

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

RAY E. SCOTT, aka/dba/asf
Ray Scott Enterprises, Inc.,
Debtor.

BKY 4-90-91

MEMORANDUM ORDER SUSTAINING
OBJECTION TO CONFIRMATION
OF PLAN

At Minneapolis, Minnesota, November 2, 1990.

The above-entitled matter came on for hearing before the undersigned on the 6th day of September, 1990, on an objection of the Minnesota Department of Revenue ("MnDOR") to confirmation of Debtor's Chapter 13 plan (the "Plan"). The appearances were as follows: Thomas Overton for MnDOR; and Frank Faulhaber for the Debtor. This Court has jurisdiction over the parties to and subject matter of this case pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate this objection because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(L).

FACTS

On January 8, 1990, Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The following day, Ray Scott Enterprises, Inc. (the "Corporation") filed a voluntary petition for relief under Chapter 11 of the Code. The resolution approving the filing of the Corporation's petition was signed by the Debtor as President of the Corporation.

The Corporation owns and operates a restaurant, although Debtor filed a "Statement of Financial Affairs for Debtor Engaged in Business" (the "Debtor's Statement") which indicated that Debtor was engaged in the business of being a "Restaurant Owner" under the name of the Corporation. According to the Debtor's Statement and Exhibit A to the Corporation's petition, Debtor owns 100% of the Corporation's stock. The Corporation's "Statement of Financial Affairs" indicates that Debtor, the Corporation's President, is the only officer, director, insider and managing executive of the Corporation. Debtor, as President, Secretary and Treasurer of the Corporation, had applied for a Tax Identification Number on behalf of the Corporation. Moreover, Debtor routinely signed Minnesota and Minneapolis sales tax returns filed on behalf of the Corporation.

Both Debtor's and the Corporation's schedules listed MnDOR as having an unsecured, priority claim of \$86,533.00. Debtor's schedule listed said claim as contingent and unliquidated, but the Corporation's schedule contained no such notation. On August 31, 1990, MnDOR filed an amended, unsecured, priority claim in each case for prepetition tax liabilities in the amount of \$138,179.56. The amount of said claim included Minnesota and Minneapolis sales taxes and payroll withholding taxes assessed prepetition against both the Corporation and the Debtor individually, as well as interest and penalties imposed with respect thereto.

DISCUSSION

MnDOR objects to confirmation of the Plan on two grounds. First, it asserts that Debtor is not eligible to be a debtor in a Chapter 13 case under 11 U.S.C. Section 109(e), and therefore the Plan does not comply with 11 U.S.C. Section 1325(a)(1). Second, it contends that the Plan has not been proposed in good faith contrary to 11 U.S.C. Section 1325(a)(3). I agree that Debtor is not

eligible to be a debtor in a Chapter 13 case, and therefore I need not reach the issue of whether the Plan has been proposed in good faith.

MnDOR asserts that its unsecured, priority claim in excess of \$100,000 is alone sufficient to render the Debtor ineligible for Chapter 13 relief. Debtor responds that his liability on said claim is contingent, and therefore said claim should not be included when determining his eligibility under section 109(e):

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$100,000 and noncontingent, liquidated, secured debts of less than \$350,000 . . . may be a debtor under chapter 13 of this title.

11 U.S.C. Section 109(e) (emphasis added). According to the Debtor, MnDOR's claim is contingent because MnDOR cannot pursue him for payment of the taxes, interest and penalties owed by the Corporation unless it is unable to collect from the Corporation. Debtor asserts that MnDOR may still collect from the Corporation under its plan of reorganization, which allegedly will provide for 100 percent payment of MnDOR's claim. The record in this case does not indicate whether such a plan has been filed or confirmed.

Debtor's liability, however, is not contingent. Debtor has been assessed personal liability for the Corporation's taxes:

The commissioner may . . . assess personal liability against any officer, director, or employee of a corporation . . . who as an officer, director, [or] employee . . . falls within the personal liability provisions of section 290.92 [or] chapter . . . 297A . . . for taxes arising thereunder which are due and owing by that corporation An order assessing personal liability shall be appealable to the tax court . . . , but an appeal shall not preclude the commissioner from exercising any collection action the commissioner deems necessary

Minn. Stat. Section 270.10, subd. 4.

