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AOD 2021-1: IRS nonacquiescence, defined benefit pension plan not an asset for insolvency exclusion under section 108

Action on Decision (AOD) 2021-01—appearing in the Internal Revenue Bulletin 2021-15 (dated Monday, April 12, 2021)—reveals the IRS nonacquiescence to the holding in a Tax Court memorandum opinion that an interest in a defined benefit pension plan is not an asset for purposes of applying the insolvency exclusion in section 108.

Read AOD 2021-1 in **IRB 2021-15** [PDF 4.26 MB]

The issue in the 2017 Tax Court memorandum opinion—*Schieber v. Commissioner,* T.C. Memo 2017-32—was whether the taxpayers' interest in a California Public Employees' Retirement System (CalPERS) defined benefit pension plan was considered an asset in determining: (1) whether they were insolvent on June 30, 2009, the date the debt was canceled; and (2) the amount of their insolvency.

In reaching its conclusion that the taxpayers' interest in the pension plan was not an asset within the meaning of section 108 for purposes of determining whether the taxpayers were insolvent, the Tax Court found:

- When the debt was canceled, the taxpayer-husband was retired and was receiving monthly payments under the pension plan.
- In the event of his death, the taxpayer-wife had a right to receive the monthly payments.
- Other than the right to receive the monthly payments, the taxpayers could not access the value in the plan. They could not convert their interest in the plan to a lump-sum cash amount, sell the interest, assign the interest, borrow against the interest, or borrow from the plan.

The IRS claimed that the taxpayers' interest in the pension plan was an asset for section 108 purposes because they could use their monthly payments to pay liabilities. However, the Tax Court observed that the test presented in *Carlson v. Commissioner*, 116 T.C. 87 (2001), was whether the asset gives the taxpayer the ability to pay an "immediate tax on income" from the canceled debt—not to pay the tax gradually over time. In *Carlson*, a commercial fishing license was found to be an asset because the license could be used, in combination with other assets, to immediately pay the income tax on canceled-debt income. By contrast, the taxpayers' interest in the pension plan could not be used to immediately pay the income tax on canceled-debt income.

Read the Tax Court’s memorandum opinion, ***Schieber v. Commissioner*** [PDF 588 KB]