California Society of CPAs

Understanding Bankruptcy Tax Issues

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Presented By:

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and

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Joseph is a California attorney and CPA. Prior to entering private practice, Joseph worked for the Internal Revenue Service for 9 years. Since entering private practice 17 years ago, Joseph has continued to focus his practice on tax controversies. Joseph has handled thousands of civil and criminal tax disputes including income and estate tax audits and appeals, sales tax audits and appeals, employment tax audits and appeals, property tax audits and appeals, U.S. Tax Court and U.S. District Court tax litigation and criminal tax investigations and prosecutions.

Joseph is currently on the Board of Directors of the Los Chapter of the California Society of CPAs, and a past Chair of the Tax Procedure & Litigation Committee of the State Bar of California and a past Chair of the Tax Section of the Beverly Hills Bar Association.

Joseph received his J.D., With Great Distinction, from the University of the Pacific, McGeorge School of Law where he graduated in the top three percent (3%) of his class and was on the Dean's List every semester. Joseph is a member of the Order of the Coif and is a recipient of three American Jurisprudence Awards and the McGeorge Alumni Scholarship.

Joseph also holds a Master of Science in Taxation from Golden Gate University and Bachelor of Science in Business Administration from the University of California, Riverside.

LAW OFFICES OF RAYMOND H. AVER
A PROFESSIONAL CORPORATION

The Law Offices of Raymond H. Aver, A Professional Corporation ("The Aver Firm") offers clients expertise in the fields of bankruptcy, creditor's rights, and business and real estate litigation in the state and federal courts. Our office has substantial experience in both business and consumer bankruptcy matters.

Firm's Expertise

The Aver Firm specializes in debtor/creditor matters, including loan workouts, prosecution and defense of business, commercial and real estate litigation. We represent corporations, individuals, and partnership debtors in chapter 7, 11, and 13 bankruptcy cases, and have assisted many individuals in discharging their tax liabilities to the IRS and FTB. We have more than 40 years of experience in representing creditors such as lenders, landlords, and trade creditors in a variety of matters ranging from loan documentation to enforcement of defaulted loans in the state and bankruptcy courts. Our staff has a working knowledge of the California Uniform Commercial Code, governing personal property secured transactions; the California Civil Code, governing real property secured transactions; and the United States Bankruptcy Code.

The Aver Firm has been involved in countless bankruptcy cases, and has litigated a myriad of cash collateral, stay relief, and plan confirmation issues. We have successfully represented many individuals in restructuring their residential real estate mortgage loans through chapter 11 and chapter 13 bankruptcy cases. We have a particular expertise in litigating fraudulent transfer, preference, dischargeability, and discharge proceedings, and has successfully prosecuted/defended more than 30 adversary proceedings through trial before the Bankruptcy Court. The members of the Aver Firm have an intimate knowledge of the judges in Southern California, having appeared before most judges on numerous occasions, as well as having participated on educational panels which included many of the judges before whom we appear.

Firm's Philosophy

The Aver Firm is committed to providing our clients with the same high quality service found at the largest law firms, at significantly more affordable rates. We cater to our client with timely, personalized attention and strong, effective leadership. We are committed to delivering aggressive and creative solutions to our clients at competitive rates.

What Our Client's Say

"Of all the attorneys I have worked with, I am particularly impressed with the Law Offices of Raymond H. Aver. The firm successfully defended a real estate related fraud case against me, winning the case on summary judgment. The lawyers in the firm proved to be aggressive, yet thoughtful litigators. I attended several hearings during which Raymond H. Aver was able to persuade the judge to change his tentative ruling."

"I am a very hands-on client, with my own ideas about what arguments to make and what facts are particularly relevant. The members of the Law Offices of Raymond H. Aver always listened to my ideas and were able to explain why they decided to utilize some and not others. I felt the lawyers treated my matter as if it was theirs. I unequivocally recommend the Law Offices of Raymond H. Aver to anyone seeking first rate legal representation."

"The Law Offices of Raymond H. Aver has assisted my companies in various complex business and real estate litigation matters involving, among other things, claims for a breach of contract, breach of fiduciary duty, fraud, imposition of a constructive trust, injunctive relief, quiet title, slander of title and specific performance. He has demonstrated a thorough knowledge of the law as it pertains to bankruptcy, business and real estate."

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Case Histories

Accountants

Our client received distributions totaling $117,828 when his employment with a major oil company terminated. Our client's tax return did not include the distributions, and he later lost all the money in some real estate investments. The Franchise Tax Board assessed our client for the tax due, penalties, and interest. On the eve of wage garnishment proceedings, the Aver Firm was able, through a chapter 13 bankruptcy filing, to obtain a discharge of the tax liability through a three-year payment plan of the portion of the tax liability entitled to priority under the Bankruptcy Code.

Lawyers

Our client, a well-established law firm, represented an individual through trial. After an adverse judgment, the individual engaged in a series of transfers. For example, he provided junior deeds of trust to his relatives who had lent him money. He also sought to transfer some of his business assets to an associate. Without consulting our client, the individual retained another attorney and filed a chapter 7 bankruptcy petition. The Chapter 7 Trustee sued our client for, among other things, to avoid and recover fraudulent and preferential transfers, for a constructive trust, injunction, accounting, and turnover, for damages for breach of fiduciary duty, and for damages for dual representation of adverse interests by an attorney. The Aver Firm defended the lawsuit. During the pendency of the action, the Chapter 7 Trustee offered to settle the case for $100,000. The Aver Firm was able to ultimately negotiate a dismissal without its client having to pay any money other than its own attorneys' fees and costs.

Public

The Aver Firm filed a chapter 7 bankruptcy petition for an individual who had significant credit card debt. One of his creditors was a former co-owner of some real property with the debtor and a third individual. That creditor sued the debtor to have the debt owed to her determined to be non-dischargeable on the basis of fraud. The Aver Firm was able, after engaging in minimal discovery, to obtain summary judgment in our client's favor.

Institutional

Our client's loan was secured by an all-inclusive third priority deed of trust. The debtor disputed the debt to our client, which resulted from the sale of the underlying real property by our client to the debtor. The Aver Firm engaged in variety of actions designed to protect its client's interest, such as objecting to the debtor's use of cash collateral, request for insider compensation, request to establish a deadline for the debtor file a disclosure statement and plan of reorganization. When the debtor sought debtor-in-possession financing, the Aver Firm orchestrated an agreement among the debtor, the first priority trust deed holder, and its client resulting in the client receiving 100% of its claim.

RAYMOND H. AVER is a member of the Law Offices Of Raymond H. Aver, A Professional Corporation ("Aver Firm"). The Aver Firm is a boutique seven person law firm specializes in debtor/creditor representation. The members of the Aver Firm have more than 40 years of experience in all aspects of bankruptcy practice representing debtors and creditors in business and consumer Chapter 11, Chapter 13, and Chapter 7 bankruptcy cases. The Aver Firm also has substantial experience in all aspects of bankruptcy, business and real estate litigation. Mr. Aver is a Certified Bankruptcy Specialist, State Bar of California Board of Legal Specialization. He is a frequent lecturer to attorneys and business people on various bankruptcy and creditors' rights related topics. Mr. Aver has been a panelist for CEB, National Business Institute, Sterling Education Services, Inc., cdcbaa (Central District Consumer Bankruptcy Attorneys' Association), Los Angeles County Bar Association, Bankers' Legal Access, San Fernando Valley Bar Association, Western Association of Equipment Lessors and UCLA Extension. Mr. Aver is a mediator appointed by the United States Bankruptcy Court for the Central District of California. He is a member of the Beverly Hills Bar Association, and the cdcbaa (Central District Consumer Bankruptcy Attorneys' Association). Mr. Aver earned his B.A. degree from the University of California at Los Angeles in political science, with honors and his J.D. degree from the University of California, Hastings College of the Law.

