UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

****

In re:

AQUILLA WENDELL WHEADON,

Debtor.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFERRING DECISION ON CERTAIN ISSUES TO THE UNITED STATES TAX COURT

****

AQUILLA WENDELL WHEADON,

Plaintiff,

BKY 5-87-284

v.

ADV 5-88-187

UNITED STATES OF AMERICA,
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

****

At St. Paul, Minnesota, this _____ day of August, 1990.

This adversary proceeding came on before the Court for hearing on Plaintiff's motion for summary judgment and Defendant's motion for relief from the automatic stay. Plaintiff appeared pro se. Defendant ("the IRS") appeared by Douglas H. Frazer, Trial Attorney, U.S. Department of Justice. Upon the moving and responsive documents, the record made at hearing, and the other relevant pleadings in this case, the Court makes the following order.

FINDINGS OF FACT AND
PROCEDURAL BACKGROUND

Plaintiff originally filed a voluntary Chapter 7 petition in the United States Bankruptcy Court for the Southern District of Illinois on March 31, 1987. On his Schedule A-1, Plaintiff listed the IRS as having a contingent, unliquidated, and disputed tax claim. Plaintiff's case was denominated as a "no asset" case; as a result, the clerk did not accept proofs of claim for filing. On July 7, 1987, Plaintiff received a discharge under Chapter 7. The case was closed on July 31, 1987. Neither Plaintiff nor the IRS commenced any proceedings on any pre-petition claim by the IRS while the case was open.

Prior to 1985, Plaintiff had been an attorney in East St. Louis, Illinois, who had been involved in several businesses and redevelopment projects there. On May 24, 1985, he was convicted of several offenses in the United States District Court for the Southern District of Illinois. Among them was a count under 26 U.S.C. Section 7206(1),(FN1) for the making of false statements on

his personal income tax returns for the years 1981 and 1982. From some time in June, 1985 until April 24, 1989, Plaintiff was incarcerated in the federal prison system; in 1988-9, he was at the Federal Prison Camp at Duluth, Minnesota.

Sometime during 1987, and while his bankruptcy case was pending in the Southern District of Illinois, an IRS agent visited Plaintiff and requested that Plaintiff produce business records to support the allowance of the investment tax credit, depreciation, and business-expense deductions which Plaintiff had claimed on his

(FN1)The pertinent statutory language is:

Any person who--

(1) . . . Willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .

shall be guilty of a felony . . .

personal tax returns for 1981 and 1982. This agent possessed the tax returns in question, as well as relevant exhibits and schedules. Plaintiff was unable to gain access to the necessary business files during his incarceration; many of them had been taken into the custody of the Department of Justice or the District Court in connection with the criminal case which had resulted in his sentence.

Following this 1987 meeting, the IRS served upon Plaintiff a "Report of Examination." Plaintiff responded with written objections to this report. On March 31, 1988, the IRS mailed Plaintiff a Notice of Deficiency for taxes, asserting liability primarily from Plaintiff's alleged involvement in the misappropriation of funds from the East St. Louis, Illinois Housing Authority and his claims to the deductions which had been the subject of the agent's inquiry. In the notice, the IRS proposed to assess civil fraud penalties against Plaintiff pursuant to 26 U.S.C. Section 6653(b)(1). This letter was followed by a Notice of Overdue Tax on May 16, 1988. The IRS has never assessed the taxes asserted in these notices against Defendant; nor has it ever commenced a court action for the collection of these taxes against Defendant.

On or about June 21, 1988, Plaintiff filed an action in the United States Tax Court, seeking redetermination of his personal tax liability for tax years 1981 and 1982. On June 23, 1988, Plaintiff filed the complaint in this adversary proceeding in the United States Bankruptcy Court for the Southern District of Illinois, styling it as an action seeking a determination of his tax liability for tax years 1981 and 1982 and its dischargeability in bankruptcy. The complaint did not expressly allege that Plaintiff had no tax liability for the years in question, and did not allege that the liability, if any, was discharged in Plaintiff's bankruptcy case; it only prayed for adjudications on

these issues.

The Bankruptcy Court then re-opened Plaintiff's bankruptcy case on August 8, 1988, and later transferred venue of the case to this Court in view of the situs of Plaintiff's incarceration.

