

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

In re:

William W. Waugh,

BKY No. 3-91-2628

Debtor.

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William W. Waugh,

ADV No. 3-94-176

Plaintiff,

v.

Internal Revenue Service,

ORDER FOR JUDGMENT

Defendant.

This adversary proceeding to determine dischargeability of a tax debt, came on for hearing before the Court on cross-motions for summary judgment on February 16, 1995. Appearances were noted on the record. The Court, having considered the briefs, heard arguments of counsel, and otherwise being fully advised in the matter, now makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

STATEMENT OF THE CASE.

Income tax liability of a debtor, who has filed a return that was last due within three years prior to the filing of a bankruptcy case, is nondischargeable under 11 U.S.C. Section 523(a)(1), by reference to 11 U.S.C. Section 507(a)(8)(i). In this case, the Debtor timely filed a return, due April 15, 1988, for the tax year 1987, but did not pay the tax. Ordinarily, the 1987 tax liability would have become dischargeable on April 15, 1991. The Debtor filed his Chapter 7 petition in May, 1991, and received his general Chapter 7 discharge in the ordinary course.

The Internal Revenue Service does not recognize the 1987 tax liability as having been discharged in the 1991 bankruptcy, and has applied tax payments that the Debtor submitted in full payment of a 1989 tax year liability, against the 1987 tax debt. The Debtor then commenced this adversary proceeding for declaratory judgment that his 1987 tax liability was discharged by his 1991 Chapter 7 discharge. He also seeks equitable relief regarding his 1989 tax liability; and, he seeks an injunction prohibiting the IRS from collecting either the 1987 or 1989 tax debt.

The IRS argues that a 1988 Chapter 13 bankruptcy case filed by the

Debtor, later converted to Chapter 11, and finally dismissed in 1991 for failure to make plan payments, interrupted or tolled the three year calculation period that would otherwise have been applicable to dischargeability of the 1987 tax liability. The IRS claims that the three year nondischargeability period, rather than ending on April 15, 1991, actually extends far beyond May 9, 1991, when the Chapter 7 petition was filed.

Finally, the IRS argues that it cannot be enjoined from levy on Debtor's property to satisfy the debts.

## II.

### FACTS.

The Debtor filed a Chapter 13 Bankruptcy case on July 1, 1988, which was later converted to a Chapter 11 case on September 15, 1988. His Chapter 11 plan was confirmed on April 12, 1989. On July 27, 1990, the plan was revoked, due to his failure to make payments in accordance with the plan. He appealed the decision, but it was affirmed on February 6, 1991, and the case was finally dismissed.

On May 9, 1991, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code, and received his discharge on August 27, 1991. From July 1, 1988 through August 27, 1991, he was under the protection of the automatic stay for a total of 1080 days.

On April 2, 1994, the Debtor directed that his refund for the 1993 tax year, \$11,019, plus \$847 cash, be applied to pay off his 1989 tax liability of \$11,858.22. Instead, the IRS applied both the 1993 tax refund and the cash payment offered by Debtor, to his 1987 outstanding tax liability.

On June 8, 1994, the IRS served upon the Debtor, its Notice of Intent to Levy, concerning his outstanding 1987 tax liability, in the amount of \$157,631.36. On June 8, 1994, the Debtor received a second Notice of Intent to Levy for his outstanding 1989 tax year liability of \$15,620.52.

The Debtor commenced this adversary proceeding on September 9, 1994, for declaratory judgment that the 1987 tax liability was discharged in the 1991 bankruptcy; and, for injunctive relief regarding the application of past payments and future collection efforts by the IRS. Both parties have now moved for Summary Judgment.

## III.

### DECISION.

Under 11 U.S.C. Section 523 (a)(1), by reference to 11 U.S.C. Section 507(a)(8)(A)(i), an income tax obligation of a debtor who has filed a return is not dischargeable if the last date on which the return could have been timely filed falls within three years of the date of the filing of the bankruptcy petition. In re: Brickley, 70 B.R. 113, 114 (Bkr. 9th Cir. 1986). Additionally, the tax obligation is a priority debt for distribution purposes; and, if the case be a case under Chapters 11, 12, or 13, the tax must be paid in full during a plan as a condition of confirmation. No one disagrees with this.

The problem arises out of serial filings. Typically, in serial filings, the earlier cases are filed under Chapters 11, 12, or 13; they involve the nondischargeable priority taxes; and, they fail. The failed cases are then followed by cases involving the same tax liability; but, the later cases are brought under Chapter 7, and they are filed outside the stated three year nondischargeability period. The issue in the later cases, as here, is whether the tax, now outside the stated three year nondischargeability period, is nonetheless nondischargeable, due to the earlier filings.

The issue is not associated with any specific inconsistency,

conflict, or statutory ambiguity found in the Bankruptcy Code. Although unartfully drafted, the relevant Bankruptcy Code nondischargeability provisions, 11 U.S.C. Sections 523(a)(1) and 507(a)(8)(A)(i), are not apparently susceptible of different interpretations regarding their scope or coverage. They appear to simply identify, as nondischargeable, income tax liability of a debtor who has filed a return that is last due within three years prior to the filing of a bankruptcy case, without regard to earlier cases.

