

# Table of Contents

<i>Acknowledgments</i> .....	v
<i>About the Author</i> .....	vii
<i>Preface</i> .....	ix

## **Chapter 1: Introduction: The Boundaries of the Problem**

¶ 1.1	The Bankruptcy Code .....	1-1
¶ 1.2	The Debtor's Alternatives .....	1-3
	[1] Arrangements With Individual Creditors .....	1-3
	[2] Assignment for the Benefit of Creditors .....	1-3
	[3] Liquidation of the Business .....	1-4
	[4] Debtor's Reorganization .....	1-4
	[5] Sale of Assets .....	1-5
¶ 1.3	Treatment of Secured and Unsecured Creditors .....	1-6
	[1] "Secured Creditor" Defined .....	1-6
	[2] "Security Interest" Defined .....	1-6
	[3] Establishing Priority .....	1-6
¶ 1.4	Parties to a Bankruptcy .....	1-7
	[1] Debtor .....	1-7
	[2] Creditors .....	1-7
	[3] Creditors Committee .....	1-8
	[4] Trustee in Bankruptcy .....	1-8
	[5] Debtor-in-Possession .....	1-8
	[6] Dispute Resolution: The Bankruptcy Court .....	1-8
¶ 1.5	"Insolvent" Defined .....	1-9
	[1] Intangible Assets .....	1-10
	[2] Exempt Assets .....	1-10
	[3] Contingent Liabilities .....	1-12
¶ 1.6	Examples of Tax Problems in Bankruptcy .....	1-12

## **Chapter 2: The Bankruptcy Estate**

¶ 2.1	Creation of the Bankruptcy Estate .....	2-2
	[1] Statutory Requirements for Filing Tax Returns .....	2-3
	[2] Liquidating Trustee Liable for Paying Taxes .....	2-3
	[3] Property of the Estate .....	2-4
	[a] Exempt Property .....	2-4
	[b] Retirement Plans .....	2-4
	[c] Other Property and Property Rights .....	2-6
	[d] Effect of Tax Liens .....	2-7
¶ 2.2	Tax Returns and Payments .....	2-9

¶ 2.3	Calculating the Tax When the Bankruptcy Proceedings Are Dismissed . . . . .	2-10
¶ 2.4	Election to Terminate Debtor's Tax Year . . . . .	2-11
	[1] No Income Tax Liability Before or Upon Commencement of Case . . . . .	2-13
	[2] Income Before Commencement of Case . . . . .	2-13
	[3] Income Before Commencement of Case and NOL Carryover . . . . .	2-14
	[4] Loss Before Commencement of Case . . . . .	2-14
	[5] Losses From Pass-Through Entities . . . . .	2-15
	[6] Foreclosure Before Petition Is Filed . . . . .	2-16
	[7] Foreclosure After Petition Is Filed . . . . .	2-16
	[8] Asset Requirement . . . . .	2-17
¶ 2.5	Computing the Bankruptcy Estate's Taxable Income . . . . .	2-17
	[1] Gross Income Defined . . . . .	2-18
	[a] Cash Basis Taxpayer . . . . .	2-18
	[b] Accrual Basis Taxpayer . . . . .	2-19
	[2] Deductions . . . . .	2-19
	[3] Net Operating Losses . . . . .	2-20
	[4] Administrative Expenses . . . . .	2-21
	[5] Carryovers and Carrybacks . . . . .	2-22
	[6] Other Issues . . . . .	2-23
¶ 2.6	Abandonment of Property . . . . .	2-24
	[1] Tax Consequences . . . . .	2-24
	[2] Tax Treatment of Abandoned Assets . . . . .	2-25
	[3] Responsibility for Paying the Tax . . . . .	2-26
¶ 2.7	Tax Returns Filed by the Bankruptcy Estate . . . . .	2-27
	[1] Annualization of Taxable Income . . . . .	2-27
	[2] Making the IRC Section 1398(d) Election . . . . .	2-28
	[3] Special Election for Joint Filers . . . . .	2-28
¶ 2.8	Tax Attributes of the Bankruptcy Estate . . . . .	2-28
	[1] Importance of Timing . . . . .	2-29
	[a] Transfer of Tax Attributes . . . . .	2-29
	[b] Termination of Bankruptcy Estate . . . . .	2-30
	[2] Revocation of Discharge . . . . .	2-30
	[3] Treatment of Certain Carrybacks . . . . .	2-30
¶ 2.9	Trustee's Tax Obligations . . . . .	2-31
	[1] Discharge of Trustee From Tax Obligations . . . . .	2-32
	[2] Debtor's Rights . . . . .	2-33