DISCUSSION

Plaintiff moves this Court for summary judgment pursuant to FED. R. CIV. P. 56 and BANKR. R. 7056. He sets forth his several alternative theories of suit for the first time in his moving papers: the IRS has never assessed his tax liability for the years in question, and is now barred from doing so by operation of the statute of limitations of 26 U.S.C. Sections 6501 and 6871; his tax liability for those years, if any, was not subject to any of the exceptions of 11 U.S.C. Section 523(a)(1) and was discharged in his bankruptcy case; and the Bankruptcy Court either has exclusive jurisdiction to determine these issues, or is the preferable forum as against the United States Tax Court. Simultaneously, Defendant has made a motion which it styles as one for relief from the automatic stay pursuant to 11 U.S.C. Section 362(d); it essentially requests leave to pursue the pending litigation in the Tax Court, before the dischargeability issue is addressed in Bankruptcy Court.

A. Plaintiff's Motion for Summary Judgment.

FED. R. CIV. P. 56(a) is made applicable to this proceeding by BANKR. R. 7056. The rule provides that summary judgment shall be granted where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The party seeking summary judgment has the burden of demonstrating the absence of any genuine issue of material fact. The evidence must be viewed in the light most favorable to the opposing party. Snell v. United States, 68 F.2d 545, 548 (8th Cir. 1982), cert. den., 459 U.S. 989 (1982); In re LaCasse, 28 Bankr. 214, 216 (Bankr. D. Minn. 1983); In re Carothers, 22 Bankr. 114, 117 (Bankr. D. Minn. 1982). If the record demonstrates the possibility of a genuine issue of material fact, summary judgment is inappropriate. United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 171 (1962); Johnson Farm Equip. Co. v. Cook, 230 F.2d 119 (8th Cir. 1956).

The movant must support his motion by deposition, admissions, answers to interrogatories, affidavits and similar evidence. When properly supported, the motion must be opposed by the same type of showing.

> [A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits, or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

FED. R. CIV. P. 56(e). This means that the responding party must

come forward with some sort of affirmative evidence of the existence of a triable issue of material fact.

The determination of whether or not a genuine issue of material facts exists is made upon the pleadings and evidence submitted. FED. R. CIV. P. 56(c). Statements by counsel in argument or briefs are not facts or evidence of facts which a court may consider. Sewell Plastics, Inc. v. Coca Cola Co., 119 F.R.D. 24 (N.C. 1988). See also In re Bowen, 89 Bankr. 800, 803 (Bankr. D. Minn. 1988); In re Anderson, 72 Bankr. 783, 789 (Bankr. D. Minn. 1987). Further, evidence which is merely "colorable," or which lacks real probative weight, cannot support the assertion of a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Such evidence must arguably match the substantive standard of proof which its proponent will bear at trial, to the extent that a reasonable fact finder could find for its proponent based upon it. Id. at 255.

In his complaint, Plaintiff first requests a determination of his tax liability for the years in question, under color of 11 U.S.C. Section 505.(FN2) What he really seeks is a determination that the IRS's claims against him are barred by the statute of limitations under the Internal Revenue Code:

> Except as otherwise provided in this section, the amount of any tax imposed by [the Internal Revenue Code] shall be assessed within 3 years after the return was filed . . . and no proceeding in court without assessment for the collecting of such tax shall be begun after the expiration of such period.

26 U.S.C. Section 6501(a). In his second request for relief, he requests a judgment establishing that any tax liability was discharged in his bankruptcy case, on the ground that that liability did not fall within any of the exceptions to discharge set forth in 11 U.S.C. Section 523(a)(1).(FN3)

In its answer, the IRS counters the first request for relief with two of the applicable exceptions to the three-year limitations period:

> In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without

(FN2)In pertinent part, 11 U.S.C. Section 505(a) provides:

> (1) . . . the court may determine the amount of legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

assessment, at any time.

26 U.S.C. Section 6501(c)(1), and

> If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the ta may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

26 U.S.C. Section 6501(e)(1)(A). It answers Plaintiff's dischargeability complaint by alleging that his tax liability for the years in question falls within the exception of 11 U.S.C. Section 523(a)(1)(C).

Pointing in his present motion to the uncontrovertible facts that the IRS has never assessed additional tax liability (FN3)11 U.S.C. Section 523(a)(1) provides, in pertinent part:

(a) A discharge under section 727. . . of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section . . . 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required--

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . .

