

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
October 4, 2002

AUG 26 2002

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (11)

IN RE:

Robert C. Johnson,

Debtor.

Robert C. Johnson,

Plaintiff,

v.

Commissioner of Internal Revenue,

Defendant.

ENTERED

AUG 26 2002

K. E. P.

Adv. Pro. No. 02-80185-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Commissioner of Internal Revenue's ("Defendant") Motion for Summary Judgment is granted as the undisputed material facts indicate that, as a matter of law, Defendant did not violate the automatic stay of 11 U.S.C. §362 or the discharge injunction of 11 U.S.C. §524 and that, accordingly, Robert C. Johnson ("Plaintiff") has no basis for damages against Defendant pursuant to I.R.C. §7433(c). Because Defendant's Motion is granted, Plaintiff's Motion to Reopen Case is moot.

Columbia, South Carolina,
August 26, 2002.


UNITED STATES BANKRUPTCY JUDGE

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CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
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~~Scott To the~~ (MAY)
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KIRK E. PORTH
Deputy Clerk

- Fide

- Johnson

- Harris

- US Atty

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
AUG 26 2002
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (11)

IN RE:

Robert C. Johnson,

Debtor.

C/A No. 92-75816

Adv. Pro. No. 02-80185-W

Robert C. Johnson,

Plaintiff

ENTERED

AUG 26 2002

ORDER

v.

K. E. P.

Commissioner of Internal Revenue,

Chapter 7

Defendant.

THIS MATTER comes before the Court upon the Motion to Reopen Case filed by Robert C. Johnson ("Plaintiff") and the Motion for Summary Judgment filed by the Commissioner of Internal Revenue ("Defendant").¹ Plaintiff moves to reopen his main case in order to prosecute his adversary proceeding against Defendant in which Plaintiff seeks damages of \$5,000,000 pursuant to L.R.C. §7433 for Defendant's abusive, reckless, and negligent conduct as well as Defendant's intent to delay United States Tax Court proceedings. Plaintiff bases his damages claim upon Defendant's alleged violations of the automatic stay pursuant to 11 U.S.C. §362 and the discharge injunction pursuant to 11 U.S.C. §524.² According to Plaintiff, Defendant's actions in attempting to collect Plaintiff's tax deficiency violated these provisions of the Bankruptcy Code. Further, Plaintiff argues that the tax deficiency in question was discharged by

¹ Plaintiff filed a Motion for Summary Judgment, and the Court scheduled a hearing on Plaintiff's motion for the same time as Defendant's Motion for Summary Judgment. At the hearing, however, Plaintiff withdrew his Motion for Summary Judgment.

² Further references to the Bankruptcy Code shall be by section number only.

his bankruptcy case. In addition to seeking \$5,000,000 in damages, Plaintiff also asks the Court to order Defendant to cease further attempts to assess or collect the subject tax deficiency. In response, Defendant filed an Answer and also filed a Motion for Summary Judgment.³ In his Motion for Summary Judgment, Defendant argues that there was no violation of the automatic stay because the stay was no longer in effect when the Internal Revenue Service (the "Service") mailed Plaintiff a Notice of Deficiency (the "Notice") and thereafter participated in a proceeding in the United States Tax Court to resolve the issue of Plaintiff's tax deficiency. In addition, Defendant argues the Service did not violate the discharge injunction because the subject taxes were not discharged. According to Defendant, the taxes at issue were not assessed before the commencement of Plaintiff's bankruptcy case but were assessable after the commencement of the case. As such, the tax liability was not discharged pursuant to §523(a)(1)(A). Finally, Defendant claims that the Court lacks subject matter jurisdiction to consider Plaintiff's action for damages pursuant to I.R.C. §7433(a) and that the proper defendant is the United States, not the Commissioner of Internal Revenue. After considering the pleadings in the adversary proceeding, the evidence presented in support of the Motions, and the parties' arguments, the Court makes the following Findings of Fact and Conclusions of Law.⁴

³ Defendant previously filed a Motion to Dismiss, which this Court treated in its Order entered on August 2, 2002. In the Order, the Court ruled that the Court had subject matter jurisdiction in this case as Plaintiff brought two causes of action created by the Bankruptcy Code. The Court also found that it did not lack personal jurisdiction based upon Plaintiff's improper service. Upon examining Plaintiff's service, the Court concluded Plaintiff properly served Defendant pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(4).