**Chapter 3: Payment of Trust Fund Taxes**

¶ 3.1	Federal Requirement for Withheld Taxes	3-2
	[1] Mechanics of Withholding	3-2
	[2] Filing Requirements	3-3
¶ 3.2	The Statutory Remedy	3-3
	[1] Who Is a “Responsible Person”?	3-4
	[a] Corporate Officers	3-5
	[b] Nonemployees	3-5
	[c] Change of Ownership and Control	3-6
	[2] “Willful” Failure to Truthfully Account for and Pay Over Taxes	3-8
	[3] Other Liabilities Under Section 6672	3-9
¶ 3.3	More Than One Person May Be “Responsible”	3-9
¶ 3.4	Simultaneous Collection From More Than One Party	3-10
	[1] Concept of “Fairness” Does Not Affect Outcome	3-10
	[2] Interplay Between IRC Sections 6672 and 7421(b)	3-11
	[3] Doctrine of Estoppel	3-11
¶ 3.5	Rights of Contribution and Interpleader	3-12
	[1] No Legal Right to Contribution or Indemnity—	
	Prior Law	3-12
	[2] Section 6672 Is a Tax, Not a Penalty	3-13
	[3] When Responsible Party Pays More Than Proportionate Share	3-13
	[4] Planning to Enforce a Right of Contribution	3-14
¶ 3.6	Injunctions	3-15
¶ 3.7	Three-Year Statute of Limitations	3-15
	[1] Assessment and Collection of Tax	3-15
	[2] Responsible Person	3-17
	[3] Refunds	3-17
¶ 3.8	Prebankruptcy Planning for Payment of Trust Fund Taxes	3-18
¶ 3.9	Impact of <i>In re Energy Resources Co.</i>	3-20
¶ 3.10	Bankruptcy Court Jurisdiction to Determine Responsible Person Liability	3-24
¶ 3.11	Procedural Matters	3-25
	[1] Pre-Assessment and Assessment	3-25
	[2] Litigation Procedure	3-26
	[3] Judgment After Trial	3-27
¶ 3.12	Effect of Personal Bankruptcy on Trust Fund Tax Liability	3-28
¶ 3.13	Spousal Responsibility for Withheld Taxes	3-29

**Chapter 4: Bankruptcy Court Proceedings**

¶ 4.1	Commencement of Bankruptcy Proceedings	4-2
	[1] Voluntary Petition	4-2
	[2] Involuntary Petition	4-3
	[3] Dismissal of Petition	4-3
	[4] Abandonment of Assets to Debtor	4-5
¶ 4.2	Bankruptcy Code Section 362: The Automatic Stay	4-5
	[1] What Is Stayed	4-5
	[2] What Is Not Stayed	4-6
	[a] Immediate Assessment Triggered by Appointment of Receiver	4-8
	[b] Conflict Between Tax Law and Bankruptcy Law	4-8
	[3] Duration of Automatic Stay	4-9
	[a] Effect of Court Supervision of a Chapter 11 Plan	4-9
	[b] Effect of Reinstatement of the Case	4-10
	[c] Stay Lifted by Facts of the Case	4-11
	[d] Abandoned Property	4-11
	[e] Postpetition Taxes	4-12
	[4] Obtaining Relief From the Automatic Stay	4-12
	[5] Violation of the Automatic Stay	4-13
	[a] Unintentional Violation	4-13
	[b] Intentional Violation	4-13
	[c] Taxpayer's Remedies	4-14
	[d] IRS Assertion of Sovereign Immunity	4-15
¶ 4.3	Claims for Taxes	4-17
	[1] Filing a Claim for Taxes	4-17
	[2] Claims Filed by the Taxpayer	4-18
	[3] Late Claims and Amendments to Claims	4-19
	[4] No Claim Filed in Bankruptcy Proceeding	4-21
	[5] Bankruptcy Claim Setoffs	4-22
	[a] Income Tax Refunds	4-23
	[b] Supreme Court's View	4-23
	[6] Setoffs and the Automatic Stay	4-24
	[7] Objections to Claims for Taxes	4-25
¶ 4.4	Tax Litigation in Bankruptcy	4-26
	[1] Who Has Jurisdiction	4-26
	[2] Timing the Filing of the Bankruptcy Petition	4-27
	[3] Third-Party Liability	4-28
	[4] Determination of Individual Liability May Be Allowed if Plan of Reorganization Is Affected	4-28

