. 1991) (holding that Bankruptcy Code requires trustee in Chapter 7 liquidation case to expeditiously liquidate property of

estate or abandon it), *rev'd*, No. 92 Civ. 718 (D. Haw Aug 3, 1993).[Back To Text](#)

¹⁵⁷ See generally Williams, *Tax Consequences of Abandonment*, *supra* note 12, at 40–42.[Back To Text](#)

¹⁵⁸ See Williams, *Tax Consequences of Abandonment*, *supra* note 12, at 40–42; Shepard, *supra* note 47, at 126–161.[Back To Text](#)

¹⁵⁹ Cf. In re Nevin, 135 B.R. 652 (Bankr. D. Haw. 1991) (ordering trustee of individual debtor–partner's Chapter 7 estate to abandon partnership interest due to potential adverse tax consequences), *rev'd*, No. 92 Civ. 718 (D. Haw. Aug. 3, 1993); In re Pflug, 146 B.R. 687 (Bankr. E.D. Va. 1992) (directing trustee to file federal income tax return containing gross income generated by dissolutions).[Back To Text](#)

¹⁶⁰ I.R.C. § 708(a) (1988); Treas. Reg. § 1.708–1(b)(1)(i) (1960).[Back To Text](#)

¹⁶¹ See In re McGowan, 95 B.R. 104 (Bankr. N.D. Iowa 1988) (finding trustee is divested of control of property when it is abandoned); Wallace v. Enriquez (In re Enriquez), 22 B.R. 934 (Bankr. D. Neb. 1982) (holding that trustee loses control after abandonment); In re Sutton, 10 B.R. 737, 739 (Bankr. E.D. Va. 1981) (holding that abandonment of asset by trustee places asset beyond reach and control of trustee).[Back To Text](#)

¹⁶² See Estes Hoyt v. Crake (In re Riverside–Linden Inv. Co.), 99 B.R. 439, 446 (Bankr. 9th Cir. 1989) (stating trustee's duty is simply to file informational tax returns for debtor partnership for period during which he is appointed), *aff'd*, 925 F.2d 320 (9th Cir. 1991) (*per curiam*); see also Daniel B. Bogart, *Liability of Directors of Chapter 11 Debtors in Possession: "Don't Look Back – Something May Be Gaining On You"* 68 Am. Bankr. L. J. 155, 186 (1994) (stating trustee's duty is to protect and preserve the property of estate).[Back To Text](#)

¹⁶³ See 11 U.S.C. § 704 (1994) (listing duties of trustee).[Back To Text](#)

¹⁶⁴ I.R.C. §§ 1501, 1502 (1988); Treas. Reg. § 1.1502–75(a)(2), (c), (d) (amended 1992).[Back To Text](#)

¹⁶⁵ I.R.C. § 1503 (1988); Treas. Reg. § 1.1502–11(a) (amended 1980).[Back To Text](#)

¹⁶⁶ 11 U.S.C. § 541(a) (1994); I.R.C. § 1399 (1988).[Back To Text](#)

¹⁶⁷ I.R.C. §§ 6031(a) (1988), 702(a), 703(a) (1988 & Supp. V 1993).[Back To Text](#)

¹⁶⁸ Id. § 6063 (1988).[Back To Text](#)

¹⁶⁹ 26 C.F.R. §301.7701–6 (1995) (stating that fiduciary includes trustees and refers to "a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest").[Back To Text](#)

¹⁷⁰ 11 U.S.C. § 346(c)(2) (1994).[Back To Text](#)

¹⁷¹ See I.R.C. §§ 6012(b)(3), 6062 (1988). As initially drafted, the Bankruptcy Code contained provisions which would have governed the taxation of bankruptcy estates for both state and federal purposes, including the requirement that trustees file partnership returns. These provisions were removed because they infringed upon the House Ways and Means Committee's constitutional authority to draft tax law, and apparently because of a dispute between members of the House Judiciary Committee and Senate Judiciary Committee. These provisions were later reinserted in the Code as finally adopted for study purposes only. The legislative history to the "Special Tax Provisions," §§ 346, 728 and 1146, clearly states that those provisions were intended to express the "policy" that the House Judiciary Committee felt should be applied in federal, state and local taxes, to be studied by the bench and bar in anticipation of the adoption of the BTA. See Pub. L. No. 96–589, 124 Cong. Rec. H32383 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards). Inasmuch as legislation resulting in the BTA was under consideration at the time of the adoption of the Bankruptcy Code, it must be presumed that Congress intended to omit those parts of the Bankruptcy Code's Special Tax Provisions which were not included in the BTA. See 126 Cong. Rec. S16491 (daily ed. Dec. 13, 1980) (statement of