⁴ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

FINDINGS OF FACT

1. Plaintiff was a limited partner in a tax shelter limited partnership, Oasis Date Associates.
2. By 1992, Oasis Date Associates was involved in a proceeding in the United States Tax Court.
3. Plaintiff filed a Voluntary Chapter 7 Petition on October 14, 1992.
4. When Plaintiff filed his bankruptcy petition, the Tax Court proceeding involving Oasis Date Associates was still pending.
5. Plaintiff received a Chapter 7 discharge on February 24, 1993.
6. On May 26, 1993, the Service mailed Plaintiff the Notice indicating that Plaintiff owes a deficiency for federal income tax liability for the tax years of 1981, 1982, 1984, 1985, and 1986. The Notice provides that Plaintiff has ninety days to contest the determination of his tax deficiency.
7. The parties agree that the disputed tax deficiency stems entirely from Plaintiff's participation in Oasis Date Associates, and the Notice outlines the grounds for the deficiency as the following:
 - a. Plaintiff did not sustain a net operating loss for the 1985 tax year; therefore, Plaintiff cannot carry back a net operating loss to the 1982 tax year;
 - b. Plaintiff's distributable share of ordinary income from Oasis Date Associates for the tax years of 1984, 1985, and 1986 is different from what was claimed on Plaintiff's returns. As a result, the Service increases Plaintiff's taxable income for these tax years to reflect Plaintiff's accurate share of distributions from the partnership;
 - c. Plaintiff's investment tax credit carryback from the 1985 tax year to the 1982 tax

year is not allowable;

d. Plaintiff's investment tax credit carryback from the 1984 tax year to the 1981 tax year is not allowable; and

e. Because Plaintiff's income tax has increased for the 1984 and 1985 tax years, the investment tax credits that he attempted to carry back are now fully absorbed. There is no remaining credit that he can carry back.

8. On August 23, 1993, Plaintiff filed a petition in the United States Tax Court challenging the adjustment of his tax liability as set forth in the Notice.

9. To date, the United States Tax Court has not resolved the amount, if any, of the deficiency Plaintiff owes the Internal Revenue Service.

CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings under the Bankruptcy Code by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Summary judgment is appropriate "if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, the court must view all evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party has the initial burden to show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 332 (1986). Once this initial showing is made, the burden of production shifts to the nonmoving party. The nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” Id. at 324; see also Fed. R. Civ. P. 5(e). In meeting this burden, the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts and must demonstrate there is a genuine issue for trial.” Matsushita, 475 U.S. at 586-87; see also Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 128 (Bankr. D. S.C. 2000) (quoting Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D. S.C. 1995)) (“‘[T]he party opposing summary judgment may not merely rely on his pleadings but must set forth specific facts which controvert the moving party’s facts and which show the existence of a genuine issue for trial.’”). The Court should grant summary judgment “against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Dunes Hotel Assoc., 194 B.R. at 976 (citing Celotex, 477 U.S. at 322).

B. Application of the Summary Judgment Standard to Plaintiff’s Cause of Action for Violation of the Automatic Stay.

Section 362(c)(2) provides that the automatic stay remains in effect until the earliest of the close of a case, the dismissal of a case, or the time a discharge is granted or denied. The undisputed facts indicate that the Court granted Plaintiff his discharge on February 24, 1993. On

that date, the stay ended. The undisputed facts also indicate that the actions Plaintiff complains of, the Service's submitting the Notice and the Service's continued attempts to collect the tax deficiency by participating in the Tax Court case, did not begin until May 26, 1993. Indeed, Defendant's actions took place after the stay ended, and, because the stay was no longer in effect, Defendant could not have violated the automatic stay. Accordingly, the Court finds that Defendant is entitled to summary judgment on Plaintiff's cause of action that seeks damages for a violation of the automatic stay.

C. Application of the Summary Judgment Standard to Plaintiff's Cause of Action for Violation of the Discharge Injunction.

