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News for Tax, Bankruptcy, and Consumer Professionals
SEE EXCERPT FROM GUIDE TO OFFERS IN COMPROMISE, BELOW

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MORGAN D. KING EDITOR

The King Law Letter

NEWS - EVENTS - UPDATES FOR BANKRUPTCY AND TAX PROFESSIONALS

LAW LETTER NO. 9b June 16 2016

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IMPORTANT PRODUCTS & EVENTS



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National Association of Consumer Bankruptcy Attorneys

NACBA's Summit at Sea - Members Only

October 7-10, 2016

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EXCERPT FROM

King's Legal Guide to

[IRS Offers in Compromise](#)
Release 2016 # 2

GUIDE TO IRS OFFERS IN COMPROMISE

¶ 6.14 ACCEPTANCE OF OFFER

6.14(f) Contractual terms

(f)11. Files bankruptcy where OIC is still pending

(i) Chapter 13

(ii) Chapter 7

An issue may arise in the event the taxpayer files a chapter 7 bankruptcy when the terms of the offer have been satisfied shortly before the bankruptcy is filed, and the last few payments were made within the 90-day preference period prescribed in the Bankruptcy Code, §§ 522, 547. See remarks in *King's Fundamentals of Consumer Bankruptcy Cases*, ¶ 3.23.

Will the trustee seek to disgorge preferential payments made to the IRS or other taxing entity?

Assume the tax liabilities are unsecured or substantially undersecured.

It has been held that the levy of a dischargeable tax within the 90-day preference period prescribed at 11 U.S.C. 547(b), 547(c) is avoidable as a preference. *In re Williams*, 153 B.R. 74 (Bankr.S.D. Ala. 1992) (levy made on debtor's wages); *In re Tabita*, 38 B.R. 511 (Bankr.E.D.Pa. 1984); if secured by lien, not a preference, *In re Kohut*, 236 B.R. 365 (Bankr.N.D. Ohio 1999), *In re Forrest*, 220 B.R. 424 (Bankr.W.D. Okla. 1997). An opinion that cites numerous cases on both sides of the issue, but concludes that the majority opinion is that such payments are avoidable preferences, *In re Ballard*, 131 B.R. 97 (Bankr.W.D.Wis. 1991).

The IRS may have to refund the payments made within the 90-day preference period. But we are talking about dischargeable taxes, so the consequences to the debtor may be *de minimus*. Being forced to refund the payments could be grounds for the OIC to be nullified, but since we are talking about dischargeable taxes, even if the filing of the bankruptcy causes a default of the OIC contract, the taxes will nonetheless be discharged.



But where an offer was made to compromise *non-dischargeable* taxes, the result could be more serious. If the IRS is forced to disgorge the final two or three payments made within the 90-day preference period, the IRS could deem it a violation of the OIC contract (OIC agreement is a contract, *U.S. v. Lane*, 303 F.2d 1 (5th. Cir. 1962), *Robinette v. Comm'r IRS* 123 T.C. 85(2004)), leaving the taxes undischarged and owed for the original amount of the liability.

Not only that, but since the recent payments would have to be transferred to the bankruptcy estate, the debtor wouldn't get the credit toward the taxes ... the debtor

would still owe the original (pre-offer) amount of the liabilities ... and the funds would be distributed to the unsecured creditors by the trustee. There is no benefit to the debtor to pay anything to the dischargeable unsecured debts. So the funds are wasted, when they could have reduced the tax liability.

Even where recent payments to the IRS were beyond the 90-day period, another issue may arise separately from the preference avoidance issue; an OIC contract includes a 5-year "probationary" period that requires the taxpayer to file all returns, pay all taxes due, and comply with all other tax regulations, for the 5 years following completion of the offer agreement.

Arguably, the filing of a bankruptcy within the probationary period constitutes a breach of the contract. In that event, the debtor will have an opportunity to assume the remainder of the contract (i.e., the probationary period). If the debtor fails to assume the contract as prescribed by the bankruptcy code, it will be deemed automatically nullified. In that event, it should not be a surprise that the IRS deems it a violation of the contract, and hence a nullification of the compromise.

The best strategy might be to delay filing the bankruptcy until at least 90 days following the most recent payments to the taxing entity have been paid. Should you wait for the 5-year period to expire? If feasible for the debtor's financial circumstances, it might be wise to wait. Perhaps a call to the local Insolvency section would put the matter to rest and make it OK to file before the probationary period expires.

See also, Internal Revenue Manual §§ 5.8.10.2.4, 5.8.10.2.2.

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**THE LAW & CASE
HOTWIRE**

**HELD: IRS DID NOT ABUSE ITS DISCRETION IN DENYING THE
DEBTOR'S OFFER-IN-COMPROMISE WHILE BANKRUPTCY CASE WAS
PENDING**

Salazar v. Commissioner of Internal Revenue, T.C. Memo. 2008-38 (U.S.T.C., 2008)

As respondent's counsel now explains, an offer-in-compromise must include all of the outstanding liabilities of the taxpayer. Further, section 6325(a) provides that the Commissioner "shall issue a certificate of release of any lien imposed with respect to any internal revenue tax" not later than 30 days after the liability for the amount has been fully satisfied. Thus respondent argues, if respondent were to accept an offer-in-compromise and the liabilities were thereby fully satisfied, he would jeopardize any secured claim to the bankruptcy distribution. Accordingly, as respondent's counsel argues, an offer-in-compromise will not be accepted while a bankruptcy is pending if the offer is less than the amount he reasonably stands to receive when the bankruptcy distribution occurs.