The order assessing Debtor's personal liability for the payroll withholding taxes was based on his qualifying as an "employer":

For the purposes of this section the term "employer" means any person, including individuals . . . and corporations transacting business in . . . the state of Minnesota for whom an individual performs or performed any service . . . as employee of such person, except that if the person for whom the individual performs or performed the services does not have legal control of the payment of the wages for such services, the term "employer" . . . means the person having legal control of the payment of such wages. As used in the preceding sentence, the term "employer" . . . includes, but is not limited to, officers of corporations who have legal control, either individually or jointly with another or others, of the payment of the wages.

Minn. Stat. Section 290.92, subd. 1(4) (emphasis added). Debtor, as an "employer", failed to file withholding tax returns as required, and consequently was assessed liability for the payroll taxes the Corporation was required to withhold:

If any employer fails to make and file any return by paragraph (1) at the time prescribed, . . . the commissioner shall make for the employer a return . . .

and assess a tax on the basis of it. The amount of tax shown on it shall be paid to the commissioner at the times as the commissioner prescribes.

Minn. Stat. Section 290.92, subd. 6(3). Once the payroll taxes were assessed against him, Debtor became personally and individually liable for them:

[E]very employer who fails to pay to or deposit with the commissioner any sum or sums required by this section to be deducted, withheld and paid, shall be personally and individually liable to the state for the sum or sums (and any added penalties and interest.)

Minn. Stat. Section 290.92, subd. 6(7)(a) (emphasis added).

Similarly, Debtor was assessed personal liability for the Corporation's sales taxes, since he qualifies as a "person" responsible for filing sales tax returns:

"Person" includes any individual, partner, officer, director, firm, partnership, joint venture, association, . . . or private corporation As used in the preceding sentence, the term "person" includes, but is not limited to, directors and officers of corporations . . . who, either individually or jointly with others, have the control, supervision or responsibility of filing returns and making payment of the amount of tax imposed by this chapter.

Minn. Stat. Section 297A.01, subd. 2. Once the time passed for Debtor to file sales tax returns on behalf of the Corporation, Debtor became personally and individually liable for the sales taxes the Corporation was required to collect:

The tax imposed by sections 297A.01 to 297A.44, and interest and penalties imposed with respect thereto, shall become a personal debt of the person required to file a return from the time the liability therefor arises, irrespective of when the time for payment of such liability occurs.

Minn. Stat. Section 297A.40, subd. 1.

Debtor was personally and individually liable for the Corporation's sales and withholding tax debts on the date of the filing of the petition, since the "extrinsic event" that triggered his personal liability had already occurred prepetition:

A "contingent" debt is defined as: one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor and if such triggering event or occurrence was one reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred.

Brockenbrough v. Commissioner, 61 B.R. 685, 686 (W.D. Va. 1986) (citing *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bkctcy. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981)). MnDOR's order assessing Debtor's personal liability, which was made prepetition, constituted the "extrinsic event".

Debtor's personal liability for the Corporation's taxes is unlike a principal's potential liability for corporate debts if the corporate veil were pierced. Some courts have held that a principal's liability for a judgment against his corporation is contingent until a court has entered judgment piercing the corporate veil and holding the principal personally liable. See,

e.g., *In re Blehm*, 33 B.R. 678 (Bkcty. D. Colo. 1983); *Craig Corp. v. Albano* (*In re Albano*), 55 B.R. 363 (N.D. Ill. 1985). But if the contingency, i.e. entry of a judgment imposing personal liability, had already occurred prepetition, the debt would not be contingent on the date of the filing of the petition. *Albano*, 55 B.R. at 371. In the instant case, MnDOR's order assessing Debtor's personal liability was the equivalent of a judgment piercing the corporate veil. The contingency, MnDOR's assessment, had already occurred prepetition.

Consequently, the entire amount of MnDOR's claim, \$138,179.56, was a noncontingent debt on the date of the filing of the petition. Therefore, Debtor is not eligible to be a debtor in a Chapter 13 case under 11 U.S.C. Section 109(e), and thus MnDOR's objection to confirmation of the Plan must be sustained. 11 U.S.C. Section 1325(a)(1).

ACCORDINGLY, IT IS HEREBY ORDERED that the objection of the Minnesota Department of Revenue to confirmation of Debtor's Plan based on Debtor's ineligibility to be a debtor under Chapter 13 of the Bankruptcy Code is sustained.

Nancy C. Dreher
United States Bankruptcy Judge