11 U.S.C. 507(a)(7), in turn, encompasses, in pertinent part:

(7). . . allowed unsecured claims of governmental units; only to the extent that such claims are for--

(A) a tax on or measured by income or gross receipts--

(i) for a taxable year ending on or before the date of the 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;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 423(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case . . .

against him for the years in question, and did not commence a court action within three years of the date on which he filed returns for either year, Plaintiff argues he is entitled to a judgment barring the IRS from enforcing any claim for tax liability for these years against him. The IRS argues that Plaintiff is not entitled to such a judgment on the paper record he has presented, would not be entitled to summary adjudication of these issues in any event, and probably would not be entitled to judgment on the merits after full evidentiary development on the issues it has joined in its defense.

The threshold issue, then, is whether there is a genuine issue of material fact going to either of Plaintiff's theories. The IRS has not produced much evidence to counter Plaintiff's assertion that there are no triable fact issues--but what it has produced does demonstrate the existence of triable fact issues going to the applicability of the exceptions to the three-year statute of limitations and to the applicability of 11 U.S.C. Section 523(a)(1)(C).

Plaintiff's complaint and exhibits are filled with many vague accusations, assertions of tainted motive on the part of the IRS, and innuendo, none of which are properly supported by documentary evidence, affidavit, or deposition testimony. Once these irrelevant or unsupported "facts" are culled out, one arrives at two groups of material facts: the established sequence of various legal procedures and administrative acts or lack of action upon which Plaintiff relies, and the fact that Plaintiff was convicted in federal court of filing false tax returns for the years in question.

Both parties repeatedly refer to the District Court conviction, but to opposite effects. Plaintiff states, without documentary support, that there was no jury or court finding of fraud or intent to evade tax in the criminal case. He then argues that his present assertion that he did not harbor that intent is sufficient to defeat the statutory exceptions which the IRS argues in its defense. Similarly without documentary support, the IRS argues that, even absent proof of a specific finding, the mere fact of a conviction of filing false returns is a sufficient basis for

an inference of fraud or intent to evade taxes so as to raise a triable fact issue on the applicability of the exceptions. The problem is that neither side has submitted anything from the record in the criminal case, whether that be special interrogatories which may have been answered by the jury, the verdict form, written or oral findings by the court, or a transcript of the trial and any post-trial proceedings which may have occurred.

There is no evidentiary basis for this Court to take judicial notice under FED. R. EVID. 201(b) of any specific findings and conclusions which were made in the criminal case. There is no evidence in the record of what those findings and conclusions were. In any event, it has been held that, in the context of tax litigation, "the mere fact that a court in one opinion makes findings of fact is not a basis for the same or another court in another proceeding to take judicial notice of those findings and to deem them to be indisputably established for purposes of the pending litigation." Estate of Reis v. Commissioner, 87 T.C. 1016, 1028-29 (1986).

For the same reasons, the record lacks an adequate basis for the application of collateral estoppel to the District Court conviction, whether in favor of Plaintiff (who has not explicitly argued it) or Defendant (which has not argued it to support a cross-motion, though it well could have). Collateral estoppel applies when the issues of fact or law previously litigated were the same as those now being litigated. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-333 (1979); Montana v. United States, 440 U.S. 147, 153 (1979).

The question on collateral estoppel is whether the issue of fraud or intent to evade taxes was at issue and decided in the criminal case. Given the lack of a record as to specific findings, the only remaining possibility is whether the conviction required such a finding; if so, the conviction itself proves such fraud or intent. The development of the caselaw indicates that a conviction of the filing of false income tax returns does not necessarily involve an adjudication of fraud or intent to evade taxes.

In an early, lengthy opinion, the Tax Court held that a conviction under 26 U.S.C. Section 7206(1) estops a taxpayer from denying that his tax returns were false and fraudulent and that there was an omission of income from his return in each year applicable. Goodwin v. Commissioner, 73 T.C. 215 (1979). In Goodwin, the Tax Court concluded that "the willful subscribing to a false return is the filing of a fraudulent return." 73 T.C. at 224. The Court went on to state that "a conclusion that a taxpayer has filed a false and fraudulent return from which substantial income is omitted is a finding of ultimate fact" in the criminal case, which could be given preclusive effect in later civil or administrative proceedings involving the defendant's tax liability. 73 T.C. at 226. In support of this conclusion, it noted that "[t]his is one of the ultimate facts required to be shown in order to sustain an addition to tax under Section 6653(b),(FN4) even though it is necessary under that section, in order to find the addition to tax to be due, to make a further ultimate finding of fact that there is an underpayment of tax due to the fraudulent omission of income from the return." 73 T.C. at 226-7. Finally, the court held that "if an underpayment of tax is due to fraud, it is this fraud which comprises the intent to evade tax." 73 T.C. at 227

(citing McGee v. Commissioner, 61 T.C. 249, 257 (1973), and Plunkett v. Commissioner, 465 F.2d 299 (7th Cir. 1972)).

