

TO STAY OR NOT TO STAY. THAT IS THE QUESTION.

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ABSTRACT

In Schoppe v. Comm., the Tenth Circuit recently held that Bankruptcy Code §362(a)(1) did not automatically stay the appeal of a Tax Court decision in a case initiated by the debtor, joining the First, Third, Fifth, and Eleventh Circuits. Bankruptcy Code §362(a)(1) provides that the filing of a bankruptcy petition operates as a stay of “the commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.” Following its precedent that Bankruptcy Code §362 operates “to stay all appeals in proceedings that were originally brought against the debtor,” the court determined that the proceeding at its inception is initiated by the debtor, as opposed to against the debtor, upon filing a petition in Tax Court, which is an independent judicial proceeding.

Conversely, the Ninth Circuit in Delpit v. Comm. ruled that both clauses of Bankruptcy Code §362(a)(1) serve to stay an appeal of a Tax Court decision concerning a debtor’s alleged tax deficiency. The court opined, “The appeal from the Tax Court’s judgment is simply a ‘continuation’ of the comprehensive income tax assessment procedure – which is initiated by IRS administrative proceedings ‘against’ the taxpayer.” Also the court reasoned that the alleged tax deficiency is a claim against the debtor.

INTRODUCTION

Today’s prolonged stagnant economy has resulted in headlines concerning bankruptcies related to individuals, businesses, and even governmental bodies. Financial planners and attorneys are inundated with inquiries concerning bankruptcy matters. Under Title 11 of the U.S. Code (Bankruptcy Code), one area that may not generate headlines but that is of utmost importance is matters concerning the automatic stay created by Bankruptcy Code § 362. The Tenth Circuit in *In re Gindi*, 642 F.3d 865, 870 (CA-10, 2011) stated that Bankruptcy Code § 362 “‘is the central provision of the Bankruptcy Code. When a debtor files for bankruptcy, section 362 prevents creditors from taking further action against him except through the bankruptcy court. The stay protects debtors from harassment and also ensures that the debtor's assets can be distributed in an orderly fashion, thus preserving the interests of the creditors as a group.’ ... The scope of the stay is broad, encompassing ‘almost any type of formal or informal action taken against the debtor or the property of the [bankruptcy] estate.’ 3 Collier on Bankruptcy ¶1362.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).” The reaches of the stay are limited by Bankruptcy Code § 362(b). Also Bankruptcy Code § 362(d) sets forth various circumstances in which relief from the stay may be sought.

Bankruptcy Code § 362(a)(1) serves to stay the commencement or continuation of certain judicial or administrative proceedings against a debtor or to recover a claim against a debtor. Key to operation of the automatic stay is the proceeding must be against the debtor. All ten of the circuit court of appeals that have addressed the issue have held that Bankruptcy Code § 362(a)(1) stays

all appeals, whether by the debtor as appellant or appellee, in proceedings that were originally brought against the debtor. Accordingly, whether the automatic stay applies to a case must be determined at its inception rather than by who brings the appeal. It is beyond the scope of this paper to analyze the holdings in these ten circuit court decisions. See, *Simon v. Navon*, 116 F.3d 1 (CA-1, 1997); *Commerzanstalt v. Telewide Sys., Inc.*, 790 F.2d 206 (CA-2, 1986); *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (CA-3, 1982); *Platinum Fin. Servs. Corp. v. Byrd (In re Byrd)*, 357 F.3d 433 (CA-4, 2004); *Marcus, Stowell & Beye Gov't Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227 (CA-5, 1986); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (CA-6, 1983), *cert. denied*, 478 U.S. 1021 (1986); *Sheldon v. Munford, Inc.*, 902 F.2d 7 (CA-7, 1990); *Farley v. Henson*, 2 F.3d 273 (CA-8, 1993); *Ingersoll-Rand Finan. Corp. v. Miller Mining Co.*, 817 F.2d 1424 (CA-9, 1987); and *TW Telecom Holdings Inc. v. Carolina Internet, Ltd.*, 661 F.3d 495 (CA-10, 2011).