Sen. Long).[Back To Text](#)

¹⁷² I.R.C. § 6063 (1988).[Back To Text](#)

¹⁷³ Id. § 6012(b)(3) (emphasis added).[Back To Text](#)

¹⁷⁴ Id. § 6063. In fairness, we must note that the instructions accompanying Form 1065 state: "If a . . . trustee in bankruptcy . . . controls the organization's property or business, that person must sign the return." Instructions for Form 1065 3 (1992), 2 1992 IRS Package X 53. These instructions, however, have no support in the law. Supra note 75 and accompanying text; *see also* McQueen & Williams, supra note 47, at 17.08.[Back To Text](#)

¹⁷⁵ *See Vaira v. Commissioner*, 444 F.2d 770, 777 (3d Cir. 1971) (treating filing of unsigned returns as failure to file return under Code).[Back To Text](#)

¹⁷⁶ I.R.C. § 6020(b) (1988).[Back To Text](#)

¹⁷⁷ Id. § 7207.[Back To Text](#)

¹⁷⁸ Id. § 7206(1).[Back To Text](#)

¹⁷⁹ Id. § 7206(2).[Back To Text](#)

¹⁸⁰ Id. §§ 6702(a), 6701(a).[Back To Text](#)

¹⁸¹ Because the partnership is required to file the Form 1065 return and because it must be signed by a partner, the real issue may be whether a trustee is a partner for tax purposes. The bankruptcy estate holds all property and interests in property and has the right to receive any profits, losses, or income. The trustee, however, is not a partner with the right to vote an interest or to share any postpetition partnership liabilities. *See* Rev. Rul. 77-137, 1977-1 C.B. 178 (finding that where partnership agreement provided that assignees of limited partners could not become substituted limited partners without written consent of general partners, but limited partners were allowed to irrevocably assign right to share in profits and losses of partnership and to receive all distributions to which limited partner would have been entitled, for federal income tax purposes such an assignee is treated as substitute limited partner). *See generally* Lewis R. Kaster & Jeffery K. Cymbler, *The Impact of a General Partner's Bankruptcy Upon the Remaining Partners*, 21 A.B.A. Real Prop., Prob. & Tr. J. 539 (1986).[Back To Text](#)

¹⁸² This is the case when a partnership files a return outside of bankruptcy. I.R.C. § 6031(a) (1988) (return of partnership income).[Back To Text](#)

¹⁸³ The *Handbook for Chapter 7 Trustees* requires trustees to file partnership returns when in fact no such requirement exists. *See* U.S. Dep't of Justice Executive Office for U.S. Trustees, *Handbook for Chapter 7 Trustees* 34-35 (April 1992). The handbook is prepared and distributed by the United States Trustees Executive Office, an arm of the United States Justice Department which represents the IRS in most tax litigation outside of the Tax Court.[Back To Text](#)

¹⁸⁴ I.R.C. § 6031(a) (1988) (requiring partnership to provide each partner or person with an interest in the partnership with information to be reported on the return on or before return is filed).[Back To Text](#)

¹⁸⁵ Stoumen v. Commissioner, 208 F.2d 903, 906 (3d Cir. 1953).[Back To Text](#)

¹⁸⁶ Id.[Back To Text](#)

¹⁸⁷ *See e.g., Commissioner v. Goldberger's Estate*, 213 F.2d 78, 81-83 (3d Cir. 1954); *see generally* McKee, supra note 14, ¶¶ 9.06[7], 10.01[1].[Back To Text](#)

¹⁸⁸ I.R.C. § 6229(a) (1988).[Back To Text](#)

¹⁸⁹ Siben v. Commissioner, 930 F.2d 1034, 1035–36 (2d Cir.), cert. denied, 502 U.S. 963 (1991); *see also* Charlton v. Commissioner, 61 T.C.M. (CCH) 3011, 3012 (1991), *aff'd*, 990 F.2d 1161 (9th Cir. 1993).[Back To Text](#)

