UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

THOMAS DIPPEL and JANICE DIPPEL, Debtors.

Docket: 04-23770-BKC-RBR Filed March 23, 2005

THOMAS DIPPEL and JANICE DIPPEL, Plaintiffs v. UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Defendant.

Docket: 04-2274-BKC-RBR-A

MEMORANDUM OPINION GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for hearing on Tuesday, February 15, 2005. The Court heard the argument of counsel for the respective parties, has considered the record in this cause and the memoranda filed therein, and is otherwise fully advised. The Court finds as follows.

STATEMENT OF FACTS

On or about April 15, 2001, an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (Form 4868) was submitted to the IRS on behalf of the Debtors by the Debtors' accountant. The extension request was accepted by the IRS and the due date of the return was extended to August 15, 2001. The Debtors' tax return for the 2000 tax year was received by the Internal Revenue Service on or about April 22, 2001, but was posted as a timely-filed return. The Debtors filed a voluntary Chapter 7 bankruptcy petition on June 15, 2004 - less than three years after the extended deadline for the filing of their tax return for the 2000 tax year, thereby rendering the tax liability for that year non-dischargeable. See 11 U.S.C. Sections 523(a)(1)(A), 507(a)(8).

ANALYSIS

1. THE DEBTORS' TAX LIABILITIES ARE NON-DISCHARGEABLE PURSUANT TO SECTION 523(a)(1)(A).

Title 11 U.S.C. Section 523(a)(1)(A) excepts from discharge under 11 U.S.C. Section 727 any tax liability that would be classified as a priority tax under 11 U.S.C. section 507(a)(8). Section 507(a)(8) states that a priority tax claim involves any tax liability for a tax year in which the tax return, "including extensions" is due within three years before the filing of the bankruptcy petition. In re Gidley, 138 B.R. 298 (Bankr. M.D. Fla. 1992) aff'd, 151 B.R. 952 (M.D. Fla.).

Count I of the complaint asserts, inter alia, that because the "taxes were due to have been filed/incurred prior to three (3) years before the filing of the case, the tax returns were received by the IRS more than two (2) years prior to the filing of the case, and the taxes were assessed greater than 240 days prior to the filing of the case," the tax liability at issue is not entitled to priority treatment under 11 U.S.C. Section 507(a)(8) and the taxes are not excepted from discharge under 11 U.S.C. Section 523(a)(1)(A). This assertion is both legally and factually incorrect.

Section 507(a)(8)(I), in conjunction with Section 523(a)(1)(A), imposes priority status and nondischargeability upon an income tax for a taxable year for which a return is last due, including extensions, after three years before the date of the filing of the petition. The Debtors' assertions notwithstanding, their tax return for the 2000 tax year was not due to be filed within three years of the petition date, since the filing deadline had been extended to August 15, 2001. For purposes of this three-year "lookback" period, the date upon which the tax was incurred is irrelevant. Similarly immaterial is the date upon which the returns were received by the Internal Revenue Service. Finally, Section 507(a)(8)(A)(ii), which asks whether the tax was assessed within 240 days of the petition date, has no bearing if the liability is already rendered nondischargeable by Section 507(a)(8)(A)(i).

Although the Court is unaware of any ruling in the Southern District of Florida addressing this issue, numerous courts elsewhere have found taxes to be nondischargeable where the tax return was due within three years of the bankruptcy petition date, regardless of the date upon which the return was actually filed. Based upon analogous facts, it has been held that the three-year. "'lookback' period commences on the date the tax is 'last due, including extensions' -- not the date the return is filed if the extension was not used." In re McDermott, 286 B.R. 913, 915 (M.D. Fla. 2002). "For purposes of [Section] 523(a)(1)(A), 'the due date of the return is diapositive and the date the return is actually filed is immaterial' in determining whether a debtor's tax obligation is dischargeable." Id., citing In re Wood, 78 B.R. 316, 320 (Bankr. M.D. Fla. 1987), aff d 866

F.2d 1367 (11th Cir. 1989). Courts addressing this issue have generally been unwilling to permit taxpayers to escape the three-year rule by attempting to nullify automatic extensions. See, e.g., Gidley, 138 B.R. at 299; Kimball v. United States, 2002 WL 441986 (D. Mass., Feb. 27, 2002) (rejecting debtor's argument that an extension was invalid because of misrepresentations he made when filing Form 4868); Brustman v. United States, 217 B.R. 828, 835 (Bankr. C.D. Cal. 1997).