There is a split among the circuit courts over whether the automatic stay provided by Bankruptcy Code § 362(a)(1) applies to an appeal of a Tax Court or district court decision regarding an action brought by the debtor/taxpayer, e.g., concerning issues such as the redetermination of a tax deficiency issued by the Internal Revenue Service (IRS), seeking a tax refund, or the granting of summary judgment due to the failure of the IRS to provide notice of a collection due process hearing. Since all the cases discussed in this paper dealing with this issue involve debtors filing bankruptcy petitions who are taxpayers, hereinafter they will be referred to as the debtor. Also, since almost all of the cases discussed herein deal with the Tax Court, hereinafter the Tax Court will be referred to in the general discussion of the issue. Effectively, the issue is whether a proceeding is initiated by the debtor when he files a petition in Tax Court or whether the Tax Court proceeding constitutes a continuation of the administrative proceeding initiated against the debtor when the IRS begins the administrative process of determining if there is a tax deficiency.

The income tax assessment procedure bars a taxpayer from petitioning the Tax Court until he has first undergone a number of administrative proceedings, including an audit, meetings with revenue agents and a supervisor, issuance of a thirty-day letter called a preliminary notice, formal proceedings before the IRS appeals division, and issuance of a ninety-day letter called a notice of deficiency. Once the taxpayer has received the notice of deficiency, the Internal Revenue Code of 1986, as amended (Code), provides two different paths that a taxpayer may follow to secure a judicial determination of his tax liability. Pursuant to Code § 6213(a), he may petition the Tax Court for redetermination of the tax deficiency asserted by the IRS, or pursuant to Code §§ 6532(a) and 7422(a), pay the asserted deficiency, file a claim for refund or credit with the IRS, and, if the claim is unsuccessful, then file a tax refund suit in either the district court or Claims Court. Upon the rendering of a decision by the judicial body, either the taxpayer or the IRS may appeal to the Court of Appeals, pursuant to Code § 7482. Oftentimes debtors file a voluntary bankruptcy petition after the rendering of a Tax Court decision and either before filing an appeal or after filing an appeal but before the appellate court renders its decision.

In *Shoppe v. Comm.*, 711 F.3d 1190, 1193 (CA-10, 2013), *cert. denied*, 2013 U.S. LEXIS 6524 (2013) (*Shoppe*), the Tenth Circuit recently addressed the issue of whether a debtor's petition filed in Tax Court is a proceeding initiated by the taxpayer or a continuation of the administrative process initiated against the debtor by the IRS and stated, "We agree with the four circuits that have applied a bright-line rule that a petition filed in Tax Court is an independent judicial proceeding initiated by the debtor, not the continuation of an administrative proceeding against the debtor." Previously the Fifth Circuit in *Freeman v. Comm.*, 799 F.2d 1091 (CA-5, 1986) (*Freeman*), the Eleventh Circuit in *Roberts v. Comm.*, 175 F.3d 889 (CA-11, 1999) (*Roberts*), the Third Circuit in *Rhone-Poulenc Surfactants and Specialties, L.P. v. Comm.*, 249 F.3d 175 (CA-3, 2001) (*Rhone*), and the First Circuit in *Haag v. United States*, 485 F.3d 1 (CA-1, 2007) (*Haag*)

issued the rulings with which *Shoppe* agreed. These five circuits ruled that the Bankruptcy Code § 362(a)(1) stay did not apply.

Conversely, the Ninth Circuit in *Delpit v. Comm.*, 18 F.3d 768 (CA-9, 1994) (*Delpit*) applied the stay, ruling that a Tax Court proceeding and appeal from a Tax Court judgment concerning an alleged tax deficiency is a continuation of an administrative proceeding against the debtor; namely, one that began with the initiation of the comprehensive income tax assessment procedure. The Ninth Circuit also viewed the judicial proceedings as a continuation of an administrative proceeding to recover a claim against the debtor, namely, the asserted tax deficiency. Before analyzing the circuit court decisions, a discussion of the relevant law is necessary.