Understanding Bankruptcy Tax Issues

It is a common misconception that bankruptcy cannot eliminate any tax liability. Although treatment of tax liability is one of the most complicated aspects of bankruptcy law, the Bankruptcy Code can offer both individual and corporate debtors substantial tax relief.

I. An Overview Of The Bankruptcy Code

A. The Code provides for five "chapters" - under which a bankruptcy case may be filed. Chapter 9 involves a bankruptcy of a municipality and Chapter 12 involves the filing of a bankruptcy of a "family farmer" as that term is defined in the Code.

B. The three chapters under which tax issues usually arise are:

- **Chapter 7.** This is a liquidation of all the debtor's assets, sometimes called a "straight bankruptcy." A Chapter 7 case may be filed by an individual or a corporation. A trustee appointed by the court inventories assets of the debtor's estate, converts non-exempt assets into cash and distributes the cash to creditors. Upon distribution, assuming there have been no objections to either the individual debtor's discharge in general or to the dischargeability of a certain debt, the individual debtor is "discharged" (i.e., generally released from all prior financial obligations). However, bankruptcy does not wipe out most mortgages or liens. If a debtor want to keep an assets, such as a house or an automobile, which is security for payment of a loan, the debtor must continue making the payments. One of the primary reasons that people choose a chapter 7 bankruptcy if they qualify under bankruptcy law and if they can afford the monthly payments on the items that they want to keep is the fact that a person can bring his/her credit score up much more quickly than if that same person filed a chapter 13 case, because he/she completes the bankruptcy case so quickly. Chapter 7 stops collection efforts against the taxpayer and can often erase tax debts.

- **Chapter 11.** A reorganization of any person or corporation, partnership or limited liability company (which cannot use Chapter 13 to reorganize) who or which may be a debtor under Chapter 7. Generally, the debtor continues to operate its business and files a plan providing for payment of all or a certain percentage of its pre-bankruptcy debt. The plan usually provides for a discharge of the debtor once it is consummated. Chapter 11 cases are by far the most complicated and therefore expensive bankruptcy option, but many

times individuals and companies cannot obtain the relief they need under chapter 7 or chapter 13, thus a chapter 11 is their best option. Filing under Chapter 11 or Chapter 13, also stops collection efforts and can buy time and force a repayment plan on the IRS.

- **Chapter 13.** A reorganization of an individual with regular income (whether from wages, salaries or income from a debtor's proprietorship). This is sometimes called a "consumer reorganization" bankruptcy, but an individual with a small going business may also file for Chapter 13 relief. The debtor must have no more than $394,795 in unsecured debts and $1,184,200 in secured debts. [11 U.S.C. § 109(e)] This figure is adjusted periodically for inflation. A Chapter 13 debtor will typically file a plan which will provide payment of a certain portion of the debtor's prepetition debts to creditors over a 36 to 60 month period. This payment will come from the debtor's future earnings or from the sale of some of the debtor's property. While the plan is in effect, the debtor will make monthly payments to a Chapter 13 Trustee who will then disburse a pro rata share of these payments to the creditors. The debtor is discharged from his debts if the plan is successfully completed.

C. Key Differences Between Individual Chapter 11 Cases And Chapter 13 Cases

See, Appendix A, *infra.*

II. Key Bankruptcy Dischargeability Rules for Individuals

Three-Year Rule	- 3 years from the Due Date of a Return including extensions.
Two-Year Rule	- 2 years from the date the Tax Return was filed or assessed for delinquent returns.
240-Day Rule	- 240 days from the date of assessment (for audited and amended returns)
Non-Fraudulent Return	- the tax return in question was non-fraudulent. [11 U.S.C. §523(a)(1)(c)]
No Willful Tax Evasion	- the taxpayer has not engaged in activity deemed a willful attempt to defeat or evade the tax. [11 U.S.C. §523(a)(1)(c)]

A. Three-year Rule

For the tax year in question - the due date for filing the return, including extensions, is more than 3 years old. The key issue is when is the "due date?" If an extension to file from April 15th to October 15th, and the return is filed on some date between the two, e.g., July 15th, the due date is still October 15th. In computing the 3 years, be sure to extend the time if the due date falls on a holiday or weekend.

B. Two-year Rule

A tax return or equivalent report or notice, if required, has been filed or given by the taxpayer for the tax year(s) in question at least more than 2 years preceding the bankruptcy filing date.

1. What is a "return"?

A return includes an "equivalent report" or "notice." [Section 523(a)(1)(B)]

A return is whatever the IRS or the courts say it is. [Section 523(a)(19) - "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements) ..."]

- excludes a return prepared under IRC Section 6020(b), the SFR

- a late filed return is not a return for bankruptcy discharge purposes. [*McCoy v. Mississippi State Tax Commission* (In re Linda T. McCoy), 666 F.3d 924 (5th Cir. 2012), involving a state income tax return. Note: the IRS does not follow *McCoy*.

see, also, Hernandez v. United States (In re Eddie Hernandez), 2012 WL 78668 (Bankr. W.D. Tex. 2012), holding income taxes were not discharged where the debtor's federal income tax return was filed after the IRS had prepared and made a "substitute for return" assessment and a return that satisfied the requirements of IRC Section 6020(a) had not been filed. In choosing to follow *McCoy*, the Court indicated any late filed return, other than a Section 6020(a) return, would not produce a tax subject to discharge. According to *In re Kimendo*, 516 B.R. 424 (Bankr. E.D. Tex. 2014), an SFR calculation based on late-filed return information is a Section 6020(a) return when filed before the IRS had made a tax liability calculation.

following McCoy:

In re Fahey, 779 F.3d 1 (1st Cir. 2015), a 2:1 decision;

In re Wendt, 2013 WL 6198348 (Bankr. S.D. Fla. 2013);

Perkins v. Mass. Dept of Revenue, 507 B.R. 45 (D. Mass. 2014)

In re Mallo, 2014 WL 7360130 (10th Cir. 2014)

Note: although this was a true "SFR" assessment, and so tax probably would not have been dischargeable for that reason, the 10th Circuit specifically allowed *McCoy's* definition of a "return" to exclude all late filed returns except those filed under IRC Section 6020(a).

BUT *see, In re Peter George Martin*, 482 B.R. 635 (Bankr. D. Colo. 2012), where the court refused to follow *McCoy* and found a return filed after a tax has been assessed after notices of deficiency had been issued was a return for discharge purposes. The Court said the term "applicable filing requirements" as used in the Bankruptcy Code defining "return" did not encompass the time for filing a return but instead referred to objective considerations such as the form and content of a return, the place and manner of filing and the types of taxpayers that were required to file a return.

cited with approval in *Brown v. Mass. Dept. Of Rev.*, 2013 WL 951797

However, the Bankruptcy Court in *In re Martin* was reversed by the District Court.

BUT *see now In re Kevin Wayne Martin,* 542 B.R. 479 (9th Cir. BAP 12.17.15), rejecting *McCoy*, *Fahey* and *Mallo*, *supra*, and adopting the 4 part test set forth in *Beard v. Commissioner*, 82 T.C. 766 (1984)[1], *aff'd* 793 F.2d 139 (6th Cir. 1986) and *In re Hatton* (II), 220 F.3d 1057, 1060-61 (9th Cir. 2000).

2. What is an equivalent "report" or "notice?"

CAVEAT: State "piggy-back" tax

A state "Report" required to be sent to the state taxing agency following a new IRS assessment could now be a "Return" which arguably would trigger a new 2 year period as to the additional tax reported and a new 3 year due date.

3. A Substitute for Return ("SFR") may not count as a return for bankruptcy discharge purposes.

See, In re Kevin Wayne Martin, 542 B.R. 479 (9th Cir. BAP 2015)

Is a return filed after an SFR a "return" for discharge purposes? Did the IRS actually assess on the SFR date?

