1998 WL 1757128 (IRS FSA)

Internal Revenue Service(I.R.S.)

IRS FSA
Field Service Advisory

November 20, 1998

CC:GL-***

Br2:WVSpatz
to: Chief, Procedural Branch, Field Service CC:FS ***

Attn: ***

from: Chief, Branch 2, General Litigation CC:GL:Br2

subject: ***Proposed Writ Ne Exeat Republica

This responds to your memorandum of *** regarding the above-described matter and confirms our prior oral concurrence with International's views that a writ of ne exeat republica is inappropriate in the present case at the present time.

In addition to the facts described in your memorandum and in District Counsel's memorandum to you of *** District Counsel orally advised this office of the following pertinent facts as of ***

(1) For tax years *** and *** were non-filers. There is no evidence that *** earned any of the income attributed to her in the Service's defaulted upon notice of deficiency to *** for tax years *** and ***

(2) For tax year *** the *** filed a joint return, there is no evidence to justify the *** year notice of deficiency's assertion of the fraud penalty against *** and District Counsel believes it is likely that *** was an “”””innocent spouse” for tax year ***

(3) For tax years *** through *** all of the Examination Division's civil evidence to support *** alleged unreported income for those years was destroyed in a fire. CID's investigative materials with respect to *** for those years cannot be disclosed to the Examination Division or to District Counsel at this time due to grand jury secrecy rules still applicable to such materials. If CID's above-described materials could somehow be obtained by the Service for civil tax purposes through a Rule 6(e) order, District Counsel anticipates that a time-consuming examination of such records would be required to attempt to reconstruct the indirect income methods employed by the Service for civil purposes in its notices of deficiency to the *** for these years.

(4) In District Counsel's estimation, there is no hard evidence at this time of the assets, if any, which *** or the *** together allegedly removed from the United States when they moved to *** in *** The *** allege that no material removal of their assets occurred and allege that their assets largely remain in a “family trust” of some type still situated in the United States. The Service is attempting to determine whether it can effect collection against the above-described “family trust” in some manner.

(5) Other than a residence in *** valued at approximately $***, the Service has no evidence that *** or *** together have assets in *** sufficient to satisfy any significant portion of the over $*** income tax assessment against them for the tax years

*** through *** As of this time, the Collection Division has not initiated any tax treaty summons through *** tax authorities to attempt to determine the extent of the *** assets in ***

(6) As of March 4, 1992, District Counsel estimated there was only a 10% chance that *** would now appear in the United States for the Tax Court's ***, hearing on the parties' respective motions to dismiss these cases for lack of jurisdiction. The parties are also now engaged in settlement discussions with respect to the merits of the tax assessments at issue.

As indicated generally in LGM GL-7/INTL-2, 1990 WL 1086225, and the cases cited therein, a writ of ne exeat republica is an extraordinary collection remedy which may result in a taxpayer being temporarily confined in prison (if unable to post suitable bond) for the taxpayer's non-payment of federal taxes, where the Service can show generally: (1) the existence of significant tax liabilities; (2) the taxpayer has a present ability to pay the tax liabilities; but (3) the taxpayer has chosen instead to attempt to place both himself and his assets beyond the collection jurisdiction of the United States. The above-described extraordinary deprivation of a person's right to travel and/or liberty has been justified only to ensure the taxpayer's continued submission to the jurisdiction of a court to award effective relief in an existing (or soon to be brought) U.S. district court proceeding, initiated by the United States to collect tax through a suit to foreclose tax liens, to reduce tax claims to judgment, and/or to compel repatriation of assets in some manner. No such U.S. district court collection suit is pending or anticipated with respect to *** at this time.

Since both parties in the present Tax Court case involving *** agree that the Tax Court lacks jurisdiction to hear the pending Tax Court case [either because the Tax Court petition was untimely by several years (the Service's position) or because no valid notices of deficiency were originally mailed by the Service to *** last known address (the taxpayer's position)], it is our view that I.R.C. § 6213(a) would not pose a genuine, legal obstacle to the Service bringing such a collection action against *** prior to the dismissal of her present Tax Court case. Otherwise, a taxpayer could always file frivolous Tax Court petitions (where no basis for jurisdiction existed) to frustrate any efforts by the Service to collect his taxes that were due. The TAMRA amendment to I.R.C. § 6213(a) gave the Tax Court authority to enjoin Service collection actions only in the case of a “timely petition” to the Tax Court. Nevertheless, in light of the burden of proof problems encountered by the Service in Kamholz v. Commissioner, 94 T.C. 11 (1990), non-acquiesced, 1991-31 I.R.B. 4, the Service often prudently chooses to exercise restraint in bringing collection actions against a taxpayer even when the existence of an open Tax Court case for a particular year should not be a genuine legal obstacle to such collection action for the same year. In the present case, the above-described Service practice of prudential restraint in bringing collection actions before a taxpayer's Tax Court case is finally dismissed would not apply, due to the Service's legitimate concerns regarding its ability to collect the tax assessed in the event of delay.

On the other hand, the Service's practical inability at this time to defend the Service's assessments against *** on the merits would pose a very significant obstacle to the Service initiating any type of affirmative collection action against ***. Even if a taxpayer is unable, offensively, to obtain jurisdiction to attack the merits of the Service's income tax assessments in the Tax Court (due to an untimely petition) or in a refund suit (due to non-payment of the taxes), a taxpayer may raise and litigate the merits of the Service's assessments as a defense to a collection lawsuit brought by the Service for affirmative relief, unless the merits of the tax have been previously litigated to a res judicata judgment. United States v. O'Connor, 291 F.2d 520, 526-528 (2nd Cir. 1961); United States v. Formige, 659 F.2d 206, 208 (D.C. Cir. 1981); and Al-Kim, Inc. v. United States, 650 F.2d 919, 922 (9th Cir. 1979).

If the United States obtains a temporary writ of ne exeat against a taxpayer through ex parte representations made to a U.S. district court, the Service will be immediately required at an adversarial hearing in district court to bear the burden of proving, inter alia, that the Service will meet probable success on the merits of its tax claims and other matters at issue in its pending (or soon to be brought) collection suit, in order to keep the extraordinary writ ne exeat in effect. In the present case, the Service would apparently be unable to defend the merits of its assessments against *** at an immediate district court hearing, because: (1) all of the civil evidence against *** was destroyed in a fire; (2) the criminal evidence (obtained through the grand jury

process) can not be obtained for a civil suit unless the standards for obtaining a Rule 6(e) order are met and, even then, significant time may be required to analyze and reconstruct the grand jury evidence for use in proving the civil adjustments; (3) the evidence is not likely to support any part of the assessments against *** (as opposed to *** for the non-filing tax years *** and *** and (4) *** is believed by District Counsel to be an “““““innocent spouse” as to tax year ***

We also concur with International's views that the Service's hard evidence of the following matters necessary for the issuance of a writ of ne exeat against *** also appears to be insufficient at this time: (1) the particular assets allegedly removed from the United States by *** in *** and (2) *** present ability to pay a significant portion of the tax assessments against her from assets held in *** beyond the ordinary collection processes of the United States.

If you have any questions regarding this case, please call William Spatz at FTS 377-6551.

LAWRENCE H. SCHATTNER

cc: International, Branch 1

Attn: Miller Williams

1998 WL 1757128 (IRS FSA)