A literal reading and "plain meaning" approach to the Bankruptcy Code, seems to indicate that income tax liability of a debtor who has filed a return, which is last due more than three years before the filing of a bankruptcy case, is not covered by the nondischargeability provision of 11 U.S.C. Section 523(a)(1); even where the same tax debt was involved in an earlier bankruptcy case as a nondischargeable tax liability falling within the three year period. Yet, every reported decision of final authority holds or indicates otherwise. See: *West v. United States* (In re West), 5 F.3d 423 (9th Cir. 1993); *Richards v. United States*, 994 F.2d 763 (10th Cir. 1993); *Montoya v. United States* (In re Montoya), 965 F.2d 554, 555-58 (7th Cir.1992); *Linder v. United States* (In re Linder), 139 B.R. 950, 952-53 (D.Colo.1992); *United States v. Deitz* (In re Deitz), 116 B.R. 792, 794 (D.Colo.1990); *Molina*, 99 B.R. at 794-95; *Stoll v. IRS* (In re Stoll), 132 B.R. 782, 784-85 (N.D.Ga.1990); *In re Ross*, 130 B.R. 312, 313-14 (D.Neb.1991); *In re Wise*, 127 B.R. 20, 21-23 (E.D.Ark.1991); *In re Ringdahl*, [1990-91] Bankr.L.Rep. (CCH) P 74,082, 1991 WL 284105 (Bkr.M.D.Fla.1991); *In re Bryant*, 120 B.R. 983, 984-85 (E.D.Ark.1990); *In re Davidson*, 120 B.R. 777, 781-87 (D.N.J.1990); *Florence*, 115 B.R. at 110-13; *In re Quinlan*, 107 B.R. 300, 301 (D.Colo.1989); *In re Ryan*, No. 88-B-07735-A, 1989 WL 155684 (Bankr.D.Colo.1989); *In re: Brickley*, 70 B.R. 113, 114 (Bkr. 9th Cir. 1986).

These cases all hold that the running of the tax priority periods fixed in 11 U.S.C. Section 507(a)(8)(A) are tolled during pendency of bankruptcy proceedings in which the IRS is stayed from collection efforts to secure payment of the tax. Since the nondischargeable tax identified in 11 U.S.C. Section 523(a)(1) is the 11 U.S.C. Section 507(a)(8) priority tax applicable to the proceeding, the running of the nondischargeability periods would necessarily be tolled as well, under the reasoning of the cases. Accordingly, under the cases, the "reach back" period for both 11 U.S.C. Sections 507(a)(8)(A) and 523(a)(1) priority and nondischargeable taxes in a bankruptcy proceeding is expanded in time equal to the lesser of: the pendency of an earlier bankruptcy proceeding in which the tax was priority and IRS collection efforts were stayed; or, the time of the priority period remaining when the earlier proceeding was commenced.

While many of the cases cited purport to base their holdings on statutory construction and plain meaning, the decisions are clearly driven by perceptions of Congressional intent, Bankruptcy Code purpose, and underlying public policy. Thus, particularly in the earlier cases, the legal reasoning and analysis are strained. Nonetheless, this Court is persuaded that the decisions are correct. They also reflect a near universal agreement on the state of the law.

It would serve no purpose here to discuss in detail the principles of statutory construction; the intricacies and interplay among Bankruptcy Code and Internal Revenue Code provisions; or, the Congressional intent and underlying public policy that shape this result. These matters are thoroughly covered in the cases cited. This Court is especially persuaded by the discussion and reasoning of the court in *West v. United States*, 5 F.3d 423 (9th Cir. 1993).

The Debtor's income tax liability for the 1987 taxes was not dischargeable in his May 9, 1991, Chapter 7 bankruptcy case. When he filed the Chapter 13 bankruptcy on July 1, 1988, the three year priority

period that had begun on April 15, 1988, for the 1987 tax liability, was tolled. Running of the period did not resume until dismissal of the case on February 6, 1991. The liability was well within the 11 U.S.C. Section 507(a)(8)(A) priority period, expanded as a result of the earlier bankruptcy proceeding, when the May 9, 1991, Chapter 7 case was filed. Therefore, the tax liability was nondischargeable under 11 U.S.C. Section 523(a)(1), by reference to 11 U.S.C. Section 507(a)(8).

Since the debt is nondischargeable, enforcement of the 11 U.S.C. Section 524 injunction is not involved. There is no basis for this Court's entry of any injunctive relief in favor of the Debtor. (FN1)

IV.

DISPOSITION.

Based on the foregoing, it is hereby ORDERED:

1) Plaintiff's motions for summary judgment and injunctive relief are denied.

2) Defendant's motion for summary judgment that William W. Waugh's federal income tax liability for the taxable year 1987, was excepted from discharge in his Bankruptcy Case No. 3-91-2628, is granted. William W. Waugh's federal income tax liability for the year 1987 is nondischargeable in Bankruptcy Case No. 3-91-2628, pursuant to 11 U.S.C. Section 523(a)(1); and the debt was excepted from his general 11 U.S.C. Section 727 discharge entered on August 27, 1991, in the case.

LET JUDGMENT BE ENTERED ON PARAGRAPH 2, ACCORDINGLY.

DATED: April 27, 1995.

By The Court:

DENNIS D. O'BRIEN  
CHIEF U.S. BANKRUPTCY JUDGE

(FN1) The Debtor seeks other injunctive relief on various grounds having nothing to do with the Bankruptcy Code or the bankruptcy proceedings. This Court has no jurisdiction over those matters. The Court lacks authority to consider, determine, or remedy any nonbankruptcy claims. See: Williams Packing & Navigation Co., 370 U.S. 1(1962); and 26 U.S.C. Section 7421(a).