

10TH CIRCUIT CONTROLLING CASE LAW - TAX LAW<sup>1</sup>

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The Bankruptcy code's stamp-tax exemption does not apply to transfers made before a plan is confirmed under Chapter 11. Because § 1146(a) affords a stamp-tax exemption only to transfers made pursuant to a Chapter 11 plan that has been confirmed, the provision may not be used to avoid a state's stamp taxes prior to plan confirmation. Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 128 S.Ct. 2326 (2008).

A distribution from a corporation is taxable if it is a dividend or a gain on the exchange or sale of stock; conversely, it is not taxable if it is a return of capital less than the shareholder's basis. One element of tax evasion is the existence of a tax deficiency. The intent of the corporation or the taxpayer is irrelevant. Under the tax code, §§ 301 and 316(a). "the tax consequences of a 'distribution by a corporation with respect to its stock' depend, not on anyone's purpose to return capital or to get it back, but on facts wholly independent of intent: whether the corporation has earnings and profits, and the amount of the taxpayer's basis for his stock." Boulware v. United States, 128 S.Ct. 1169 (2008).

The Commerce and Due Process Clauses impose distinct but parallel limitations on a State's power to tax out-of-state activities, and each subsumes the "broad inquire" whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. Because the taxpayer here did business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. Under the unitary business principle developed to answer that question, a State need not isolate the intrastate income-producing activities from the rest of the business, but may tax an apportioned sum of the corporation's multistate business if the business is unitary. Meadwestvaco v. Illinois Dept. Of Rev., 128 S.Ct. 1498 (2008).

Taxpayers must comply with the Tax Code's refund scheme before bringing suit, including the filing of a timely administrative claim. The limitation period found in the Revenue Act, rather than the limitation period found in the Tucker Act, applies to tax refund actions. The Code's refund scheme would have no meaning whatever if taxpayers failing to comply with it were nonetheless allowed to bring suit subject only to the Tucker Act's longer time bar. U.S. v. Clintwood Elkhorn Mining Co., 128 S.Ct. 1511 (2008).

26 U.S.C. § 6404(e)(1) permits the Secretary of the Treasury to abate some or all of the interest due on unpaid taxes if the assessment of interest is due to unreasonable error or delay on the part of the Internal Revenue Service. The Tax Court provides the exclusive

forum for judicial review of a refusal to abate interest under § 6404(e)(1). Hink v. United States, 127 S.Ct. 2011 (2007).

If a taxpayer fails to challenge an IRS levy on its property within the nine-month period provided in 26 U.S.C. § 7426(a)(1), the taxpayer may not later challenge the levy through an action for a tax refund under 28 U.S.C. § 1346(a)(1), which has a longer limitation. Congress provided the shorter, and more specific, limitations period for levies because it is important to get such controversies decided quickly. EC Term of Years Trust v. United States, 127 S.Ct. 1763 (2007).

The IRS need only assess taxes against the partnership in order to extend by 10 years, the statute of limitations for collection against each individual partner who might be jointly and severally liable for the debts of the partnership. 26 U.S.C. § 6501(a). United States v. Galletti, 542 U.S. 114, 124 S.Ct. 1548 (2004).

The three year lookback period found in 507(a)(8)(A)(i) is a limitations period subject to traditional principles of equitable tolling. The three year period is tolled during the pendency of a prior bankruptcy petition regardless of petitioners good faith or intentions. Young v. United States, 122 S. Ct. 1036 (2002).

Back wages are subject to FICA and FUTA taxes by reference to the year the wages are in fact paid. United States v. Cleveland Indians Baseball Co., 121 S. Ct 1433 (2001).

When substantive law creating a tax obligation puts the burden of proof on a taxpayer, the burden of proof on the tax claim in bankruptcy court remains where the substantive law put it. Rule 3001 does not address the burden of proof issue when a trustee disputes a claim, thus Rule 3001 provides no additional guidance to the issue of who must carry the burden of proof. Raleigh v. Illinois Dept. of Revenue, 120 S. Ct. 1951 (2000).

Under 26 U.S.C. §§ 6321 and 6331(a) the government may impose a lien on “property” or “rights to property” belonging to the taxpayer. The language is broad and reveals on its face that congress meant to reach every interest in property that a taxpayer might have. When Congress so broadly uses the term “property” we recognize that the Legislature aims to reach “every species of right or interest protected by law and having an exchangeable value.” Drye v. United States, 120 S. Ct. 474 (1999).

31 U.S.C. § 3713(a) which provides that a Government claim shall be paid first when a decedent's estate cannot pay all of its debts, does not require that a federal tax claim be given priority over a judgment creditor's perfected lien on real property. An unrecorded federal tax lien does not have priority over a preexisting judgment lien created by an earlier recording of the judgment. The Tax Lien Act 26 U.S.C.A. § 6323(a), rather

than the federal priority statute 31 U.S.C.A. § 3713(a) is the governing statute when a debtor's estate cannot pay all of its debts. The bankruptcy law provides an additional context in which another federal statute was given effect despite the priority statute's literal, unconditional text providing that the Government "shall be paid first." As such, the priority Act and the bankruptcy laws were to be regarded as *in pari materia*, and both were unqualified as neither contained any qualification, none could be interpolated. There are sound reasons for treating the Tax Lien Act of 1966 as the governing statute when the Government is claiming a preference in the insolvent estate of a delinquent taxpayer. United States v. Estate of Romani, 523 U.S. 517, 118 S. Ct. 1478 (1998).

Section 4971 of the Internal Revenue Code, which imposes a 10% tax on unpaid pension plan contributions is not an "excise tax" within the meaning of § 507(a)(7)(E). The categorical § 510(c) subordination of the government's claims under IRS § 4971 and is beyond the scope of the court's judicial authority. U.S. v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 116 S. Ct. 2106 (1996).

