

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
JOHN & CONNIE FARMER,)	CASE NO. BK94-81583
)	
DEBTOR)	A94-8149
)	
JOHN & CONNIE FARMER,)	
)	CH. 7
Plaintiff)	
vs.)	
)	
UNITED STATES OF AMERICA,)	Fil. Nos. 10, 17, 18
Acting through the Internal)	
Revenue Service,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on July 20, 1995, on Motion for Summary Judgment filed by the United States. Appearances: Douglas Quinn for the debtors/plaintiff; Lisa Hartnett for the USA/IRS. 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) and (K).

BACKGROUND

Prior to the filing of Bankruptcy, John W. Farmer and Connie L. Farmer (hereinafter debtors) had outstanding income tax liability for the years 1979, 1980, 1982, 1983, 1992, and 1993. The 1979, 1980, 1982, and 1983 liabilities were the result of audit deficiencies determined against the debtors. The 1992 and 1993 liabilities were the result of debtors' failure to pay income taxes shown on tax returns as actually due.

The Internal Revenue Service (IRS) properly made assessments and filed liens against the debtors for unpaid federal income taxes, interest and penalties for the taxable years 1979, 1980, 1982, 1983, 1992 and 1993. Thereafter, the debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code and filed an adversary proceeding alleging that they were entitled to a discharge of all of the tax liabilities assessed against them. The United States, on behalf of the IRS, filed a Motion for Summary Judgment.

By agreement of the parties, the Court has separately ordered that the tax claims for the years 1979, 1980, 1982, and 1983, including interest and penalties, are dischargeable and the

claims for federal income taxes for the year 1992 and 1993, including interest and penalties, are excepted from discharge.

Issues

1. Do tax liens related to nondischargeable tax debts survive bankruptcy and remain a lien against debtors pre- and post-petition property?
2. Do tax liens related to dischargeable tax debts survive bankruptcy and remain a lien against prepetition property?
3. Do tax liens for dischargeable debts attach to post-petition increases in pension funds attributable to post-petition contributions to such funds?

Decision

1. The motion for summary judgment is granted in part and denied in part. Tax liens securing nondischargeable taxes remain valid and enforceable against both pre- and post-petition property of the debtors.
2. Tax liens securing dischargeable debts remain valid and enforceable against prepetition property of the debtors.
3. Tax liens securing dischargeable debts do not attach to and are not enforceable against property acquired post petition by the debtors, including post-petition contributions to retirement plans.

Discussion

In order for the IRS to have a valid tax lien against debtor's property, a lien must be filed and perfected in accordance with 26 U.S.C. § 6323(a) and (f). In the present case, the IRS properly filed the liens in accordance with this statute, and the debtors do not dispute that such liens were properly filed.

The proper filing resulted in a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such debtors. 26 U.S.C. § 6321.

A federal tax lien, arising under 26 U.S.C § 6321, gives the United States a lien upon all property and rights to property of the taxpayer owned when the lien arose. In addition, the lien attaches to after acquired property. The lien, however, need not specifically describe any property. In Re May Reporting Servs., Inc., 115 B.R. 652, 656 (Bankr. D.S.D. 1990).

The debtors argue that since the IRS failed to timely file an objection to the debtors' claimed exemptions, the IRS is precluded from attaching tax liens to any of the property claimed by the debtor as exempt in the bankruptcy case. Debtors rely upon the case of Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992), in support of its argument. Taylor held that neither a trustee nor a creditor could contest the validity of a claimed exemption after the 30 day objection period expired pursuant to Federal Bankruptcy Rule 4003(b) because 11 U.S.C. § 522(l) which states that property claimed by the debtor as exempt is exempt if no party objects, regardless of whether the exemption is legally valid. Id. at 643-44; see also FED. BANKR. R. 4003(b).

Taylor is distinguishable from the present case because the creditor in Taylor was not the IRS and did not have a tax lien. Under 11 U.S.C. § 522(c)(2)(B), property that is otherwise exempt under the Bankruptcy Code is not exempt as to tax liens:

Unless the case is dismissed, property
exempted under this section is not liable
during or after the case for any debt of the
debtor that arose ... before the commencement
of the case, except --

(2) a debt secured by a lien that
is -- (B) a tax lien, notice of
which is properly filed.

11 U.S.C. § 522(c)(2)(B). Pursuant to the plain language of subsection (c) of Section 522, tax liens are enforceable against property that is claimed as exempt by the debtor. DeMarah v. United States (In re DeMarah), 62 F.3d 1248 (9th Cir. 1995); Braddock v. United States (In re Braddock), 149 B.R. 636, 639 (Bankr. D. Mont. 1992); Isom v. United States (In re Isom), 901 F.2d 744, 746 (9th Cir. 1990); In re Driscoll, 57 B.R. 322, 327 (Bankr. W.D. Wis. 1986).