OVERVIEW OF THE RELEVANT SECTIONS OF THE BANKRUPTCY CODE

Bankruptcy Code § 362 imposes an automatic stay on eight enumerated proceedings upon the filing of a voluntary petition of bankruptcy. In pertinent part, Bankruptcy Code § 362 provides:

“Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of—

(1) the *commencement or continuation*, including the issuance or employment of process, of a *judicial, administrative, or other action or proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or to *recover a claim against the debtor* that arose before the commencement of the case under this title;

... and

(8) the commencement or *continuation* of a proceeding *before the United States Tax Court* concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title (emphasis added).”

Accordingly, there are two different provisions within Bankruptcy Code § 362(a)(1) whereby an automatic stay may be imposed. To clarify, dividing the provisions of Bankruptcy Code § 362(a)(1) into two clauses illuminates the two triggers of an automatic stay: an automatic stay shall be imposed on the *commencement or continuation*, including the issuance or employment of process, of a *judicial, administrative, or other action or proceeding [i] against the debtor* that was or could have been commenced before the commencement of the case under this title, or [ii] to *recover a claim against the debtor* that arose before the commencement of the case under this title[.] (Hereinafter referred to as Clause (i) and Clause (ii).) While Bankruptcy Code § 362(a)(1) is not limited to tax matters, applying it to tax matters indicates that Clause (i) applies to a myriad of proceedings that may be brought against the taxpayer, whereas Clause (ii) only applies to recover a claim against the taxpayer. The primary issue in Clause (ii) in tax matters is whether the redetermination of an asserted tax deficiency by the IRS is an action to recover a claim against the debtor.

In *Freeman*, *Rhone*, *Haag*, and *Schoppe*, the courts primarily focused on whether or not the action in the lower court was brought by or against the taxpayer and did not discuss Clause (ii) in detail. In *Delpit* and *Roberts*, the courts addressed both Clause (i) and Clause (ii), with the Eleventh Circuit in *Roberts* providing a detailed discussion of both clauses. In *Delpit*, the Ninth Circuit addressed the legislative history of Bankruptcy Code § 362 and stated, “Congress intended to give debtors ‘a breathing spell’ from their creditors and to stop ‘all collection efforts, all harassment, and all foreclosure actions.’ H.R. Rep. No. 95-595, 95th Cong., 2d Sess.

(1978), *reprinted in* 1978 U.S.C.C.A.N. at 6296-97. The automatic stay allows debtors, during the period of the stay, ‘to be relieved of the financial pressures that drove [them] into bankruptcy.’ *Id.* at 6297. Accordingly, Section 362 is ‘*extremely broad* in scope’ and ‘should apply to *almost any type* of formal or informal action against the debtor or the property of the estate.’ 2 *Collier on Bankruptcy* Par. 362.04, at 362-34 (15th ed. 1993) (emphasis added).” *Delpit*, 18 F.3d at 771.

Code § 362(a)(8) applies only to proceedings before the United States Tax Court concerning the tax liability of a debtor; thus it does not specifically address staying appeals from decisions of the Tax Court. However, following the termination of proceedings in the Tax Court, the proceeding is no longer before the United States Tax Court. Accordingly, Bankruptcy Code § 362(a)(8) does not stay the appeal once the Tax Court proceeding terminates or is concluded. In *Roberts*, the Eleventh Circuit, citing *Cheng v. Comm.*, 938 F.2d 141 (CA-9, 1991), ruled that appeals of decisions of the Tax Court are not stayed by Bankruptcy Code § 362(a)(8). However, *Roberts* disagreed with the Ninth Circuit’s ruling in *Cheng* as to when the proceeding before the Tax Court terminates, noting that Code § 7481(a)(1) provides that, with certain exceptions, the decision of the Tax Court shall become final ... upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time. Code § 7483 requires a party to a decision of the Tax Court must file “a notice of appeal with a clerk of the Tax Court within ninety days after the decision of the Tax Court is entered” to obtain appellate review. *Roberts* disagreed with *Cheng*’s holding that a Tax Court proceeding is “concluded with the filing of a final judgment.” *Cheng*, 938 F.2d at 143. It reasoned that the Tax Court does not file a final judgment but rather it enters a decision that becomes final if a notice of appeal is not filed before the expiration of the ninety-day period provided for in Code § 7483. Rather, *Roberts* ruled that the entry of the Tax Court decision terminates a Tax Court proceeding. The court stated, “This conclusion finds support in the common-sense principle that a judicial ‘proceeding’ within the meaning of section 362(a) ends once a decision on the merits has been rendered; ministerial acts or automatic occurrences that entail no deliberation, discretion, or judicial involvement--such as the running of the 90-day period for filing a notice of appeal and the resulting finality of the Tax Court’s decision--do not constitute continuations of such a proceeding.” *Roberts*, 175 F.3d 889 at 897. When a Tax Court proceeding terminates or is concluded is beyond the scope of this paper.