A bankruptcy court may not equitably subordinate claims on a categorical basis in derogation of Congress's priorities scheme. IRS penalties may not be equitably subordinated from their §§ 503(b)(1)(C) and 507(a)(1) priorities on a categorical basis. The language of § 510(c), principals of statutory construction, and legislative history indicate Congress's intent in its 1978 revision of the Code to use the existing doctrine of equitable subordination as the starting point for deciding when subordination is appropriate. The opinion is silent re whether there is a need to find creditor misconduct before a claim may be equitably subordinated. United States v. Noland, 116 S. Ct. 1524 (1996).

The sale of a ticket in the State of Oklahoma for bus travel from Oklahoma to another state has sufficient nexus to Oklahoma to be viewed as a local transaction subject to Oklahoma sales tax which does not contravene the Commerce Clause. Oklahoma Tax Com'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995).

A tax is not immune from double jeopardy scrutiny simply because it is a tax. If the tax is a form of punishment, then double jeopardy protections apply. Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994).

A trustee appointed pursuant to a confirmed Chapter 11 plan must file the returns that the corporate debtors would have filed had the plan not assigned their property to the trustee. Even if § 1141(a) binds creditors of the corporate and individual debtors with respect to claims that arose before confirmation, they do not bind the United States or any other creditor with respect to postconfirmation claims. Holywell Corp. v. Smith, 503 U.S. 47, 112 S. Ct. 1021 (1992).

26 U.S.C. § 7201 states that “[a]ny person who willfully attempts in any manner to evade or defeat any tax ... or the payment thereof shall ... be guilty of a felony....” Being a specific intent crime, the government is required to prove intent, in this case willfulness by proving that the law imposed a duty on the defendant, that the defendant knew of the duty, and that he voluntarily and intentionally violated that duty. Cheek v. United States, 498 U.S. 192 (1991).

Under common-law principles, a trust is created *in property*; a trust therefore does not come into existence until the settlor identifies an ascertainable interest in property to be the trust res. A 26 U.S.C. § 7501 trust is radically different from the common-law trust. § 7501 creates a trust in an abstract "amount" - a dollar figure not tied to any particular assets - rather than in the actual dollars withheld. Common-law tracing rules are thus unhelpful in the case of a § 7501 trust issue. Congress expected that the IRS would have to show some connection between the § 7501 trust and the assets sought to be applied to a debtor's trust-fund obligations. The IRS cannot exclude funds from the estate if it cannot trace them to § 7501 trust property. The debtor's act of voluntarily paying its trust-fund tax obligation is alone sufficient to establish the required nexus between the "amount" held in trust and the funds paid. Any voluntary prepetition payment of trust-fund taxes out of the debtor's assets is not a transfer of the debtor's property and is not avoidable pursuant to § 547. This rule applies to both funds placed in designated tax withholding accounts as well as funds paid from debtor's general account. Begier v. I.R.S., 496 U.S. 53, 110 S. Ct. 2258 (1990).

§ 1123(b)(5) and § 105 are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships. The bankruptcy court has the authority to order the IRS to apply tax payments to offset trust fund obligations where it concludes that the action is necessary for a reorganization's success. U.S. v. Energy Resources Co., Inc., 495 U.S. 545, 110 S. Ct. 2139 (1990).

Whatever immunity the bankruptcy estate once enjoyed from taxation on its operations has long since eroded. There is now no constitutional impediment to the imposition of a sales tax or use tax on a liquidation sale. The intergovernmental tax immunity doctrine does not proscribe a tax on a bankruptcy estate arising from the liquidation sale. A court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed. Cal. State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 109 S. Ct. 2228 (1989).

Once a court determines that property rights exist under state law, federal law determines the consequences of those rights, including the priority of tax liens versus other claims against the property. U.S. v. National Bank of Commerce, 472 U.S. 713, 722 (1985).

Section 541(a)(1)'s scope is broad. Section 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. The estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition, including property seized pursuant to a valid IRS tax lien. Section 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings. The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession. United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).

The liability of a debtor under Internal Revenue Code § 6672 is nondischargeable under Bankruptcy Act § 17(a)(1)(e). The liability based upon the corporation's failure to pay withholding taxes is a nondischargeable tax debt rather than a dischargeable penalty. United States v. Sotel, 436 U.S. 268, 274 (1978).

Withholding taxes due on the trustee's postpetition payment of prepetition priority wage claims were entitled to be treated ratably with the wage priority of which they were a part rather than as an administrative expense or a prepetition tax claim. Otte v. United States, 419 U.S. 43, 56-58 (1974).

The trustee in a liquidating bankruptcy case is under an obligation to file returns for estate taxes, even though the taxes themselves were incurred by the debtor in possession during the pendency of the Chapter XI arrangement proceeding. Nicholas v. United States, 384 U.S. 678, 693 (1966).

A trustee's strong arm power, read together with Internal Revenue Code § 6323, will defeat a federal tax lien that was unrecorded on the petition date. United States v. Speers, 382 U.S. 266, 275 (1965).

Congress clearly intended that personal liability for unpaid tax debts survive bankruptcy. The general humanitarian purpose of the Bankruptcy Act provides no reason to believe that Congress has a different intention with regard to personal liability for the interest on such debts. The general rule for liquidation of the bankruptcy estate has long been that a creditor will be allowed interest only to the date of the petition in bankruptcy. Bruning v. United States, 376 U.S. 358, 361 (1964).

Congress used the words "judgment creditor" in § 3672 in the usual, conventional sense of a judgment of a court of record. We do not think Congress had in mind the action of taxing authorities who may be acting judicially where the end result is something in the nature of a judgment. U.S. V. Gilbert Associates, Inc., 345 U.S. 361 (1953).

