



STATE BOARD OF EQUALIZATION

450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
TELEPHONE (916) 322-6083
FAX (916) 323-3387
www.boe.ca.gov

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August 29, 2003

Ms. Lyn Scholz
Deputy Clerk
Marin County Assessment Appeals Board
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903

RE: *Authority of AAB of Hear and Decide Appeal filed by
Assessee in Bankruptcy*

Dear Ms. Scholz:

This is in response to your inquiry addressed to the Supervising Tax Counsel Lou Ambrose, regarding the proper treatment of an appeal of an escape assessment levied against _____, Ltd., following its voluntary Chapter 11 bankruptcy petition. As discussed in more detail below, it is our opinion that the appeal of a property tax assessment, escape or otherwise, qualifies for an exception to the "automatic stay" provided in subdivision (b)(9)(D) of section 362 of the Bankruptcy code, and therefore, does not preclude a local assessment appeals board from hearing and deciding the taxpayer's application for reduced assessment.

Factual Background

Our reply is based upon the following background facts provided in your letter dated August 15, 2003:

1. Marin County sent an Unsecured Tax Statement dated May 23, 2003 to _____, Ltd. (hereafter "L _____"), parent company of _____ Corp., for business and personal property escaping assessment on the 1999-2000 assessment roll.
2. Taxes on that escape assessment are due on August 31, 2003.
3. On July 15, 2003, L _____, Ltd., filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code.
4. Appealing the escape assessment, L _____ filed an *Application for Reduced Assessment*, which your office received on July 22, 2003.
5. In a letter dated August 4, 2003, L _____ takes the position that section 362 of the Bankruptcy Code operates to stay its appeal of the 1999-2000 escape assessment.

Based upon these facts, you have posed the following question: "Could you please advise the impact of the bankruptcy petition on the pending Application for Changed Assessment?"

Analysis

May the Marin County Assessment Appeals Board hear an appeals petition from an assessee in bankruptcy even when the bankruptcy proceedings have not yet been completed?

Yes. While the "automatic stay" provision granted by subdivision (a) of 11 U.S.C. section 362 stays judicial, administrative, or other actions or proceedings against a debtor, it is our opinion that an assessment appeal qualifies under the exceptions to the automatic stay provided in subdivision (b)(9) of section 362.

As you may be aware, the filing of a bankruptcy petition triggers the "automatic stay" contained in 11 U.S.C. § 362 (hereafter section 362). As codified in subdivision (a)(1) of section 362, the "automatic stay" operates to stay or suspend the commencement or continuation of a judicial, administrative or other action against the debtor, as well as any action to recover a pre-petition claim or debt, without regard to the type of bankruptcy filed (i.e. Chapter 7, 9, 11, 12, or 13). Unless an action falls within specified exceptions under subdivision (b) of section 362, a creditor must petition the bankruptcy court for relief from the "automatic stay" prior to pursuing an action against the debtor.

Under prior case law interpreting section 362 as it then existed, it was our opinion that the "automatic stay" precluded the State Board of Equalization from hearing and deciding petitions for reassessment. That opinion was based on long-held Board Legal Department opinions and, in part, on the holding in *Delpit v. Commissioner* (9th Cir. 1994) 18 F.3d 768. In *Delpit*, the United States Court of Appeals, Ninth Circuit, held that an appeal of a Tax Court decision is simply a continuation of the comprehensive tax assessment procedure which is initiated against the taxpayer. *Delpit v. Commissioner, supra*, at 770.

Since we opined that the assessment appeal process was a comprehensive tax assessment procedure, it was implicit that the assessment appeal process fell within the scope of actions covered by the "automatic stay." However, amendments to subdivision (b)(9) of section 362, enacted after the Ninth Circuit's decision in *Delpit, supra*, provided several new tax-related exceptions to the automatic stay, including:

- (A) an audit by a governmental unit to determine tax liability;
- (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;
- (C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment..."

Notwithstanding those exceptions listed above, it must be noted, that subdivision (b)(9) of section 362 does not specifically mention appeals of tax assessments. However, the "making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment . . ." is relevant to these facts.