Bankruptcy Code § 362(b) provides exceptions to the automatic stay provided in Bankruptcy Code § 362(a); thus, it serves to limit its broad scope. In relevant part, Bankruptcy Code § 362(b) provides:

- (b) The filing of a petition under section 301, 302, or 303 of this title ... does not operate as a stay--
- (9) under subsection (a), of—
 - (A) an audit by a governmental unit to determine tax liability;
 - (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;
 - (C) a demand for tax returns; or
 - (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

Bankruptcy Code § 362(b)(9) allows the IRS to conduct audits regarding a debtor’s tax liability, issue a notice of tax deficiency based on the audit’s results, demand tax returns of the debtor, and make an assessment for the tax and issue a notice and demand for payment after the filing of a petition for bankruptcy. Code § 362(b)(9) preserves the IRS’s ability to audit a debtor and its

claim against a debtor; however, it is not determinative as to the automatic stay provision of Bankruptcy Code § 362(a)(1) after a notice of deficiency is issued.

SPLIT AMONG THE CIRCUIT COURTS

As previously noted, the First Circuit in *Haag*, the Third Circuit in *Rhone*, the Fifth Circuit in *Freeman*, the Tenth Circuit in *Schoppe*, and the Eleventh Circuit in *Roberts* have ruled that whether a case is subject to the Bankruptcy Code § 362(a)(1) automatic stay must be determined at its inception and that a proceeding is initiated by the debtor when he files a petition in Tax Court or the district court as in *Haag*. Accordingly, the automatic stay does not apply to an appeal when the debtor filed the petition in the Tax Court or district court as it is not against the debtor. Conversely, the Ninth Circuit in *Delpit* held that the Tax Court proceeding is a continuation of the administrative proceeding initiated against the debtor when the IRS begins the administrative process of determining that there is a tax deficiency and that the tax deficiency is a claim against the debtor to be recovered; thus, the stay applied to the appeal. To properly put the circuit court decisions in historical context with regard to one another, they will be analyzed in chronological order.

FREEMAN

In *Freeman*, decided in 1986 in a per curiam decision, the Fifth Circuit denied the debtor's petition to vacate its earlier affirmation of the Tax Court's dismissal of the debtor's petition filed in Tax Court for a redetermination of their federal income tax liability as it was not timely filed. The debtor failed to notify the Fifth Circuit that a Chapter 11 bankruptcy petition was filed ten days after they filed a notice of appeal of the Tax Court's dismissal of their petition. The Fifth Circuit rejected the debtor's position that the proceedings before the Fifth Circuit were stayed due to the Bankruptcy Code § 362(a)(1) automatic stay. The court ruled that an examination of the posture of the case at the initial proceeding is determinative as to whether the appeal is a proceeding against the debtor. In ruling against the debtor, the court stated, "Since appellants initiated proceedings before the Tax Court by filing their petition for a redetermination of their income tax liability, the initial proceeding was initiated by the debtor, not against the debtor. If the initial proceeding is not against the debtor, subsequent appellate proceedings are also not against the debtor within the meaning of the automatic stay provisions of the Bankruptcy Code. Since the prior appellate proceeding before this Court was not against the debtor, it was not stayed pursuant to the automatic stay." *Freeman*, 799 F.2d at 1093. Accordingly, since it was the debtor who filed the petition in the Tax Court, initiating the proceeding at its inception, the appeal was not stayed by Bankruptcy Code § 362(a)(1).

