

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
FREDRICK M. & SUSAN K. GETZSCHMAN,)	CASE NO. BK91-81834
)	
DEBTOR)	A92-8055
)	
FREDRICK M. & SUSAN K. GETZSCHMAN,)	
)	CH. 7
Plaintiff)	
vs.)	
)	
STATE OF NEBRASKA DEPARTMENT OF)	
REVENUE)	
)	
Defendant)	

MEMORANDUM

Hearing was held on January 19, 1993. Appearing on behalf of the State of Nebraska Department of Revenue was Sally Feidman. The debtors appeared pro se. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

These debtors filed a Chapter 7 bankruptcy petition on September 3, 1991. The Nebraska Department of Revenue is a creditor concerning income taxes due the state for 1985. The tax claim results from a change made to the 1985 United States Individual Income Tax Return, Federal Form 1040, of the debtors. That change was based on an audit performed in 1990 by the Internal Revenue Service. As a result of such change to the federal tax obligation of the debtors, the tax obligation to the Nebraska Department of Revenue for the tax year 1985 increased from that which was shown on the 1985 tax return.

The debtors have filed this adversary proceeding requesting a discharge of the 1985 tax obligation resulting from the changes mentioned above. The debtors allege that the appropriate amended returns were filed on a timely basis and that assessments made by the Department of Revenue do not fall within the time periods "delineated in 11 U.S.C. § 507(a)(7). . ."and, therefore, the tax

obligation "should be discharged by this Court pursuant to 11 U.S.C. §§ 523(a)(1) and 507(a)(7) of the Bankruptcy Code."

The Nebraska Department of Revenue asserts that no amended return was filed and the tax obligation is not dischargeable because § 523(a)(1)(B)(i) prohibits discharge of taxes for which a return was not filed.

The issue at trial was whether or not the debtors could prove that they had mailed the amended tax return. The Nebraska Revised Statutes at Section 49-1201 and -1202 (Reissue 1988) provide for a presumption of mailing and evidence of mailing. Section 49-1201, entitled Presumption of Mailing, states:

Any report, claim, tax return, statement, or any payment required or authorized to be filed or made to the State of Nebraska, or to any political subdivision thereof, which is: (1) Transmitted through the United States mail; (2) mailed but not received by the state or political subdivision; or (3) received and the cancellation mark is illegible, erroneous, or omitted shall be deemed filed or made and received on the date it was mailed if the sender establishes by competent evidence that the report, claim, tax return, statement or payment was deposited in the United States mail on or before the date for filing or paying.

Section 49-1202, entitled Registered, Certified Mail; Record Authenticated; Evidence of Mailing, states:

If any such report, claim, tax return, statement, or payment is sent by United States mail and either registered or certified, a record authenticated by the United States post office of such registration or certification shall be considered competent evidence that the report, claim, tax return, statement, or payment was delivered to the state officer or state agency or officer or agency of the political subdivision to which addressed, and the date of registration or certification shall be deemed the postmarked date.

Prior to trial, the Department of Revenue filed a motion in limine requesting that the Court prohibit the debtor from presenting any evidence of mailing other than the proof of registered or certified mail provided for in Section 49-1202. The Court overruled the motion in limine. When testimony by the

debtor was proffered concerning the act of mailing and when copies of the alleged amended returns were proffered in evidence at the trial, objections as to their admissibility were lodged by the Department of Revenue and overruled by the Court.

The position of the Department of Revenue is that the only competent evidence of mailing, when a tax return is not received, is the registered or certified mail document. That position is based upon the fact that the Nebraska tax statutes are tied to the federal tax statutes. Neb. Rev. Stat. 77-2714 to 77-27,123 (Reissue 1990). Section 77-2714 states "Any term used in Sections 77-2714 to 77-27,123 shall have the same meaning as when used in a comparable context in the laws of the United States related to federal income taxes, unless a different meaning is clearly required".

A comparable statute to Neb. Rev. Stat. §§ 49-1201 and -1202 under the federal law is 26 U.S.C. § 7502. That statute deals with how a taxpayer proves a tax return was timely mailed so that the date of mailing can be treated as the date of filing. Several cases interpreting Section 7502 have ruled that the only evidence admissible on the issue of date of mailing is the Postal Service registration or certification paperwork. In those cases, testimony of the debtor and other documentary evidence was excluded. See, for example, Brookman v. United States (In re Brookman), 114 Bankr. 769 (Bankr. M.D. Fla. 1990); Surowka v. United States, 909 F.2d 148 (6th Cir. 1990); and Miller v. United States, 784 F.2d 728 (6th Cir. 1986). See also Bruder v. Commissioner, 57 T.C.M. (CCH) 873 (1989).

This Court is not convinced that the federal statutory language and the Nebraska statutory language are the same. For example, the federal statute, 26 U.S.C. § 7502, deals with mailing requirements and states at Section 7502(c)(1)(A) that "such registration shall be prima facie evidence that the return . . . was delivered. . . ." The Nebraska statute does not deal with prima facie evidence. Section 49-1202 suggests that registration or certification documents "shall be considered competent evidence that the . . . tax return . . . was delivered" The Nebraska statutory section does not state that the certification or registration materials are the only competent evidence. The Nebraska Rules of Evidence at Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1989) provide guidance to the courts as to what type of evidence is admissible. There is no definition of "competent evidence" in the Nebraska Rules of Evidence or in Section 49-1202. Competent evidence has been defined in Black's Law Dictionary as "'admissible' (*i.e.*, relevant and material) as opposed to 'incompetent' or 'inadmissible' evidence." Black's Law Dictionary 257 (5th ed. 1979).