However, the Tax Court's Goodwin opinion was largely based on the earlier Tax Court decision in Considine v. Commissioner, 68 T.C. 52 (1977). In a later decision in a refund action by the same taxpayers as in Considine, for tax years different from those involved in the Tax Court action but nonetheless involved in the same previous conviction, the United States Court of Claims further refined and limited the preclusive effect to be given to tax fraud convictions, and increased the burden of proof required of the IRS in relying on a prior criminal conviction to obtain a judgment in a later civil proceeding to assign liability under the false documents provision of the IRS Code. The Court stated "Section 7206(1) plainly punishes a false statement in a return if the taxpayer does not believe it to be

(FN4)Goodwin was a taxpayer's action challenging the IRS's determination of deficiencies in previous years' taxes and its accompanying assessment of civil fraud penalties under 26 U.S.C. Section 6653(b).

true. These same issues have a direct impact on the finding of 'fraud' under the fraud penalty provision--the findings of these knowing falsities plus proof of an intent to evade tax, constitute fraud." Considine v. U.S., 654 F.2d 925, 929 (Ct. Cl. 1981) (emphasis added).

The courts have held that the fraud element for assessment of penalties under 26 U.S.C. Section 6653(b) incorporates an intent on the part of the taxpayer to evade the tax. See, e.g. Irolla v. United States, 182 Ct. Cl. 775, 778, 390 F.2d 951, 953 (1968). Under this analysis, the fraud penalty provision of 26 U.S.C. Section 6653(b) has been construed so that the ultimate facts for this statute include 1. a knowing falsification in the return, 2. an intent to evade, and 3. an underpayment. In this view, the single term "fraud" consists of separate parts: an intentional wrongdoing (including a knowing falsification) and an intent to evade. Both of these parts are necessarily "ultimate" facts as to the civil fraud penalty. Considine, 645 F.2d at 929-930.

Even though these decisions emerged out of proceedings involving the civil fraud penalties of 26 U.S.C. Section 6653(b) rather than ones in which a party invoked the statute of limitations of 26 U.S.C. Section 6501, they furnish an appropriate structure of analysis and rule of decision for the application of collateral estoppel. The governing statutory provisions in both instances make reference to fraud, and necessarily involve considerations to intent to evade taxes; both are part of the Internal Revenue Code, a single body of codified law from which identical language should be given parallel judicial construction.

When applied to the present facts, the rationale of the cited cases establishes that Plaintiff's conviction, standing alone, cannot stand as evidence on the issue of civil fraud or intent to evade. The only extant decision in the context of a

criminal case is in agreement; in United States v. Anderson, 254 F. Supp. 177, 183-85 (W.D. Ark. 1966), the court noted, in what seems to be dicta, that a conviction under 26 U.S.C. Section 7206(1) did not require a determination on the issue of intent to evade tax.

Thus, the uncontroverted fact of Plaintiff's conviction, standing alone, can not resolve the ultimate fact issue here. In point of fact, in its isolation it cannot even shed any light on the issue, whether to the benefit of one side or the other. The factual record for the disposition of Plaintiff's motion, then, must be broader.

In his initial motion, Plaintiff relied solely on the passage of time since the filing of his 1981 and 1982 tax returns to support his statute-of-limitations and dischargeability arguments. In response to the IRS's invocation of the fraud and intent-to-evade exceptions, Plaintiff has alleged in a fairly conclusory fashion that he had no intent to evade taxes when he filed the subject returns, and accuses the IRS of trying to attribute to him income which in fact was generated by and taxable to the business entities in which he was involved. He argues that, absent some evidence from the IRS in the form of a "smoking gun," his own denial of fraudulent intent is sufficient to establish as a matter of law that the IRS is not entitled to the statutory exceptions.

