

# UPDATE ON INTERNAL REVENUE SERVICE BANKRUPTCY PRACTICE

Richard Charles Grosenick  
Office of Chief Counsel – IRS  
211 W. Wisconsin Ave. – Suite 807  
Milwaukee, WI 53203

Telephone (414) 231-2439  
Fax: (855) 634-8092

## I. How Do I Get a Copy of a Tax Return?

A. Type in “Get Transcript” at [irs.gov](http://irs.gov).

B. Debtors who do not have copies of their returns can obtain a tax return transcript which shows most of the line items of a return as filed. The return transcript is not a copy of the return but a computerized transcript.

1. Use Form 4506-T to request a copy of the return transcript (don't ask for an account transcript – an account transcript contains only a summary of the return).
2. Transcripts can also be ordered by calling 1-800-908-9946
3. There is no charge to obtain a transcript
4. Return transcripts are available for the current and nine prior calendar years

C. Copies of the debtors' tax returns can also be requested

1. Use Form 4506 to get a copy of the actual return
2. There is a user fee of \$57 for each return requested
3. Takes up to 60 days to process
4. Copies of individual returns are usually available for 7 years from the date of filing. Business returns may be available for a longer period.
5. Forms 4506, 4506-T and other forms can be found on [irs.gov](http://irs.gov).

D. IRS Walk-in no longer stamps copies of returns

1. Neither does Insolvency
2. Stamped copy ≠ IRS accepted return for processing

E. The IRS cannot disclose taxpayer information to third parties without a Power of Attorney (POA) form. I.R.C. § 6103 [except for trustees – see sec. 6103(e)(4) & (5)]

1. No POA is needed if the IRS filed proof of claim in the bankruptcy
2. POA will be needed to discuss:
  - a. post-petition debts if no § 1305 claim
  - b. debts not included on the proof of claim
  - c. spousal debts if only one spouse files the petition
  - d. any tax debt if the bankruptcy case is closed

3. POA Forms are available online at irs.gov (type in "Form 2848" in the search box).

- a. Years, taxes at issue strictly construed
- b. POA is only effective for tax periods up to three years from date of POA

## II. Where do I contact the IRS?

### A. Address to notify the IRS of a bankruptcy filing:

Internal Revenue Service  
P.O. Box 7346  
Philadelphia, PA 19101-7346

### B. Address to mail payments:

Internal Revenue Service  
P.O. Box 7317  
Philadelphia, PA 19101-7317

### C. Don't send notices, etc. to Wisconsin Insolvency.

- 1. At best, takes time for them to forward to Philadelphia
- 2. At worst, notice won't be forwarded at all
- 3. Only send notice if you know the specific Insolvency specialist and you're faxing it directly to that person

### D. Who to contact? Look on proof of claim.

- 1. If POC outdated, that Specialist will refer you to current Specialist
- 2. UNAX limits employee access to cases, so only assigned Specialist can access
- 3. If no Specialist assigned, or need to contact Supervisor, call me

## III. How Do I Get a Proof of Claim Amended?

### A. Proof of claim process

- 1. Centralized Insolvency (CIO) gets notice of bankruptcy
- 2. Case is assigned to Insolvency Specialist's queue
  - a. No longer enough Specialists for Wisconsin, overflow goes to Specialists in other states
  - b. Inventory rebalanced about every three months
  - c. Specialist in ch. 13 will keep case until plan confirmation, then returned to CIO
  - d. Ch. 7A, 11 & 12 go to Advisor (higher-grade Specialist)
  - e. Ch. 7N not assigned, no POC filed
- 3. Specialist investigates case
  - a. If return filed, Specialist will prepare and file POC
  - b. If no return filed, Specialist will estimate claim

i. Some specialists used to contact the debtor's attorney or Trustee to get copy of unfiled return; this is being phased out.

c. If audit, Specialist will file estimated POC

i. Best way to get audit completed and finalized is to expeditiously provide requested documents to Examiner/Revenue Agent.

B. Will the IRS amend the Proof of Claim?

1. No – if payment received (even if payment received outside of the bankruptcy)

2. Yes – if substantive change in tax (amended return, audit)

3. Yes – if offset

C. Adjustments

1. This function is now with Centralized Insolvency (so Specialists can't make individual account adjustments without authorization)

2. Follow-up with Insolvency Specialist until client receives notification of adjustment (Form 4549 or other record of change).