See, In re Kevin Wayne Martin, 542 B.R. 479 (9th Cir. BAP 2015)

Most cases hold a return filed after an SFR but prior to assessment is a return - IRS agrees; fewer cases consider it a return if filed after the assessment, *but, see, In re Kevin Wayne Martin*, and such a return that corrects an incorrect IRS assessment has a chance of being deemed a return, at least as to any new amount of tax liability not previously assessed.

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[1] In *Beard v. Commissioner,* the United States Tax Court determined that a writing could be found to be a "return" if (1) if purported to be a return, (2) was executed under penalty of perjury, (3) contained sufficient data to calculate the tax liability and (4) represented an honest and reasonable attempt to satisfy the requirements of the tax law.

Since *Beard*, courts have struggled with the continuing viability of that decision particularly in light of the decision in *McCoy*. But as of 12.17.15 *see,* at least in the 9th Circuit, *In re Kevin Wayne Martin.*

C. The 240-day Rule

1. When was the assessment made?

   IRS billing uses the term "assessment" - date easy to identify.

   Many state taxing agencies, including California, do not: tax is deemed "assessed" when it can no longer to appealed administratively (i.e., when it is "final).

   How many assessments were there?

   by year?
   by period?
   by type of tax?

2. When was leap day? If it falls within the 240 day period but you do not count it you will wait an unnecessary day before you think you can file.

3. Subsequent assessment starts a new 240-day period as to the additional tax assessed; if the original tax meets the other dischargeability rules (i.e., 3-year Rule, 2-year Rule) there are no other new time periods for subsequent assessment.

4. Interest arising from the assessment follows the tax (i.e., if the assessment satisfies the 240 day period, so does the interest (it does not matter when the interest is dated).

Practice Tips: Interplay Between Bankruptcy and Tax

Filing tip: a non consumer bankruptcy can be filed, and having to satisfy the Means Test can be avoided, when tax and "business" debts are more than half of a petitioner's total debt. Therefore, you may want to have the IRS make tax assessments if doing so would put your client over the 50% non consumer debt threshold for chapter 7 filing purposes. This is particularly true if your client is not otherwise able to file chapter 13 because the debts he/she exceed the debt limits applicable to that type of bankruptcy case.

Benefit: the provisions of Bankruptcy Code Section 707(b) governing "abusive" filings do not apply to non consumer debtors.

Another filing tip: Consider having an assessment made so that a priority tax debt can be created, and in turn:

a. be payable in a chapter 13 case rather than having it remain as an unsecured general claim that will accrue interest and penalties for the term of the chapter 13 plan and remain payable when the plan was completed[2]; or

b. become dischargeable if no claim was filed for the priority income tax liability.[3]

D. Willful Evasion: how "bad" do you have to be?

1. Majority rule: must do more than mere failure to file.

Guilt of one spouse is not imputed to other spouse.

- Potential Fraud and Willful Evasion

Membership in a tax protest organization?

Engage in a pattern of unfiled returns? Why?

Filed a fraudulent, frivolous, blank or incomplete return?

Repeatedly understated income or overstated deductions on return?

Serial failure to pay taxes? Why?

Concealed, gave away or traded away valuable assets, or transferred title?

Is the beneficiary of a family trust, business trust or other trust?

Lost, concealed or destroyed financial documents?

Maintained inadequate records?

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[2] *See,* Section III, *infra*, "Strategy point: making A Section 523 Tax also a priority tax in chapter 13."

[3] *See,* Section III, *infra*, "Same Six Rules Apply For Chapter 13 As Chapter 11."

2. Recent Circuit Court of Appeals decisions:

a. "the good" - *Hawkins v. Franchise Tax Board of California; United States of America, Internal Revenue Service*, 769 F.3d 662 (9th Cir. 2014), the Court did not find the existence of intent in the form of acts done to specifically evade tax as was required by the Section 523(a)(1)(c) willful evasion exception to discharge - the taxpayer must have done a bad act and by that act have attempted to evade paying taxes.

case remanded for analysis using specific intent to evade tax standard;
must prove acts with a "bad purpose"

followed *U.S. v. Parker*, 2015 WL 1745879 (S.D. Cal. (2.17.15)

b. "the bad and the ugly" - *Vaughn v. United States of America; Internal Revenue Service*, 765 F.3d 1174 (10th Cir. 2014), the Court found a "willful attempt to evade" tax existed

the *Hawkins* case, *supra*, was 2:1 decision, with the dissent following *Vaughn*

the Bankruptcy Court had found both fraud and a willful intent to evade had existed but the appellate review as limited to the issue of evasion.

III. Discharge Of Income Tax In Chapter 13

Advantages Over Chapter 7

There are many situations in which a Chapter 13 provides greater flexibility and dischargeability for the debtor than a Chapter 7. Common among these are: stopping a home foreclosure and paying the default mortgage payments in an extended plan; providing debt relief where the debtor has nonexempt assets (such as a small business) and wishes to retain the assets.

Deferred Repayment Schedule - taxpayer proposes a plan whereby tax and other claims are paid, during a 36 to 60 month period, in deferred cash payments, and the amount of the monthly payment in most cases is geared primarily to the debtor's budget and ability to pay. A Chapter 13 Plan where there is a tax obligation is generally utilized to stop tax collection efforts and provide that the tax claim be paid in full over a period of time. While a Chapter 7 can only discharge certain taxes, and then stall tax collection activities for nondischargeable claims for a period of time (ordinarily only until the discharge, typically a period of 4 to 6 months), a Chapter 13 has the added advantage of forcing the taxing entity into a lengthy payment plan for the undischarged taxes.

No Interruption In Business Activity - small business owners are frequently in trouble with tax claims such as payroll, sales, or income taxes. In a Chapter 7, there is a two-fold problem: (1) the assets of the taxpayer are often not exempt and therefore subject to liquidation by the trustee. Thus, the small business debtor would be put out of business if he or she elected Chapter 7. And in a Chapter 7 payments on secured assets (such as equipment in a business) must be current or be subject to relief from stay. In comparison, a Chapter 13 can frequently be used to spread out (and reduce) the monthly payments on installment contracts, or provide for paying the default payments over time, effectively refinancing the purchase of the equipment on more financially viable terms, and the assets are retained by the taxpayer. (2) even if it can be shown that the assets are of such modest value as to fall within an exemption, the Chapter 7 trustee often takes the view that until such exemption is determined the operation of the business must be stopped and the keys to the business premises turned over to the trustee. In contrast, the Bankruptcy Code specifically authorizes the debtor in Chapter 13 to continue operation of the business. [11 U.S.C. §1304(b)]

No Surrender Of Assets - in the typical Chapter 13, the taxpayers assets are not seized or liquidated which is often the case in a Chapter 7. Accordingly, whether the debtor is a wage earner with nonexempt assets or a small business

with nonexempt assets, Chapter 13 has clear advantages over a Chapter 7 liquidation in terms of holding on to assets the debtor wishes to keep.

Same Six Rules Apply For Chapter 13 As Chapter 7[4]

Note: a Section 507 priority income tax is not dischargeable in chapter 7 but is still technically dischargeable in chapter 13. Priority personal income taxes, never dischargeable in chapter 7, are discharged in chapter 13 if IRS fails to file a timely claim. Reason: priority personal income taxes are not excepted from discharge in chapter 13 [11 U.S.C. §1328(a)(2)]

Post petition interest - an issue

In chapter 13, interest on a tax claim continues to accrue during the plan.

The issue: is that post petition interest discharged? Caveat: the debtor can be personally liable for the accrued post petition interest following discharge.

In most jurisdictions accruing post petition interest on an unsecured non dischargeable claim cannot be paid through the plan unless the plan is a 100% plan for allowed claims. [11 U.S.C. §1322(b)(10)]

Section 523(a)(1)(A) "bad boy" income taxes and Section 507(a)(8)(C) trust fund taxes are nondischargeable. [11 U.S.C. §1328(a)(2)] Nondischargeable does not mean it is also priority and so must be paid. Interest follows the tax. Therefore, if the tax is nondischargeable, the interest is too. *In re Monahan*, 497 B.R. 642 (1st Cir. BAP 2013), regarding payroll taxes.