¹⁹⁰ I.R.C. § 6229(c)(3) (1988).[Back To Text](#)

¹⁹¹ Id. § 6229(f); Treas. Reg. § 301.6231(c)7T(a) (1987).[Back To Text](#)

¹⁹² Id. § 6229(f); I.R.C. § 6501(a) (1988 & Supp. V. 1993).[Back To Text](#)

¹⁹³ Id. § 6503(h) (Supp. V 1993).[Back To Text](#)

¹⁹⁴ I.R.C. § 6503(h) (Supp. V 1993).[Back To Text](#)

¹⁹⁵ Id. § 6229(f) (1988).[Back To Text](#)

¹⁹⁶ Id. § 6503(h) (Supp. V 1993).[Back To Text](#)

¹⁹⁷ Id. § 6501. [Back To Text](#)

¹⁹⁸ Id. § 6502.[Back To Text](#)

¹⁹⁹ This oversight in legislative drafting has been identified and legislation was introduced which, if it had been adopted, would have suspended the running of the one year period for assessments on partnership items converted to nonpartnership items because of the partner's bankruptcy, effective as of the date of the adoption of the TEFRA partnership audit rules in 1982. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97–248, 96 Stat. 324. For an explanation of the bill, see Technical Explanation of the Tax Simplification Act of 1991 (H.R. 2777 and S. 1394) (JCS–10–91) § 213(b), June 28, 1991, *microformed on* CIS No. 91–j862–17 (Congressional Info Serv.). Another attempt to remedy this oversight was made in 1993; it too failed to become law. *Tax Simplification Act and Technical Corrections Act of 1993*, H.R. 3419, 103d Cong., 1st Sess., pt. 2, at 69–70 (1993).[Back To Text](#)

²⁰⁰ Travelers Ins. Co. v. Plaza Family Partnership (In re Plaza Family Partnership), 95 B.R. 166, 174 (E.D. Cal. 1989) (refusing to allow debtor to use cash collateral of estate to employ accountant for preparation of tax records); *see also* Massey v. United States (In re Cotswold Village Investors), No. 87–00846–SWC, LEXIS 88 TNT 235–23 (N.D. Ga. Sept. 13, 1988) (reversing itself as to trustee's duty to file return on behalf of debtor–partnership, referring to 11 U.S.C. § 1106(a)(6), and noting that filing of partnership returns in question would inure to benefit of general and limited partners). The court ordered that the Chapter 11 trustee may apply to the court for an order assessing the costs of preparing partnership income tax returns against the debtors' partners, cash collateral, or from any other source the court deemed appropriate. Id.[Back To Text](#)

²⁰¹ Plaza Family, 95 B.R. at 174.[Back To Text](#)

²⁰² *See* Gibson v. United States (In re Russell), 927 F.2d 413, 417 (8th Cir. 1991) (stating that tax refunds are part of bankruptcy estate); Bank of New England Old Colony v. Clark, 986 F.2d 600, 603 (1st Cir. 1993) (indicating that tax refund awarded to insolvent bank would flow to creditors).[Back To Text](#)

²⁰³ Estes & Hoyt v. Crake (In re Riverside–Linden Inv. Co.), 99 B.R. 439, 441 (Bankr. 9th Cir. 1989) (granting trustee authorization to enlist assistance of accounting firm to prepare informational returns), *aff'd*, 925 F.2d 320 (9th Cir. 1991) (*per curiam*).[Back To Text](#)

²⁰⁴ *See* Riverside, 99 B.R. at 441 (explaining that fee application included services other than preparation of the returns and not making issue of any delinquent returns). *But see* In re Samoset Assocs., 14 B.R. 408, 410 (Bankr. D. Me. 1981) (holding trustee of pre–Code bankruptcy case was not under any duty to file income tax returns for partnership estate–Internal Revenue Code provisions relied on are applicable to cases filed under the Bankruptcy Code). Cf. In re Mouradick, 153 B.R. 556, 558 (Bankr. E.D. Cal. 1993) (allowing administrative claim in individual

Chapter 11 case for accountant's fees for preparation of nondebtor partnership's income tax return in which debtor was partner, under theory that "liabilities of the debtors are presumably affected by the tax obligations arising from" partnership which distributed considerable funds to debtor).[Back To Text](#)