DELPIT

In *Delpit*, in 1994, the Ninth Circuit is the only circuit to date holding that Bankruptcy Code § 362(a)(1) applies to stay the appellate proceedings, even though the taxpayer initiated the proceedings in the Tax Court by filing a petition disputing the notice of deficiency. The Delpits filed a timely notice of appeal and then filed a voluntary petition of bankruptcy. The court concluded that both Clause (i) and Clause (ii) of Bankruptcy Code § 362(a)(1) applied. Regarding Clause (i), the court viewed the appeal as a continuation of an administrative proceeding against the debtor. The court reasoned that a taxpayer must participate in the comprehensive income tax assessment procedure the IRS has established before petitioning the Tax Court and the procedure begins with an audit. Ultimately, the taxpayer's journey through the procedure may wind its way to the Supreme Court. The court referenced IRS Publication No. 556, *Examination of Returns, Appeal Rights, and Claims for Refund*. The court stated, "Under the income tax assessment procedure, a taxpayer is barred from petitioning the Tax Court until he has first participated in a number of administrative proceedings that are initiated 'against' him. These proceedings include an audit, a meeting with a revenue agent and a supervisor, a 30-day

letter ('Preliminary Notice'), formal proceedings before the IRS Appeals Division, and a 90-day letter ('Notice of Deficiency'). These proceedings may continue with the taxpayer's request to the Tax Court to remove or reduce the deficiency assessment and, next, an appeal by one party or the other to the Court of Appeals.

"Here, because the Commissioner prevailed in the Tax Court, the appeal pending before us happens to have been filed by the taxpayer, the Delpits. In other cases, the appeal will have been filed by the Commissioner. Either way, however, the appeal from the Tax Court's judgment is simply a 'continuation' of the comprehensive income tax assessment procedure - which is initiated by IRS administrative proceedings 'against' the taxpayer. Accordingly, we hold that the automatic stay provisions of Section 362(a)(1) apply to such appeals." *Delpit*, 18 F.3d at 770.

Regarding Clause (ii), the court ruled that the appeal is also a continuation of an administrative proceeding to recover a claim against the debtor. In a brief statement without engaging in a detailed analysis of its reasoning, the court stated, "Here, the IRS initiated a proceeding (i.e., an audit) against the taxpayers in order to recover a \$38 million claim for an alleged tax deficiency. (The IRS's claim arose in 1986, well before the Delpits filed for bankruptcy.) Because the Delpit's appeal is a 'continuation' of that proceeding, we also hold that the appeal is stayed under the second clause of Section 362(a)(1)." *Delpit*, 18 F.3d at 770-771. Accordingly, the court viewed the alleged tax deficiency as the claim to be recovered against the taxpayer.

The court referenced the legislative history of Bankruptcy Code § 362 indicating Congress's intent to give debtors breathing room and relief from the financial pressures in order to arrange their bankruptcy filing as support for its decision. The court stated, "Staying this case would allow the Delpits to reorganize their finances in an orderly fashion while postponing further legal proceedings and the attendant expenses they would otherwise incur before this court. The stay would give them a breathing spell from the IRS's pursuit. Most important, it might afford the Delpits and the IRS an opportunity to work out a realistic settlement and compromise agreement that might not otherwise be possible." *Delpit*, 18 F.3d at 771.

The Ninth Circuit rejected the reasoning adopted in *Freeman*. It supported its reasoning by stating, "The mere fact that a debtor 'initiates' an action in Tax Court is not dispositive; *we must examine the proceedings as a whole to determine whether they are in fact initiated 'against the debtor.'* ... Otherwise, declaratory judgments and state-court proceedings initiated by the debtor to resolve disputes over tax liability would never be subject to the automatic stay (emphasis added)." *Delpit*, 18 F.3d at 773. Viewing the proceedings as a whole, the Ninth Circuit saw them beginning with the institution of the extensive administrative proceedings against the debtor; namely, the audit.