Strategy point: making a Section 523 tax also a priority tax in chapter 13.

If a Section 523 tax is unassessed, it is not a priority tax, Section 507(a)(8)(A)(iii), it will not be paid, and it will not be discharged.

However, it can be paid through the chapter 13 plan, if: (a) the tax return is filed prior to the bankruptcy filing; (b) you wait until the tax

[4] Prior to BACPA, "bad boy" conduct under Section 523(a)(1)(B) and (C) was dischargeable in chapter 13 - failure to file, late filing, fraud and wilful evasion is no longer dischargeable.

is assessed, and the petition is filed within 240 days of the tax assessment date.

Superdischarge Survives In Part

"Bad boy" conduct under Section 523(a)(1)(B) and (C) was dischargeable in chapter 13; however, under BAPCPA no longer dischargeable, and trust fund priority tax under Section 507(a)(8)(C) is now nondischargeable.

But the superdischarge still remains for important tax liabilities:

1. Most categories of priority taxes are still technically dischargeable, as long as the tax does not fall under Section 523(a)(1)(B) or (C). [11 U.S.C. §1328(a)]

   Note: the plan must provide for full payment of all priority taxes, including interest. An individual debtor in a chapter 13 case must pay taxes classified as Section 507(a)(8) priority tax claims through a repayment plan within a maximum period of 5 years.

2. Tax penalties: The superdischarge remains for tax penalties. Non-pecuniary loss penalties, such as penalties for failure to file, frivolous filing, fraud and willful misconduct, are never priority taxes and are dischargeable no matter when assessed or when the triggering event happened. [11 U.S.C. §523(a)(7); 1328(a)] However, if the penalty is for "... actual pecuniary loss within the meaning of Section 507(a)(8)(G). In contrast, a Chapter 7 discharge will not discharge a penalty on a tax claim unless it relates to a tax that is dischargeable under Section 523(a)(1) (i.e., that is not a "bad boy" tax claim, *or* unless the transaction or event that gave rise to the penalty occurred more than 3 year prior to the bankruptcy filing. [11 U.S.C. §523(a)(7)(A) and (B)] Consequently, a penalty on a recent (within 3 years) tax claim is ordinarily not dischargeable in Chapter 7.

   Pecuniary loss penalties: The Trust Fund Recovery Penalty ("TFRP"), a pecuniary loss penalty (assessed to reimburse and compensate the government for an actual loss of taxes) is *not* dischargeable, even if the TFRP assessment date is more than 3 years from the

bankruptcy petition date [11 U.S.C. §1328(a)(2)], and it remains a priority debt. [11 U.S.C. §507(a)(8)(C)]

The typical "941" liability for a non-sole proprietor includes the employer's portion of the social security tax, which is 50% of the social security assessment, and is dischargeable, with any interest that accrued on it, if the return filing satisfies the 3 year rule. [11 U.S.C. §507(a)(8)(D)] Payroll (trust fund) taxes for cases filed on or after October 17, 2005, are not dischargeable in (either Chapter 7 or) Chapter 13 even when the IRS files an untimely claim or does not file a claim. [11 U.S.C. §1328(a)(2)] Note: the failure to file a proof of claim for a priority, nonsection 523 personal income tax will still result in a discharge because not within Section 1328(a).

3. Interest: The interest follows the tax. If the tax is dischargeable, so is the interest.

Chapter "20" Limited, But Not Eliminated, By BAPCPA

BAPCPA created a 4 year waiting period between the filing date of a prior Chapter 7 resulting in discharge and a subsequent chapter 13 filing. As a result, the strategy formerly used of first filing a Chapter 7, and upon discharge immediately filing a Chapter 13, is impacted by BAPCPA; unless the waiting period expires before the Chapter 13 is filed the debtor cannot get a discharge in the Chapter 13.

However, the Chapter "20" filed within 4 years of the Chapter 7 filing may still have value for the debtor: Even though the taxpayer is not eligible for a discharge in the subsequent Chapter 13, the taxpayer is still eligible to be a debtor in Chapter 13, thus getting the protection of the automatic stay and a court approved payment plan to pay nondischargeable debts. Additionally, penalties will stop.

Tax Liens Can Be Stripped Down In Chapter 13

Note: IRS not bound by amount shown as secured debt in its proof of claim. Once a lien is properly recorded against real property, the property itself

becomes liable for the underlying tax debt and IRS lien value is ultimate value of property. [*In re Nomellini* 534 B.R. 166 (Bankr. N.D. Cal. 2015)] In *Nomellini*, the IRS filed a proof of claim in the total amount of $214,520.27. The IRS listed $10,000 as secured and $204,520.27 as unsecured. The IRS's valuation of its secured claim was based entirely on the value of Debtor's personal property, because the schedules indicated there was no equity in the real property to which the IRS's lien attached. Attached to the proof of claim was a copy of the federal tax lien. Ruling: It makes no difference that the IRS submitted a proof of claim in which it asserted a $10,000 secured claim. Liens pass through bankruptcy unaffected even if a secured creditor incorrectly files an unsecured claim that should have been secured. Because the debtor never stripped or modified the IRS lien against the real property, either by motion or through his plan, the IRS's lien was not affected by plan confirmation, and the IRS had a valid lien against the property despite confirmation of a Chapter 13 plan stating:

> The valuations shown above will be binding unless a timely objection to confirmation is filed. Secured claims will be allowed for the value of the collateral or the amount of the claim, whichever is less ....

IV. Discharge Of Income Tax In Chapter 11

A. Similar to Chapter 13

1. Goal: the goal is to achieve a court approved repayment plan or schedule intended to preserve the debtor's assets and permit payment of debt, including tax claims, over a period of time in deferred periodic payments based on the debtor's budget and ability to pay.

2. Effect of Plan: in many cases all or a portion of the general unsecured debts, including dischargeable taxes, may be discharged or wiped out, with the remaining balance paid during the life of the plan.

B. Tax Dischargeability Rules Basically The Same As In Chapter 7

1. *See,* Section I, *infra.*

C. Chapter 11 Procedurally More Complex Than Chapter 7 or Chapter 13

1. Chapter 11 is a much more involved, and time consuming than a Chapter 13 which generally makes it undesirable for small debtors due to the expense in legal fees and other requirements such as opening a debtor in possession account, preparing Monthly Operating Reports, and paying quarterly fees.[5]

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[5] Quarterly fees are due no later than one month following the end of each calendar quarter. Failure to pay quarterly fees may result in the conversion or dismissal of the case. Quarterly fees are based upon the disbursements made by the debtor during a calendar quarter.

TOTAL QUARTERLY DISBURSEMENTS	QUARTERLY FEE
$0 to $14,999.99	$325.00
$15,000 to $74,999.99	$650.00
$75,000 to $149,999.99	$975.00
$150,000 to $224,999.99	$1,625.00
$225,000 to $299,999.99	$1,950.00
$300,000 to $999,999.99	$4,875.00
$1,000,000 to $1,999,999.99	$6,500.00
$2,000,000 to $2,999,999.99	$9,750.00
$3,000,000 to $4,999,999.99	$10,400.00
$5,000,000 to $14,999,999.99	$13,000.00
$15,000,000 to $29,999,999.99	$20,000.00
$30,000,000 or more $30,000.00	$30,000.00

D. No Debt Limits

Unlike Chapter 13, which currently limits eligibility to: (1) an individual; (2) with regular income[6]; (3) that owes, on the date of the bankruptcy filing, noncontingent, liquidated, unsecured debts of less than $394,795 and noncontingent, liquidated, secured debts of less than $1,184,200, there are no debt limits for eligibility in Chapter 11. The debt limits were recently adjusted as of April 1, 2016.

