

M e m o r a n d u m**170.0007.001**

To : William D. Dunn
Assistant Principal Tax Auditor (MIC:49)

Date: July 31, 1995

From : Thomas J. Cooke
Staff Counsel

Subject: S--- E. O---
Account No. SB UT XX-XXXXXXX-020

Gary Jugum has requested that I respond to your memorandum to him dated May 30, 1995 concerning the above taxpayer.

In your memorandum, you state that based on the Board's decision that S--- E. O---, rather than P--- M--- (SB UT XX-XXXXXXX-010), was the purchaser of the vessel "G--- L---," the Board requested that a determination be issued to Mr. O---. The attorney for Mr. O--- contends that any such liability is discharged as the result of his client's filing of Chapter 7 bankruptcy on November 4, 1991 and his subsequent bankruptcy discharge on January 30, 1995.

The Board's records indicate that the vessel was purchased in either June or July 1986 and that a Sales and Use Tax return was not mailed to Mr. O---. Accordingly, the tax was due on or before the last day of the twelfth month following the month during which the vessel was purchased, either June 30 or July 31, 1987, depending on the month of purchase.

You state that the applicable use tax is clearly an excise tax (Rev. & Tax Code §6201). Pursuant to 11 U.S.C. §507(a)(7)(E), an excise tax debt may be discharged if the tax debt in question arose more than three years prior to the filing of the bankruptcy petition and a return was filed. In this case, Mr. O--- did not file a return. You state that the tax liability comes within the exception to discharge provided by 11 U.S.C. §§523(a)(1)(A) and (B)(i). You ask for a legal opinion on this issue.

There are several reasons why Mr. O---'s liability has not been discharged in his bankruptcy action.

11 U.S.C. §523(a) provides that a bankruptcy discharge "does not discharge an individual debtor from any debt --

- (1) for a tax or a custom duty –
 - (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
 - (B) with respect to which a return, if required --
 - (i) was not filed; . . .
- (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --"

the filing of a claim.

Since Mr. O--- did not file a return prior to his bankruptcy filing date of November 4, 1991, this liability cannot be discharged because of the exception to discharge provided by 11 U.S.C. §523(a)(1)(B)(i). Any post-petition return filed would have constituted a post-petition liability similarly excepted from discharge in a Chapter 7 bankruptcy. It is our understanding that no such post-petition return was filed.

Also, Mr. O--- did not list or schedule the Board as a creditor in his bankruptcy petition. The Certificate of Service accompanying Mr. O---'s Discharge of Debtor provided to the Board does not list the Board as an "interested party." If the Board was listed or scheduled in the bankruptcy action, the Board would appear on the Certificate of Service. The failure of Mr. O--- to list or schedule the Board as a creditor in his bankruptcy petition also excepts the liability from discharge pursuant to 11 U.S.C. §523(a)(3).

TJC/cmm