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IN OTHER NEWS

Bankruptcy - Taxes - Consumer Protection

U.S. credit card borrowing surges; more defaults soon?

June 13, 2016

by Joseph N. DiStefano, staff writer

The U.S. economy is growing at just 2.5% a year, but credit card lending is rising more than twice as fast: 5% over year-earlier levels each month since last fall, accelerating to 6% in March and April, says Federal Reserve data.

That's the fastest card debt has grown since card lending fell in the 2009 recession, writes longtime credit card analyst David Hilder in a report to clients of Philadelphia-based Drexel Hamilton this morning.



Since Americans aren't earning that much more, won't delinquencies, chargeoffs and bankruptcies be rising in another year or two?

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8 ARRESTED FOR BANKRUPTCY FRAUD

The FBI arrested eight people Tuesday, charging them with allegedly concealing more than \$3 million in assets from federal bankruptcy court in Miami.

The five cases allege the eight people hid assets or illegally transferred them out of their name before filing Chapter 7 bankruptcies. In so doing, the indictment alleges, they shielded assets from creditors and avoided repaying outstanding debts.

Neighbors of Yechezkel, 39, and Tamar Nissenbaum, 35, couldn't believe a small army of FBI agents arrived at their high-rise condo building at 4101 Pine Tree Dr. in Miami Beach early Tuesday morning. Agents walked out them out, through the lobby, in handcuffs.

"It comes as a huge shock when someone who's cared about, who's a member of the community, gets taken into custody like that," neighbor Alex Strassman told Miami Herald news partner CBS4.

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SENTENCED FOR BANKRUPTCY FRAUD

Pocatello, Idaho (KIFI/KIDK)

Kim Thompson, 49, of Rigby was sentenced to three years of probation Tuesday, including six months of home confinement, for bankruptcy fraud.

Chief U.S. District Judge B. Lynn Winmill also ordered Thompson to pay a \$3,000 fine.

U.S. Attorney Wendy Olson said Thompson pleaded guilty on February 10 as part of a plea agreement.

According to that agreement, Thompson filed bankruptcy in the United States Bankruptcy Court on October 14, 2010. As part of that proceeding, Thompson testified under oath at a meeting of creditors that he had no aircraft or accessories.

Thompson later admitted that he had purchased a Piper Arrow airplane in 2009 and that he had never transferred the registration or ownership documents into his name in order to conceal ownership from the bankruptcy trustee.

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NEW STUDENT LOAN DEBT FORGIVENESS FOR VICTIMS OF SCAM COLLEGES

On Monday, the Obama administration released new guidelines for the forgiveness of specific student loans. This program would forgive student loan debt incurred by those who can prove they were the victims of scams perpetrated by for-profit colleges that used fraudulent or illegal methods to convince the student to enroll. While there are federal laws already in place for this, the application process is difficult, plus few people know the program even exists.

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A Summer Reprieve... Debt Collection Litigation & CFPB Complaint Stats

May 2016

- For May 2016, 35% of all consumer litigation plaintiffs had sued at least once before under consumer litigation statutes.
- About 927 different companies were sued, down 2.5% over the 950 last month. And 715 different debt collectors were complained about to the CFPB, about 4% higher than last month's 687 (but remember the caveat about more data trickling in).
- The percentage of suits filed as putative class actions were fairly strong for two out of the three main statutes, with 18% for FDCPA, 17.2% for TCPA and only 7.3% for FCRA.
- California attorney Todd M. Friedman represented the most consumers for the month with 30, and also the most consumers YTD with 171.

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Ex-CEO of Monarch Mortgage indicted in federal court

A giant in the Hampton Roads financial world is in trouble with the law. 13News Now has learned former Chief Executive Officer of Monarch Mortgage,

Edward "Ted" Yoder, has been indicted in federal court on bankruptcy fraud charges. Yoder was arrested early Thursday morning.

Court records show the case alleges when Ted Yoder filed for bankruptcy, he concealed some of his assets by hiding them in another person's accounts. According to the documents, Yoder is accused of hiding hundreds of thousands of dollars from a bankruptcy trustee.

Ted Yoder has been a staple on the Hampton Roads financial scene for decades. Yoder has been connected to other high profile news stories. Reports show he gave former Governor Bob McDonnell advice on his money troubles.

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Lawyer wants bankruptcy to cover student loans

Student loans are swamping some Minnesotans, and a St. Cloud lawyer wants to provide legal relief.

"I'm outraged about it," Wesley Scott said about the mounting debts people are facing. The bankruptcy lawyer at Kain & Scott has written at least four times to U.S. senators from Minnesota about the issue.

Graduates of four-year postsecondary programs in Minnesota faced an average debt load of \$32,000 in 2014. That number was \$21,000 in 2005, according to The Institute for College Access & Success.

Scott wants Sens. Amy Klobuchar and Al Franken to help change Chapter 13 bankruptcy rules to make student loans dischargeable, or able to be wiped out, as with some other debts in bankruptcy.

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