E. Greater Debtor/Entity Eligibility

Unlike Chapter 13 which makes the debtor eligible only if an individual, a husband or wife or a sole proprietor, there are no entity limitations in Chapter 11 for eligibility. Therefore, an individual, husband-wife, corporation, limited liability company or partnership may select Chapter 11.

F. Deferred Payment Periods

Unlike Chapter 7 which provides no payment schedule for nondischargeable taxes, the undischarged prepetition tax claims in a Chapter 11 may be paid over the life of the confirmed plan in deferred in monthly or other periodic payments (subject to the six-year limit for unsecured priority taxes) [11 U.S.C. §1129(a)(9)©]

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[6] The definition of an "individual with regular income" is quite broad: "an individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker," [11 U.S.C. §101(30)], and includes:

(1) Workers with wage or salary income are pretty much the people chapter 13 was designed for. (Older versions of the law called it a "wage-earner's plan.") It's easy for such debtors to show the bankruptcy court that they can make the monthly payments on the repayment plan by submitting their pay stubs. Workers can also have an easier time demonstrating that they can complete the repayment plan based on their job security.

(2) People who run their business, whether general partners, unincorporated businesspeople, or contract workers, can also show that their income is regular. This sometimes requires certification of the debtor's income information by an accountant.

(3) Income received by family members can be claimed as regular income for the purposes of filing chapter 13. For married couples, this can allow one spouse to stay out of the bankruptcy and only join it if necessary.

(4) Passive income sources are acceptable too, such as Social Security payments, disability payments, worker's compensation, welfare, pensions, retirement plans, spousal support, and even investment income.

G. Allocation Of Payments

Unlike Chapter 7 where the courts have uniformly refused to permit the debtor to determine what tax claims the estate dividends should be allocated to, the court in a Chapter 11 (and probably in a Chapter 13) has the power to allocate payments to the trust-fund taxes, thus allowing dischargeable taxes to be paid (as opposed to the preference of the IRS which would be to allocate the payments received through the Chapter 11 plan to the dischargeable claims, leaving the trust-fund claims unpaid). [*In re Energy Resources Co., Inc.*, 495 U.S. 545 (1990)][7]

H. No Tax On Forgiveness Of Indebtedness

Except for debt wiped out in bankruptcy, the general rule is that forgiveness of debt results in taxable "income." For example, an informal, non-bankruptcy "workout" of debt as an alternative to Chapter 11, where the creditors are persuaded to compromise their claims and set up a payment schedule, may incur income tax obligations on the amount of the debt that is "forgiven." In comparison, debt wiped out in Chapter 11 incurs no tax on the discharged claims.

I. Priority Tax Claims Must be Paid Within 5 Years of the Petition Date

The Bankruptcy Code requires that unsecured priority tax claims must be paid no later than 5 years from the date of the bankruptcy filing. [11 U.S.C. §1129(a)(9)©]. This could put a great deal of stress on the debtor's budge, perhaps even making the plan unfeasible and unconfirmable. Note: The Bankruptcy Code also expressly provides that the IRS can agree to a different treatment. Also, the debtor is required to pay interest on the claim at the government rate. Lastly, this rule applies to secured claims for priority taxes, but does not apply to secured claims or to those claims that are not priority under Section 507(a)(8), but may nevertheless be nondischargeable tax claims under Section 523 (late filing of tax return or fraudulent return). [11 U.S.C. §1129(9)(D)]

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[7] The ruling in *Energy Resources* does no state that the court shall or even should make such an allocation, but merely that the court may do so, given the proper circumstances. The decision, therefore, will be made on a case by case basis. *See, e.g., In re GLK, Inc.*, 921 F.2d 967 (9th Cir. 1990) where the court held allocating payments to the trust-fund portion of the tax claim was not necessary to the reorganization and disallowed it in the plan. *In re Deer Park, Inc.*, 136 B.R. 815 (9th Cir. BAP 1992) where the court approved allocation of tax payments even in a liquidating Chapter 11 case, where it was determined that such allocation was necessary for the success of the liquidation plan.

J. Postpetition Tax Returns Must Be Filed And Postpetition Taxes Must Be Paid On A Current Basis

A Chapter 11 debtor is required to file all tax returns due after the bankruptcy filing and to pay all postpetition taxes when due. The failure to file tax returns due after the bankruptcy filing or to pay postpetition taxes when due is grounds for dismissal of the bankruptcy case or conversion to Chapter 7. [11 U.S.C. §1112(b)(4)(I)]

V. Tolling And Delaying Events

Certain events in the tax history may extend or delay one of more of the three "time rules" summarized on page 1, *supra.*

1. Prior Bankruptcy

Hanging paragraph following Section 507(a)(8)(G) provides that certain time periods are suspended for any time which a stay of proceedings against collection was in effect in a prior bankruptcy -

Tolls the 3 year period for time stay overlaps, plus 90 days.

Tolls the 240-day period for time stay overlaps, plus 90 days.

Caveat: even if a prior bankruptcy has been filed, that bankruptcy might not appear - Code 520 - on the account transcript. Therefore, always check Pacer to determine whether a bankruptcy has been filed. Otherwise, the bankruptcy petition might be filed before the tax liability is dischargeable.

2. Equitable Tolling

The expiration of the two year return filing period of Section 523(a)(1)(B)(ii) is tolled by a prior bankruptcy filing. [*In re Putnam,* 503 B.R. 656 (Bankr. E.D. N.C. 2014)

3. Extension To File Return

Delays the start of the 3-year period. For IRS, the first extension requested by the taxpayer extends the due date to October 15 (leapfrogs over August 15).

In some states, failure to file the state tax return on time triggers an automatic extension of the due date for the state income tax return, and this extended due date may be longer than the extended date for the federal tax. In California, if the taxpayer does not file the state tax return by April 15, the state return due date is automatically extended to October 15.

4. Tax Litigation

Delays assessment and, therefore, start of 240-day assessment period. Also, add period in which appeal can be filed.

5. Offer-In-Compromise

a. Tolls 240-day assessment period, for the time the OIC was "in effect" or "pending" during such period of time and overlaps the 240-day period, plus 30 days.

1. An OIC could be deemed "in effect" for years, if the offer settlement is structured as a monthly payment to be made under a "Periodic Payment Offer" or "Deferred Periodic Payment Offer." [Internal Revenue Manual (I.R.M.) Section 5.8.1.9.4]

2. Time OIC is on "appeal" is likely to be deemed "pending." Most of the few bankruptcy cases addressing this topic treat time an offer is on appeal as "pending."

b. OIC does not ordinarily toll the 3-year period.

Section 507(a)(8)(A)(ii) specifically prescribes that for the time a "pending" or "in effect" OIC overlaps the 240-day period, the running of the 240-day period is tolled plus thirty days; it does not include the 3-year period, and Section 507(a)(8)(A)(I), setting out the 3-year rule, does not mention offers in compromise as a tolling event.

> The making of a "processable" offer in compromise prohibits levy. [26 U.S.C. §6331(k)] However, the mere *making* of an offer, by itself, is not a "request for hearing and an appeal" as prescribed by the hanging paragraph at the end of Section 507(a)(8) (because IRS offers are accepted or rejected without a "hearing" unless appealed). Plus, the system provides for an appeal of a rejected offer suggesting that the original making of an offer, without more, is not a appeal *per se*.

c. Appealed OIC

In the event an OIC is rejected, the Tax Code provides an *administrative appeal,* which probably falls under the phase "request for a hearing and an appeal ..." [26 U.S.C. §7122], and levy is still prohibited while on appeal. [26 U.S.C. §6331(k) and Internal Revenue Manual §8,23.1.2]

> However, the hanging paragraph of Section 507(a)(8)(G) qualifies the phrase "request for a hearing and an appeal" by adding "of any *collection action* taken or proposed against the debtor, plus 90 days." If the debtor submitted an offer where collection action had not been taken or proposed, is the debtor's "appeal" one that qualifies as a tolling event? If so, then the time a rejected OIC is on appeal may toll the 3-year period as well as the 240-day period.