During the February 15, 2005 oral argument on the Defendant's Motion for Summary Judgment, Debtors' counsel argued that the Debtors' April 15, 2001 request for an automatic extension was rendered moot by the Debtors' timely filing of a tax return for the 2000 tax year. The same reasoning was relied upon by the Bankruptcy Court in McDermott v. United States, 2001 WL 1589617, at *2 (Bankr. M.D. Fla. Nov. 6, 2001), and soundly rejected on appeal to the U.S. District Court, which found it irrelevant that a filing extension was not actually needed or used:

> Pursuant to Section 523(a)(1) of the Bankruptcy Code, taxes are excepted from discharge if they are "for a taxable year ending on or before the date of filing of the petition for which a return, if required, is LAST DUE, INCLUDING EXTENSIONS, after three years before the date of the filing of the petition." (Emphasis added.) For purposes of sections 523(a)(1)(A), "the due date of the return is dispositive and the date the return is actually filed is immaterial" in determining whether a debtor's tax obligation is dischargeable. In re Wood, 78 B.R. 316, 320 (Bankr. M.D. Fla. 1987) (Judge George L. Proctor), affd 866 F.2d 1367 (11th Cir. 1989). The clear statutory language includes extensions without any qualifying terms for the type of extensions. It does not include only valid extensions, nor only fully used extensions, nor only necessary extensions, nor only extensions that the taxpayer benefitted from. The clear statutory language provides that the "lookback" period commences on the date the tax is "last due, including extensions"--not the date the return is filed if the extension was not used. The mere fact that an extension is not used does not make it void.

McDermott, 286 B.R. at 915.

Similarly irrelevant is the Debtors' allegation that their accountant filed the request for an automatic extension without their having requested that he do so. Automatic extensions of the filing deadline are granted by the Internal Revenue Service, not by the taxpayer. The Internal Revenue Code authorizes the Secretary of the Treasury to grant a reasonable extension of time for filing any return as follows: "(a) GENERAL RULE. -- The Secretary may grant a reasonable extension of time for filing any return, declaration, statement, or other document required by this title or by regulations. Except in the case of taxpayers who are abroad, no such extension shall be for more than 6 months." I.R.C. section 6081(a). The statute makes it plain that such an extension-permitting the filing of a return beyond the statutory deadline-is an act of legislative grace. See Rev. Ruling 83-27, 1983-1 C.B. 337, 1983-6 I.R.B. 8, 1983 WL

198939 ("The granting or withholding of an extension is a discretionary function, which, like other discretionary authority, must be exercised within the limits of the authority granted"). The authority to accept an extension, or terminate an extension after it has been granted, rests solely with the IRS. The requirements for requesting an automatic extension are minimal: Form 4868 does not require the taxpayer's signature and can be submitted, as in this case, by someone working on the taxpayer's behalf. Except in the unusual circumstance in which the IRS denies the extension request, an extension is granted and the risk of "failure to file" penalties is averted during this four-month period. Counterbalancing the ease by which an extension may be obtained, however, is the obligation of a debtor to determine -- by contacting the IRS if necessary -- the date upon which his tax return, was "last due, including extensions," before attempting to discharge taxes associated with the return in bankruptcy.

Based upon the uncontested facts and established law, the Debtors' tax liability for the 2000 tax year is excepted pursuant to 11 U.S.C. Sections 507(a)(8) and 523(a)(1)(A) from any discharge to which the Debtors could be entitled under 11 U.S.C. Section 727. Accordingly, judgment is entered in favor of the United States and against the Debtors as to this issue.