The bankruptcy court may exercise jurisdiction over and constitutionally determine

proof and allowance of state tax claims. Gardner v. New Jersey, 329 U.S. 565,572, 580 (1947).

The general rule when a tax return is unsigned is that it is invalid. Lucas v. Pilliod Lumber Co., 281 U.S. 245 (1930).

Section 6662(a) of the Internal Revenue Code imposes a 20 percent accuracy-related penalty on the portion of the underpayment of tax attributable to negligence or disregard of rules or regulations. The “negligence” contemplated by the statute is any failure to make a reasonable attempt to comply with the provisions of the tax law. 6662(c). Negligence is defined as the lack of due care or failure to do what a reasonable or ordinarily prudent person would do under the circumstances. Under § 6664(c)(1), however, no penalty will be imposed if it is shown that there was a reasonable cause for such underpayment and the taxpayer acted in good faith with respect to such underpayment. Barrett v. United States, 561 F.3d 1140 (10<sup>th</sup> Cir. 2009).

The value of a charitable contribution of property, and thus the value that can be deducted from an income tax return, is reduced by the amount of gain which would not have been long term capital gain if the property had been sold by the taxpayer at its fair market value. 26 U.S.C.S. § 170(e)(1)(A). Thus, unless the property is a capital asset providing long term capital gain, the property qualifies as ordinary income and a taxpayer’s deduction is limited to his cost or basis in the property. Two requirements must be met to claim a deduction for long term capital gain. First, the taxpayer must have owned the property for more than one year. Second, the property must meet the statutory definition of a capital asset. See 26 U.S.C. § 1221(a). Jones v. Commissioner, 560 F.3d 1196 (10<sup>th</sup> Cir. 2009).

If an employer withholds payroll taxes (also known as “trust-fund taxes”), but fails to pay them over to the government, the employee is nevertheless credited with having paid the taxes, and the government may not require any additional payment from the employee. The IRS may then effect payment of the withhold taxes from the employer via 26 U.S.C. § 6672. Smith v. United States, 555 F.3d 1159 (10<sup>th</sup> Cir. 2009).

The built-in gain provisions of 26 U.S.C. § 1374 were designed to prevent a taxpayer from using a subchapter S election to avoid corporate tax on gains attributable to periods when the taxpayer was a C corporation, and thus subject to entity-level tax. An item of income is built-in under Tres. Reg. § 1.1374 - 4(b)(1) if the S corporation had the right to receive the income prior to electing S-corporation status, even if the corporation had not actually or constructively received the income at that point. MMC Corp. v. Commissioner, 551 F.3d 1218 (10<sup>th</sup> Cir. 2009).

A properly filed tax lien generally attached to a delinquent taxpayer's property and rights to that property and remains attached, even if the property is transferred to a third party, until the lien is satisfied or becomes unenforceable by reason of lapse of time. 26 U.S.C. §§ 6321 and 6322. Section 7425 requires notice of the sale of such property must be provided to the Secretary of Treasury "in writing ... not less than 25 days prior to such sale." 26 U.S.C. § 7425(c)(1). Congress, in enacting § 7425(b), intended federal law to apply when the government fails to receive notice of a nonjudicial sale. A federal tax lien remains undisturbed by a nonjudicial sale unless the sell complies with the notice requirement found under § 7425. Russell v. Unites States, 551 F.3d 1174 (10<sup>th</sup> Cir. 2008).

Generally, the taxpayer bears the burden of proof on all issues presented in a case. See 26 U.S.C. § 7453; Tax Court Rule 142(a)(1). If, however, the taxpayer introduces credible evidence with respect to any factual issue, see 26 U.S.C. § 7491(a)(1), and also meet substantiation and record maintenance requirement, see *id.* § 7491(a)(2)(A)-(B), the burden shifts to the Commissioner with respect to that issue. "Credible evidence," as used in § 7491(a)(1), means the quality of evidence, which after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted. Rendall v. Commissioner, 535 F.3d 1221 (10<sup>th</sup> Cir. 2008).

The Internal Revenue Code requires employers to deduct from their employee's wages the employees' share of FICA and individual income taxes. See 26 U.S.C. § 3102(a). The employer is liable for the withheld portion of the employees' payroll taxes and must pay over the full amount to the government each quarter. 26 U.S.C. § 3403. These withheld amounts are considered to be held in a "special fund in trust for the United States" after collection each pay period until they are remitted to the government. 26 U.S.C. § 7501. Section 6672 of the IRS Code provides that the officers or employees who, on behalf of an employer, are responsible for collecting withholding taxes and paying them over to the government, and who willfully fail to do so, may be personally assessed a civil penalty equal to the amount of the delinquent taxes. United States v. Farr, 536 F.3d 1174 (10<sup>th</sup> Cir. 2008).

The IRS may satisfy a tax deficiency by imposing a lien on any property or rights to property belonging to the taxpayer. Property and rights to property may include not only property and rights to property owned by the taxpayer but also property held by a third party if it is determined that the third party is holding the property as a nominee of the delinquent taxpayer. The nominee theory focuses upon the taxpayer's relationship to a particular piece of property. The ultimate inquiry is whether the taxpayer has engaged in a legal fiction by placing legal title to property in the hands of a third party while actually retaining some or all of the benefits of true ownership. Although in many instances the delinquent taxpayer will have transferred legal title to a third party, an actual transfer of legal title is not essential to the imposition of a nominee lien. A third party may hold property as a taxpayer's nominee if the taxpayer pays for the property and enjoys the

benefits of ownership, even though the third party holds legal title and the taxpayer has never held legal title himself. Application of the nominee doctrine involves questions of both state and federal law. We look initially to state law to determine what rights the taxpayer has in the property the IRS seeks to reach. If the court concludes that the taxpayer has a property interest under state law, then federal law determines whether the taxpayer's state-delineated rights qualify as property or rights to property within the compass of federal tax lien legislation. Holman v. United States of America, 505 F.3d 1060 (10<sup>th</sup> Cir. 2007).