[5]	IRS Collection Policy	4-29
[6]	Bankruptcy Court Has Option to Hear Tax Dispute	4-29
[7]	Burden of Proof in Bankruptcy Court Tax Litigation	4-31
	[a] IRS Treated as Any Other Claimant	4-31
	[b] IRS Tax Claims	4-32
	[c] Rebuttal of Presumption of Correctness	4-33
	[d] The Supreme Court's <i>Raleigh</i> Decision	4-33
[8]	Appeals From Bankruptcy Court	4-34
¶ 4.5	Limitations on Tax Claims	4-35
	[1] Control or Custody of Court Determines Limitations	4-36
	[2] Limitations Period in Bankruptcy Proceedings	4-36
	[3] Limitations Period for Refunds	4-38
	[4] Limitations Period for Assessing Postpetition Taxes	4-39
	[a] Bankruptcy Estate's Final Tax Return	4-40
	[b] Filing for a Short Year	4-41
¶ 4.6	Declaratory Relief Actions in Bankruptcy	4-41
¶ 4.7	Recapture of Assets; Turnover Orders	4-42

## Chapter 5: Discharge of Taxes

¶ 5.1	Statutory Pattern for Discharge of Tax Liability	5-2
	[1] Nondischargeable Debts—Priority Taxes	5-2
	[a] Taxes Due Within Three Years of Filing of Petition	5-3
	[b] Taxes Assessed Within 240 Days of Filing of Petition; Offers in Compromise	5-5
	[c] Taxes Assessable After Commencement of Case	5-6
	[d] Statutory Extensions of the Limitations Period	5-7
	[e] Taxes Other Than Federal Income Tax	5-7
	[f] Debts Incurred to Pay Taxes to the United States	5-8
	[g] Erroneous Refunds	5-8
	[2] Tax Returns Not Filed or Filed Late	5-9
	[3] Fraudulent Returns or Attempts to Evade or Defeat the Tax	5-10
	[a] Collateral Estoppel	5-11
	[b] Standard of Proof	5-12
	[4] Tolling of Applicable Period—The <i>Young</i> Case	5-15
	[5] Effect of Tax Liens	5-17
¶ 5.2	Dischargeable Tax Debts	5-20
	[1] Dischargeability of Interest	5-20
	[2] Dischargeability of Tax Penalties	5-21
	[3] Tax Penalties vs. Penalties Imposed for Improper Conduct	5-22

¶ 5.3	Other Reasons for Nondischargeability of Taxes	5-25
	[1] Failure to Schedule the Liability	5-25
	[2] Engaging in Prohibited Conduct	5-26
	[a] Concealed Property	5-26
	[b] Concealed or Destroyed Books and Records	5-28
¶ 5.4	Bankruptcy Code Section 507(a)(2)—Unsecured Claims	5-28
¶ 5.5	Chapter 11 Reorganization Discharges	5-28
	[1] Tax Requirements of Reorganization Plan	5-29
	[2] Treatment of Secured Tax Claims	5-30
	[3] Serial Chapter 11 Proceedings	5-31
¶ 5.6	Chapter 13 Proceedings	5-31
	[1] Tax Claims	5-32
	[2] Effect of Confirmation	5-33
¶ 5.7	Chapter 12 Arrangements	5-35
¶ 5.8	The Right to a Discharge	5-35

## Chapter 6: Income From Cancellation of Debt

¶ 6.1	Tax Treatment—A Brief History	6-2
¶ 6.2	Accounting for Cancellation of Debt	6-3
¶ 6.3	“Cancellation of Debt” Defined	6-4
	[1] Original Issue Discount	6-7
	[2] Change in the Form of the Debt	6-8
	[a] Change in Payment Terms	6-9
	[b] Change in Interest Rate	6-10
	[c] Change in Maturity Date	6-11
	[d] Change in Both Interest Rate and Maturity Date	6-11
	[e] Change in Principal Amount	6-11
	[f] Cancellation of Accrued Interest for Increased Principal	6-12
	[i] Dollar for Dollar Debt Modification	6-12
	[ii] Unequal Dollar Amounts	6-12
	[3] Debt Modification	6-13
	[a] “Modification” Defined	6-13
	[b] Change in Yield	6-15
	[c] Change in Timing, Amount of Payment	6-15
	[d] Substitution of Obligor	6-16
	[e] Change in Form of Security	6-16
	[f] Change in the Nature of the Instrument	6-17
¶ 6.4	Cancellation of Debt in Exchange for Property	6-18
	[1] A Taxable Event	6-18
	[2] Tax Treatment	6-18