²⁰⁵ See generally 11 U.S.C. §§ 507(a)(1), 503(b) (1994).[Back To Text](#)

²⁰⁶ Travelers Ins. Co. v. Plaza Family Partnership (In re Plaza Family Partnership), 95 B.R. 166, 174 (E.D. Cal. 1989).[Back To Text](#)

²⁰⁷ Schindler v. Walker (In re Harbor Village Dev.), 95-1 U.S. Tax. Cas. (CCH) ¶ 50,032 at 87,127-28 (Bankr. D. Mass. 1994).[Back To Text](#)

²⁰⁸ See 11 U.S.C. § 503(a) (1994) (allowing entities to file requests for administrative expenses).[Back To Text](#)

²⁰⁹ I.R.C. § 6698(a), (b) (1988).[Back To Text](#)

²¹⁰ 11 U.S.C. §§ 109(a), 101(41) (1994).[Back To Text](#)

²¹¹ I.R.C. § 761(a) (1988).[Back To Text](#)

²¹² 11 U.S.C. § 541 (1994).[Back To Text](#)

²¹³ Id. § 101(3), (5), (41).[Back To Text](#)

²¹⁴ I.R.C. § 761(a) (1988).[Back To Text](#)

²¹⁵ Id. § 6031(a) (1988).[Back To Text](#)

²¹⁶ Id. § 6698(a), (c) (1988).[Back To Text](#)

²¹⁷ See supra part II.B.[Back To Text](#)

²¹⁸ 11 U.S.C. § 1106(a)(6) (1994); see Priv. Ltr. Rul. 85-09-038 (Nov. 30, 1984).[Back To Text](#)

²¹⁹ In re Alton, 81 B.R. 97, 99 (Bankr. M.D. Fla. 1987) (noting that partnership is separate entity from its components and although general partner is "legally liable for the debts of the partnership, this liability is only secondary, and the partnership . . . is the primary obligor"). The court indicated that administrative expenses must be actual and necessary in order to be afforded priority status. Moreover, administrative expenses and priorities are narrowly construed, otherwise, "all debts incurred by a partnership under Chapter 11 [would be] properly chargeable as administrative expenses against the estate of the individual general partner." Id. at 99. This logic clearly was not intended by Congress when the Code was enacted. Id. [Back To Text](#)

²²⁰ I.R.C. § 6031(a) (1988).[Back To Text](#)

²²¹ 11 U.S.C. § 723(a) (1994); H.R. Rep. No. 595, 95th Cong., 2d Sess. 381 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6337; S. Rep. No. 989, 95th Cong., 2d Sess. 95 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5881.[Back To Text](#)

²²² Schindler v. Walker (In re Harbor Village Dev.), 95-1 U.S. Tax Cas. (CCH) ¶ 50,032, at 87,127-28 (Bankr. D. Mass. 1994) (finding partners responsible for all taxes due on income generated from partnership). The court noted that commencement of a bankruptcy proceeding does not change the status of the partnership as a taxable entity. Id.[Back To Text](#)

²²³ I.R.C. § 6698(a) (1988).[Back To Text](#)

²²⁴ 11 U.S.C. § 723(a); I.R.C. § 6698(a), (c) (1988).[Back To Text](#)

²²⁵ 11 U.S.C. § 503(b)(1)(B)(i), (C) (1994).[Back To Text](#)

²²⁶ I.R.C. § 701 (1988); *see also* I.R.C. § 702 (1988 & Supp. V 1993) (providing that each partner should compute income tax separately).[Back To Text](#)

²²⁷ 11 U.S.C. § 507(a)(1) (1994).[Back To Text](#)

²²⁸ 156 B.R. 318 (Bankr. M.D. Fla. 1993).[Back To Text](#)

²²⁹ 160 B.R. 136 (Bankr. N.D. Ca. 1993), rev'd on other grounds, 64 F.3d 1292 (9th Cir. 1995).[Back To Text](#)

²³⁰ Hillsborough Holdings, 156 B.R. at 320; Towers, 160 B.R. at 139.[Back To Text](#)

²³¹ 11 U.S.C. § 507(a)(8)(A)(iii) (1994).[Back To Text](#)

²³² I.R.C. § 6698(a) (1988).[Back To Text](#)

²³³ 11 U.S.C. § 507(a)(8)(A) (1994).[Back To Text](#)