Although a definition in Black's Law Dictionary does not carry as much weight as a definition by the legislature or an interpretation by a court, it is a sufficient reference when other definitions or interpretations are lacking. See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership, No. 91-1695, 1993 WL 79640 at * 13 (U.S. Mar. 24, 1993) (O'Connor, J., dissenting) ("Of course, we are not bound to accept Black's Law Dictionary as the authoritative expositor of American law. But if Congress had intended to depart from the accepted meaning of excusable neglect. . .surely it would have so indicated.")

This Court concluded at trial and concludes at this point of the opinion that the language in Section 49-1202 providing that post office registration or certification documents "shall be considered competent evidence" does not exclude the presentation of other evidence. The position of the Court is bolstered by two cases interpreting the federal statute. The first is In re O'Neill, 134 Bankr. 48 (Bankr. M.D. Fla. 1991). In that case, the bankruptcy court acknowledged that other courts had deemed inadmissible any evidence other than the post office certification or registration materials. However, the Court admitted the testimony of the debtor concerning the debtors' actions in mailing the tax return. The court found that the testimony of the debtor alone, with no other corroborating evidence, was insufficient to overcome the presumption that the tax return had not been received by the Internal Revenue Service in light of the evidence presented by the Internal Revenue Service concerning their receipt validation procedures.

The second case is Estate of Wood v. Commissioner, 909 F.2d 1155 (8th Cir. 1990). In that case, the Eighth Circuit Court of Appeals ruled that testimony provided by the personal representative of the taxpayer and testimony provided by the local postmistress were sufficient to overcome the presumption of non-delivery of a tax return to the Internal Revenue Service. Such testimony was also sufficient to overcome the presumption that the tax return was not timely mailed. In other words, the Eighth Circuit Court of Appeals recognizes that the certification or registration procedure with the post office is not the only evidence admissible on the issue of mailing under 26 U.S.C. § 7502.

Similarly, this Court finds that the certification or registration materials from the post office are not the only types of evidence admissible under the Nebraska statutes to prove that a tax return was mailed.

All that being said, however, the Court finds that Mr. Getzschman's testimony that he mailed an amended return, although

not by certified or registered mail, is not sufficient to overcome the presumption that the tax return was not received and, therefore, not filed. In response to the direct testimony of the debtor and the submission of alleged copies of the amended return, the Department of Revenue presented testimony concerning the procedures that are followed at the Department of Revenue with regard to this type of case.

First, when a notice is received from the Internal Revenue Service that a change has been made to the federal return, the employees of the Department of Revenue check the account of the debtor to determine if an amended state return has been filed which would reflect the changes on the federal return. If such an amended return is not filed within a particular amount of time, a notice is provided to the debtor. Thereafter, if an amended return is not timely filed, an assessment procedure is followed. The debtor is given the opportunity to file a return or request a statement from the Department as to the amount of tax owed based upon the federal changes.

In this case, the Department followed all of the above-listed procedures. The debtor responded to the notice that the Department would calculate the amount due by requesting a statement for the amount due. The debtor did not, at that time, report to the Department that an amended return had been filed at any time.

The Director of Revenue Operations of the Department of Revenue testified that several members of his staff had conducted an examination of the procedures and the account of the debtors. They had determined that the Department did not receive the plaintiffs' alleged amended return.

The testimony of the employees of the Department of Revenue concerning the procedures ordinarily followed in a case such as this and actually followed in this particular case is convincing. The Department of Revenue did not receive an amended return. The evidence is further convincing that the debtors did not claim to have filed an amended return until they filed this lawsuit. They responded to correspondence from the Department of Revenue, not in a manner which would indicate that they had filed an amended return and that such amended return must have been lost, but in a manner that would indicate there was no amended return and they requested a tax be determined without such a return.

The Nebraska Department of Revenue is entitled to the presumption that its actions are performed with regularity. The federal government receives the benefit of such a presumption as stated in Lee Brick & Tile Co., Inc. v. United States, 132 F.R.D.

414 (M.D.N.C. 1990). Armed with such a presumption and with the evidence presented by the employees of the Department, this Court finds as a fact that the amended return has not been filed. This Court further finds as a fact that the debtors' testimony of mailing an amended return, without more, such as certified or registered documents, is insufficient to overcome the presumption of regularity and is insufficient to convince this Court that a tax return was actually mailed.

Therefore, the Court finds that the amended tax return was not filed. Since the amended tax return has not been filed, the tax obligation owing to the Nebraska Department of Revenue is nondischargeable under 11 U.S.C. § 523(a)(1)(B)(i).

Separate judgment entry shall be filed.

DATED: April 8, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies to Sally Feidman and debtors

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JUDGMENT

The tax obligation to the Nebraska Department of Revenue is nondischargeable. The Court finds against the plaintiffs and in favor of the defendant, Nebraska Department of Revenue, and enters judgment of nondischargeability in this case.

DATED: April 8, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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