The pivotal question to this analysis is whether a tax assessment appeal fits within one of the exceptions listed above. If so, an appeals board may hear and decide applications filed by assesseees in bankruptcy without obtaining relief from stay from the bankruptcy court. If assessment appeals do not fit within one of those exceptions—and an assessment appeals board hears the appeal notwithstanding the pending bankruptcy action—the assessment appeals board will have violated the "automatic stay" and may be subject to sanctions by the bankruptcy court. To date, no court has answered this question.

It is our opinion that assessment appeals fit within the assessment exception contained in subdivision (b)(9)(D) of section 362. In support of that conclusion, we draw your attention to two separate Ninth Circuit Court of Appeals decisions:

In *Delpit*, the Ninth Circuit held that a tax appeal is simply a continuation of the comprehensive tax assessment procedure that is initiated against the taxpayer. *Delpit v. Commissioner, supra*, at 770. Thus, applying that rationale to the assessment appeals process, it is our opinion that such appeals are merely the continuation of the comprehensive tax assessment procedures that the county has initiated. The language in subdivision (b)(9)(D) appears to specifically contemplate this result.

Furthermore, it is our opinion that an escape assessment does not become final until the taxpayer's appeal rights have terminated. To determine when California taxes become final, please refer to *In re King* (9th Cir. 1992) 961 F.2d 1423. In *King*, the Ninth Circuit examined California's assessment of income taxes and the date when such taxes become final and payable. Comparing California's income tax assessment procedures to the procedures employed by the Internal Revenue Service, the Ninth Circuit noted that California law does not define when tax assessments occur. It held that, in California, a tax assessment become final when the taxpayer's appeal rights have terminated and the tax becomes payable. *In re King, supra*, at 1427.

Applying the Ninth Circuit's holding in *In re King* to property tax assessments yields the same conclusion. Revenue and Taxation Code section 1605 provides that assesseees have 60 days from the date of a notice of an escape assessment or the date of a tax bill resulting from an escape assessment to file an *Application for Reduced Assessment*. However, like income taxes, the Revenue and Taxation code does not define when a property tax assessment becomes final.

Applying the holding in *In re King*, that a tax assessment does not become final until the appeal rights have terminated or the tax appeal is resolved—we believe that the escape assessment appeal process is merely a continuation of the county's comprehensive assessment procedures. This conclusion is also supported by the claim for refund provisions of Revenue and Taxation Code section 5097. Subdivision (c) of section 5097 provides that:

If an application for equalization of an escape assessment is filed pursuant to Section 1603, a claim may be filed on any taxes resulting from the escape assessment or the original assessment to which the escape relates within the period provided in paragraph (2) of subdivision (a) or within 60 days from the date the board of equalization makes its final determination on the application, whichever is later.

In effect, the deadline for the taxpayer's remedy—filing a claim for refund of taxes on an escape assessment—does not occur until 60 days after the assessment appeals board decides any appeal of that escape assessment. It follows that the taxes on an escape assessment do not become final until an assessee has exhausted or waived its right to appeal that assessment.

Thus, it is our opinion that the assessment appeal is the final step in the assessment procedure and fits within the assessment exception contained in subdivision (b)(9)(D) of section 362.

Conclusion

The United States Court of Appeals, Ninth Circuit, has held that California tax assessments become final when the taxpayers' appeal rights have terminated and that an appeal is merely the continuation of a comprehensive tax assessment process. As a step in the tax assessment process, an assessment appeal qualifies under the exception to the automatic stay provided in subdivision (b)(9)(D) of section 362 of the Bankruptcy Code.

The views expressed in this letter are advisory in nature only; they represent the analysis of the legal staff of the Board of Equalization based on present law and the facts set forth herein.

Sincerely,

/s/ Michael Lebeau

Michael Lebeau
Tax Counsel

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cc: Ms. Jean Ogrod, MIC:83
Mr. David Gau, MIC:63
Ms. Kristine Cazadd, MIC:82
Ms. Jennifer Willis, MIC:70
Mr. Dean Kinnee, MIC:64