²³⁴ Id. § 507(a)(8)(G) (1994).[Back To Text](#)

²³⁵ H.R. Rep. No. 1445, 95th Cong., 2d Sess. 74–75 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7046, 7110.[Back To Text](#)

²³⁶ 11 U.S.C. § 726 (1994).[Back To Text](#)

²³⁷ Id. § 726(a)(1)–(4).[Back To Text](#)

²³⁸ Id. § 726(a)(4).[Back To Text](#)

²³⁹ Id. § 301.[Back To Text](#)

²⁴⁰ Id. § 303(h).[Back To Text](#)

²⁴¹ 11 U.S.C. § 303(g) (1994).[Back To Text](#)

²⁴² Id. § 726(a)(4).[Back To Text](#)

²⁴³ Id.[Back To Text](#)

²⁴⁴ Id. § 726(a)(6).[Back To Text](#)

²⁴⁵ Lopez–Stubbe v. Rodriguez–Estrada (In re San Juan Hotel Corp.), 847 F.2d 931, 936 (1st Cir. 1988) (holding trustees personally liable for breaches of fiduciary duty).[Back To Text](#)

²⁴⁶ *See supra* part II.B. (discussing reasons why trustee does not have to file returns for partnership).[Back To Text](#)

²⁴⁷ 11 U.S.C. §§ 346(c)(2), 728(b) (1994).[Back To Text](#)

²⁴⁸ *See supra* text accompanying notes 172–74.[Back To Text](#)

²⁴⁹ Priv. Ltr. Rul. 85–35–015 (May 31, 1985).[Back To Text](#)

²⁵⁰ 11 U.S.C. § 322(c) (1994).[Back To Text](#)

²⁵¹ In re Pflug, 146 B.R. 687 (Bankr. E.D. Va. 1992). The case is unusual not only because of the court's willingness to entertain a motion which it recognized was not properly before the court (the debtor was, in reality, seeking a declaratory judgment which is not permitted as discussed in the text), but also because it clearly illustrates the situation in which the trustee and the bankruptcy court may have misunderstood the difference between income from discharge of indebtedness and gain realized on the transfer of property in satisfaction of encumbering debt. Id. at 688. The court recognized that income from discharge of indebtedness is excluded from the bankruptcy estate's gross income, but failed to recognize that the estate may also have recognized gains on the foreclosures against the various partnerships' assets. Id. at 690. In *Pflug*, the debtor argued that the estate must report gross income generated by the dissolution of various partnerships and arising from the foreclosure of secured debts for less than the amount of their outstanding mortgages. Id. at 690. The court found that these events created COD income which may be excluded from the estate's gross income. Id. at 691. The court, however, made no mention of the probability that the debtor's basis was considerably less than the amount realized on the foreclosure, apparently the full amount of the debt satisfied, triggering the realization of gain. See Helvering v. Hammel, 311 U.S. 504 (1941) (holding no distinction between losses from forced sales and voluntary sales); Yarbro v. Commissioner, 737 F.2d 479, 486 (5th Cir. 1984) (finding "sale or exchange" includes abandonment of property subject to nonrecourse debt), cert. denied, 469 U.S. 1189 (1985); Millar v. Commissioner, 577 F.2d 212, 216 (3d Cir. 1978) (considering nonrecourse obligation as basis in calculation of amount realized in computing gain resulting from foreclosure of notes), cert. denied, 439 U.S. 1046 (1978). If the partnership debt was merely canceled, the court's interpretation of tax law was correct; however, the court stated that real estate assets were foreclosed upon for less than their outstanding mortgages. Pflug, 146 B.R. at 690 n.5. If the secured assets were foreclosed against in satisfaction of nonrecourse debt and the full amount of the debt satisfied was the amount realized, the difference between which and the partnership's basis in the property would measure the gain or loss realized by the partnership. 1A Collier on Bankruptcy, supra note 68,

¶ 13.02[6][d]; Shepard, supra note 47, at 79–104. If the partnership indebtedness was recourse and the partners remained liable for deficiencies after the foreclosure sale, the proceeds of the foreclosure sales are the amounts realized used to determine whether the partnership realized gains or losses, separately stated distributive shares of which must be reported on each partners individual tax return at the end of the partnership year in which the foreclosure sales took place. See Aizawa v. Commissioner, 99 T.C. 197 (1992), aff'd, 29 F.3d 630 (1994); Rev. Rul. 90–16, 1990–1 C.B. 12. Although not likely, it is possible the *Pflug* court reached the right result. However, the Court's opinion is severely damaged by its failure to address the gain issue and, therefore, the case is of no value as precedent.[Back To Text](#)