Plaintiff argues that Defendant violated the discharge injunction when the Service mailed the Notice and participated in the Tax Court proceeding to resolve the amount of Plaintiff's tax deficiency. According to Plaintiff, the tax deficiency that the Service attempts to assess was discharged by the entry of this Court's discharge order. Defendant disagrees and argues that the tax deficiency falls within the definition of §507(a)(8)(A)(iii) and was consequently exempted from discharge by §523(a)(1)(A). In the simplest terms, the Court must decide whether the tax deficiency was discharged in Plaintiff's bankruptcy case.

To begin its analysis, the Court notes that a discharge order generally discharges all debts that arose before the debtor filed for bankruptcy. See §727; Waugh v. Internal Revenue Service (In re Waugh), 260 B.R. 806, 811 (N.D. Tex. 2001). Certain debts, however, are not included in this discharge. For example, §523(a)(1)(A) provides that taxes entitled to a priority status under §507(a)(8) are excepted from discharge. To determine whether the tax deficiency falls within §507(a)(8)(A)(iii) as Defendant argues, the Court must decide (1) whether the tax was not

assessed before the commencement of Plaintiff's bankruptcy case and (2) whether the tax was assessable after the commencement of Plaintiff's bankruptcy case.

Regarding the first prong, the Court concludes that the Service did not assess Plaintiff's tax deficiency before the commencement of Plaintiff's bankruptcy case and in fact has not yet assessed Plaintiff's tax deficiency. A tax deficiency is assessed for purposes of rendering the assessment nondischargeable not when the notice of the assessment is filed but when the assessment becomes final. See Franchise Tax Board v. Bracey (In re Bracey), 77 F.3d 294, 295 (9th Cir. 1996). Once a taxpayer files a petition disputing the amount of a tax deficiency with the Tax Court, the filing of that petition stays all further assessment and collection activity until the Tax Court decision is final. See I.R.C. §6213(a); Doerge v. United States (In re Doerge), 181 B.R. 358, 363 (Bankr. S.D. Ill. 1995). Once the Tax Court renders its decision, it becomes final upon the expiration of a ninety day appeal period. See I.R.C. §§7481(a)(1), 7483; Doerge, 181 B.R. at 363. If no appeal is filed, the government then has sixty days following expiration of the appeal period in which to make the assessment. See I.R.C. §6503(a)(1); Doerge, 181 B.R. at 363.

Applying this law to the undisputed facts of the case, it is clear that the tax deficiency was not assessed before Plaintiff commenced his bankruptcy case. Indeed, the Service has merely filed a Notice alerting Plaintiff of a tax deficiency and participated in the Tax Court proceeding, and neither of these actions resulted in an assessment. Moreover, the Tax Court has not yet reached a decision concerning the amount of Plaintiff's tax deficiency, and the Service cannot assess Plaintiff's taxes until this decision is final and the time for an appeal has expired. Accordingly, the Court finds that the Service did not assess the subject taxes before the

commencement of Plaintiff's bankruptcy case and that Defendant thereby satisfies the first prong of §507(a)(8)(A)(iii).

Next, the Court must determine whether the Internal Revenue Service has the ability to assess the deficiency after Plaintiff's petition date. Whether the liability was assessable after the commencement of the case is determined by the Internal Revenue Code's provisions for when assessments can be made. See Waugh, 260 B.R. at 813. Generally, the Internal Revenue Service has three years from the date the return is filed during which it may audit a taxpayer's return and assess a deficiency. See I.R.C. §6501(a); Fox v. United States (In re Fox), 172 B.R. 247, 249 (Bankr. E.D. Tenn. 1994); Myron M. Sheinfeld et al., Collier on Bankruptcy Taxation, ¶TX4.02[1][iv] (15th ed. rev. 2001). This case, however, involves a tax deficiency relating to Plaintiff's participation in a partnership, and a different standard of limitations applies to partnership taxes. See Waugh, 260 B.R. at 813. In cases of partnerships, the Internal Revenue Service must make assessments within three years after the later of the date on which the partnership files its information return or the due date for filing the information return. See I.R.C. §6229(a); Waugh, 260 B.R. at 813. The period of limitations is suspended not by a notice of deficiency to the individual partners but by a final partnership administrative adjustment ("FPAA") notice mailed to the tax matters partner. See I.R.C. §6229(d); Waugh, 260 B.R. at 813. The period of limitations is suspended by a FPAA until one year after the deadline for individual partners to file a petition contesting the FPAA or, if such a petition is filed, until one year after a final decision by the Tax Court. See I.R.C. §6229(d); Waugh, 260 B.R. at 813.

