

170.0064.400**Memorandum**

To: Mr. Michael P. Kitchen
Staff Tax Auditor
Audit Refund Section

Date: September 29, 1995

From: Thomas J. Cooke
Staff Counsel

Subject: REDACTED TEXT

This office has received your memorandum dated August 17, 1995, in which you requested that the Legal Section provide the Refund Section with a response to the above taxpayer's contentions in his claim letter.

On April 21, 1995, the taxpayer filed a claim for refund of \$56,436.00 plus interest and penalties. The taxpayer contends in his claim that when the Board issued its determinations (on January 4, 1985 and on October 18, 1985) against the taxpayer, the taxpayer "was in Chapter 11 bankruptcy status pending confirmation of a Chapter 11 bankruptcy plan. On information currently available it was apparent no plan was ever confirmed, and the Chapter 11 was converted to Chapter 7 and REDACTED TEXT was discharged on February 24, 1986."

The taxpayer claims that he initially filed Chapter 13 bankruptcy on May 3, 1984, and that that action was converted to a Chapter 11 proceeding which was then converted to a Chapter 7 action. The conversion of a bankruptcy action from one chapter to another does not affect a claim's status as prepetition or post-petition. See 11 U.S.C. §348(d). Post-petition liabilities under the taxpayer's Chapter 13 bankruptcy filing remain post-petition liabilities under the conversion to Chapter 11 and Chapter 7 proceedings. 11 U.S.C. §362 only imposes an "automatic stay" on the tax liabilities which arise "before the commencement of the case under this title." It is our opinion that the determination issued on January 4, 1985, for the tax period of May 4, 1984 to June 30, 1984 and the determination issued on October 18, 1985 for the tax period of January 1, 1985 to June 26, 1985 were not violations of the "automatic stay" and are valid. See *In re McKnight*, 136 B.R. 891 (Bkrcty. S.D. Ga 1992).

You state that the taxpayer paid the entire outstanding balance on November 4, 1994, in the form of a levy that the claim for refund is only timely for this last payment, and that the time that payment was received, the outstanding balance on the determination that this office recommended be canceled consisted of interest and penalty only. You state that it is your assumption that the provisions of Revenue and Taxation Code section 6902 would not allow the Board to refund other payments on this determination as there was not a timely claim for refund filed by the taxpayer to protect those other payments.

It is our opinion that a taxpayer must file a timely claim for refund to recover any overpayments from the Board.

As you know, the Board does not act on a refund claim unless the tax, penalty and interest are paid. There are no provisions of federal law which require the Board to return funds collected as a result of the issuance of a determination in violation of the bankruptcy "automatic stay" when the return of those funds are prohibited under the provisions of state law.

TJC/cmm