The debtors argue that if tax liens can attach to exempt property, then under Section 522(c)(2)(B), the tax liens remain in place on exempt property only to the extent that the liens secure a "debt", and once the underlying "debt" becomes unenforceable, the lien is no longer valid or effective. In support of this argument, the debtors rely upon the Bankruptcy Code definitions of "debt," which is defined at 11 U.S.C. § 101(12) to mean "liability on a claim," and of "claim," which is defined by 11 U.S.C. § 101(5) to mean a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured..." The debtors' position is that since the debtors received a discharge of their personal liability, there is no "right to payment" on the tax debt, upon which the tax liens are based. Consequently, because

the taxes for years prior to 1992 have been discharged, the liens for those previous years are no longer valid.

Courts that have previously considered this argument have overwhelmingly rejected the position taken by the debtor. In Isom, the debtors argued that the tax liens held by the IRS were no longer enforceable because the related personal tax debt of the debtor was discharged in the bankruptcy case. 901 F.2d at 745. The circuit court disagreed with the debtors and held that the tax liens remained legally enforceable, even where the underlying tax debt of the debt was discharged in the bankruptcy case. Id. The court opined that while the personal liability of the debtor was discharged, the property upon which the tax liens attached remained liable for the debt secured by the tax lien. Id. The court concluded that this result was the intent of Congress, and in addition, 11 U.S.C. § 524(a)(2), which prohibits creditors from pursuing personal obligations of the debtor discharged in bankruptcy, was amended in 1984 to eliminate the prohibition of actions against the property of the debtor. Id. at 745 n.1 & 746.

The IRS's tax lien against the debtor's property created a right to payment in addition to the right the IRS had against the debtor personally. This additional right to payment was not affected by the discharge of the debtor's personal obligation. Johnson v. Home State Bank, 501 U.S. 78, 111 S. Ct. 2150, 2154, 115 L.Ed. 2d 66 (1991); Dillard v. United States (In re Dillard), 118 B.R. 89, 91-92 (Bankr. N.D. Ill. 1990); United States v. Uria, 180 B.R. 688, 693-94 (S.D. Fla. 1995) (citing Dillard).

The principle that a properly filed pre-petition tax lien is not discharged, even though the personal liability of the debtor has been discharged, but is enforceable against exempt or non-exempt property of the debtor has been widely adopted by other courts. In re Hanson, 132 B.R. 406, 409-10 (Bankr. E.D. Mo. 1991); Bisch v. United States (In re Bisch), 159 B.R. 546, 549 (Bankr. 9th Cir. 1993); Braddock, 149 B.R. at 640; Quillard v. United States (In re Quillard), 150 B.R. 291, 295-96 (Bankr. D.R.I. 1993); Rouse v. United States (In re Rouse), 141 B.R. 218, 220 (Bankr. W.D. Okla. 1992); Olson v. United States (In re Olson), 154 B.R. 276, 282 (Bankr. D.N.D. 1993); Cennamo v. United States (In re Cennamo), 147 B.R. 540, 542 (Bankr. C.D. Cal. 1992); Schreiber v. United States (In re Schreiber), 163 B.R. 327, 334 (Bankr. N.D. Ill. 1994); Uria, 180 B.R. at 694 (citing In re Rench, 129 B.R. 649, 651 (Bankr. D. Kan. 1991); Gerulis v. United States Revenue Serv. (In re Gerulis), 56 B.R. 283 (Bankr. D. Minn. 1985); Stephenson v. United States (In re Stephenson), 96 B.R. 388 (Bankr. S.D. Fla. 1988); see also Wrenn v. American Cast Iron Pipe Co. (In re Wrenn), 40 F.3d 1162, 1164 (11th Cir. 1994) ("A discharge in bankruptcy 'voids any judgment..., to the extent that such judgment is a determination of the personal liability of the debtor.' 11 U.S.C. § 524(a)(1)

(1988) (emphasis added). Thus, discharge does not affect liability in rem, and prepetition liens remain enforceable after discharge." (citations omitted)).

Following the conclusion reached by a vast majority of other courts, this Court finds that the IRS's tax liens survive bankruptcy. Thus, the liens for years 1979, 1980, 1981, and 1982 are enforceable against property of the debtors even though their corresponding tax debts have been discharged. The lien for the 1992 and 1993 nondischargeable tax debts remain enforceable against property of the debtors.

The debtors have continued to make post-petition payments into their retirement plans which were in existence prepetition. The next issue to be determined is whether prepetition tax liens attach to after-acquired property when the underlying personal liability of the debtors is discharged.