The court rejected the Commissioner's argument that the IRS cannot be considered to have instituted the administrative proceeding against the taxpayers, as the issuance of a notice of deficiency is exempted from the automatic stay provisions by Bankruptcy Code § 362(b)(9). The court reasoned that the IRS initiates the administrative proceedings "long *before* a Notice of Deficiency is ever issued." Also, the court opined that Bankruptcy Code § 362(b)(9) "merely *preserves* the Commissioner's claim against the debtor; the provision has absolutely no relevance to the question of what happens to that claim *after* a Notice of Deficiency is issued." *Delpit*, 18 F.3d at 773.

Furthermore, the Ninth Circuit noted that *Freeman* did not address Clause (ii). The court stated, "*Freeman* holds that an appeal from a Tax Court judgment is not a proceeding against the debtor. It does not decide whether such an appeal involves a proceeding to recover a *claim* against the

debtor. *Freeman*, 799 F.2d at 1092-93. While the distinction may be thin, so is the reasoning that supports *Freeman's* conclusion regarding the first clause.” *Delpit*, 18 F.3d at 773.

ROBERTS

In *Roberts*, decided in 1999, the Eleventh Circuit rejected the reasoning of the Ninth Circuit in *Delpit* and granted the petition of the IRS to dismiss the Robertses’ appeal of a Tax Court decision as untimely filed. The court ruled that Bankruptcy Code § 362(a)(1) did not stay the ninety-day time period within which the Robertses were required to file the notice of appeal. The Eleventh Circuit held that neither Clause (i) nor Clause (ii) was satisfied.

In *Roberts*, the debtor brought an action in Tax Court seeking a redetermination of a tax liability asserted by the IRS. The Tax Court ultimately entered its decision on October 27, 1993, the debtors filed a bankruptcy petition December 30, 1993, and the debtors filed the notice of appeal on May 3, 1996. Pursuant to Code § 7483, in order to obtain appellate review of the Tax Court decision, the debtor must file “a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered.” Since the Eleventh Circuit ruled that the ninety-day period for filing a notice of appeal was not stayed by Bankruptcy Code § 362(a)(1), it ruled that the appeal was untimely and thus it lacked jurisdiction.

The Eleventh Circuit rejected the Ninth Circuit’s view of a Tax Court proceeding as a continuation of IRS administrative proceedings against the taxpayer. Citing the Supreme Court’s decision in *Freytag v. Comm.*, 501 U.S. 868, (1991) and Eleventh Circuit precedent, the court ruled that a Tax Court proceeding is clearly an independent judicial proceeding. In *Freytag*, in a matter unrelated to Bankruptcy Code § 362, addressing the independence of the Tax Court, the Court stated, “The Tax Court remains independent of the Executive and Legislative Branches. Its decisions are not subject to review by either the Congress or the President. Nor has Congress made Tax Court decisions subject to review in the federal district courts. Rather, like the judgments of the district courts, the decisions of the Tax Court are appealable only to the regional United States courts of appeals, with ultimate review in this Court. The courts of appeals, moreover, review those decisions ‘in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.’” *Freytag*, 501 U.S. at 891.

Roberts cited Eleventh Circuit precedent in *Gatlin v. Comm.*, 754 F.2d 921, (CA-11, 1985), where the Eleventh Circuit quoted *Conforte v. Comm.*, 74 T.C. 1160, 1177 (1980), which stated, “[A] trial before the Tax Court is a proceeding de novo; our determination of a petitioner’s tax liability must be based on the merits of the case and not any previous record developed at the administrative level.” The *Roberts* court stated at *Roberts*, 175 F.3d at 895, n. 5, “We recognize that the chronology of a Tax Court case both informs and is informed by the occurrence of certain IRS administrative acts. . . . This temporal interrelationship does not mean, however, that a Tax Court case is actually part of a cohesive series of IRS administrative acts that constitute an ‘administrative proceeding’ within the meaning of section 362(a)(1).” Accordingly, the court held that the filing of the petition by the Robertses commenced a judicial proceeding in the Tax Court, thus it was not a judicial proceeding against the debtor within the meaning of Clause (i). Rejecting the reasoning in *Delpit*, the court stated, “According to the *Delpit* court, however, ‘the mere fact that a debtor ‘initiates’ an action in Tax Court is not dispositive; we must examine the proceedings as a whole to determine whether they are in fact initiated ‘against the debtor.’” *Delpit*, 18 F.3d at 773. In our view, an examination of the Tax Court judicial proceeding as a whole yields no support for a contrary conclusion.” *Roberts*, 175 F.3d at 895.

