

April 2015

### *No Discharge for Late-Filed Tax Return*

This past six months, two federal appeals courts have decided that the bankruptcy statute does not permit an individual to discharge income tax liability generated in a year for which the return was filed after the filing deadline, except in extremely limited circumstances.

In 2005, Congress amended the bankruptcy statute to define a tax return as “a return that satisfies ... applicable filing requirements.” The courts determined that the filing deadline was an “applicable filing requirement”. Therefore, a late-filed return is not a return at all under the statute.

Unpaid taxes from a year for which no return is filed are not discharged in bankruptcy. The only exception is a late-filed return prepared by the IRS with the cooperation of the taxpayer under Internal Revenue Code § 6020(a).

Even if an individual does not have the funds to pay the taxes, it is important to file the tax return timely, in order to preserve the option of discharging the tax debt at a later date. *Fahey v. Massachusetts Dep’t of Revenue (In re Fahey)*, 779 F.3d 1 (1<sup>st</sup> Cir. 2015); *Mallo v. IRS (In re Mallo)*, 774 F.3d 1313 (10<sup>th</sup> Cir. 2014).

### *Protection for Foreign Banks*

New York’s highest court recently reaffirmed an old judge-made rule that treats a New York branch of a foreign bank as a separate entity from its foreign parent.

Motorola Credit Corporation obtained a \$3.1 billion judgment against Turkish nationals. Seeking to freeze assets that might satisfy the judgment, Motorola served a restraining order on the New York branch of Standard Chartered Bank, whose headquarters is in the United Kingdom. The bank did not locate any assets of the Turkish nationals in its New York branch, but did locate \$30 million in its branches in United Arab Emirates.

The court held that the New York branch of the bank should be treated as a separate entity from its parent company, preventing Motorola’s restraining order from freezing the assets in the UAE branches. The court reasoned that a contrary result “would result in serious consequences in the realm of international banking to the detriment of New York’s preeminence in global financial affairs.” *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014).

### *Unreasonably Small Capital*

In 2007 and early 2008, Ritchie SC Holdings received \$48.3 million from SemGroup, L.P. as limited partner distributions. SemGroup filed for bankruptcy protection in July 2008. A creditor representative sought to recover these distributions, arguing that SemGroup was left with “unreasonably small capital” after the distributions.

A federal court in Delaware rejected this argument, because the court found that, at the time of the distributions, SemGroup retained the ability to borrow funds. This borrowing ability had to be considered in determining whether SemGroup had unreasonably small capital. *Whyte v. Ritchie SC Holdings LLC (In re Secrude, L.P.)*, 526 B.R. 556 (D. Del. 2014).



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