The debtors do not suggest that the liens which secure the nondischargeable debts are unenforceable against post-petition contributions. However, it is the position of the debtors that the liens which secure the discharged tax obligations, although attaching to property in existence on the date of the petition, do not attach to after-acquired property. The debtors are correct.

There is a long line of cases at both the circuit court and bankruptcy court level which support the position of the debtors. United States v. Sanabria, 424 F.2d 1121, 1122 (7th Cir. 1970) (affirming district court ruling limiting federal tax lien to assets attached at date of petition); United States v. McGugin (In re Braund), 423 F.2d 718, 718-19 (9th Cir.) cert. denied, 400 U.S. 823, 91 S. Ct. 44, 27 L.Ed.2d 51 (1970) (holding the proper interpretation is not to extend prepetition tax liens to assets acquired postbankruptcy); Wessel v. United States (In re Wessel), 161 B.R. 155, 159 (Bankr. D.S.C. 1993) (holding tax liens attached to prepetition right to annuity payments, but "As the taxes were discharged in this action, it is true that these liens will not attach to property, or rights to property, that plaintiff acquires post-petition."); Olson, 154 B.R. at 282 (differentiating liens on nondischargeable taxes from liens on dischargeable taxes because the latter "survive bankruptcy only as to the debtor's prepetition property."); Gidley v. United States (In re Gidley), 138 B.R. 298, 300-301 (Bankr. M.D. Fla. 1992) (holding valid federal tax lien did not attach to property acquired by debtors from trustee at a private sale postpetition as this was after acquired property); Leavell v. United States (In re Leavell), 124 B.R. 535, 540 (Bankr. S.D. Ill. 1991) ("Tax liens securing dischargeable debts, however, do not attach to the debtor's postpetition after-acquired property." (citations omitted)); Frengel v. Internal Revenue Serv. (In re Frengel), 115 B.R. 569, 572 (Bankr. N.D. Ohio 1989) ("Post-petition

appreciations in the value of property, as well as after acquired property, inure to the benefit of a debtor under the fresh start principle."); Dishong v. United States Dept. of the Treasury (In re Dishong), 188 B.R. 51 (Bankr. M.D. Fla.).

The authority cited is consistent and persuasive. The tax liens attributable to the discharged tax debts do not attach to any post-petition contributions to the "retirement" plans or to the appreciation in those plans due to the accrual of interest or dividends on such post-petition contributions. Although it may be difficult for the parties to determine the exact value of the debtors' interest in the plans as of the petition date and, although it may be an accounting nightmare to differentiate the appreciation in that value from the post-petition amounts as the years pass, the debtors, nonetheless, have a right to post-petition property free and clear of liens for discharged taxes. This is the same result that would have been reached had there been no post-petition contributions to the plans, but instead, new plans set up and contributed to post petition.

The parties should note that this decision deals only with property that is actually acquired post petition. It does not deal with appreciation in property which existed on the petition date. The Supreme Court case in Taylor, supra at 3, has made it clear that secured claim holders do not have their liens "stripped down" to the petition date value of the property, but that the liens continue to attach to post-petition appreciation in that same property.

Summary

1. The motion for summary judgment is granted in part and denied in part. Tax liens securing nondischargeable taxes remain valid and enforceable against both pre- and post-petition property of the debtors.

2. Tax liens securing dischargeable debts remain valid and enforceable against prepetition property of the debtors.

3. Tax liens securing dischargeable debts do not attach to and are not enforceable against property acquired post petition by the debtors, including post-petition contributions to retirement plans.

Separate journal entry to be filed.

DATED: December 20, 1995

BY THE COURT:

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

Copies faxed by the Court to:

QUINN, DOUGLAS

341-0216

Copies mailed by the Court to:

Lisa Hartnett

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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<u>DEBTOR(S)</u>)	
)	CH. 7
JOHN & CONNIE FARMER,)	Filing No. 10, 17, 18
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
UNITED STATES OF AMERICA,)	
Acting through the Internal)	
Revenue Service,)	DATE: December 20, 1995
)	HEARING DATE: July 20,
<u>Defendant(s)</u>)	1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Summary Judgment

APPEARANCES

Douglas Quinn, Attorney for debtors
Lisa Hartnett, Attorney for USA/IRS

IT IS ORDERED:

1. The motion for summary judgment is granted in part and denied in part. Tax liens securing nondischargeable taxes remain valid and enforceable against both pre- and post-petition property of the debtors.
2. Tax liens securing dischargeable debts remain valid and enforceable against prepetition property of the debtors.
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BY THE COURT:

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

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