CAVEAT: Many OICs are filed during the course of a request for a "Collection Due Process" hearing (*see,* ¶6, *infra*). While the making of an OIC does not toll the 3-year period, the accompanying CDP hearing, which is a request for a hearing and an appeal, tolls both periods, because the CDP request tolls the periods. [11 U.S.C. §507(a)(8)(G) hanging paragraph] Thus, in looking at the taxpayer's history, a finding of a previous or pending OIC is a red flag that should trigger looking for a request for a CDP hearing as well.

6. Request For Collection Due Process Hearing[8] - 26 U.S.C. §§6220, 6330

a. Tolls the 3-year period.

b. Tolls the 240-day period.

Both the 3-year and 240-day rule are suspended for any time period, plus 90 days, during which a governmental unit is "prohibited" under nonbankruptcy law from "collecting" a tax "as a result of" a timely request by the debtor for a hearing and appeal of any collection action taken or proposed against the debtor (Section 507(a)(8)(G) hanging paragraph).

7. Installment Plan - does not toll

A request for an installment plan generally stops levy action. However, it does not toll any of the periods. The Bankruptcy Code does not mention tax installment payment plans. The IRM section governing installment plans is in the "Collection" part, not the "appeals" part of the Manual. Thus, the IRS does not treat it as an appeal. Furthermore, the making of a request for an installment plan does not require a hearing for disposition. It therefore appears that installment plans fall within any category described in the hanging paragraph following Section 507(a)(8)(G). However, there have been no bankruptcy cases found that address the ostensible tolling effect of an installment plan.

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[8] A taxpayer's request for a collection due process ("CDP") hearing is a request for a hearing and, in essence, an appeal of a proposed collection effort. The CDP procedure is found in the "Appeal" section of the Internal Revenue Manual. The taxpayer's opportunity to file the request for CDP is the 30 day period following the issuance of a "Final Notice of Intent to Levy' or a notice of tax lien. Upon filing a timely request for a CDP hearing all levy action must stop pending the disposition of the hearings.

VI. Tax Liens In Bankruptcy

A. Effect of Valid Prepetition IRS Lien - the existence of a lien recorded in taxpayer's county of residence may negate the effect of a discharge.

1. General Effect (Extinguishment of In Personam Liability) - Section 524 bars creditors, including the IRS, from seeking to collect discharged debts from the debtors personally. However, tax liens that are still valid may be enforceable against property owned by the debtor before bankruptcy, even though the tax debt has been discharged.

2. Excluded Property vs. Exempt Property - property excluded from the bankruptcy estate may be pursued after discharge even if no Notice Of Federal Tax Lien has been filed, e.g., an ERISA-qualified plan. For exempt property, a lien must have been filed prepetition for property to remain subject to it if tax was discharged.

3. Secret Lien - a filed/recorded lien does not make a tax debt a priority obligation. It simply secures the payment of the amount in the lien to the extent of the value of the debtor's property. The IRS also has what is referred to as a "secret" lien. This automatically arises upon the assessment of a tax liability but is not recorded anywhere. However, the IRS does not assert the effect of this "secret" lien as a lien in bankruptcy because the trustee has the status of a judgment lien creditor as of the petition filing date under Section 544 of the Bankruptcy Code and so can avoid the "secret" lien.

4. Not avoidable on exempt property

5. After acquired property

a. Discharged Tax

- A lien survives bankruptcy, but only as to property owned by the debtor at the time of the bankruptcy filing. It does not attach to property acquired postpetition.

- It a tax is dischargeable, the lien can be stripped in a Chapter 13. The restrictions on lien stripping for vehicles and other personal property pursuant to BAPCPA Section 1325(a)(9) apply only to purchase money security interests and tax liens are not purchase

money security interests. Even if the tax is dischargeable, the lien cannot be stripped in a Chapter 7, but depending upon the value of the property subject to the lien, the same result may follow.

b. Nondischarged Tax

The lien survives bankruptcy as to all of the debtor's present and future property, including after-acquired property. It is therefore important to avoid having a debtor acquire property after the bankruptcy is over if there remain tax liabilities that have to be resolved with the IRS.

c. Bankruptcy Not Filed

If bankruptcy is not filed, the lien covers all property acquired throughout the lifetime of the lien.

6. Competing Liens

There may be a question as to whether the IRS lien is prior in time to another lien that is filed. The county recorder and Secretary of State's records must be checked to determine the status of the IRS lien in the chain of title regarding any property.

7. Property covered

a. Realty - for realty to be covered by an IRS lien, the lien must be filed in the county where the real property is located.

b. Personalty - the lien must be recorded in the county of the taxpayer's residence. All personal property is deemed to be at the taxpayer's residence at the time the lien is filed regardless of where it actually is and the lien thereafter automatically follows the taxpayer and the taxpayer's personal property if the taxpayer should move out of the county or out of state.

NOTE: If the taxpayer has moved around in recent years it is quite possible the IRS lien has not been recorded in the county where the taxpayer resides, or where the real property is located. Conduct an online public records search for tax liens and where and when the liens were recorded.

8. Self-Releasing

An IRS lien usually releases automatically 10 years after a tax is assessed if the statutory period for collection has not been extended and the IRS does not extend the effect of the Notice of Federal Tax Lien by refiling it. When a lien is self-released, the Notice of Federal Tax Lien itself is the released document. This means the IRS typically will not file a second piece of paper stating the lien has been released. The problem this creates is the original lien filing will continue to appear of record in not only the county filings but also on the taxpayer's credit report. If the lien liability has legally been satisfied or the lien has self-released, it will be necessary to send a copy of the original lien and the discharge to the credit reporting agencies in order to have the original lien filing removed as a matter of record or to otherwise note the lien has been released. A lien release can be requested even if the collection has not expired.

9. Strip-Down Permitted

An undersecured tax lien for a dischargeable tax may be stripped down in Chapter 11 or Chapter 13. Tax liens cannot be avoided in Chapter 7 on the grounds that the lien impair an exemption; if the tax is dischargeable in the Chapter 7, the bankruptcy court can determine the amount of the lien that is secured at the time of the filing. Payment of that sum entitles the debtor to the release of the lien.

Liens Secured By Vehicles - a common application of lien stripping is the reduction of tax lien to the present value of the car. Thus a $12,000 IRS lien, secured by a car worth $10,000 on the date of the bankruptcy filing, is secured in the amount of $10,000, and the balance of the $2,000 balance of the IRS lien is undersecured. $2,000 of the lien may be stripped off the asset (the car) in Chapter 11 or Chapter 13. The plan must provide for payment in full of the secured portion of the lien; the unsecured portion can be paid little to nothing along with other unsecured claims.

Note: a non-tax lien may not be stripped down in a Chapter 13 against a car and other personal property if the lienholder has a purchase money security interest securing the debt that was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of

a car acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding the bankruptcy filing. [11 U.S.C. §1325(a)(9) hanging paragraph]

APPENDIX A

Key Differences between Individual Chapter 11 Cases and Chapter 13 Cases

	CHAPTER 11	CHAPTER 13
Fees		
Filing Fees	$1,717	$310
Trustee's Fees	None unless trustee appointed. If appointed, compensation based on "commission" set by Code §§ 326(a), 330(a)(7).	Up to 10% of plan payments made by the trustee. 28 USC § 586(e)(1)(B)(I).
UST Fees	Minimum $325 per quarter; increases as disbursements increase.	None.
Attorney's Fees	Depends on complexity: $100,000 to $1,000,000+	$5,000 average
Committee Fees	Committee authorized to employ attorney and other professionals at estate's expense, Code §§ 330(a), 503(b)(2), 1103(a). Small business debtors may ask that no committee be appointed.	No committees, no fees.
Financial Reporting		
Prepetition Counseling	All individual debtors must go through credit counseling prior to filing a petition. Code § 109 (b)(1).	Same.
Prepetition Tax Return	If requested by the UST, court, or party in interest, federal income tax returns for the 3 years prior to the petition date and unfiled when the case was commenced must be filed with the court. Code § 521 (f)(2), (g)(2).	Same. Plus, not later than 7 days before the first date set for the creditors' meeting, a chapter 13 debtor must provide the trustee, and any creditor making a timely request, with a copy of the federal income tax return or transcript for the most recent prepetition tax year for which a return was required. Code § 521 (e); Rule 4002(b)(3) & (4). Plus, Code § 1308(a) requires that all delinquent tax returns due for tax periods ending during the 4-year period prior to the filing of the petition be filed with the appropriate tax entity no later than the day before the first scheduled date for the meeting of creditors.