²⁵² 11 U.S.C. § 505(a) (1994); Allis–Chalmers Corp. v. Goldberg (In re Hartman Material Handling Sys., Inc.), 141 B.R. 802, 812–13 (Bankr. S.D.N.Y. 1992) (stating neither § 505 nor any other provision in the Code provides authority for declaratory judgments regarding debtors taxes).[Back To Text](#)

²⁵³ 28 U.S.C. § 2201 (1988 & Supp. V 1993).[Back To Text](#)

²⁵⁴ IRS v. Sulmeyer (In re Grand Chevrolet, Inc.), 153 B.R. 296 (Bankr. C.D. Cal. 1993) (finding no "actual controversy" existed to be decided, and, therefore, Chapter 11 trustee's request for declaratory judgment that consolidated debtor estates could file consolidated federal income tax return was not ripe for judicial determination; trustee had not attempted to file returns, and it did not appear that IRS denied affirmatively tax status sought by trustee in any way other than maintaining that order of substantive consolidation of estates did not make various estates members of "affiliated group"); Kilen v. United States (In re Kilen), 129 B.R. 538, 543 (Bankr. N.D. Ill. 1991) (stating that § 505 proceedings are not exempt from the case or controversy requirement despite special treatment afforded by Declaratory Judgment Act).[Back To Text](#)

²⁵⁵ As provided in the Bankruptcy Code, property of the estate is used to pay the claims of creditors. Since the I.R.C. provides that a partnership (until terminated pursuant to federal tax law) shall make a return for each taxable year, the partnership would be responsible for reporting any income to the estate.[Back To Text](#)

²⁵⁶ See I.R.C. § 6223(b) (1988) (defining the tax matters partner as the one to whom the Commissioner of the IRS is required to send notices).[Back To Text](#)

²⁵⁷ I.R.C. § 6109 (1988); Treas Reg. 301.6109-1(d)(2), 1(a)(1) (1967).[Back To Text](#)

²⁵⁸ See 11 U.S.C. § 346(b)(1) (1994) (stating, *inter alia*, that any distributive share of income from partnership after commencement of bankruptcy action is income of estate).[Back To Text](#)

²⁵⁹ Id. § 505(a)(1) (stating that trustee may request judicial determination of amount or legality of any fine, tax or penalty relating to a tax).[Back To Text](#)

²⁶⁰ See O'Neil v. IRS (In re O'Neil), 140 B.R. 263, 265 (N.D. Cal. 1992) (holding that court may determine amount or legality of tax against estate and may also determine respective liabilities of the parties, of bankruptcy estate and of debtor), aff'd, 24 F.3d 248 (9th Cir. 1994); accord In re K-Fabricators, Inc., 135 B.R. 654, 658 (Bankr. W.D. Wash. 1992); In re Five Dames, Inc., 14 B.R. 143, 143 (Bankr. S.D. Fla. 1981). Therefore, since debtor's tax situation may be adversely affected by the outcome, it follows that he should be able to participate.[Back To Text](#)

²⁶¹ See text accompanying note 169; see also 11 U.S.C. § 323 (1994) (stating that trustee is representative of estate). But see Martin-Trigona v. Ferrari (In re Whet, Inc.), 750 F.2d 149, 149 (1st Cir. 1984) (recognizing trustee is representative of both debtor and creditors); Nuckolls v. Dominion Bank (In re Nuckolls), 67 B.R. 855, 858 (Bankr. W.D. Va. 1986) (noting trustee's duty to manage estate so as to give creditors greatest possible return, and debtor any surplus).[Back To Text](#)

²⁶² See supra note 27 and accompanying text (indicating commencement of bankruptcy does not affect status of partnership and, therefore, partnership must continue to file return).[Back To Text](#)

²⁶³ I.R.C. § 1399 (1988); II Int. Rev. Man. ¶ 4583.21(14) (June 29, 1992).[Back To Text](#)

²⁶⁴ See supra notes 31-36 and accompanying text (providing property of estate shall be used to satisfy claims against estate).[Back To Text](#)