¶ 6.5	Cancellation of Debt in Exchange for Stock	6-20
	[1] Stock Issued Before January 1, 1995	6-20
	[a] Impact of Case Law	6-21
	[b] Bankruptcy Exception	6-22
	[c] Insolvent Debtors	6-23
	[d] Disqualified Stock	6-23
	[e] The De Minimis Rule	6-24
	[2] Stock Issued After December 31, 1994	6-25
	[3] Issuance of Parent Stock	6-25
¶ 6.6	Contribution to Capital	6-27
	[1] For Cancellation of Indebtedness	6-27
	[2] Stock for Debt Transaction	6-28
	[3] Shareholder Is One of Many Creditors	6-28
¶ 6.7	Acquisition of Debt by Related Party	6-29
¶ 6.8	Purchase Money Debt Reduction	6-31
	[1] Assigned Debts	6-32
	[2] Debtor Becomes Solvent	6-32
	[3] Exception to Income Recognition	6-33
¶ 6.9	Mortgage Foreclosures	6-33
	[1] Nonrecourse Debt Foreclosures	6-34
	[2] Recourse Debt Foreclosures	6-35
	[3] When Is Mortgage Debt Foreclosure Income Realized?	6-37
¶ 6.10	Expiration of Statute of Limitations	6-38

## **Chapter 7: Consequences of Cancellation of Debt Income**

¶ 7.1	Relationship Between IRC Sections 61(a)(12) and 108	7-2
¶ 7.2	Exclusion of Cancellation of Indebtedness From Gross Income	7-3
	[1] Prepackaged Bankruptcy	7-4
	[2] Title 11 Cases	7-4
	[3] Insolvency Situations	7-6
	[4] Qualified Farm Indebtedness	7-8
	[5] Qualified Real Property Business Indebtedness	7-8
	[6] Priority of Exclusions	7-9
¶ 7.3	Reduction of Tax Attributes of IRC Section 108(b)	7-10
	[1] Net Operating Losses	7-11
	[2] General Business Credit	7-12
	[3] Capital Loss Carryover	7-13
	[4] Reduction of Basis	7-13
	[a] Available Amount of Basis Reduction	7-14

[b]	Limitations of Basis Reduction—IRC Section 1017	7-14
[c]	Basis Reduction Under IRC Section 108(b)(5)	7-16
[5]	Special Rules for Application of IRC Section 1017	7-17
[a]	Trade or Business Property	7-17
[b]	Exempt Property	7-19
[c]	Partnership Interests	7-19
[d]	Affiliated Corporate Groups	7-20
[e]	Election as to Certain Inventory	7-20
[f]	Recapture of Reductions	7-21
[6]	Special Agreements With the IRS	7-21
[7]	Minimum Tax Credit	7-21
[8]	Carryover of Passive Activity Losses and Credits	7-22
[9]	Foreign Tax Credits	7-22
[10]	When Cancellation of Indebtedness Income Exceeds Tax Attributes	7-22
¶ 7.4	Bankruptcy Estate Is Responsible for Adhering to IRC Sections 108(b)(5) and 1017	7-24
¶ 7.5	Effect of Alternative Minimum Tax on Cancellation of Indebtedness Income	7-25

## **Chapter 8: Partnerships and S Corporations**

¶ 8.1	Taxation of Partnerships and Limited Liability Companies	8-2
[1]	Allocation of Income and Losses	8-3
[2]	Basis of Partnership Interest and Limitation of Losses	8-3
[3]	Treatment of Partnership Debt	8-3
[4]	Distributions and Deemed Distributions	8-4
¶ 8.2	Cancellation of Partnership Debts	8-5
[1]	Partners' Level of Recognition of Income on Cancellation of Indebtedness	8-6
[a]	Allocation of Canceled Debt	8-6
[b]	Partners' Recognition of Income	8-7
[2]	Special Allocations	8-8
[3]	Nonrecognition of Cancellation of Indebtedness Income	8-9
[a]	Bankruptcy or Insolvency of a Partner	8-9
[b]	Partner-Creditor's Contribution to Capital	8-11
[c]	Outside Creditor's Contribution to Capital	8-13
[d]	Lost Deductions	8-13
[e]	Purchase Money Reduction	8-14

