Number: **199929024**
Release Date: 7/23/1999 UIL: 9999.98-00

GENERAL LITIGATION BULLETIN

Department of the Treasury *Internal Revenue Service*

Office of Chief Counsel

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BULLETIN NO. 462 ***MARCH 1999***

PRIVILEGED COMMUNICATIONS
SUMMONS ENFORCED OVER CLAIM OF ATTORNEY-CLIENT PRIVILEDGE

The Second Circuit reversed the lower court and ruled in favor of the United States in a summons enforcement proceeding, **United States v. Ackert, 1999 U.S. App. LEXIS 3129 (2d Cir. Feb. 26, 1999)**. An investment banking firm approached Paramount Communications with an investment proposal. The proposed transaction would generate significant capital losses, which would offset recent capital gains Paramount received from the sale of a subsidiary. Ackert, who pitched the proposal to Paramount, subsequently was contacted by Paramount's tax counsel. In conducting research to advise Paramount regarding the tax implications of the proposal, tax counsel met with and discussed details of the proposed transaction and its potential tax consequences. Paramount chose to go with the proposal, although using another investment banking firm.

In a later audit of Paramount, the Service issued a summons to Ackert, seeking his testimony about the transaction. Paramount intervened and asserted the attorney-client privilege. Although the magistrate judge initially agreed to enforce the summons, following an interview with Ackert the judge agreed with Paramount that the summons would invade privileged communications. The Government appealed.

On appeal, Paramount argued that the situation was analogous to United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). In Kovel, the court upheld the privilege to protect communications between an accountant and the client's attorney, where the accountant's role is to clarify communications between attorney and client. The Second Circuit disagreed with this argument. Because the purpose of the privilege is to encourage clients to make full disclosure to their attorneys, the privilege protects only communications between a client and an attorney. The privilege does not extend to communications which may prove important to an attorney's legal advice to a client. Although Kovel permitted the inclusion of a third party in attorney-client privileged communications, the third party served only to improve the comprehension of the communications between attorney and client, as an interpreter serves. In this case, Paramount's tax counsel was not relying on Ackert to translate or interpret information given to counsel by its client, and therefore had no basis for asserting the privilege. **SUMMONSES: Defenses to Compliance: Privileges: Attorney-Client**

1. **ANTI-INJUNCTION ACT**

Sokolow v. United States, 1999 U.S. App. LEXIS 3360 (9th Cir. Mar. 4, 1999) - Taxpayer and his then spouse made joint estimated tax payments in 1988. Filing a separate tax return for that year, taxpayer claimed a credit for one-half of the payments. The Service mistakenly credited the taxpayer with all of the estimated payments and issued a refund. Taxpayer's spouse also filed a separate return, claiming a refund of all of the estimated payments, and eventually obtained a district court ruling in her favor. The Service then removed the full amount of estimated tax payment credits from the taxpayer's account and began collection. In turn, the taxpayer filed a suit for injunctive relief, claiming under Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) that he had no adequate remedy at law. The Ninth Circuit disagreed, finding the taxpayer could have paid the tax and challenged the validity of the tax liability in a refund suit. Consequently, the taxpayer was not entitled to injunctive relief.

2. **BANKRUPTCY CODE CASES: Application of Payment**
TRUST FUND TAXES:
In re Applied Paging Technologies, Inc., 1999 Bankr. LEXIS 173 (Bankr. D. N.J. Feb. 8, 1999) - Brothers owned corporation which resold paging services, and which filed for bankruptcy. The prospective purchaser at the liquidation sale of the corporation's assets was willing to pay top dollar only if the brothers signed a non-competition guarantee. The brothers were willing to do this if the bankruptcy court would order the Service to apply the monies received to the trust fund portion of the corporation's tax liability, thus reducing their responsible person liability. The court agreed with the Service that the brothers lacked standing under the "zone of interest" test, in that the interest of a liquidation bankruptcy (maximizing payments to creditors) would not be met by an act which benefitted only the brothers, who were not parties to nor creditors of the bankruptcy. Further, the court held it was not free under B.C. § 105(a) to designate payments toward trust-fund taxes in a non-reorganization case.

3. **BANKRUPTCY CODE CASES: Chapter 12: Confirmation of Plan (§ 1225)**
BANKRUPTCY CODE CASES: Interest: Administrative and "Gap" Expenses
In re Cousins, 1999 Bankr. LEXIS 146 (D. N.H. Feb. 2, 1999) - The Service filed a proof of claim in the debtor's ch. 12 bankruptcy, which was allowed as a priority, unsecured claim. Following confirmation, the debtors paid the amount of the claim in full, without post-petition interest. The court initially ruled the debtors could not invoke res judicata, as their plan was silent as to how to treat post-petition interest. However, the court then ruled the Service could not collect on the interest claim. Citing In re Bossert, 201 B.R. 553 (Bankr. E.D. Wash. 1996), the court found the Service's attempt to collection post-petition interest under B.C. § 1228(a)(2) was contrary to congressional intent.