Post-petition Tax Returns	If requested by the UST, court, or party in interest, federal tax income tax returns filed while the case is pending must be filed with the court. Code § 521 (f)(1), (g)(2). Also requirements to file return for the Chapter 11 Estate (1120) and the individual (1040).	Same. Plus, if requested by UST, court, or any party in interest, an annual statement of income and expenditures identifying the amount and sources of income, those responsible for the support of a dependent of the debtor, and those who contributed and the amounts contributed to the debtor's household. Code § 521 (f)(4) & (g)(1).
Statements & Schedules	Code § 521 (a)(1) requires all debtors to file a list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures, statement of financial affairs, Code § 342(b) certificate (only if debts are primarily consumer debts), copies of employer payment advices, statement of monthly net income, and statement of reasonably anticipated increases in income or expenditures.	Ditto. But, in chapter 13 cases, if these documents are not filed within 45 days of the filing of the petition, the case is "automatically" dismissed on the 46th day. Code § 521 (l). Not so in chapter 11 cases.
Disclosure Statement	If the debtor is not a small business debtor, the plan must be accompanied by a disclosure statement. It must be approved as including "adequate information" necessary for a "hypothetical investor" to make an informed judgment about the plan before acceptances of the plan are solicited. Code § 1125. In a small business case, the court may permit a combined plan and disclosure statement, or use of a form disclosure statement. The court may also conditionally approve the disclosure statement, subject to final approval at the confirmation hearing. Code § 1125(f); Rules 3016(b), 3017.1.	Same.

Financial Reporting	Code § 308 requires small business debtors to report their current and recent financial status, profitability, cash flow projections, comparisons of actual and projected receipts and disbursements, compliance with the post-petition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules, filing of tax returns, and payment of all administrative expenses and taxes. To a degree, this information is included in the monthly operating reports required by the Office of the United States Trustee.	Section 308 does not apply in chapter 13 cases.
Disposable Income	Official Form 22B must be filed. Rule 1007(b)(5). This form is much less detailed than Official Form 22C. Means test deductions required by Code § 1325(b)(3) are not applicable in a chapter 11. Also note that Schedules I and J will indicate similar data.	Official Form 22C must be filed. Rule 1007(b)(6). 2010: 1007(a) and (c) amended, not (b).
Property of the Estate	All property is included in the bankruptcy estate. Code § 541 (a). The estate includes property acquired after the petition is filed as well as an individual debtor's earnings from services. Code § 1115 (a) and (b).	Same.

THE PLAN		
Who May File a Plan and When it Must Be Filed	In a small business case, only the debtor may propose a plan in the first 180 days of the case. Thereafter, any party may file a plan. All plans must be proposed by the 300th day. Code § 1121 (e). In all other cases without trustees, only the debtor may file the plan in the first 120 days. If filed, the debtor has until the 180th day to solicit acceptances of the plan. If a trustee is appointed and no plan is filed in the first 120 days, or if the debtor fails to obtain the acceptance of the plan by the 180th day, any party in interest may propose a plan Code § 1121(a), (c), & (d). These time periods can be extended for up to 18 months after petition date (to file a plan) and 20 months after petition date (for acceptances). These periods can be shortened for cause as well.	Only the debtor may propose a plan. § 1321. It must be filed within 14 days of the filing of the petition. Rule 3015(b).

Earliest Confirmation Date	A meeting of creditors may occur no earlier than 21 days and no later than 40 days after the order for relief. Rule 2003(a). However, nothing in chapter 11 requires that the meeting occur or be completed prior to confirmation. If the debtor solicited prepetition acceptances to a "prepackaged" plan, the court may even dispense with the meeting Code § 341 (e). 28 days' notice of a hearing on disclosure statement and deadline to object to disclosure statement and 28 days' notice of a confirmation hearing and deadline to object to confirmation must be given. (Total process = 60 to 90 days). Rule 2002(b). Rule 9006 allows for shortening. If a small business debtor files a plan with the petition, if conditional approval is given to the disclosure statement on the 1st hearing could take place as early as the 28th day after filing of the petition. Code § 1129(e) requires that the plan of a small business debtor be confirmed no later than 45 days after the plan is filed.	A meeting of creditors may occur no earlier than 21 days and no later than 50 days after the order for relief. Rule 2003(a). Parties must receive 21 days' notice of the meeting. Rule 2002(a)(1). 28 days' notice of a confirmation hearing and deadline to object to confirmation must be given. Rule 2002(b). Confirmation hearing may take place no earlier than 21 days and no later than 45 after meeting of creditors. Code § 1324(b). Confirmation could occur as early as the 35th day, assuming: notice of the meeting served on the first day of the case; a meeting on the 21st day; notice of the confirmation hearing served on 14th day; and objections raised at the confirmation hearing.
Voting	Creditors with impaired claims may vote. A class of claims accepts the plan when 1/2 in number and 2/3 in amount of the claims voting accept the plan. Code §§ 1124, 1126, 1129(a)(8).	Creditors may not vote.
Absolute Priority Rule	Case law split on whether absolute priority rule applies.	Because creditors may not vote, there is no absolute priority rule.

Best Interests	Unless the claim holder makes an election under code § 1111(b), a chapter 11 plan must provide to each holder of a claim in an impaired class not less than the present value of the amount that would be paid on such claim if the estate were liquidated under chapter 7. Code § 1129(a)(7).	A chapter 13 plan must provide to each allowed unsecured claim not less than the present value of the amount that would be paid on such claim if the estate were liquidated under chapter 7. Code § 1325(a)(4).
Best Efforts	If the holder of an allowed unsecured claim objects to confirmation, the plan must either pay unsecured claims in full, or the value of the property distributed under the plan must be no less than the projected disposable income of the debtor. Code § 1129(a)(15). Disposable income must be projected over the longer of the 5-year period following the first plan payment, or the entire period the plan provides for payments. Code § 1129(a)(15). To project disposable income, the debtor's actual expenses, provided they are reasonably necessary for the maintenance or livelihood of the debtor, are deducted from current monthly income. The "presumed expenses" deducted from current monthly income under Code § 1325(a)(3) are not applicable. Code §§ 1129(a)(15)(B) & 1325(b)(2).	If the holder of an allowed unsecured claim or the trustee objects to confirmation, the plan must either pay the unsecured claims in full, or all projected disposable income must be applied to make payments to unsecured creditors. Code § 1325(b)(1). Disposable income projected over 3 years must be devoted to the payment of unsecured creditors if the debtor's annualized current monthly income is less than median family income. If it is more, the commitment period increases to 5 years. Code §§ 1322(d), 1325(b)(1)(B) & (b)(4). The method of projecting disposable income hinges on whether the debtor's annualized current monthly income is greater than median family income. If greater, the expenses deductible from debtor, current monthly income are limited by the presumed expenses used in the means test. Code §§ 707(b)(2), 1325(a)(3). If less than or equal to median family income, actual expenses that are reasonably necessary for the maintenance or livelihood of the debtor are deductible from current monthly income as under Code § 1129(a)(15)(8). Code § 1325(b)(2).