2. INTEREST ON THE DEBTORS' TAX LIABILITY IS NONDISCHARGEABLE.

The Debtors also maintain that they are entitled to a judgment that their tax penalties and interest are dischargeable, since the "taxes owed by the Debtor arose more than three years prior to the date of filing and are dischargeable under 11 U.S.C. Sections 523(a)(1) and (a)(7)(B)." It is undisputed that penalties, and interest on penalties, are dischargeable, where the transaction or event giving rise to the penalty occurred more than three years prior to the filing of the bankruptcy petition. In re Burns, 887 F.2d 1541, 1544 (11th Cir. 1989); In re Wines, 1992 WL 200602 (S.D. Fla., Apr. 8, 1992). The plain language of 11 U.S.C. Section 523(a)(7) does not, however, extend to interest on the tax obligations. The Court finds, as a matter of law, that the interest on the Debtors' nondischargeble tax liabilities is similarly barred from discharge.

3. THE DEBTORS ARE NOT ENTITLED TO SEEK AVOIDANCE OF TAX LIENS.

The Complaint also incorrectly maintains that the "Debtor may avoid a lien pursuant to 11 U.S.C. Section 506(d) to the extent the lien secures a claim that is not an allowed secured claim." As a matter of law, a Chapter 7 debtor is not permitted to "strip down" the value of a creditor's lien.

In Dewsnup v. Timm, 502 U.S. 410 (1992), the United States Supreme Court held that a Chapter 7 debtor could not "strip down" a creditor's lien on real property to the judicially determined value of collateral. The Court emphasized that a creditor's lien stays with the real property until foreclosure and that under the Bankruptcy Act of 1898, liens on real

property pass through bankruptcy unaffected. Accordingly, Dewsnup stands for the proposition that a debtor may not circumvent a creditor's lien by petitioning a court to reduce a creditor's secured claim to the value of the collateral.

Numerous courts in the Eleventh Circuit have followed the Dewsnup rule. In the particularly instructive case of In re Houze, 1994 WL 389475 (Bankr. S.D. Fla. April 4, 1994), a debtor attempted to avoid federal tax liens based upon taxes that had been discharged, arguing that there was no equity in his property to which the tax liens could attach. This Court correctly found the debtor's assertion to be in direct contravention of the Dewsnup rule that federal tax liens pass through bankruptcy unaffected. See also In re Thomas, 260 B.R. 884 (Bankr. M.D. Fla. 2001) (holding that Chapter 7 debtors could not use an objection to the claim of the Internal Revenue Service, in combination with motion to value homestead property securing it, to "strip down" the lien to the value of debtor's interest in homestead); In re Phillips, 197 B.R. 363 (Bankr. M.D. Fla. 1996) (finding debtor precluded under Dewsnup from avoiding the undersecured portion of a federal tax lien to the extent he sought to do so by seeking a determination that the lien was invalid as it pertained to his exempt property); see also In re Millsaps, 133 B.R. 547, 550 (Bankr. M.D. Fla. 1991) (holding that whether or not the personal prepetition tax obligations are discharged, exempt real property remains subject to any properly filed tax liens); In re Carpenter, 2003 WL 1908944 (Bankr. M.D. Fla. Mar. 14, 2003).

Federal tax liens automatically attach to and are secured by all property and rights to property, whether real or personal, belonging to a debtor, as a matter of course. See 26 U.S.C. Section 6321; United States v. Bess, 357 U.S. 51 (1958); In re Houze, 1994 WL 389475 (Bankr. S.D. Fla. April 4, 1994); In re Ready, 269 B.R. 258, 263 (Bankr. M.D. Fla. 2001) ("It is well-settled that any such existing [federal tax] lien survives the bankruptcy case with respect to the prepetition property, even if the debtor's personal liability for the underlying tax is discharged in the bankruptcy case.") (internal footnote omitted); United States v. O'Day, 1996 WL 814496 (M.D. Fla. Dec. 20, 1996). According to well-established precedent, any federal tax lien attaching to the Debtors' property and interests in property pass through bankruptcy unaffected, and the Debtors lack any basis for asking that a lien be avoided.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that Motion By Defendant United States of America For Summary Judgment (C.P. 9) is GRANTED. More specifically:

1. The Debtors' Tax Liabilities Are Non-Dischargeable Pursuant to Section 523(a)(1)(A);

2. Interest on the Debtors' Tax Liability is Nondischargeabie; and

3. The Debtor is Not Entitled to Seek Avoidance of Tax Liens.

ORDERED in the Southern District of Florida on MAR 23 2005