The day of the sale of real property is not to be counted as the first day of the 180 day redemption period provided under 26 U.S.C. § 6337(b)(1). Westland Holdings, Inc. v. Lay, 462 F.3d 1228 (10<sup>th</sup> Cir. 2006).

A capital gain occurs when a taxpayer sells a capital asset at a profit. Generally, a capital asset is defined as "property, held by the taxpayer whether or not connected with his trade or business. Where a lump sum payment is received in exchange for what would otherwise be received at a future time as ordinary income, capital gains treatment of the lump sum is inappropriate. This is so because the consideration was paid for the right to receive future income, not for an increase in the value of income-producing property. Watkins v. Commissioner of Internal Revenue, 447 F.3d 1269 (10<sup>th</sup> Cir. 2006).

Generally, 26 U.S.C. § 6501(a) requires the IRS to assess an income tax deficiency within three years after a taxpayer files a return. Before assessing an income tax deficiency, the IRS must first issue a notice of deficiency and allow a taxpayer ninety days to file a tax court petition. § 6212(a); §6213(a). If a tax court petition is filed, the IRS may not assess the tax until the tax court's decision has become final. § 6213(a). Placing a proceeding in respect of a deficiency on the docket of the tax court suspends the running of the statute of limitations. The placing of the proceeding on the tax court's docket need not be authorized or ratified by the taxpayer in order for the suspension of the statute of limitations to take effect. Martin v. Commissioner, 436 F.3d 1216 (10<sup>th</sup> Cir. 2006).

Sale proceeds, subject to tax liens, that were placed into debtor's operating account and used to pay counsel's attorney's fees were subject to equitable tracing principals using LIFO technique to trace the funds. After a transaction occurs involving property encumbered by a tax lien, the lien reattaches to the thing and to whatever is substituted for it. A tax lien encumbering property attaches to a cashier's check that is traceable to proceeds of sale of the property. The government has a well-established right to bring common law causes of action, including tortious conversion. Federal statutes do not, by implication, abrogate the government's right to bring common law suits. In other words, common law actions are available to the government to supplement those remedies found in federal statutes, as long as the statute does not expressly abrogate those rights. U.S. v. Henshaw, 388 F.3d 738 (10<sup>th</sup> Cir. 2004).

Transferee liability pursuant to 26 U.S.C. § 6901(a) is excepted from discharge pursuant to §§ 523(a)(1)(A) and 507(a)(8)(A)(iii). McKowen v. Internal Revenue Service, 370 F.3d 1023 (10<sup>th</sup> Cir. 2004).

Certificates of Assessments and Payments on Form 4340 detail the assessments made and the relevant date that a Summary Record of Assessment was executed. Certificates on Form 4340 are presumptive proof of a valid assessment. Form 23C is now only used when the computer is unavailable. Since RACS Report 006 contains the same information contained on Form 23C and is certified and signed by an assessment officer, RACS Report 006 satisfies the signature and certification requirements of 26 C.F.R. § 301.6203-1. Production of a Form 4340 creates a presumption that a Summary Record of Assessment, whether on Form 23C or RACS Report 006, was validly executed and certified. Treasury regulations provide that courts must take judicial notice of the various seals of the IRS. 26 C.F.R. § 307-7514-1(c), (d). March v. Internal Revenue Service, 335 F.3d 1186 (10<sup>th</sup> Cir. 2003).

A individual partner's share of partnership losses was not converted into a nonpartnership item merely because the partner filed a bankruptcy petition. The debtor and the bankruptcy estate are distinct entities in an individual debtor's bankruptcy proceeding. The IRS can only challenge an allocation on a partnership return at a partnership-level proceeding. Katz v. C.I.R., 335 F.3d 1121 (10<sup>th</sup> Cir. 2003).

Certificates of Form 4340 are presumptive proof of a valid assessment. Since the regulations do not specifically require the use of Form 23C but merely that an assessment provide certain information and be signed by an assessment officer, Form 4340 meets the regulatory requirements. In cases where a Form 23C is not completed and signed, the signing of Form 4340 itself establishes the effectiveness of the assessment, and relevant time periods run from the signing of Form 4340, not the fictional signing of Form 23C. March v. Internal Revenue Service, 335 F.3d 1186 (10<sup>th</sup> Cir. 2003).

The taxation scheme set out in the Internal Revenue Code is complicated and the tax consequences of many transactions depend on form, how the transaction is structured, but that at the same time, the incidence of taxation depends on the substance of a transaction. The income tax consequences under the Internal Revenue Code depend upon the substance of the situation, not the form. In a true lending transaction, there exists the reasonable likelihood that the lender will be repaid in the light of all reasonable foreseeable risks. Rogers v. United States of America, 281 F.3d 1108 (10<sup>th</sup> Cir. 2002).

Like other creditors in bankruptcy proceedings, the IRS is generally precluded from including unmatured interest as a part of its unsecured claim. Post-petition, pre-confirmation interest generally cannot be included in a Chapter 11 plan unless the claim is secured and the value of the collateral exceeds the value of the claim. In re Tuttle, 291

F.3d 1238 (10<sup>th</sup> Cir. 2002).