Because a Tax Court proceeding concerning Oasis Date Associates was pending when Plaintiff filed bankruptcy, the Court concludes that, pursuant to I.R.C. §6229(d), the Service

could assess the tax after the Tax Court entered its decision, and, in this instance, the assessment could occur after the date Plaintiff's bankruptcy case commenced. See Waugh, 260 B.R. at 813. Moreover, the Service had the ability to assess the tax, which became a nonpartnership item when Plaintiff filed bankruptcy, after the commencement of Plaintiff's bankruptcy case pursuant to I.R.C. §6229(f)(1). I.R.C. §6229(f)(1) provides the Service a one year period after the date on which an item became a nonpartnership item to assess it. Because of these provisions, the Court concludes that the Service could assess the tax deficiency after the commencement of Plaintiff's bankruptcy case. Accordingly, the Court finds that the second prong of §507(a)(8)(A)(iii) is satisfied and that the disputed tax deficiency was exempted from Plaintiff's discharge. Because the tax deficiency was not discharged, neither Defendant nor the Service violated the discharge injunction when the Service mailed the Notice to Plaintiff and attempted to collect the tax deficiency. The undisputed material facts indicate that Defendant is entitled to a judgment as a matter of law, and the Court grants Defendant's Motion for Summary Judgment as to Plaintiff's cause of action seeking damages for a violation of the discharge injunction.

D. Application of the Summary Judgment Standard to Plaintiff's Action for Damages under I.R.C. §7433.

Defendant also moved for summary judgment on the grounds that a bankruptcy court lacks subject matter jurisdiction to consider Plaintiff's claim for damages under I.R.C. §7433. The Court disagrees with Defendant's assessment of the Court's jurisdiction under I.R.C. §7433; however, in light of the ruling that summary judgment is appropriate for Plaintiff's causes of action alleging violations of the automatic stay and the discharge injunction, the Court believes it should grant summary judgment as well to Plaintiff's claim for damages pursuant to I.R.C.

§7433.

Under I.R.C. §7433(e), a taxpayer can petition a bankruptcy court to recover damages against the United States if, in connection with any collection of a federal tax with respect to the taxpayer, an officer or employee of the Service willfully violates the automatic stay or the discharge injunction. To this Court, this provision clearly provides a bankruptcy court jurisdiction to consider the causes of action Plaintiff asserts. However, because the Court has concluded that the undisputed facts indicate as a matter of law that Defendant did not violate the automatic stay or the discharge injunction, there does not appear to be a basis on which Plaintiff can recover damages against Defendant. Because Defendant has, under these undisputed facts, done nothing that merits a damages award under §7433, the Court grants Defendant's motion for this cause of action as well.

Finally, the Court notes that, although it is granting Defendant's summary judgment motion in full, it does so knowing that Plaintiff has a pending proceeding in the Tax Court that is scheduled for hearing in October 2002. This Tax Court proceeding should finally determine the amount of tax deficiency, if any, Plaintiff owes the Service. The Tax Court has great expertise in handling these matters and this Court is confident that Plaintiff will have a full and fair opportunity to have his day in court and to present any arguments he has to dispute the amount of the deficiency. Moreover, the Tax Court proceeding will bring closure to Plaintiff's tax situation, which, after nine years of disputing his liability for the deficiency, he understandably hopes to resolve.

Because the Court has granted Defendant's Motion for Summary Judgment regarding Plaintiff's three causes of action, the Court considers Plaintiff's Motion to Reopen Case moot.

CONCLUSION

From the arguments discussed above, it is therefore

ORDERED that Defendant's Motion for Summary Judgment is granted as the undisputed material facts indicate that, as a matter of law, Defendant did not violate the automatic stay of §362 or the discharge injunction of §524 and that, accordingly, Plaintiff has no basis for damages against Defendant pursuant to I.R.C. §7433(e).

IT IS FURTHER ORDERED that Plaintiff's Motion to Reopen Case is moot.

AND IT IS SO ORDERED.

Columbia, South Carolina,
August 26, 2002.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below for:

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APR 26 2002

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KIRK E. PORTH

Deputy Clerk

-IDE
-Johnson
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