The problem with Plaintiff's argument is that the IRS may prove fraud and intent to evade by adducing a body of circumstantial evidence from which a court may infer the requisite state of mind. See Considine, 645 F.2d at 931; Irolla, 182 Ct. Cl. at 779, 390 F.2d at 953; Powell v. Grandquist, 252 F.2d 56, 61 (9th Cir. 1958); 26 U.S.C. Section 7454(a). In response to Plaintiff's motion, the IRS has pointed to enough circumstantial evidence to make out a genuine issue of material fact on the availability of the exceptions: at relevant times, Plaintiff was an attorney at law who was involved with several businesses and also with the East St. Louis Housing Authority in some fashion. It is thus likely that Plaintiff was familiar with income tax law to at least some degree. In the criminal case, the Government alleged and, apparently, proved that at least one of the businesses in which Plaintiff had interests became a front for the laundering of money embezzled from the Housing Authority. It is at least possible that the jury found, via the conviction, that Plaintiff had intended to evade taxes when he knowingly filed false returns.

Evidence of this sort has been found sufficient to support an inference of fraud and/or intent to evade, after trial on the merits. See, e.g. Considine (taxpayer found to have had intent to evade taxes on basis of evidence that he was a long-time practicing C.P.A. with mater's degree in business economics, had studied law, had taught accounting and taxation, and had knowingly understated his income and overstated his deductions). As such, it is sufficient to join a triable fact issue which goes squarely to both of Plaintiff's requests for relief. That circumstance then conclusively defeats Plaintiff's motion for summary judgment in his favor.

B. Defendant's Motion for "Relief from Stay" and Its Attendant Request for Abstention in Favor of Litigation in the Tax Court.

Though it defeats Plaintiff's motion for summary judgment, the record does weigh decisively in favor of granting the IRS's motion for "relief from the automatic stay," at least to the extent it incorporates a request that this Court refrain from determining Plaintiff's tax liability before it addresses the issue of dischargeability.(FN5) The IRS acknowledges that the jurisdictional grant of 28 U.S.C. Section 1334 is broad enough to encompass both of Plaintiff's requests for relief, and thus does not challenge the Bankruptcy Court's authority to hear them.(FN6) The IRS properly questions, however, whether the Bankruptcy Court is the most appropriate forum for determination of Plaintiff's tax liability.

The threshold dispute between Plaintiff and Defendant is essentially over the existence and amount of Defendant's claim against Plaintiff for income taxes for several pre-petition years. As noted, the Bankruptcy Court could hear this dispute and decide it, subject to the possible imposition of the decisional process of 28 U.S.C. Section 157(c)(1) and BANKR. R. 9033. The underlying justification for an exercise of this non-core jurisdiction and authority would be to achieve the resolution of all issues in a manner which would promote economy, efficiency for the bankruptcy estate and the parties to such a dispute, and finality, without requiring debtors and the Government to appear in several different forums. As inclusive as it may be, however, this grant of jurisdiction is not exclusive of other forums; the governing substantive law is not the Bankruptcy Code, and the Tax Court, the Court of Claims, or the District Court are or may be vested by statute with the same jurisdiction over the subject dispute. The Bankruptcy Court, as a specialized tribunal created under statute, has an inherent power to refrain from exercising such non-exclusive jurisdiction, in deference to another federal tribunal with equal

(FN5)Counsel for the IRS styled his motion as one for relief from the automatic stay of 11 U.S.C. Section 362(a). That stay was dissolved by operation of law in 1987, by the grant of discharge to Plaintiff or, at the very latest, when the case was originally closed. 11 U.S.C. Section 362(c)(2). It was replaced by the discharge injunction of 11 U.S.C. Section 524(a)(2). As the present proceeding is one to fix the nature, amount, and dischargeability of a pre-petition debt, it may proceed to judgment on those issues notwithstanding the discharge.

(FN6)It does appropriately note that, given the present status of Debtor's bankruptcy case, only the dischargeability count of Plaintiff's complaint can be a core proceeding subject to final disposition by a Bankruptcy Judge. As Plaintiff's Chapter 7 case is still denominated as "no-asset," there can be no claims against a bankruptcy estate; thus, Plaintiff's request for determination of his tax liability is not a proceeding for the allowance or disallowance of claims within the scope of 28 U.S.C. Section 157(b)(2)(B). At the very most, as a proceeding to fix and liquidate a debt claimed to be nondischargeable, it is a "related proceeding" within the contemplation of 28 U.S.C. Sections 157(c) and 1334(b).

jurisdiction and more specialized expertise in the subject matter of a given dispute. In re Page-Wilson Corp., 37 Bankr. 527, 529 (Bankr. D. Conn. 1984).