The IRS may impose a lien on any property or rights to property belonging to a taxpayer. 26 U.S.C. § 6321. To complement this provision, § 6331(a) allows the Secretary to collect such tax by levy upon all property and rights to property on which there is a lien. The term “levy” as used in this title includes the power of distraint and seizure by any means. Unlike a lien-foreclosure suit authorized by 26 U.S.C. §7403, however, an administrative levy does not determine priority disputes between the Government and other claimants, but instead protects the Government against diversion or loss while such disputes, if any, are resolved. Further, an administrative levy does not transfer ownership of the property to the IRS. A lien against a partner owning an individual tax extends only to his interest in the surplus of the partnership property. The IRS steps into the shoes of the taxpayer and acquires whatever rights to the property the taxpayer possessed. Absent a foreclosure or similar action, the taxpayer still retains ownership of the property. United States v. Triangle Oil, 277 F.3d 1251 (10<sup>th</sup> Cir. 2002).

The mailing of a notice of deficiency tolls the 3-year limitations period I.R.C. §6503(a)(1). A notice of deficiency that fails to include the petition date has the effect of tolling the 3-year limitation period. Smith v. Commissioner of Internal Revenue, 275 F.3d 912 (10<sup>th</sup> Cir. 2001).

The entire amount recovered in a contingent fee lawsuit is taxable income for the taxpayer. The attorney fees paid to the contingent-fee-attorney are a deductible expense to the extent allowed after application of the Alternative Minimum Tax. Hukkanen-Campbell v. Commissioner of Internal Revenue, 274 F.3d 1312 (10<sup>th</sup> Cir. 2001).

Unless a statute expressly provides for such a power, the Tenth Circuit will not read into the language of the statute, the power of a taxing agency to seize and sell property that is in the taxpayer’s possession only because of a leasehold interest. In re Western Pacific Airlines, Inc., 273 F.3d 1288 (10<sup>th</sup> Cir. 2001).

Where a tax return is invalid for failure of the taxpayer’s failure to sign it, “acceptance” of the return by the IRS does not cure the defect. The taxpayer has a duty to sign the return. See 26 U.S.C. §§ 6061, 6065. Explicit statutory requirements must be observed and are beyond the dispensing power of Treasury officials. Olpin v. Commissioner of Internal Revenue, 270 F.3d 1297 (10<sup>th</sup> Cir. 2001).

There was no transfer of debtor’s interest in property where, under Colorado law, acquisition of real property by tax deed creates a virgin title erasing all former interests in the land. A regularly conducted, non-collusive tax sale, foreclosing on assets subject to a lien constitutes a sale for reasonable equivalent value, even if the purchase price was below market value, as long as there is no evidence of collusion. The decisive factor in

determining whether a transfer pursuant to a tax sale constitutes reasonable equivalent value is a state's procedure for tax sales, in particular, statutes requiring that tax sales take place publicly under a competitive bidding procedure. In re Grandote Country Club Company, LTD., 252 F.3d 1146 (10<sup>th</sup> Cir. 2001).

The Commissioner's acceptance, failure to return for signature, and use of an unsigned return constitutes acceptance of the return for all purposes. The determination of whether a return should be treated as joint depends upon whether the spouse intended to file a joint return. Olpin v. Commissioner, 237 F.3d 1263 (10<sup>th</sup> Cir. 2001).

Sections 6103 and 7431 address improper disclosure of tax return information and not improper collection activity. There is nothing in § 6103 which requires that the underlying means of disclosure be valid before the safe harbor of § 6103(k)(6) applies. The validity of the collection activity is irrelevant to the issue of whether the disclosure is wrongful. Mann v. United States of America, 204 F.3d 1012 (10<sup>th</sup> Cir. 2000).

Self-employment tax is to be paid (by cash basis taxpayers) on income for the year the income was received rather than the year the income was earned, even where the taxpayer paid the maximum self-employment tax assessed by law for the year the income was earned. Walker v. United States of America, 202 F.3 1290 (10<sup>th</sup> Cir. 2000)

26 U.S.C. § 61(a)(12) ordinarily requires a taxpayer who has incurred a financial obligation, which is later discharged in whole or in part, to recognize as taxable income the extent of the reduction in the obligation. Section 108(a)(1) provides an exception to this rule if the debt is discharged in a bankruptcy proceeding or at a time when the taxpayer is insolvent. Gitlitz v. Commissioner, 182 F.3d 1143 (10<sup>th</sup> Cir. 1999).

For a tax assessment to be valid, the records supporting the assessment must identify the taxpayer, the character of the tax liability, the taxable period, and the amount of the assessment. Any failure of the IRS to comply with its duty to provide the information set out in § 301.6203-1 does not render the assessment invalid. Howell v. United States of America, 164 F.3d 523 (10<sup>th</sup> Cir. 1998).

If a liable employer fails to pay the amount of its liability under § 1362(b) after demand is made by PBGC, PBGC can establish a lien on all property of the liable party. see 29 U.S.C. § 1368(a). Such lien is to be treated in the same manner as a tax due and owing the United States under the Bankruptcy Code. see 29 U.S.C. § 1368(c)(2). Only taxes incurred by the estate are administrative expenses, however, until the petition is filed, there can be no estate; hence first priority for tax claims extends only to post-petition taxes. In re Bayly Corp., 163 F.3d 1205 (10<sup>th</sup> Cir. 1998).

Federal tax liens only arise in property as to which the defaulting taxpayer has rights of ownership. See United States v. Wingfield, 833 F.2d 1466, 1472 (10<sup>th</sup> Cir. 1987). State law determines such rights. See United States v. Central Bank of Denver, 843 F.2d 1300, 1303 (10<sup>th</sup> Cir. 1988). Federal law then determines the priority of competing liens against a taxpayer's property. The IRS should be viewed as any other creditor seeking to pierce a corporate veil that is allegedly defrauding it of its legitimate claim. In taxation cases, the transfer of an economic benefit to a shareholder may be reachable for tax purposes as a constructive dividend. Floyd v. Internal Revenue Service, 151 F.3d 1295 (10<sup>th</sup> Cir. 1998).