D. Rate of interest = 4% since April 1, 2016.

1. See B.C. § 511 (rate of interest on tax claims); IRC § 6621(a)(2) (underpayment rate); Rev. Rul. 2016-06

2. May change quarterly

IV. Which Cases Get Referred to the United States' Attorney?

A. IRS Counsel cannot represent the IRS in Bankruptcy Court (only in Tax Court). So, any case requiring an appearance will be handled by the Department of Justice, usually by a local United States Attorney. Insolvency sends a request, called a referral, directly to the United States' Attorney's Office, asking that the U.S. Attorney represent the Service's interests in a particular case. The following cases will be referred:

B. If you don't include our secured claim in the plan

1. Needs to have the correct dollar amount (Matter of Penrod, 50 F.3d 459 (7<sup>th</sup> Cir. 1995).

2. Needs to have the correct rate of interest

3. Also see Section VII (F) below.

B. If you file an objection to our proof of claim

1. Adversary cases are normally handled by Department of Justice attorneys from Washington, D.C.

C. If you have some unusual plan provision (like paying our claim outside of bankruptcy)

1. Insolvency no longer has flexibility to make exceptions

2. Adoption of National, instead of local, standards

3. ex. – 1305 claims are being phased out

The Service is changing its procedures on section 1305 claims, and will now only file such a claim under the following circumstances:

- a. The plan of reorganization specifically provides for payment of the section 1305 claim.
- b. The Service is notified of the plan provisions.
- c. The year at issue is the first tax year after the bankruptcy filing (so, if the debtor files for bankruptcy in 2016, we would file a 1305 claim for the 2016 tax year, but not for the 2017 tax year).
- d. **Do not** amend the IRS claim to include a post-petition year. The Trustee will object.

#### V. How is the IRS Handling Tax Refunds?

A. IRS has a right of offset. 11 U.S.C. § 553; I.R.C. § 6402.

1. Offset creates a secured claim. 11 U.S.C. § 506(a)

B. Offsets of tax refunds do not require a motion to lift the stay. In re Pugh, Case No. 13-23483 (McGarrity)

1. The word “refund” is shorthand for the process. It is more accurate to say that the debtor has a claim to a tax refund. For that claim to ripen into an actual refund, there must be monies owing to the debtor’s estate after offset. If no amount is left after the offset, there is no refund to become property of the estate. See Internal Revenue Service v. Luongo, 259 F.3d 323, 335 (5<sup>th</sup> Cir. 2001); In re Gould, 401 B.R. 415, 423-26 (9<sup>th</sup> Cir. BAP 2009); In re Lyle, 324 B.R. 128 (Bnk. N.D. Cal. 2005) (non-tax case with discussion on when debtor has a property interest in a tax overpayment).

2. I.R.C. § 6402(a) provides that in the case of any overpayment, the Service may credit such overpayment against any tax liability, and then refund any balance to the taxpayer.

3. Unless there is a net amount owing after offset, there is no actual refund to be issued to the debtor.

- a. If the amount of the debtor’s overpayment for a tax year is less than the amount of the debtor’s acknowledged tax liability for all outstanding tax years, the Service will, under I.R.C. § 6402(a), credit the overpayment against the liability.

4. This process is not a setoff in the traditional sense

- a. The IRS is not taking debtor’s property (like a bank setoff); instead, the IRS is keeping the property of the Government.

- b. When the debtor has taxes withheld, those are taxes that are owed to the Government. The withheld taxes are the

- Government’s money. If the taxpayer pays in more taxes than are owed, the taxpayer gets that money back in the form of a refund.

- c. However, if the debtor claims a refund for the current tax year, but owes for prior years, the Government can keep that money – because it’s the Government’s money which the debtor previously underpaid. The debtor’s claim is denied.

C. How does this work in practice?

1. Offset occurs, letter send to debtor.
2. Insolvency notified by Centralized Insolvency, Specialist will amend

POC (new language):

3. Below is the form language that we currently use in the first paragraph of the attachment to Form 410 Proof of Claim (where we breakout the actual amounts owed):

The United States has not identified a right of setoff or counterclaim. However, this determination is based on available data and is not intended to waive any right to setoff against this claim debts owed to this debtor by this or any other federal agency. All rights of setoff are preserved and will be asserted to the extent lawful.

Once we have offset a debtor's refund, the following language will replace the language above in the first paragraph (I've italicized the key change):

*The United States has the right of setoff or counterclaim(s) in the amount of \$ \_\_\_\_\_.*  
The identification of the right of setoff in the amount is based on available data and is not intended to waive or limit the right to setoff against this claim debts owed to this debtor by this or any other federal agency that have not been identified. All rights of setoff are preserved and will be asserted to the extent lawful.

4. The dollar amount shown (\$ \_\_\_\_\_) will be the amount that we have taken from the debtor's overpayment and applied to other tax debts. The amount shown also will be the difference in amount between the amended claim and the preceding claim, so everyone can see where the offset was applied. We will send a letter to the debtor with a more detailed explanation of how the offset was applied, as we have done in the past. The amended proof of claim will contain only the offset and not any other adjustments – if we have to show any outside payments, abatements or exam adjustments, we will file an additional amended claim, without the offset paragraph.