Treatment of Certain Claims		
Home Mortgages	The plan may provide for the cure of any arrears on a home mortgage. Code § 1123(a)(5)(G), (b) & (d). "Curing" a default is distinct from modification of a claim. Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. Code § 1123(b)(5). The exception to the anti-modification rule in chapter 13, Code § 1322(c), is not applicable in chapter 11. As a result, it does not appear that a matured or accelerated home loan can be extended unless such is permitted by applicable nonbankruptcy law.	The plan may provide for the cure of any arrears on a home mortgage. Code § 1322(b)(3). Unmatured, unaccelerated claims secured only by the debtor's home cannot be modified. Code § 1322(b)(2). Section 1322(c) permits chapter 13 debtors to cure defaults under a home mortgage unless and until the home is sold at a foreclosure sale. Also, notwithstanding the maturity of a home loan, the plan may provide for payment of the home loan through the plan pursuant to Code § 1325(a)(5)(8).
Other Secured Claims	Unlike chapter 13, nothing in chapter 11 prevents an individual debtor from stripping down an undersecured claim into its secured and unsecured parts, and treating each part as a separate and distinct claim. Code § 1129(b)(1)(A). Periodic payments to secured creditors need not be in equal installments. But see secured tax claims below.	Plan may not bifurcate certain undersecured claims into secured and unsecured constituent parts. Code § 1325(a)(9). This prohibition extends to claims secured by purchase money debt incurred within 910 days of the petition and secured by motor vehicles acquired for the personal use of the debtor or incurred during the 1-year period preceding the petition and secured by any other thing at value. If a secured claim is being paid through the plan in periodic payments, "such payments shall be in equal installments." Code § 1325(a)(5)(B)(iii)(I).
Secured Tax Claims	Secured tax claims that would otherwise be priority tax claims under Code § 507(a)(8) were they not secured must be paid regular installments over a period ending 5 years after the order for relief and "in a manner not less favorable than the most favored non-priority unsecured claim provided for by the plan." Code § 1129(a)(9)(D).	No similar limitation.

Long Term Debt	There is no limitation on the maximum duration of a chapter 11 plan. Consequently, it is possible to provide in the plan for the conversion of short-term debt to long-term debt. However, unless court orders otherwise, an individual chapter 11 debtor is not entitled to a discharge until the "completion of all payments under the plan." Code § 1141(d)(5)(A). Second, if an unsecured creditor objects, Code § 1129(a)(15)(B) requires an individual chapter 11 debtor to commit all projected disposable income "during the period for which the plan provides payments."	The only debt that may be treated as long-term debt is a debt that matures after the completion of the plan and is not modified by the chapter 13 plan. (Cure permissible.) Provided a chapter 13 plan seeks only to cure an arrearage, long-term debt may continue beyond the length of the plan. Code § 1322(b)(3) & (5).
Duration of Plan		
Minimum Length	There is no mandatory minimum chapter 11 plan length. However, if the holder of an allowed unsecured claim objects to a plan that does not pay unsecured claims in full, "the value of the property distributed under the plan [must be] not less than the projected disposable income of the debtor (as defined in Code § 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer." Code § 1129(a)(15)(B).	There is no mandatory minimum chapter 13 plan length. But if the plan does not provide for payment of unsecured claims in full and if the trustee or an unsecured creditor objects, the plan must run 3 to 5 years depending on whether annualized current monthly income exceeds state median family income. Code §§ 1322(d), 1325(b)(4)(A)(ii).
Maximum Length	Chapter 11 does not limit the length of chapter 11 plans. However, if an unsecured creditor objects, Code § 1129(a)(15)(B) requires an individual chapter 11 debtor to commit all projected disposable income for 5 years or, if longer, "during the period for which the plan provides payments." Also, unless the court orders otherwise, no discharge will be issued until the "completion of all payments under the plan." Code § 1141(d)(5)(A).	Absent good cause, a plan cannot require payments for more than 3 years if annualized current monthly income is less than the state median family income. Code § 1322(d)(2). If there is good cause to exceed 3 years, the plan's length may not exceed 5 years. Code § 1322(d)(1)(C). If annualized current monthly income is equal to or more than median family income, a chapter 13 plan may not require payments for more than 5 years. Code § 1322(d)(1).

Modification of Plan		
Pre-Confirmation	Only the proponent of the plan may modify it prior to confirmation. Bankruptcy Code § 1127(a).	Only the debtor may modify the plan prior to confirmation. Code § 1323(a).
Post-Confirmation	If the debtor is an individual, after confirmation of the plan, and whether or not the plan has been substantially consummated, the debtor, any trustee, the United States Trustee, or the holder of an unsecured claim may propose a modification. This right ends when the plan payments have been completed. Code § 1121(e).	After confirmation, the debtor, the trustee, or the holder of an unsecured claim may propose a modification. This right ends when the plan payments have been completed. Code § 1329(a).
Discharge		
Timing	After completion of plan payments. Code § 1141 (d)(5)(A). But the court may order otherwise.	After completion of plan payments. Code § 1328(a). Hardship discharge is also available.
DSOs	Individual chapter 11 debtor with a "domestic support obligation" is not required to certify currency on all required payments; however, a plan may not be confirmed unless all domestic support obligations "that first became payable after the date of the filing of the petition" have been paid. 1129(a)(14).	Debtor with a "domestic support obligation" also must certify that he or she is current on all required payments before the discharge will be entered. Code § 1328(a).
Financial Management Course	Individual chapter 11 debtor not required to take course to obtain discharge.	Debtor must complete a financial management course. Code § 1328(g).
Hardship Discharge	After confirmation but before completion of plan payments, Code § 1141(d)(5)(B) permits an individual debtor to request a hardship discharge.	After confirmation but before completion of plan payments, Code § 1328(b) permits an individual debtor to request a hardship discharge.
Super-Discharge	Not available.	Available but watered down. May discharge a debt for willful and malicious injury, *see* Code § 523(a)(6), as well as domestic nonsupport obligations, *see* Code § 523(a)(15). But Code § 1328(a)(4) excepts for restitution or damages awarded in a civil action against the debtor as a result of "willful or malicious injury" that caused personal injury or death.

Consequences When the Case Is Unsuccessful		
Small Business Debtor Exception to Automatic Stay	The automatic stay does not apply to cases filed by a small business debtor if the debtor was a debtor in an earlier small business case that remains pending, or it was previously a debtor in a small business case that was dismissed or had a plan confirmed within the 2 years preceding the latest petition. Also, an entity that acquires substantially all of the assets of a small business having a petition dismissed or plan confirmed in the preceding 2 years cannot acquire the automatic stay in its own bankruptcy case petition unless it proves by a preponderance of the evidence that the acquisition was not for the purpose of evading Code § 362(n).	Nothing similar in chapter 13.
One Case Pending in Prior Year	If an individual was a debtor in a prior case under chapter 7, 11, or 13, if that prior petition was dismissed, and if the prior petition was pending within 1 year of the new petition, the automatic stay with respect to a debt, property securing such debt, or any lease terminates as to the debtor (but not the estate) on the 30th day after the filing of new case. However, Code § 362(c)(3) does not apply if the new case was filed under a chapter other than chapter 7 after the prior case was dismissed pursuant to Code § 707(b). Code § 362(c)(3)(B) permits any party in interest to file a motion to extend the stay as to all or some creditors. Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition.	Same.

Two Cases Pending in Prior Year	When an individual debtor has filed two or more prior cases that were pending during the previous year, but were dismissed, the automatic stay never goes into effect. Once again, there is an exception for a case "re-filed" under Code § 707(b). A party in interest may request that the court impose the automatic stay despite the filing and dismissal of multiple prior petitions. Code § 362(c)(4)(B). Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition.	Same.