To avoid a late filing penalty under I.R.C. § 6651(a)(1), the taxpayer bears the heavy burden of proving the failure to timely file was both due to reasonable cause and not due to willful neglect. A taxpayer is expected to exercise ordinary business care and prudence and not to take on such a load that he could not fulfill his own legal obligations within the required time. A tax return does not have to be completely accurate, but must be based on the best information available, and may be amended later if necessary. In re Craddock, 149 F.3d 1249 (10<sup>th</sup> Cir. 1998).

To qualify for the related pass-through deductions which limited partners claimed on their taxes, the limited partners needed to unconditionally obligate themselves to make additional capital contributions to cover their proportionate share of losses and expenses. A contract need not expressly set forth common law remedies for default. In re Villa West Associates, 146 F.3d 798 (10<sup>th</sup> Cir. 1998)

Under 26 U.S.C. § 6672, willful conduct is not the same as "willful" conduct in the criminal context. Certain facts are irrelevant to the determination of whether a responsible person willfully failed to pay withholding taxes. We are troubled by the possibility the courts have transformed 26 U.S.C. § 6672 into a strict liability statute, outside the jury's realm, by 1) broadly defining the most likely fact scenarios leading to a failure to pay withholding taxes as "willful" conduct as a matter of law, and 2) closing the door on any opportunity for a responsible person to distinguish his case from those factual scenarios. The better way to protect government revenue and reserve a role for the trier of fact without undermining existing precedent is to continue to apply the established paradigms to identify willful conduct as a matter of law, yet expressly recognize a reasonable cause exception to the application of those paradigms. The exception should be narrowly construed, and limited to those circumstances where 1) the taxpayer has made reasonable efforts to protect the trust funds, but 2) those efforts have been frustrated by circumstances outside the taxpayer's control. Finley v. United States, 123 F.3d 1342 (10<sup>th</sup> Cir. 1997)(en banc).

Where the IRS neither asserts a claim for post-petition, pre-confirmation interest ("gap period interest") on its secured pre-petition tax claim nor objects to the debtor's plan at confirmation, these failures preclude the IRS's entitlement to gap period interest.

Sections 523(a)(1)(A) and 507(a)(7) clearly authorize the exception of tax debts and interest from dischargeability under 11 U.S.C. 1141(d)(2) only when the governmental entity holds an unsecured claim to that debt. United States of America v. Victor, 121 F.3d 1383 (10<sup>th</sup> Cir. 1997).

26 U.S.C. § 448 does not require the IRS to use the accrual method of accounting to calculate the debtor's tax liability for a given year. Moreover, § 448(d)(7) contemplates that the taxpayer, not the IRS, is responsible for making necessary changes in accounting methods. In re EWC, Inc., 114 F.3d 1071 (10<sup>th</sup> Cir. 1997).

A tax penalty or assessment that is void as a result of the violation of the automatic stay does not alter a taxpayer's liability for the tax or invalidate the IRS's claim. The only effect of violation of the automatic stay, other than the possibility of contempt, is the unenforceability of any benefit the creditor obtained as a result of the violation. In re Goldston, 104 F.3d 1198 (10<sup>th</sup> Cir. 1997).

A person's actions of voluntarily ceding power of business accounts to a bank in the event of default, coupled with the knowledge that other creditors are being paid when the IRS is not, is sufficient to make his failure to pay the taxes willful. If a person could have insisted on a provision requiring the bank to pay the taxes, but did not, the failure to do so in the face of the knowledge of the unpaid tax obligations satisfies us that he voluntarily and consciously failed to pay the taxes, and therefore his failure was willful. Bradshaw v. United States, 83 F.3d 1175 (10<sup>th</sup> Cir. 1996).

Congress enacted the equivalent of § 523(a)(1)(C) to make nondischargeable those taxes which the debtor "willfully attempted in any manner to evade or defeat." Although the terms are not statutorily defined, the language is unambiguous. Moreover, the phrase has well-known judicial interpretation in tax cases, which Congress presumably intended to adopt. Nonpayment, by itself, does not compel a finding that the given tax debt is nondischargeable. Rather, nonpayment is relevant evidence which a court should consider in the totality of conduct to determine whether or not the debtor willfully attempted to evade or defeat taxes. A debtor's actions are willful under § 523(a)(1)(C) if they are done voluntarily, consciously or knowingly, and intentionally. Dalton v. Internal Revenue Service, 77 F.3d 1297 (10<sup>th</sup> Cir. 1996).

The confirmation of a plan discharges the debtor from all debts of a kind specified in § 502(i). Section 502(i) concerns postpetition taxes entitled to priority under § 507(a)(8) and includes income taxes, property taxes, withholding taxes, excise taxes, customs duty and associated penalties. Hollytex Carpet Mills, Inc. v. Oklahoma Employment Security Comm., 73 F.3d 1516 (10<sup>th</sup> Cir. 1996).

If I.R.S. form 4330 is provided to the debtor with all of the information required under Treasury Regulation § 301.6203-1 which identifies the character of the liability assessed, applicable tax periods and amount of the assessment, and if signed by the assessing officer it is a valid assessment. Under § 6672 a responsible person is liable for a penalty equal to the total amount of the unpaid withholding taxes and the IRS may make a lump sum assessment of § 6672 penalties instead of being required to make separate quarterly assessments. The determination of whether an individual is a "responsible person" under 26 U.S.C. 6672 involves the application of law to fact and is subject to de novo review. Taylor v. I.R.S. 69 F.3d 411 (10<sup>th</sup> Cir. 1995).

The label given a tax in the Internal Revenue Code is not determinative of its status for priority under § 507(a)(7). The four-part test announced in re Lorber Indus., 675 F.2d 1062 (9<sup>th</sup> Cir. 1982) should be used to determine whether an exaction is a tax or penalty for priority in bankruptcy. Section 510(c)(1) does not require a finding of claimant misconduct to subordinate nonpecuniary loss tax penalty claims. In re CF&I Fabricators of Utah, Inc., 53 F.3d 1155 (10<sup>th</sup> Cir. 1995), *cert. granted*, 116 S. Ct. 558 (1995). - CASE REVERSED IN PART. CATEGORICAL REORDERING OF PRIORITIES IS NOT AUTHORIZED UNDER § 510(c).

