

PROGRAM SUMMARY 4-23-22

By: Gary R. Wallace-Program Summary Committee Chair

***cdcbaa* Holds Fourth Meeting and MCLE Program of 2022: "Taxes and Bankruptcy"**

On April 23, 2022, the CDCBAA held its fourth members meeting and MCLE program of the year. To help mitigate the spread of COVID-19, the meeting and program were conducted as a live webinar via Zoom video. The program topic was: **"Taxes and Bankruptcy."** The distinguished panel consisted of Najah Shariff, an Assistant United States Attorney in the Tax Division of the United States Attorney's Office for the Central District of California, and Steven L. Walker, Esq. of the Law Offices of Steven L. Walker. CDCBAA former president and current board member Hale Antico moderated.

Mr. Walker began the lecture with a discussion of commonly encountered tax compliance issues. As a preventive measure for business clients, Mr. Walker stressed the importance of having an accountant, a bookkeeper, a software program for maintaining books and records, and a payroll service provider.

Ms. Shariff cleared up a fundamental threshold issue that often confuses less experienced bankruptcy counsel confronted with tax issues, namely how to interface with the government on behalf of the client. She explained that it is the U.S. Attorney's office that represents the IRS in bankruptcy court. However, the U.S. Attorney's involvement usually commences only after a referral or when an issue is otherwise deemed sufficiently important for that office's involvement. Instead, many tax issues, including simple fact inquiries, can be resolved directly with the IRS local field insolvency office, without the need for U.S. Attorney office involvement. Frequently, a bankruptcy insolvency specialist is assigned to a case. The specialist will usually be the one who prepares and files any IRS proofs of claim in the case and his/her name will appear on the claim, so he/she is typically a good person to contact first. Ms. Shariff also provided telephone numbers and website information for additional IRS contact points.

Ms. Shariff also reminded counsel to add the following IRS address to debtors' master mailing lists: IRS, P.O. Box 7346 Philadelphia, PA 19101. Ms. Shariff then explained how to understand an IRS proof of claim by showing samples. She also explained the important distinctions among secured, unsecured priority and unsecured general tax claims. She further discussed the broad powers under 11 U.S.C. section 505 that bankruptcy courts have to determine the amount and extent of tax liability.

Mr. Walker explained the tax debt exceptions to dischargeability under 11 U.S.C. sections 523, 1141 and 1328. Mr. Walker pointed out the significance of a notice of federal tax lien, which, if filed before a petition date, rides through a debtor's case and attaches even to exempt assets that were part of the estate at the time of the bankruptcy filing, such as a homestead and retirement accounts, notwithstanding entry of discharge. Ms. Shariff further addressed dischargeability of tax penalties, which may be dischargeable in certain instances (such as when they relate to debt for tax returns that were filed outside the three-year window and when they relate to a general unsecured tax debt).

Regarding late-filed returns, Mr. Walker noted that being late with a return is not as bad as being really late in filing: i.e., the longer a client waits to file an already-late return, the more difficult it can be to obtain a favorable resolution with the IRS or in court. To emphasize that point, Mr. Walker then discussed the Ninth Circuit's *Hawkins* case regarding willful tax evasion.

Ms. Shariff then explained in even more detail how to verify and distinguish among the types of tax debt, and their significance in a typical case. Ms. Shariff strongly urged counsel to obtain client's IRS transcripts and review them *before* filing a case, especially when the client has made counsel aware that there is likely significant tax debt. Ms. Shariff and Mr. Walker also explained, with examples, how the three-year look-back period and the 240-day assessment rule work for determining the dischargeability of income taxes.

Our speakers also pointed out that, per the Ninth Circuit's decision in *Smith v. United States IRS (In re Smith)*, 2016 U.S. App LEXIS 12859 (2016), a tax debt for a late-filed return may be dischargeable if it is filed before the IRS assesses a Substitute for Return (SFR), especially when it can be shown that the taxpayer/debtor made "a reasonable attempt to comply with the Tax Code." For unfiled returns, it was observed that the IRS generally has a six-year look-back rule, but the CA FTB has a 20-year collection statute.

Our speakers also reminded counsel to advise their clients that, once they file a bankruptcy petition, no taxing agency is likely to consider an offer and compromise, at least not without first obtaining a court order for relief from the automatic stay to engage in such discussions.

Our speakers also provided another important practice tip in situations where a client's federal taxes increase, whether by amended returns or otherwise. California Revenue and Tax Code section 18622 require the taxpayer to notify the FTB of such change within six months. The failure to do so may result in nondischargeability as to the FTB for such increase. See *Berkovich v. Cal. Franchise Tax Bd. (In re Berkovich)*, 619 B.R. 397 (B.A.P. 9th Cir. 2020).

The program culminated with a prepared "problem and answer" session. Two very detailed and helpful outlines containing discussions, case authorities and flowcharts were provided to all registered participants.

There was a great deal more very useful information provided to listeners during this superb nuts and bolts seminar. The foregoing summary is therefore intended to be just that. For more information, please go to our website, where members can view the seminar and materials at their convenience.

The next CDCBAA members meeting and Zoom MCLE program will be held on June 11, 2022. The topic will be "**MEET THE U.S. TRUSTEE AND HIS STAFF.**" The speakers will include: Peter Anderson, US Trustee for Region 16; Jack Arutyunyan, Regional Auditor; Jill Sturtevant, Assistant US Trustee; Abram Feuerstein, Assistant US Trustee; Kenneth Miskin, Assistant US Trustee; Kate Bunker, Trial Attorney; and Everett Green, Trial Attorney. We hope you will join us.



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