In considering whether or not to retain jurisdiction over a matter like the one at bar, the Bankruptcy Court must treat requests for abstention on a case by case basis. In the case of determinations of tax liability, this requires balancing the Bankruptcy Court's need to administer the bankruptcy case in an orderly and efficient fashion, the complexity of the tax issues to be decided, the asset and liability structure of the debtor, the length of time required for trial and decision, judicial economy and efficiency, the burden on the Bankruptcy Court's docket, prejudice to the debtor and potential prejudice to the taxing authority from inconsistent assessments. In re Hunt, 95 Bankr. 442, 445 (Bankr. N.D. Tex. 1989). As noted in Hunt, "[t]he ancillary jurisdiction of a bankruptcy court to liquidate claims, however, involves more nearly the administrative convenience of settling all disputes in a single forum; it is not as vital to the purpose of bankruptcy." 95 Bankr. 445 (quoting In re Gary Aircraft, Inc., 698 F.2d 775, 783. (5th Cir. 1983). The Hunt Court concluded that, in general, the Bankruptcy Court should defer a complicated, technical tax-law dispute to a specialized forum if it is available. Id. These principles are sound, based as they are on a recognition of the desirability of litigating technical, specialized disputes in a forum which has the most well-developed expertise in the law governing them.

The threshold--and possibly determinative--statute of limitations issue in this adversary proceeding is based entirely on provisions of the Internal Revenue Code. Give the nature of the IRS's case, the bankruptcy-law issue of dischargeability is to some extent factually intertwined with the tax-law issue--but it is at least possible that the ultimate issue could be resolved in Plaintiff's favor on the statute-of-limitations claim alone; in any event, fact-finding in the first matter would simplify the decision-making process in the dischargeability matter. The statute of limitations issue, further, is complicated by several possible applications of the doctrine of tolling, which might arise from the occurrences of Plaintiff's incarceration, the original pendency of his original bankruptcy case, and the effect of the reopening of the case. This Court is simply not familiar with the substantive principles governing these tax-law issues; the Tax Court is, as it deals with them on a regular basis.

The other major consideration which supports deference to the Tax Court is the tenuous relationship of this dispute to the Bankruptcy Court's mission and purpose. Plaintiff's case was closed as a "no asset" case; there was no estate to distribute to creditors, so the fixing and liquidation of Plaintiff's tax liability has no bearing on an administrative function in bankruptcy. The only creditor affected by this dispute is the IRS, which presumably would enforce any nondischargeable claim it has against Plaintiff's post-petition assets or income.

This is a two-party dispute, one between the Government and a taxpayer, and one which almost certainly would have gone into litigation in one of its two aspects even had Plaintiff not filed

for bankruptcy. Absent Plaintiff's claim of dischargeability, this matter would have no defensible place in the Bankruptcy Court. As the Tax Court has concurrent jurisdiction to determine dischargeability under 11 U.S.C. Section 523(a)(1), the connection between this dispute and Plaintiff's original invocation of bankruptcy remedies, ever more stretched, does not merit retaining it here. Thus, this Court defers decision on Plaintiff's first request for relief to the Tax Court.

C. Disposition of This Adversary Proceeding.

This order will relegate the parties to presenting and resolving the issue of Plaintiff's liability to the IRS, if any, in the Tax Court. A disposition there in favor of Plaintiff would almost certainly moot the remaining dischargeability issue. A disposition in favor of the IRS might allow the litigation of the dischargeability issue on a motion for summary judgment in the Bankruptcy Court, and would at least simplify the scope of the factual inquiry in the remaining count even if it had to come to trial.

In any event, the further progress of the dischargeability count must await final judgment in the Tax Court. It follows that there is no reason to leave this file open on this Court's docket at present. The most appropriate disposition of this file, then, is to administratively close it; it may be reopened if the Tax Court proceedings do not finally resolve all of the issues. With Plaintiff's release from incarceration and his establishment of residency in Ohio, the venue of this adversary proceeding which is most convenient to the parties no longer reposes in this District. If the parties have to reopen this file for further litigation, they should feel free to stipulate to an appropriate change of venue.

THEREFORE, IT IS ORDERED:

1. That Plaintiff's motion for summary judgment is denied.

2. That this Court defers decision on the issue of Plaintiff's pre-petition income tax liability to the United States Tax Court, for resolution in the pending proceedings between Plaintiff and Defendant in that Court.

3. That this adversary proceeding is administratively closed, without prejudice to its reopening upon joint or individual application of the parties, for further proceedings on Plaintiff's request for determination of dischargeability.

BY THE COURT:

_____
GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE