



February 10, 2005

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Federal Rule of Bankruptcy Procedure 4002

Dear Mr. McCabe:

As legal academics specializing in bankruptcy (Lawless and Porter) and tax law (Johnson) at the William S. Boyd School of Law of the University of Nevada, Las Vegas, we write to comment on the proposed changes to Federal Rule of Bankruptcy Procedure 4002 ("FRBP 4002"). Specifically, we object to the change in FRBP 4002 that would require an individual debtor to bring income tax returns to every section 341 meeting of creditors.

The proposed amendment to FRBP 4002 renders irrelevant a provision of the Internal Revenue Code (26 U.S.C. § 6103) and upsets the careful balance Congress has struck regarding the confidentiality of income tax returns. As such, the proposed amendment is an improper use of the rulemaking process and usurps the national legislature's prerogative to set the terms under which persons may have access to private tax return information.

Under the proposed amendment, an individual debtor would have to bring his or her most recently filed income tax return, including any attachments, to the meeting of creditors required by section 341 of the Bankruptcy Code. The proposed change also would require the debtor to bring other documents, such as pay stubs and bank account information, to the section 341 meeting. Although we believe those other changes unnecessarily burden debtors in bankruptcy court, this letter is directed at the legality of using a court rule to change the statutory directive about the release of income tax returns in bankruptcy cases.

The Internal Revenue Code already provides rules under which the bankruptcy trustee can obtain a debtor's tax return. These rules carefully balance the taxpayer's privacy interests in the return information against the needs of bankruptcy trustees, courts, and parties-in-interest to access the return information for administration of the bankruptcy case. The proposed amendment to FRBP 4002 would give the bankruptcy trustee blanket access to the tax returns of individual debtors. Thus, the proposed

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amendment to FRBP 4002 would give bankruptcy trustees power beyond what the Internal Revenue Code currently allows.

Section 6103(a) of the Internal Revenue Code begins with the general proposition that tax “returns and return information shall be confidential.”¹ *See also Church of Scientology v. IRS*, 484 U.S. 9, 10 (1987). Confidentiality is the baseline principle for tax returns and return information.

Section 6103 then enumerates specific exceptions to the general rule. Subsection (e)(5) deals with bankruptcy cases and allows the bankruptcy trustee in a chapter 7 or chapter 11 case to obtain the debtor’s tax return for the taxable year the case is commenced or any preceding taxable year. *See* 26 U.S.C. § 6103(e)(5). Because the bankruptcy estate succeeds to various tax attributes of the debtor, *see* 26 U.S.C. § 1398(g), disclosure of the debtor’s income tax return is necessary so that the trustee may prepare the return of the bankruptcy estate. Significantly, these rules apply only to individual debtors in chapter 7 and chapter 11 cases and cease to apply at the moment the chapter 7 or chapter 11 case is dismissed.² In all other cases, a bankruptcy trustee must rely on subsection 6103(e)(4). Under that provision, the bankruptcy trustee may obtain the debtor’s tax return only upon written request and a finding by the IRS that the trustee has a material interest which will be affected by the information contained in the return.

The rules in section 6103 are the product of careful and detailed consideration by Congress, which specifically balanced the need for disclosure of return information to other government agencies:

[S]ubstantial controversy [has been] created as to whether the present extent of actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes breaches a reasonable expectation of privacy on the part of the American citizen with respect to such information. This, in turn, has raised the question of whether the public’s reaction to this possible abuse of privacy would seriously impair the effectiveness of our country’s very successful voluntary assessment system, which is the mainstay of the Federal tax system.

¹ Under 26 U.S.C. § 6103(b)(1), a “tax return” is “any tax or information return, declaration of estimated tax, or claim for refund [filed with the Internal Revenue Service] including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.” “Return information” includes items such as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments” and other private information defined in 26 U.S.C. § 6103(b)(2).

² This limitation comes from the language of 26 U.S.C. § 6103(e)(5), which limits its application only to cases in which “section 1398 applies.” Section 1398, in turn, applies only to chapter 7 and chapter 11 cases in which the debtor is an individual. *See* 26 U.S.C. § 1398(a).

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S. Rep. 938, 94th Cong., 2d Sess. 317 (pt. 1), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 3439, 3747.

Congress balanced these concerns with legitimate needs for access to tax information, and section 6103 is the result of that balancing:

The Congress reviewed each of the areas in which returns and return information were subject to disclosure. With respect to each of these areas, the Congress strove to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary tax assessment system.

. . . [T]he Congress felt that returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103 where it was determined that disclosure was warranted.

Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 314-15, *reprinted in* 1976-3 C.B. (vol. 2) 326-27.

As it relates to income tax returns, the proposed changes to FRBP 4002 completely overlap with section 6103 of the Internal Revenue Code. It is a well-established principle that federal court rules shall not "abridge, enlarge, or modify any substantive right." *See* 28 U.S.C. §§ 2072, 2075. By changing the rules under which a bankruptcy trustee may access income tax returns, the proposed amendment to FRBP abridges and modifies taxpayers' substantive rights to keep income tax returns confidential to the extent consistent with section 6103. Certainly, there are appropriate situations for a trustee to obtain income tax returns from the debtors and even appropriate situations for a bankruptcy court to order that a debtor produce income tax returns. *See Beach v. Morris (In re Beach)*, 281 B.R. 917 (B.A.P. 10th Cir. 2002); *International Horizons, Inc. v. Committee of Unsecured Creditors*, 16 B.R. 484 (N.D. Ga. 1981). These situations may even be numerous. We do not object to the disclosure of a debtor's income tax return in appropriate cases. Rather, we object to a court rule changing the general statutory principle that a debtor is entitled to an individualized determination that the release of such tax return information is appropriate.

As such, the proposed change is an inappropriate use of the rulemaking process. We have no question that the proposed change to FRBP 4002 would make life easier for bankruptcy trustees, but that is not the appropriate question. If any changes are to be made to the statutory protections for the confidentiality of income-tax returns, Congress should make the change. The 108th Congress considered and did not enact proposed changes to the Bankruptcy Code that would have required debtors to produce income-tax returns in every case. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920, 108th Cong., 2d Sess., § 315(b)(2). A bill is now pending before the

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109th Congress that would make similar changes to the Bankruptcy Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, S. 256, 109th Cong., 1st Sess., § 315(b)(2). Those interested in changing the rules relating to debtor's private tax return information should take those concerns directly to Congress rather than using changes to the federal court rules to do an end run around the legislative process.

Sincerely,



Robert M. Lawless
Gordon & Silver, Ltd., Professor of Law



Steve R. Johnson
E.L. Wiegand Professor of Law



Katherine Porter
Visiting Associate Professor of Law