IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In re:	*	
	*	
GERALD S. LICHTER,	*	Case No. 97-6-5830-SD
	*	Chapter 7
Debtor.	*	
	*	
* * * * * *	*	
	*	
GERALD S. LICHTER,	*	
	*	
Plaintiff,	*	
vs.	*	Adversary No. 98-5010-SD
	*	
INTERNAL REVENUE SERVICE,	*	
	*	
Defendant.	*	

MEMORANDUM AND ORDER THAT
TAX CLAIMS ARE NONDISCHARGEABLE

I. ISSUE.

The controlling issue presented by Debtor's complaint to determine the dischargeability of certain federal income tax claims is whether Debtor's prior Chapter 13 case tolled the three year period for defining priority income tax claims under 11 U.S.C. § 507(a)(8)(A).

II. FACTS.

The Debtor has filed a complaint to determine the dischargeability of his prepetition federal income tax liability for the calendar years 1990 through 1994. The Debtor and the Internal Revenue Service ("IRS") have stipulated that no tax is due for 1990, that Debtor's 1991 tax obligation is a

dischargeable general unsecured claim, and that Debtor's 1994 tax obligation is not dischargeable. Therefore, only years 1992 and 1993 are at issue.

The last date for filing Debtor's 1992 tax return, including extensions, was August 15, 1993; and for 1993, including extensions, it was October 17, 1994. Debtor's tax returns were actually filed on May 11, 1993 and October 20, 1994, respectively. Debtor filed this Chapter 7 bankruptcy case on December 4, 1997. Previously, Debtor had filed, in another district, a Chapter 13 case on December 13, 1994 that was voluntarily dismissed on July 26, 1996.

Based on these stipulated dates, the parties agree that if Debtor's prior Chapter 13 case tolled the 3 year period for determining priority tax claims under 11 U.S.C. § 507(a)(8)(A), the IRS claims for years 1992 and 1993 are priority claims. If they are priority claims, they are not dischargeable under 11 U.S.C. § 523(a)(1)(A). If, on the other hand, the period is not tolled, Debtor's income tax liabilities for 1992 and 1993 fall outside the 3 year qualifying period for priority treatment; and they are thus dischargeable as general unsecured claims. Using for each year the last dates on which the tax returns were last due, including extensions, the court concurs with this agreement by the parties.

III. DISCUSSION

There is a split of authority among the circuit courts of appeal on this tolling issue, with the greater number concluding that a debtor's prior bankruptcy case tolls the time periods for determining priority tax claims. See In re Waugh, 109 F.3d 489 (8th Cir. 1997), cert. denied 118 S.Ct. 80 (1997); In re Taylor, 81 F.3d 20, 23 (3d Cir. 1996); West v. United States (In re West), 5 F.3d 423 (9th Cir. 1993), cert. denied 511 U.S. 1081 (1994); United States v. Richards (In re Richards), 994 F.2d 763 (10th Cir. 1993); Montoya v. United States (In re Montoya), 965 F.2d 554 (7th Cir. 1992); Palmer v. IRS (In

Palmer), 228 B.R. 880 (B.A.P. 6th Cir. 1999). But see Quenzer v. United States (In re Quenzer), 19 F.3d 163 (5th Cir. 1993). There is no controlling opinion on this issue by the United States Court of Appeals for the Fourth Circuit.

Within the Fourth Circuit, bankruptcy court decisions are similarly divided. Compare In re Darden, 202 B.R. 715 (Bankr. E.D. Va. 1996) and In re Bowling, 147 B.R. 383 (Bankr. E.D. Va. 1992), which conclude that a debtor's prior bankruptcy case suspends the three year period for determining priority tax claims, with In re Little, 216 B.R. 769 (Bankr. E.D.N.C. 1997), which concludes that a prior bankruptcy does not toll the qualifying period.

Resolution of the tolling issue is difficult, because to follow the weight of authority seemingly violates the plain meaning of applicable statutes. An individual debtor's discharge excepts a priority tax debt "of the kind and for the periods specified in section . . . 507(a)(8) . . . ." 11 U.S.C. § 523(a)(1)(A). Section 507(a)(8)(A)(i) provides an eighth priority for "a tax on . . . income . . . 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; . . . . " Id. at § 507(a)(8)(A)(i). There is no provision in the Bankruptcy Code that suspends the three year priority period while a debtor is the subject of a bankruptcy case.

The plain meaning of statutory language controls. Where the statutory language is plain, the meaning is conclusive without resort to other authorities. As explained by the United States Supreme Court in United States v. Ron Pair Enterprises, 489 U.S. 235, 109 S. Ct. 1026 (1989),

> The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'

Id. at 241, 1030 (citations omitted).

> The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' In such cases, the intention of the drafters, rather than the strict language, controls.

Id. at 242, 1031 (citations omitted, brackets in original).

Section 108 of the Bankruptcy Code addresses extensions of time. Potentially applicable is subsection (c). As relevant, it provides:

> . . . if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c).

Nonbankruptcy law includes the Internal Revenue Code. Subsections 6503(b) and (h) of the Internal Revenue Code provide:

> § 6503. Suspension of running of period of limitation
>
> * * * * *
>
> (b) Assets of taxpayer in control or custody of court.
>
> The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.
>
> * * * * *

(h) Cases under title 11 of the United States Code.

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and –

(1) for assessment, 60 days thereafter, and
(2) for collection, 6 months thereafter.