The court reasoned that if it ruled that the Tax Court proceeding was against the Robertses, it would create a fundamental and unwarranted inconsistency in the application of Bankruptcy Code § 362 to tax-related proceedings before the Tax Court and the district court. It noted that even in

the Ninth Circuit, a tax refund suit in the district court is not an action against the debtor. The court stated, “Because tax refund suits and Tax Court petitions share a common purpose, we see no logical reason why a taxpayer's election to proceed in Tax Court rather than district court should affect a court's determination of whether the proceeding is ‘against the debtor’ under the first clause of section 362(a)(1).” *Roberts*, 175 F.3d at 895.

Regarding Clause (ii), *Roberts* rejected the Ninth Circuit’s position that an appeal of a Tax Court decision is the continuation of an administrative audit proceeding initiated by the IRS to recover a claim against the debtor, namely, the alleged tax deficiency. It noted that, with regard to Clause (i), it had already ruled that a Tax Court case is an independent judicial proceeding. Also, it reasoned that the IRS conducts audits to establish whether a deficiency exists, and only after one does and is assessed does the IRS initiate an administrative collection process to recover the assessed deficiency. The court stated, “Furthermore, it is well-established that the Tax Court is a court of strictly limited jurisdiction and powers. ... Although it is empowered to enjoin the collection of a deficiency in certain limited circumstances ... the Tax Court possesses no statutory authority to issue orders in aid of IRS collection activities. ... Instead, the Government must bring a suit for collection of tax in federal district court (or perhaps in state court) if it wants judicial assistance in recovering a tax deficiency. ... Thus, a Tax Court case plainly cannot be characterized as a proceeding ‘to recover a claim against the debtor.’” *Roberts*, 175 F.3d at 895-896.

RHONE

In *Rhone*, decided in 2001, the Third Circuit ruled that Bankruptcy Code § 362(a)(1) did not apply to stay the debtor’s appeal, as the debtor filed the petition in Tax Court seeking to challenge a notice of administrative adjustment of partnership items issued by the IRS. The debtor was seeking to appeal the Tax Court’s denial of its motion for summary judgment as the notice was untimely filed. It adopted the reasoning of the Fifth and Eleventh Circuits and stated, “We like the Eleventh Circuit find the Ninth Circuit's position to be unpersuasive and out of sync with this Circuit's general jurisprudence addressing Bankruptcy § 362, and we too adopt the no-stay view.” *Rhone*, 249 F.3d at 280.

HAAG

In *Haag*, in 2007, the First Circuit ruled that Bankruptcy Code § 362(a)(1) did not stay the debtor’s appeal of a district court’s summary judgment in a case brought by the debtors contending that the IRS failed to provide them with notice of a collection due process hearing regarding federal tax liens filed against them. The court ruled that the Haag’s brought the suit in the district court; thus it was not against the debtor. The court stated, “Occasionally, a court has held that an action brought by a debtor should be re-characterized as a further phase of a suit against the debtor. In particular, the Ninth Circuit held, in disagreement with three other circuits, that a debtor's *de novo* action in the Tax Court to redetermine a tax deficiency should be treated as a ‘continuation’ of an administrative proceeding against the debtor and so stayed. ... There is much to be said for the mechanical rule followed by the plurality of circuits; Congress chose to stay only actions against the debtor and not those by him even though each can have adverse effects on the estate and other third party interests. This case ... is no occasion for a departure from the statutory terms.” *Haag*, 485 F.3d at 4.

