

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
SHAWN & JUDY BROOKS,) CASE NO. BK01-80269
)
Debtor(s).) CH. 13

MEMORANDUM

Hearing was held on September 27, 2001, on the Debtors' Objection to the Claim of the Nebraska Department of Revenue (Fil. #33) and the State's Resistance (#37). Richard Register appeared for the debtors, and James Woodruff appeared for the Nebraska Department of Revenue. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

A drug stamp tax authorized by the Marijuana & Controlled Substances Tax Act, Neb. Rev. Stat. §§ 77-4301 to -4316, was assessed by the Nebraska Department of Revenue ("NDR") against Mr. Brooks in February 1994. The NDR also filed notice of a tax lien on the debtors' real and personal property with the Register of Deeds in the debtors' county of residence to secure payment of the taxes, penalties, and interest, pursuant to the Uniform State Tax Lien Registration & Enforcement Act, Neb. Rev. Stat. §§ 77-3901 to -3909.

After the debtors filed bankruptcy, the NDR filed a proof of claim for \$932.25 in penalties and interest due, denoting it as a secured claim.

The debtors object to the claim as a secured claim. They do not dispute the existence or amount of the claim, but assert that because the tax lien cannot attach to exempt property and because the debtors have no non-exempt property, the claim should be treated as a general unsecured claim.

As recognized by the debtors, this issue has been addressed in this and other jurisdictions in the context of Internal Revenue Service liens and levies. The seminal case is United States v. Barbier, 896 F.2d 377 (9th Cir. 1990). In response to

the Barbiers' argument that the IRS statute exempting certain household and personal property from levy also prohibits attachment of a federal tax lien to that property, the Ninth Circuit ruled that the statute exempting certain property from summary collection procedures by the IRS was not intended to "frustrate the IRS's status . . . as a secured creditor." Barbier, 896 F.2d at 379-80. In other words, the IRS may hold a lien on property that is otherwise exempt, although the IRS is not able to seize that property and sell it to collect delinquent taxes.

A number of other courts, including the District Court for the District of Nebraska, have followed Barbier. See, e.g., United States v. King (In re King), 137 B.R. 43 (D. Neb. 1991); IRS v. Monson, Neb. Bkr. 91:474 (D. Neb. 1991); American Trust v. American Community Mut. Ins. Co., 142 F.3d 920 (6th Cir. 1998); Sills v. United States (In re Sills), 82 F.3d 111 (5th Cir. 1996); In re Voelker, 42 F.3d 1050 (7th Cir. 1994).

The NDR asserts that the same reasoning is applicable in this case, because the state statutory language is similar to the IRS Code language interpreted in Barbier and its progeny. Section 77-3904(1) provides that the amount of any unpaid tax or fee "shall be a lien in favor of the State of Nebraska upon all property and rights to property, whether real or personal, then owned by such person or acquired by him or her thereafter" This is congruent with 26 U.S.C. § 6321, which creates a lien in favor of the United States upon all property of any person neglecting or refusing to pay his or her federal taxes.

The ability to seize a taxpayer's property is covered in Neb. Rev. Stat. § 77-3906(2)(a): "In case of failure to pay taxes or deficiencies," the taxing authority may "levy upon, seize, and sell such real and personal property belonging to the taxpayer, except exempt property, as is necessary to satisfy the liability for the payment of the amount due." This is analogous to 26 U.S.C. § 6331, which permits the IRS to levy upon all property and rights to property, except property exempt under 26 U.S.C. § 6334, of a person who did not pay his or her federal taxes. In the Nebraska statute, "exempt property" means property exempt from execution under the laws of Nebraska, as set forth in Neb. Rev. Stat. § 25-1552 et seq. Neb. Rev. Stat. § 77-3906(2)(c). The Internal Revenue Code exempts specific personal property: wearing apparel; school books; fuel; provisions; furniture; personal effects; books and tools of a trade, profession, or business; unemployment and workers' compensation

benefits; certain annuity, pension, disability, and public assistance payments; undelivered mail; child support payments; a minimum amount of income; and a residence. 26 U.S.C. § 6334(a).

The debtors in this case argue that upholding the NDR's lien on their exempt property will require them to account for that security interest in their Chapter 13 plan, affecting their ability to complete the plan and putting the NDR in a better position than it would be entitled to either outside of bankruptcy or in a Chapter 7 case.

With all due regard to the debtors' position, the statutory scheme simply cannot be interpreted as the debtors suggest in light of all the case law to the contrary regarding the analogous sections of the Internal Revenue Code. The respective legislative bodies have granted sweeping powers to the taxing authorities to assess and collect revenue with which to fund federal and state operations. That status distinguishes tax debts from any other debts owed by a debtor, and it justifies the discrepant treatment, if any, given to tax entities in Chapter 13 cases. By virtue of the state statute and case law interpreting the Internal Revenue Code, the State of Nebraska holds a secured claim in this case.

IT IS ORDERED the Debtors' Objection to the Claim of the Nebraska Department of Revenue (Fil. #33) is overruled.

A separate order shall be entered.

DATED: November 9, 2001

BY THE COURT:

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

Copies faxed by the Court to:

James Woodruff, Atty. for Neb. Dept. of Revenue (122)

Copies mailed by the Court to:

United States Trustee

Kathleen Laughlin, Ch. 13 Trustee

*Richard Register, Atty. for Debtors, 425 North H Street,
Fremont, NE 68025

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

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ORDER

IT IS ORDERED the Debtors' Objection to the Claim of the Nebraska Department of Revenue (Fil. #33) is overruled. See Memorandum filed this date.

DATED: November 9, 2001

BY THE COURT:

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

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