Filing of notice of lien against transferee who acquired debtor-taxpayer's property pursuant to liquidating Chap. 11 plan was not required for IRS to remain perfected in assets that transferee acquired, but only in property acquired by transferee subsequent to transfer. In re LMS Holding Co., 50 F.3d 1526 (10<sup>th</sup> Cir. 1995).

Res Judicata of a confirmed plan does not bar IRS from assessing or collecting additional taxes beyond those provided for in debtor's plan where IRS audited debtor's tax returns post-confirmation and taxes in question were nondischargeable. In re DePaolo, 45 F.3d 373 (10<sup>th</sup> Cir. 1995).

Operating procedures of the IRS do not create rights in the taxpayer. Gille v. United States, 33 F.3d 46 (10<sup>th</sup> Cir. 1994).

The bankruptcy court, using its equitable powers, may suspend the 240 day assessment period under § 507(a)(7)(ii) during the pendency of a prior bankruptcy case. In re Richards, 994 F.2d 763 (10<sup>th</sup> Cir. 1993).

The bankruptcy court lacks the authority to reclassify postpetition interest and tax penalties as unsecured debts. In re Preferred Door Co., Inc., 990 F.2d 547 (10<sup>th</sup> Cir. 1993).

Confirmation of a reorganization plan for an individual debtor will not discharge recent excise taxes whether or not a claim for such tax was filed or allowed. Gift taxes fit within the § 523(a)(1)(A) exception of discharge that covers taxes entitled to priority under

§ 507(a)(7). § 523(a)(1)(A) makes clear that these taxes remain nondischargeable whether or not a claim for such tax was filed or allowed. A Bankruptcy court's determination of a claim's untimeliness does not affect application of the § 523 exception to discharge. § 523(a)(1)(A) was intended to prevent the discharge of tax claims which were never filed or filed late but which would otherwise have been allowable. Congress has made the choice between collection of revenue and rehabilitation of the debtor by making it extremely difficult for a debtor to avoid payment of taxes under the Bankruptcy Code. This is an express congressional policy judgment that we are bound to follow. In re Grynberg, 986 F.2d 367 (10<sup>th</sup> Cir. 1993).

The court may re-characterize for purposes of bankruptcy what Congress has deemed a tax in the Internal Revenue Code. The 10 percent penalty for early withdrawal from a qualified pension plan is punitive in nature and not entitled to priority under § 507(a)(7)(G). In re Cassidy, 982 F.2d 161 (10<sup>th</sup> Cir. 1992).

Penalties and interest that are not in compensation for pecuniary loss are not entitled to priority. Prepetition interest of federal employment taxes is a priority claim. A federal tax lien secures both the trust fund portion and the nontrust fund portion including penalties and interest. In re Bates, 974 F.3d 1234 (10<sup>th</sup> Cir. 1992).

Taxes incurred post-confirmation are taxes owed by the individual and not by the estate as administrative priority. Tax penalties imposed pursuant to a nondischargeable tax debt are nondischargeable. I.R.S. child support assessments made pursuant to 26 U.S.C. § 6305 are nondischargeable in bankruptcy. In re Fullmer, 962 F.2d 1463 (10<sup>th</sup> Cir. 1992).

Substitute returns prepared by the IRS are not "filed returns" for purposes of § 523(a)(1)(B). In re Bergstrom, 949 F.2d 341 (10<sup>th</sup> Cir. 1991).

Property of the estate includes that portion of the debtor's tax refund attributable to the prepetition portion of the taxable year. In re Barowsky, 946 F.2d 1516 (10<sup>th</sup> Cir. 1991).

A security interest based on the extension of purchase money defeats any previously filed lien including a federal tax lien. First Interstate Bank of Utah, N.A. v. I.R.S., 930 F.2d 1521 (10<sup>th</sup> Cir. 1991).

A tax penalty imposed with respect to a transaction or event that occurred before three years before the bankruptcy petition is dischargeable in bankruptcy. In re Roberts, 906 F.2d 1440 (10<sup>th</sup> Cir. 1990).

An IRS statutory notice of deficiency is presumed correct. The burden rests on the taxpayer to establish that the determination of income is erroneous. Jones v. Commissioner, 903 F.2d 1301 (10<sup>th</sup> Cir. 1990).

The Federal court has jurisdiction under § 505 to consider state tax issues where the debtor has failed to assert any challenge to the assessment prior to commencing bankruptcy proceedings, or where the debtor has challenged the assessment through state proceedings which are still pending at the time the bankruptcy petition is filed. City Vending of Muskogee v. Oklahoma Tax Com'n, 898 F.2d 122 (10<sup>th</sup> Cir. 1990).

The bankruptcy trustee has a duty to prepare and file a tax return for income earned by the bankruptcy estate. In re Joplin, 882 F.2d 1507 (10<sup>th</sup> Cir. 1989).

While the theory of relation back to the date of attachment, when the financing statement was filed, is valid as concerns priority between private creditors under state law, it is not effective for federal tax purposes. Only choate state-created liens take priority over later federal tax liens. Under federal law, liens are perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Under § 6323(a) there is an exception to the general rule for security interests. When the holder of a security interest also claims an interest in the property subject to a federal tax lien, the federal lien is deemed to have attached when the IRS files a notice of the tax lien with the proper authority, rather than when the delinquent tax was first assessed. United States v Central Bank of Denver, 843 F.2d 1300 (10<sup>th</sup> Cir. 1988).