- a. POC provided to all parties
- b. no setoff letter

D. Exceptions – The IRS will move to lift stay in these situations:

1. non-tax debts (such as Affordable Care Act)
  2. Business taxes owed in individual chapter 11 cases
- Why must the IRS lift the stay in these cases?* No mutuality in the debt.

E. Other Government agencies may offset if IRS doesn't.

1. We do not have any details about these offsets. The debtor will get a letter from the offsetting agency.
2. You can contact the Federal Agency Offset at 1-800-304-3107.
3. Other agency offsets are handled by the United States Attorney's Office. They will file the motion to lift stay.

F. *Please* don't have debtors call Insolvency to ask where refunds are – direct them to “Where’s My Refund?” on [irs.gov](http://irs.gov).

## VI. How Do I Get a Tax Lien Released?

### A. Discharge v. release v. subordination

1. It is important to note that there is a "fundamental legal distinction between the 'release' of a federal tax lien provided for by . . . § 6325(a) and the 'discharge' of property from the tax lien provided for by . . . § 6325(b)."

Adamowicz v. United States, 101 Fed. Cl. 485, 487-88 (2011) (quoting Internal Revenue Manual § 5.17.2.8.3(1)).

2. When the IRS, following a demand, issues a lien against an individual for unpaid taxes, the lien applies to all of the individual's property. See 26 U.S.C. §§ 6321 and 6322. A release or withdrawal "extinguishes the federal tax lien itself," requiring that the amount owed underlying the tax liability is paid or that the lien is deemed unenforceable. Following a release, the IRS no longer has a lien against any of the individual's property.

3. A discharge, however, is applicable only to a portion of an individual's property subject to the lien. A discharge "permit[s] the transfer of [a] property free from the lien," but does not release an individual's other property from the lien. Id. (quoting 26 C.F.R. § 301.6325-1(c))

4. With a subordination, the lien still exists against the property, but the IRS agrees that another lien takes priority.

5. a “withdrawal” is similar to a release – the IRS is removing the Notice of Federal Tax Lien from the records. Unlike a release, a withdrawal does *not* mean the underlying tax liability is gone.

### B. Process – go to [irs.gov](http://irs.gov) and type in “Get Rid of Lien”:

1. For discharge – see Publication 783 and Form 14135
2. For subordination – see Publication 784 and Form 14134
3. For release/withdrawal – see Form 12277

### C. Who to contact

1. Not done by phone or fax, only by mail
2. Send to Advisory at

Internal Revenue Service  
Advisory Unit, Stop 5012  
230 S Dearborn St. Rm 2630  
Chicago, IL 60604-1505  
Fax: 877-477-8752

3. The process takes at least 90 days, sometimes more, but you should be contacted within 10 days of sending in your request. If not, send in a follow-up fax asking for Advisory to call you about the status of your request. If you still don't hear anything, call me.

4. Advisory won't tell you if there is a lien on property, or whether the lien is still in effect. You need to check the courthouse records and/or do a title search.

## VII. What Else Do I Need to Know?

A. Dissolved Entities in Bankruptcy. If you include a former LLC or corporation in chapter 13, we may not include the business on the proof of claim. The IRS tracks entities by Employer Identification Number (EIN), and tracks chapter 13 cases by the debtor's Social Security Number. Chapter 13 is limited to individuals, so Insolvency will not always cross-reference a business even if it shows up in the schedules.

1. The LLC will continue to get collection notices, because the EIN will not be coded for bankruptcy.
2. If the business is not on the proof of claim, and you believe there are taxes owed, contact Insolvency.
3. If the taxes for the business are not included on our proof of claim, your client will face collection after bankruptcy.

B. No installment agreements or offers in compromise while in bankruptcy

1. If the debtor had a valid installment agreement or offer in compromise prior to bankruptcy, that will be reactivated after the automatic stay lifts
2. The debtor needs to follow-up immediately after the bankruptcy concludes – once the IRS records that the automatic stay is lifted, we will cancel the installment agreement or offer if our records show a default

C. Returns on Extension. Your client does not need to file a tax return until April 15, and can get an extension until October 15. But, if a return is not filed, we must estimate our proof of claim. You can't object that our claim is wrong unless a return is filed.

D. Marital Property – if only one spouse files for bankruptcy, we will include both spouses' tax debts in our claim

1. If spouses file separate bankruptcies, we will include both spouse's tax debts in each bankruptcy. We will credit all payments received and let the trustee know when we are fully paid.

E. "Per Return" on the proof of claim means that we have received the return. At some point, "Per Return" will be only be added once the return is processed by the Service Center, but right now "Per Return" may be used by Insolvency Specialists or Centralized Insolvency when a return is received.

1. This means the amount on the claim may change once the return is processed or examined. In theory, once the amount is finalized, "Per Return" will be replaced by the assessment date.
2. These changes, as with offsets, are dependent on programming changes which may or may not be completed due to the budget.