	[f] Related Party Acquisitions . . . . .	8-15
¶ 8.3	Special Rule for Tax Attribute Reductions . . . . .	8-15
¶ 8.4	Taxation of S Corporations . . . . .	8-17
	[1] Limitations on Losses . . . . .	8-18
	[2] Basis Adjustments for Income and Loss . . . . .	8-19
¶ 8.5	Tax Treatment of Cancellation of Debt . . . . .	8-20
	[1] Effect of Cancellation of Indebtedness Income— Tax Attribute Reductions . . . . .	8-21
	[2] Net Operating Losses and Loss Limitations . . . . .	8-22
¶ 8.6	Scenario 1: Shopping Center, Ltd. (Interplay Between IRC Sections 108, 1017, and 1366) . . . . .	8-23
	[1] Income and Loss; Balance Sheet . . . . .	8-24
	[2] Cancellation of Indebtedness . . . . .	8-26
	[3] Tax Consequences to the Partners . . . . .	8-27
	[a] Analysis of <i>C</i> Corporation . . . . .	8-27
	[b] Analysis of <i>S</i> Corporation . . . . .	8-28
	[c] Analysis of <i>G</i> Partnership . . . . .	8-28
	[d] Analysis of <i>H</i> Partnership . . . . .	8-29
	[4] Summary . . . . .	8-30
¶ 8.7	Debt Adjustment Contrasted to Foreclosure . . . . .	8-30
¶ 8.8	Scenario 2: Manufacturing Partnership, Ltd. . . . .	8-31

## **Chapter 9: Corporate Reorganizations Under the Bankruptcy Code**

¶ 9.1	Basic Concepts of Reorganization . . . . .	9-2
	[1] Continuity of Interest Test . . . . .	9-2
	[2] Continuity of Business Enterprise Test . . . . .	9-2
	[3] Plan of Reorganization . . . . .	9-3
¶ 9.2	IRC Section 382—Net Operating Loss Carryovers . . . . .	9-3
	[1] Exception for Bankruptcy Situations . . . . .	9-4
	[2] IRC Section 382(1)(5)—General Rule . . . . .	9-4
	[a] Reduction for Interest Payments to Creditors . . . . .	9-5
	[b] Accrued Interest on Indebtedness . . . . .	9-6
	[3] IRC Section 382(1)(6)—Alternate Provision . . . . .	9-7
	[4] Regulations Under IRC Section 382(1)(6) . . . . .	9-8
	[a] Coordination Provisions . . . . .	9-8
	[b] Valuation Rules . . . . .	9-8
	[5] Election Out of Treatment Under IRC Section 382(1)(5) . . . . .	9-9
	[6] Changes in Corporate Ownership . . . . .	9-10
	[a] The 5 Percent Test . . . . .	9-10
	[b] Equity Structure Shift . . . . .	9-11

[7] Built-In Gains and Losses . . . . .	9-12
[a] Purpose of the Rules . . . . .	9-12
[b] Threshold Requirement . . . . .	9-13
¶ 9.3 IRC Section 368(a)(1)(E) Reorganizations . . . . .	9-13
¶ 9.4 IRC Section 368(a)(1)(G) Reorganizations . . . . .	9-14
[1] Requirements of IRC Sections 354, 355, and 356 . . . . .	9-15
[2] Title 11 or Similar Case Requirement . . . . .	9-15
[3] G Reorganizations That Qualify as Other Reorganizations . . . . .	9-16
[4] Agency Receivership Proceedings . . . . .	9-16
[5] Use of Parent Stock . . . . .	9-16
¶ 9.5 Examples of Corporate Reorganization . . . . .	9-17
[1] Creditors Receive Stock in Debtor Corporation . . . . .	9-18
[2] New Corporation—Old Shareholders and Creditors Receive Stock . . . . .	9-19
[3] New Corporation—Only Creditors Receive Stock . . . . .	9-20

## Appendixes

Appendix 1	Sample Motion for Contempt Sanctions . . . . .	A-2
Appendix 2	IRS Form 982, Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment) . . . . .	A-5
Appendix 3	Sample Complaint to Determine Dischargeability of Debt: Debtor as Plaintiff . . . . .	A-6
Appendix 4	Sample Complaint to Determine Dischargeability of Debt: Debtor as Defendant . . . . .	A-8
Appendix 5	IRC Section 1398(d) Worksheet . . . . .	A-10
Appendix 6	Internal Revenue Code Section 108—Income From Discharge of Indebtedness . . . . .	A-11
Appendix 7	Bankruptcy Code Section 507(a)(8) . . . . .	A-22
Appendix 8	Bankruptcy Code Section 523—Exceptions to Discharge . . . . .	A-24

<b>Table of Cases . . . . .</b>	<b>T-1</b>
---------------------------------	------------

<b>Table of Federal Statutes and Regulations . . . . .</b>	<b>T-7</b>
--	------------

<b>Index . . . . .</b>	<b>I-1</b>
------------------------	------------