26 U.S.C. § 6503(b), (h) (1994).

If subsection 108(c) of the Bankruptcy Code and subsections 6503(b) and (h) of the Internal Revenue Code are applicable, Debtor's prior Chapter 13 case would toll the three year qualifying period for priority tax claims and the IRS would prevail. However, these sections are not literally applicable. First, § 108(c) of the Bankruptcy Code applies only to a period fixed by nonbankruptcy law, and the three year measuring period for determining priority tax claims that is in § 507(a)(8)(A)(i) is part of the Bankruptcy Code. Second, the three year period in 11 U.S.C. § 507(a)(8)(A)(i) is not a statute of limitations for commencing or continuing a civil action that may be tolled under 11 U.S.C. § 108(c). Rather, it is a measuring period that defines a priority claim.

Nevertheless, great mischief could be achieved by an unscrupulous debtor if a debtor's prior bankruptcy did not toll the three year measuring period for determining priority tax claims. Unless the three year period is protected, a multiple filing debtor could defeat or reduce the priority treatment afforded by Congress to tax claims. A Congressional compromise on the tax priority issue that was made during passage of the Bankruptcy Code would thus be frustrated. That compromise weighed the interests of general creditors in not being wiped out by excessive priority tax claims, the interests of debtors in obtaining a fresh start, and the interests of tax authorities in being assured of a reasonable period within which to collect taxes. See S. Rep. No. 95-989 at 14 (1977). The result of this

compromise was to grant the IRS a priority claim, but to limit the priority to three years and to subordinate it to certain other priority claims. See 11 U.S.C. § 507(a)(8)(A).

The great majority of the courts of appeal that have considered this issue, consequently, have seized upon the exception to the plain meaning rule of statutory construction for rare cases that was recognized in Ron Pair Enterprises, 489 U.S. at 242, 109 S.Ct. at 1031. That exception allows the literal language of a statute to be modified where literal application would " '. . . produce a result demonstrably at odds with the intentions of its drafters.' " Id. (quoting Griffin v. Oceanic Contractors, Inc., 498 U.S. 564, 571, 102 S. Ct. 3245, 3250 (1982)).

The court's opinion in In re Waugh has stated this reasoning as follows:

> . . . we conclude that this is such a 'rare case.' If we applied the plain meaning of section 108(c) and held that the priority period of section 507(a)(8)(A)(i) is not suspended during bankruptcy proceedings, Congress's intent to afford the IRS a three-year priority period for the collection of taxes certainly would be frustrated. Therefore, we concluded that the three-year priority period of section 507(a)(8)(A)(i) is suspended by 11 U.S.C. § 108(c) and 26 U.S.C. § 6503(b) and (h), for the time that the automatic stay prevents the IRS from collecting outstanding tax debts.
>
> The legislative history of 11 U.S.C. § 108(c) supports the conclusion that Congress intended the section 108(c) and 26 U.S.C. § 6503(b) and (h) to suspend the priority period of section 507(a)(8)(A)(i):
>
> > In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter (sec. 6503(b) of the Code). The amendment applies this rule in a title 11 proceeding. Accordingly, the statute of limitations on collection of a nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.

P. 9, 12, 13.

> S.Rep. No. 95-989, at 31 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5816-17. Although the plain language of section 108(c) states that it tolls priority periods only in nonbankruptcy cases, we conclude that Congress intended 11 U.S.C. § 108(c) and 26 U.S.C. § 6503(b) and (h) to toll the three-year priority period of 11 U.S.C. § 507(a)(8)(A)(i). Therefore, because the automatic stay prevented the IRS from collecting Waugh's tax debt from July 1, 1988 until February 6, 1991, the three-year priority period of section 507(a)(8)(A)(i) was suspended during that time.
>
> . . . Most recently, the Court of Appeals for the Third Circuit recognized that '[t]o limit § 507(a) in this regard would lead to absurd results, as the government would lose its priority claim to back taxes as a result of the taxpayer's abuse of the bankruptcy process.' *In re Taylor*, 81 F.3d 20, 23 (3d Cir. 1996).
>
> . . . Were we to adopt Waugh's limited interpretation of 507(a)(8)(A)(i)'s priority period, future tax debtors could abuse the bankruptcy process by remaining tied up in bankruptcy proceedings until the three year lookback period of section 507(a)(8)(A)(i) expired, then voluntarily dismissing the bankruptcy petition and refiling once the tax liability became dischargeable. . . . We determine that Congress did not intend to allow such an abuse of the bankruptcy process.

In re Waugh, 109 F.3d at 493-94 (emphasis added).

This court agrees with the majority conclusion as expressed in Waugh.

IV. CONCLUSION.

For these reasons, the claims of the IRS for 1992 and 1993 are priority claims, and they are not dischargeable.

Therefore, it is, this _____ day of April, 1999, by the United States Bankruptcy Court for the District of Maryland,

ORDERED and DECLARED, that the IRS income tax claims against the Debtor for years 1990, if any, and 1991 are dischargeable; and it is further

ORDERED and DECLARED, that the IRS income tax claims against the Debtor for years 1992, 1993 and 1994 are nondischargeable.

_____

E. Stephen Derby
Judge

cc: Marc H. Nachman, Esquire
Handler & Nachman, P.A.
28 West Allegheny Avenue
The Penthouse, Suite 500
Towson, Maryland 21204

Bradley C. Plovan, Special Assistant
United States Attorney
Internal Revenue Service
31 Hopkins Plaza, Suite 1300
Baltimore, Maryland 21201

Internal Revenue Service
Special Procedures Staff
31 Hopkins Plaza, Suite 1120
Baltimore, Maryland 21201

Gerald S. Lichter
2240 Essex Street
Baltimore, Maryland 21231

Charles R. Goldstein, Trustee
2 N. Charles Street, Suite 210
Baltimore, Maryland 21201

P. 9, 12, 13.

Office of the U.S. Trustee
300 West Pratt Street
Suite 350
Baltimore, Maryland 21201

P. 9, 12, 13.