IRC § 6702 refers to the filing of a return in which the taxpayer takes a frivolous position as offending conduct, and penalizes the specific conduct of filing a frivolous return. Because IRC § 6702 refers to the act of filing a purported return and is designed to discourage such filings, the frivolous filing triggers the § 523(a)(7)(B) “event” not the failure to file. The fact that the amount of the penalty is not computed by reference to a tax liability also suggest this penalty is unrelated to a tax year *per se*. Frivolous filing penalties assessed within three years before the petition date should be excepted from discharge under § 523(a)(7)(B). In re Wilson, 407 B.R. 405 (10<sup>th</sup> Cir. BAP 2009).

As a general rule, tax refunds are not exempt from a debtor’s bankruptcy estate. Utah’s exemption statutes provide that certain classes of exempt property, including retirement income (U.C.A. § 78B-5-505(1)(xiv)) remain exempt in any other form into which it is traceable (U.C.A. § 78B-5-507(2)). Utah law recognizes further that exempt property retains its exempt character if the property can be traced by “any other reasonable basis for tracing selected by the individual,” (U.C.A. § 78B-5-507(3)(b)). By filling out tax forms for withholding of taxes and filling out forms to request a tax refund, the exempt funds can be reasonably traced since the amounts paid and received have been tracked throughout the process. Even through debtor’s exempt retirement income may have been converted into taxes and then into a tax refund before being returned to her, it was reasonably traceable through the entire process and remains exempt under Utah law. In re Smith, 401 B.R. 487 (10<sup>th</sup> Cir. BAP 2009).

Debtors in Chapter 7 and Chapter 11 cases may elect to treat their taxable year as two taxable years. One ending on the day prior to the filing of their petition, and the other beginning on the petition date. 26 U.S.C. § 1398(d)(2). Where an overpayment of tax is applied as a credit towards the debtor's following year's taxes, no claim for refund of such overpayment shall be allowed for the taxable year in which the overpayment arises. 26 U.S.C. § 6513(d). A Chapter 7 trustee may not recover a pre-petition tax refund which was applied by the debtors as a prepayment towards the debtor's subsequent year's taxes. In re Graves, 396 B.R. 70, 72 (10<sup>th</sup> Cir. BAP 2008). (*But see: In re Marshall*, 550 F.3d 1251)

Taxes are nondischargeable under § 523(a)(1)(A) because they are taxes of the kind set forth in § 507(a)(8)(A)(ii) inasmuch as they were assessed within 240 days before the petition date. Even if the taxes are attributable to the debtor's spouse's income, by executing and filing a joint return, the debtor became jointly and severally liable with the spouse for the taxes as a matter of law. 26 U.S.C. § 6013(d)(3). There is no "required return" element in § 507(a)(8)(A)(ii). Section 105(a) cannot be used to negate the legislative mandate explicitly set forth in §523(a)(1). In re Carlin, 328 B.R. 221 (10<sup>th</sup> Cir. BAP 2005).

As the hypothetical holder of a judicial lien under § 544(a) a trustee is not a "purchaser" or "a holder of a security interest" within the meaning of 26 U.S.C. § 6323(b)(1). In re Silver, 303 B.R. 849 (10<sup>th</sup> Cir. BAP 2004).

A tax refund that resulted only from tax withholdings of the debtor-husband was property of the husband's bankruptcy estate. Even though the debtor and his wife filed a joint return, where the wife had no tax withheld during the tax year, the refund was entirely the husband's and thus the entire refund was property of husband's estate. In re Kleinfeldt, 287 B.R. 291 (10<sup>th</sup> Cir. BAP 2002).

A debtor's tax refund, including earned income credit is property of the estate under § 541(a). In re Trudeau, 237 B.R. 803 (10<sup>th</sup> Cir. BAP 1999).

A tax refund that consists of money earned by the debtor post-petition is not property of the estate. In re Christie, 233 B.R. 110 (10<sup>th</sup> Cir. BAP 1999).

A tax refund payable to the debtor did not retain its character as "earnings from personal services" and for that reason lost its exempt status once paid to the taxing authority. In re Annis, 229 B.R. 802 (10<sup>th</sup> Cir. BAP 1999).

26 U.S.C. § 6103(e)(4) has no application to a Chapter 7 trustee's request that a debtor turnover tax returns. Debtors are required to turnover their tax returns to the trustee. A failure to turnover the returns could result in the denial of debtors' discharge, subject to criminal liability and sanctions. In re Beach, 281 B.R. 917 (10<sup>th</sup> Cir. BAP 2002).

Funds payable to the debtor from the IRS as a result of the debtor qualifying for an earned income credit are in the nature of an overpayment of a tax rather than "earnings from personal services" and as such are not exempt as earnings from personal services necessary for the maintenance of the debtor's family or other dependents. In re Dickerson, 227 B.R. 742 (10<sup>th</sup> Cir. BAP 1998).

Earned income credit is property of the estate. In re Montgomery, 219 B.R. 913 (10<sup>th</sup> Cir. BAP 1998).

IRS's unfiled prepetition tax claim which was provided for in debtor's Chapter 13 plan did not survive debtors' Chapter 13 discharge. The claim was a pre-petition claim at the moment that it became payable at the close of tax year even though it was not "due" until April 15. In re Dixon, 218 B.R. 150 (10<sup>th</sup> Cir. BAP 1998).

Statute: 28 U.S.C. § 960(a) provides 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."

Statute: 26 U.S.C. § 7433(e) provides as follows:

(e) Actions for violations of certain bankruptcy procedures

(1) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive

(A) In general

Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted

Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that -

- (i) administrative and litigation costs in connection with such an action may only be

awarded under section 7430; and (ii)  
administrative costs may be awarded only if  
incurred on or after the date that the bankruptcy  
petition is filed.