

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

N(34)613(1)(f)-1

January 21, 1997

Subject: Valuation of Secured Claims
in Chapter 11 and 13 Cases **Cancellation Date:** April 21, 1997

This is to inform District Counsel attorneys of the following two recent appellate decisions from which petitions for certiorari have been filed: Associates Commercial Corp. v. Rash, 90 F.3d 1036 (5th Cir. 1996) (en banc), petition for cert. filed, 65 U.S.L.W. 3204 (U.S. Sept. 20, 1996) (No. 96-454), and Taffi v. United States, 96 F.3d 1190 (9th Cir. 1996) (en banc), petition for cert. filed, - U.S. - (U.S. Dec. 3, 1996) (No. 96-881). Both of these decisions involve the issue of how to value property a debtor proposes to retain under a chapter 11 or 13 plan. One method of valuation is based on fair market (or retail) value. An alternative method of valuation is based on the amount of net proceeds the creditor would receive from a hypothetical forced sale. The method of valuation is pertinent in determining the amount of a creditor's secured claim under B.C. § 506(a) for purposes of determining the amount of plan payments due under the plan.

Because this issue is now pending in the Supreme Court, any correspondence with the Tax Division of the Department of Justice about this issue should be transmitted to the Office of Assistant Chief Counsel (General Litigation) for preruleview. See CCDM 34(613):(1)(f).

In Rash, which does not involve the Internal Revenue Service, a private creditor has a security interest in the chapter 13 debtor's truck, which the debtor is retaining for use in his business. The holder of a secured claim only receives payments under a chapter 13 plan to the extent of the value of the property to which the creditor's security interest or lien attaches. The creditor argued that because the debtor is retaining the truck, it should be valued based on its replacement cost to the debtor, or its retail value. The Fifth Circuit's en banc decision instead holds that the collateral should be valued based on the amount of money the creditor would obtain if it foreclosed on the collateral, which in this case would be the wholesale value of the truck. The creditor has filed a petition for certiorari, and the Department of Justice has filed an amicus brief in support of the petition for certiorari.

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In Taffi, an en banc panel of the Ninth Circuit held in a unanimous opinion that fair market value is the proper standard for valuation without any deduction for hypothetical costs of sale. In Taffi, the debtor's confirmed chapter 11 plan provided for full payment of the Service's secured claim. The Service's claim was secured by debtor's residence. The debtor asserted that the secured claim should be valued based on the forced sale value of the residence, or in the alternative, based on fair market value minus the hypothetical costs of sale. The Service asserted that its claim should be based on the fair market value of the residence without any deduction for hypothetical costs. The en banc panel agreed with the Service's position. The court rejected the proposition that the valuation should be based on what the creditor would obtain if it foreclosed on the collateral. Except for the Fifth Circuit, all other circuits which have addressed this issue in cases involving private creditors are consistent with the Ninth Circuit's decision. Metrobank v. Trimble, 50 F.3d 530 (8th Cir. 1995); Winthrop Old Farm Nurseries, Inc. v. New Bedford Institution for Savings, 50 F.3d 72 (1st Cir. 1995); Huntington National Bank v. Pees (In re McClurkin), 31 F.3d 401 (6th Cir. 1994); Coker v. Sovran Equity Mortgage Corp., 973 F.2d 258 (4th Cir. 1992). The debtors have filed for certiorari in Taffi, and this office has recommended that the United States acquiesce in certiorari.

We reiterate that correspondence to the Department of Justice about the issues raised in Rash and Taffi should be sent to the Office of Assistant Chief Counsel (General Litigation) for preruleview. Any questions should be addressed to Mitchel S. Hyman of Branch 2 in General Litigation, (202) 622-3620.

_____/s/
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