SCHOPPE

In *Schoppe*, in 2013, the Tenth Circuit ruled that Bankruptcy Code § 362(a)(1) did not stay the debtor’s appeal of a Tax Court decision, finding him liable for tax deficiencies because the debtor commenced the judicial proceeding in the Tax Court for a redetermination of his tax deficiencies. The Tenth Circuit cited its decision in *TW Telecom Holdings Inc.* as support that whether a case is subject to the Bankruptcy Code § 362 automatic stay must be determined at its inception. The

Tenth Circuit briefly discussed *Freeman*, *Delpit*, *Roberts*, *Rhone*, and *Haag* and stated, “We agree with the four circuits that have applied a bright-line rule that a petition filed in Tax Court is an independent judicial proceeding initiated by the debtor, not the continuation of an administrative proceeding against the debtor. Because the underlying case in this appeal originated with Mr. Schoppe commencing a judicial proceeding in Tax Court for a redetermination of his tax deficiencies, we conclude the automatic stay in § 362(a)(1) does not apply.” *Schoppe*, 711 F.3d at 1192.

CONCLUSION

In Bankruptcy Code § 362, Congress has provided an automatic stay for the enumerated proceedings, which apply in a myriad of situations, both tax and non-tax related. The issue of whether Bankruptcy Code § 362(a)(1) applies in certain tax-related matters at the appellate level has been adjudicated in six of the thirteen court of appeals. While it appears to be settled among these circuits that whether a case is subject to the automatic stay must be determined at its inception, there is a split over whether a proceeding is initiated by the debtor when he files a petition in Tax Court or district court or whether the judicial proceeding is a continuation of the proceeding initiated against the debtor when the IRS begins the administrative process of determining if there is a deficiency. In the First, Third, Fifth, Tenth, and Eleventh Circuits, the filing of a petition in Tax Court is viewed as an independent judicial proceeding initiated by the debtor; thus, it is not against the debtor and the automatic stay does not apply. Conversely, the Ninth Circuit is the lone circuit to hold that a proceeding before the Tax Court and a subsequent appeal are continuations of the comprehensive income tax assessment procedure initiated by the IRS against the debtor and to recover a claim against the debtor; thus, the judicial proceeding is against the debtor and the automatic stay does apply.

In 2013, the Supreme Court denied certiorari in *Schoppe*; thus, unless the issue reaches the Supreme Court in the future, Congress amends the statute, or the Ninth Circuit reverses itself in a future case, the split will continue. Taxpayers, debtors, and their counsel must be aware of this split in cases where a voluntary bankruptcy petition is filed and there are tax matters pending before the appellate courts or to be appealed after a lower court proceeding is concluded. This may affect decisions regarding which lower court to initiate tax actions and the jurisdiction of the appellate court to hear the case. It appears unlikely that the reasoning of the Ninth Circuit will be adopted in those circuits that have not yet ruled on the issue, as five other circuits have ruled differently, *Delpit* was decided in 1994, and no other circuit has agreed with the Ninth Circuit since its ruling.

Often, when assessing the likelihood of success of a client’s matter, practitioners view the relevant law and facts and determine whether the client has a winning case or if it is a “dog.” So far, only in the Ninth Circuit must that dog STAY!

REFERENCES

Bankruptcy Code §§ 362(a)(1) and (8)

Bankruptcy Code § 362(b)(9)

Bankruptcy Code § 7481(a)(1)

Bankruptcy Code § 7483

Cheng v. Comm., 938 F.2d 141 (CA-9, 1991)

Delpit v. Comm., 18 F.3d 768 (CA-9, 1994)

Freeman v. Comm., 799 F.2d 1091 (CA-5, 1986)

Freytag v. Comm., 501 U.S. 868 (1991)

Haag v. United States, 485 F.3d 1 (CA-1, 2007)

Roberts v. Comm., 175 F.3d 889 (CA-11, 1999)

Rhone-Poulenc Surfactants and Specialties, L.P. v. Comm., 249 F.3d 175 (CA-3, 2001)

Shoppe v. Comm., 711 F.3d 1190 (CA-10, 2013), *cert. denied*, 2013 U.S. LEXIS 6524 (2013)