

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
 )  
REUBEN W. OLSON, ) CASE NO. BK02-83078  
 )  
Debtor(s). ) CH. 13

MEMORANDUM

Hearing was held in Omaha, Nebraska, on June 26, 2003, on the debtor's motion to allow claim out of time (Fil. #37) and objection by the United States (Fil. #39). Marion Pruss appeared for the debtor, and Henry Carriger appeared for the Internal Revenue Service. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

The motion is denied.

The debtor requests leave to file a priority tax claim out of time. The claim arises from the debtor's failure to pay 2002 self-employment taxes amounting to approximately \$10,000. The debtor believes that the portion of that amount based on his pre-petition income should be considered a priority claim, while the remainder (the amount attributable to post-petition income) should be treated as an administrative expense.

The Internal Revenue Service opposes this idea, asserting that debtor's 2002 tax liability became fixed as of December 31, 2002, and due and payable on April 15, 2003, and both dates are post-petition so the entire amount is a post-petition claim. The IRS also notes that it has not filed and does not intend to file a claim for the debtor's 2002 tax liability and does not wish to be made an involuntary participant in the debtor's plan of reorganization.

The debtor relies on Bankruptcy Code § 502(i) to support his contention that his tax liability should be treated as a pre-petition debt:

A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection

(a), (b), or (c)) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. § 502(i).

Section 507(a)(8) provides:

(a) The following expenses and claims have priority in the following order:

\* \* \*

(8) Eighth, 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 523(a)(1)(C)) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]

11 U.S.C. § 507(a)(8)(A).

The debtor filed his bankruptcy petition on September 25, 2002. He proposes to, in essence, bifurcate his liability for

the 2002 taxes into pre- and post-petition amounts for purposes of claims allowance. He relies on the Eighth Circuit opinion of Missouri Dep't of Revenue v. L.J. O'Neill Shoe Co. (In re L.J. O'Neill Shoe Co.), 64 F.3d 1146 (8th Cir. 1995), in which the corporate debtor was allowed to treat tax claims attributable to pre-petition income as a priority claim and tax claims attributable to post-petition income as an administrative expense. The holding in O'Neill Shoe was followed by the bankruptcy court in In re Michaelson, 200 B.R. 862 (Bankr. D. Minn. 1996), which dealt with Chapter 13 debtors who filed bankruptcy approximately three-fourths of the way through the tax year. In Michaelson, as in the present case, the debtors owed pre-petition quarterly estimated tax payments under 26 U.S.C. § 6654. In dicta, the bankruptcy court expressed the opinion that such installment payments are simply an escrow against future tax liability and cannot be a liability of the debtors until their tax is calculated and assessed at the end of the tax year. Under that theory, the debtors' entire tax liability would arise post-petition, when their tax year closed on December 31 or when payment of the tax became due on April 15th of the following year. However, the Michaelson court conceded that such an analysis was contrary to O'Neill Shoe.

In the present case, however, a discussion of whether and how to apportion the claim is premature. The Bankruptcy Code does not accommodate special treatment of federal tax claims in a Chapter 13 case, unlike cases under Chapter 7 or Chapter 11. Section 1305(a)(1) sets out the procedure for any entity holding a claim against the debtor for taxes that become payable to a governmental unit while the case is pending to file a proof of claim. The IRS has not filed such a claim, and the debtor has no standing to do so under the Bankruptcy Code. Only after a proof of claim has been filed pursuant to § 1305 does § 502 become applicable. In re Seyden, 294 B.R. 418, 419-20 (Bankr. S.D. Ga. 2002). The Seyden court explained:

Section 1305 grants permission to "any entity that holds a claim against the [Chapter 13] debtor" to file a post-petition claim against the debtor "for taxes that become payable to a governmental unit while the case is pending," § 1305(a)(1). That claim, after it has been filed in accordance with § 1305(a), is then allowed or disallowed pursuant to the requirements of § 502. § 1305(b). The provisions of § 502 do not apply until and unless a claim is properly filed under § 1305(a). "Rules of statutory construction dictate

that the plain meaning is 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.'" Green Tree Acceptance, Inc. v. Hoggie (In re Hoggie), 12 F.3d 1008, 1010 (11th Cir. 1994) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989)). Because subsection (b) of § 1305 expressly states that § 502 applies to claims filed in accordance with subsection (a) of § 1305, which qualifiedly permits Chapter 13 claimholders – not debtors – to file post-petition claims, there is no indication that the drafters intended debtors to have the option of filing such claims.

294 B.R. at 420. See also In re Wilkoff, No. 98-34354DWS, 2001 WL 91624 (Bankr. E.D. Pa. Jan. 24, 2001) (following Michaelson dicta in determining that quarterly payments are not related to income earned during a particular quarter and holding that debtors' tax liability became payable on Dec. 31 and therefore was a post-petition debt, but not allowing the debtors to pay the claim through their plan. "Since the IRS is an entity holding a claim for 'taxes that become payable to a governmental unit while the case is pending,' it had the option of filing a proof of claim for Debtors' 1998 income tax liability. It did not do so. Consequently, the claim was not allowed or disallowed under § 502. Thus, the claim could not be provided for in the Plan.")

Accordingly, the debtor's motion must be denied. Separate order will be entered.

DATED: September 22, 2003.

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*Marion Pruss                      Kathleen Laughlin  
Henry Carriger                      United States Trustee

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

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ORDER

Hearing was held in Omaha, Nebraska, on June 26, 2003, on the debtor's motion to allow claim out of time (Fil. #37) and objection by the United States (Fil. #39). Marion Pruss appeared for the debtor, and Henry Carriger appeared for the Internal Revenue Service.

IT IS ORDERED the debtor's motion to allow claim out of time (Fil. #37) is denied. See Memorandum entered this date.

DATED: September 22, 2003

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*Marion Pruss  
Henry Carriger  
Kathleen Laughlin  
United States Trustee