4. **BANKRUPTCY CODE CASES: Exemptions (§ 522)**
BANKRUPTCY CODE CASES: Setoff (§ 553)

In re Jones, 1999 U.S. Dist. LEXIS 2621 (M.D. Ala. Feb. 23, 1999) - Debtor filed chapter 7 bankruptcy, claiming tax refund as exempt. The Service setoff the refund against dischargeable taxes under B.C. § 553(a). Although the court recognized a conflict between a creditor's right of setoff under section 553 and the debtor's right to exempt property under section 522(c), the court chose to follow what it viewed as the majority position and held that the Service's right to setoff under section 553(a) must yield to the debtor's right to exempt and protect assets under section 522(c).

5. **BANKRUPTCY CODE CASES: Liens**

In re Deppisch, 227 B.R. 806 (Bankr. S.D. Ohio 1998) - In 1991, Service filed a Notice of Federal Tax Lien in Columbus, against the taxpayer for taxes owed from 1981-84. In 1997, the debtor filed chapter 7 bankruptcy, receiving a discharge later that year (after entering into an agreed order with the Service that the taxes for 1981-84 were discharged). In 1998, the Service levied on the debtor's IRA account at a Columbus bank. The court found that neither the discharge of the unsecured tax liability nor the status of the IRA as exempt or non-exempt property altered the fact that the federal tax lien had attached to the IRA pre-petition. As the lien had not been avoided, the Service validly levied against the IRA.

6. **BANKRUPTCY CODE CASES: Preference (§ 547)**

In re Kohout, 1999 Bankr. LEXIS 175 (Bankr. N.D. Ohio Feb. 11, 1999) - Service filed Notice of Federal Tax Lien and levied on debtors' wages and retirement accounts within 90 days of debtors filing for chapter 11 bankruptcy. The Service did not file a proof of claim in the bankruptcy. The court found, under C-L Cartage Co., Inc., 899 F.2d 1490 (6th Cir. 1990) that payments to a fully secured creditor are not avoidable preferences under B.C. § 547(b). Because the Service did not receive more through its pre-petition levies than it would have received in a chapter 7 liquidation, the tax levies were not avoidable.

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

Richmond v. United States 1999 U.S. App. LEXIS 4588 (9th Cir. March 19, 1999) - Taxpayers were assessed deficiencies in August, 1980 and May, 1981. On July 27, 1982, taxpayers filed chapter 7 bankruptcy, during which the Service notified them of additional deficiencies for 1978 and 1979. On April 1, 1988, the debtors were denied a discharge, however, the bankruptcy court never sent notice to the Service, which first learned of the order in September, 1989. When the Service again commenced collection, the taxpayers filed a second chapter 7 in July, 1990, receiving a discharge in November, 1990. In 1993, the Service assessed 1978 and 1979 deficiencies and levied on the taxpayer's wages. The court found, in addition to the suspension of the three year deficiency assessment statute of limitation under I.R.C. § 6503(i), the limitations period remained suspended until the Service received actual knowledge of the denial of discharge.

8. **DAMAGES, SUITS FOR: Against U.S.: Unauthorized Collection (§ 7433)**
Dziura v. United States, 1999 U.S. App. LEXIS 3135 (1st Cir. Feb. 26, 1999) - In May, 1993, the Service seized taxpayer's paintings. One painting did not sell at the initial auction in September, 1993, so the Service conducted a second, successful sale in May, 1994, outside of the 40 days from the time of public notice as required by I.R.C. § 6335(d). The court of appeals found the taxpayers' suit, brought in April, 1996, was barred by the two-year statute of limitations in I.R.C. § 7433(d). Rejecting the taxpayers' argument that the Service's retention of the painting beyond the forty-day period was a "continuing violation" of the statute, the court held that because the taxpayers should have known that the painting had not sold, their cause of action accrued, at the latest, on the date of the initial auction.