²⁶⁵ See generally 11 U.S.C. §§ 704, 1106 (listing duties of trustee under Chapter 7 and 11 and not mentioning managerial powers). But see § 1108 (explaining unless otherwise ordered, trustee may operate business).[Back To Text](#)

²⁶⁶ See Schindler v. Walker (In re Harbor Village Dev.), 95-1 U.S. Tax Cas. (CCH) ¶ 50,032, at 87,

127-28 (Bankr. D. Mass. 1994) (reasoning since commencement of bankruptcy case does not create a separate tax entity, individual partners remain liable for payment of any postpetition taxes by virtue of "flow through" character of a partnership).[Back To Text](#)

²⁶⁷ See supra notes 209-24 and accompanying text (explaining that estate is not created until filing of a bankruptcy petition and therefore any tax assessed against estate is postpetition penalty payable by partners of debtor-partnership).[Back To Text](#)

²⁶⁸ I.R.C. § 6031 (1988).[Back To Text](#)

²⁶⁹ S. Rep. No. 1035, 96th Cong. 2d Sess. 25 (1980), reprinted in 1980 U.S.C.C.A.N. 7017, 7039.[Back To Text](#)

²⁷⁰ See supra note 119 and accompanying text (referring to Priv. Ltr. Rul. 85-09-038 which stated that a trustee is not obligated to file delinquent partnership returns); see also In re Samoset Assocs., 14 B.R. 408, 410 (Bankr. D. Me. 1981) (holding that no requirement in the IRC for trustee to file debtor-partnership's return).[Back To Text](#)

²⁷¹ See supra notes 122–25 and accompanying text; see also Nicholas v. United States, 384 U.S. 678, 686 (1966) (requiring trustee to seek out and pay postpetition taxes).[Back To Text](#)

²⁷² Priv. Ltr. Rul. 85–09–038 (Nov. 30, 1984).[Back To Text](#)

²⁷³ Id.[Back To Text](#)

²⁷⁴ Priv. Ltr. Rul. 85–35–015 (May 31, 1985); see also 1A Collier on Bankruptcy, supra note 68,

¶ 10.03[4] (noting that IRC impliedly provides for amended returns by its publication of amended return forms 1040X and 1120X); I.R.C. § 6501(c)(7) (1988) (providing rule for extending time to file amended return). But see Badaracco v. Commissioner, 464 U.S. 386 (1994) (holding that filing of amended return after fraudulent return in no way limits fraudulent nature of initial return).[Back To Text](#)

²⁷⁵ II Int. Rev. Man. (Audit) (CCH) § 4583.21(14) (June 29, 1992); see also IRS Publication 908, Tax Information on Bankruptcy 19 (Rev. Sept. 1994).[Back To Text](#)

²⁷⁶ See Preston v. United States (In re 4100 North High Ltd.), 3 B.R. 232, 238 (Bankr. S.D. Ohio 1980) (stating partnership exists subsequent to filing petition for winding up of affairs).[Back To Text](#)

²⁷⁷ Supra notes 24–32 and accompanying text.[Back To Text](#)

²⁷⁸ See generally I.R.C. §§ 6031, 6063 (1988).[Back To Text](#)

²⁷⁹ See id. §§ 6012, 6012(b)(3), 6062 (1988).[Back To Text](#)

²⁸⁰ See United States v. State Farm Fire & Casualty Co. (In re Joplin), 882 F.2d 1507, 1508 (10th Cir. 1989) (finding that trustee has duty to file individual returns).[Back To Text](#)

²⁸¹ See I.R.C. § 6012(b)(3), (4) (1988) (providing that fiduciary shall file returns for individual and corporation). But see I.R.C. § 6031(a) (1988) (stating that partnership will file tax returns, with no mention of fiduciary's doing so).[Back To Text](#)

²⁸² I.R.C. § 6031(a) (1988).[Back To Text](#)

²⁸³ Id. § 6062.[Back To Text](#)

²⁸⁴ Id. § 6063.[Back To Text](#)

²⁸⁵ Id. [Back To Text](#)

²⁸⁶ See supra note 162 and accompanying text (stating that trustee cannot be responsible for reporting taxable events outside the estate).[Back To Text](#)

²⁸⁷ See I.R.C. § 6063 (1988) (requiring partner to sign return).[Back To Text](#)