American Bankruptcy Institute Law Review

Volume 3 Number 2 Winter 1995

INTRODUCTION

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This issue of the *American Bankruptcy Institute Law Review* continues the tradition of the *Law Review* of focusing on one theme and developing issues within that theme of current interest and great importance. Again, the *Law Review* has assembled a cast of first−rate authors that represent the many constituencies of the American Bankruptcy Institute: academics, accountants, government lawyers, private practitioners, and law students. The articles follow general themes concerning federal, state, and local tax issues in the bankruptcy context, not only analyzing the issues as framed under present law, but also suggesting specific changes.

Among the many bankruptcy taxation subjects included in this issue are the tax compliance duties of bankruptcy trustees, the designation of trust fund tax payments pursuant to a Chapter 11 liquidation plan, the impact on business of the repeal of the stock−for−debt exception to the recognition of cancellation of indebtedness income, the contours of the bankruptcy estate, the jurisdiction of bankruptcy courts to decide tax issues, the legitimacy of a Congressional waiver of state sovereign immunity, and the nondischargeability of tax claims in bankruptcy.

This issue covers a wide, but related range of topics, reflecting the varied nature of bankruptcy taxation. Its thoughtful articles should serve to not only open debate, but also as a useful tool of research. A brief description of the articles follow.

Bankruptcy Commissioner, academic, and practitioner James I. Shepard and I address a recurring issue in partnership Chapter 7 bankruptcies. Much confusion surrounds the duty of a Chapter 7 trustee to file federal information returns on behalf of the debtor partnership. The Internal Revenue Service asserts the position that a trustee has such duty, even though present law strongly suggests otherwise. We conclude no such duty exists and propose modifications that accommodate the interests of the IRS, trustee, creditors of the bankruptcy estate, and partners.

Bryan T. Camp, an attorney with the IRS, weighs in on the difficult issues posed by the Supreme Court's opinion in *United States v. Energy Resources, Inc.* [1] Mr. Camp provides a powerful critique on the extension of *Energy Resources* to Chapter 11 liquidating plans. In particular, he is critical of the ex post designation of trust fund tax payments as ordered by the court in *IRS v. Creditors Committee (In re Deer Park, Inc.)*. [2] Further, the article provides an excellent review of trust fund tax collections.

Professors Grant Newton and Paul Wertheim have contributed a wonderful article on the impact from the repeal [3] of the stock−for−debt exception to the recognition of cancellation of indebtedness income. [4] Observing that the repeal was inserted into the legislation without public hearings or debate, the authors present some hard evidence that the repeal's revenue−generating ability was greatly overstated. This empirical study examined 142 public companies that had confirmed plans during 1988−1992. The authors conclude that $100 million in tax savings was enjoyed by these debtors because of the exception. But repeal and theoretical recapture of these amounts represent only about fifteen percent of the $622 million increase in tax revenues projected under the 1993 Act. If the congressional estimates are accurate, the authors assert that the shortfall must be made up from mostly small companies seeking reorganization; debtors least likely to afford the tax. The enjoyment of this article is not only found in the lucid treatment of the concepts, but also in the author's ability to weave data into their cogent arguments against the repeal of the stock−for−debt exception.

Michael A. Urban, an attorney with Price Waterhouse, addresses the scope of the Supreme Court's opinion in *Patterson v. Shumate*. [5] In *Patterson*, the Court held that "applicable nonbankruptcy law" is not limited to state law and that an ERISA−mandated anti−alienation provision satisfies the literal terms of section 541(c)(2) of the Bankruptcy Code, thus excluding from the bankruptcy estate an individual's interest in his ERISA−qualified retirement plan. Mr. Urban provides a careful analysis of *Patterson* and suggests that its holding is narrower than many of us might have initially suspected.

Donald D. Haber, an attorney with the FDIC, takes on the controversial issue of whether a bankruptcy court has the power to declare the federal tax consequences of a confirmed plan. After carefully unpacking the law on jurisdiction as it existed prior to the enactment of the Bankruptcy Code, Mr. Haber squarely confronts the maze of relevant jurisdictional provisions under the Bankruptcy Code and the Declaratory Judgment Act. Mr. Haber ultimately concludes that a bankruptcy court presently possesses the power to declare the federal tax consequences of a confirmed plan; a controversial but well thought out position on the matter.

The two student notes in this issue are worth careful attention. The first, by Loren F. Levine, addresses a challenging federalism question that directly impacts on many bankruptcy issues: whether Congress has the power to waive sovereign immunity under the Bankruptcy Code on behalf of the states. Ms. Levine's thorough account reaches a controversial climax to be sure. The second, by Lynn Murtha, tackles one of the most difficult issues concerning the dischargeability of tax claims in bankruptcy: the contours of the exception from discharge of taxes resulting from a willful attempt to evade or defeat a tax. Ms. Murtha presents a carefully researched and compelling account that under present law, the willfulness requirement under section 523(a)(1)(C) must be interpreted by reliance on the criminal as opposed to the civil standard of willfulness.

In closing, I want to thank a few folks that made this issue possible. I have been deeply impressed by the quality and dedication of the *Law Review* staff and, in particular, the professionalism exhibited by their editorial board. Salute.

Thanks is also in order to Professor Robert Zinman, the faculty advisor to the *Law Review* at St. Johns, the Advisory Board, the contributing authors, and the leadership of the ABI. The tax aspects of bankruptcy are too often neglected in the formal literature of bankruptcy law. This issue begins the reversal of that situation.

Consistent with the fine tradition of the *Law Review*, we open the issue with an entertaining and thoughtful roundtable discussion on the issues posed by the interface of tax law with bankruptcy law and policy. All the best.

FOOTNOTES:

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[1] 495 U.S. 545 (1990).Back To Text

[2] 10 F.3d 1478 (9th Cir. 1993).Back To Text

[3] The statutory stock−for−debt exception was repealed by the Omnibus Budget Reconciliation Act of 1993.Back To Text

[4] *See* 11 U.S.C. §108.Back To Text

[5] 505 U.S. 753 (1992).Back To Text