9. **LEVY: Failure to Surrender Property: Bank Deposit**
United States v. Bank of the West, 1998 U.S. Dist. LEXIS 21188 (N.D. Cal. Dec. 18, 1998) ***(unpublished)*** - Bank receiving tax levy instead foreclosed on the account pursuant to its security interest. The court, in an unpublished opinion, held the bank liable not only for the amount of the levy, but also a 50% penalty under I.R.C. § 6332(d)(2). The bank argued that its action was reasonable because it raised lien priority as a defense. However, the court held that under United States v. National Bank of Commerce, 472 U.S. 713 (1985), only two defenses are available to a tax levy: (1) that bank is not "in possession of" or "obligated with respect to" property or property rights belonging to the delinquent taxpayer; or (2) the taxpayer's property is subject to a prior judicial attachment or execution. As neither of these defenses were available to the bank, its actions in foreclosing on the funds constituted illegal self-help. As levy is a provisional remedy, the court said the bank should have honored the levy and litigated its claim of lien priority in a post-seizure proceeding.

10. **LIENS: Action to Quiet Title**
Crisp v. United States, 1999 U.S. Dist. LEXIS 2279 (E.D. Cal. Feb. 18, 1999) - Taxpayers brought quiet title action to avoid tax liens, claiming that the statute of limitations had run before the Service assessed the underlying taxes. The court held that it lacked jurisdiction to consider such an argument, because a challenge to the statute of limitations goes to the merits of the assessment, not the procedural propriety of the tax lien.

11. **LIENS: Priority over Assignee: Assignment as Security Interest**
Terry, Trustee v. United States, No. B-117644 (Cal. Ct. App. Jan. 21, 1999) - Taxpayer, living in Monterey, was residual beneficiary of trust, located in Los Angeles. Service filed NFTLs against taxpayer in Monterey before taxpayer assigned interest in trust as security for loan. Although the Service conceded that the NFTL filed in Monterey had no effect on property in Los Angeles, it argued that under the doctrine of equitable conversion, the taxpayer's interest in the trust was converted to personal property, which would have been subject to the NFTL, upon entry of the order confirming sale. The state court agreed that the sale of the real

property converted the taxpayer's interest so that the NFTL could attach, however, the court determined the date of conversion to be the closing date of the sale. Since the closing date was after the date the taxpayer had assigned his interest to the bank, the bank had priority to the funds.

12. **LIENS: Priority over Security Interests**
In re Main Street Beverage Corporation, 1998 U.S. Dist. LEXIS 21137 (D. N.J. Sept. 28, 1998) (*unpublished*) - Finance company loaned money to debtor, who pledged all present and future assets as collateral. Two years later, Service filed a Notice of Federal Tax Lien, after which debtor filed for chapter 11 bankruptcy. In liquidation, the debtor's primary asset was a liquor license. The court held that because the liquor license was not "property" under state law, the finance company could not have a perfected security interest in either the license or the proceeds from the sale of the license. Consequently, the tax lien primed the security interest.

13. **LIENS: Priority over Security Interests: Obligatory Disbursement Agreements: Surety Agreements:**
Titan Indemnity Company v. Triborough Bridge & Tunnel Authority, Inc., 135 F.3d 831 (2d Cir. 1998) - Surety claimed funds from failed construction project held in trust under New York law. Affirming the district court, the Second Circuit found the Service had first priority to the fund under New York law. Although federal law controls the priority of competing liens, the court held that state law determines what interest competing claimants have in the fund. Because the surety did not contest the government's statement of facts in its motion for summary judgment (which stated that the contractor had not defaulted until the funds had been earned and so were subject to tax), the court would not allow the surety to contend on appeal that issues of material fact existed.

14. **LIENS: Removal**
REDEMPTION: By I.R.S.
Vardanega v. United States, 1999 U.S. App. LEXIS 4584 (9th Cir. March 19, 1999) - At foreclosure sale, individual purchased real estate previously owned by three co-tenants. The Service had a lien against one co-tenant, and subsequently redeemed the property. Following the plain language of I.R.C. § 7425(d), the court rejected the taxpayer's argument that the government can redeem only that portion of property to which its lien attached. Unlike a seizure, where the government steps into the taxpayer's shoes, in a redemption the government steps into the purchaser's shoes. The court also found that there was no taking for Fifth Amendment purposes, as the individual knew of the lien before he bought the property, and was fully compensated by the Service's redemption payment.

15. **LIMITATIONS: Assessment and Collection: Suspension of Running**
United States v. Citizen's Bank, 83 AFTR2d ¶ 99-547 (D. R.I. Feb. 11, 1999) - Service assessed taxes in March 1987 against corporation, but agreed to suspend levy when given promissory note secured by mortgage. In January, 1996, Service

contacted property owner, but agreed not to foreclose due to his age and health. After owner died, Service commenced foreclosure action in September, 1997. Taxpayer objected, claiming ten year collection statute had run. The court found that where the government suspends collection when provided with security for later payment, the government may proceed against the security, not bound by the statute of limitations applicable to the original obligation, even if the taxpayer has not independently guaranteed payment.