

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
TERESE SPALDING,)	CASE NO. BK91-81259
)	
DEBTOR)	A92-8072
)	
TERESE SPALDING,)	
)	CH. 7
Plaintiff)	
vs.)	
)	
STATE OF NEBRASKA,)	
)	
Defendant)	

MEMORANDUM

Hearing was held on August 17, 1992, on the defendant's motion requesting the Court to abstain. James Bachman of Bachman & Riha, P.C., Omaha, Nebraska, appeared on behalf of the debtor. Sally Feidman, Special Assistant Attorney General for the Nebraska Department of Revenue, appeared on behalf of the moving party.

Background

Plaintiff was an employee, minority shareholder, officer and director of a corporation, RFD-TV, Inc., which operated in Nebraska for several years prior to its financial collapse and bankruptcy filing. During the life of the corporation, the plaintiff, at various times, held the title of secretary and treasurer of the corporation. She prepared and signed payroll tax returns and submitted such returns to the State of Nebraska and to the Internal Revenue Service. The State of Nebraska Department of Revenue, following state statutory authority contained in Nebraska Revised Statutes Section 77-1783 determined that the plaintiff was a responsible party for Nebraska withholding taxes and other tax obligations of RFD-TV, Inc.

The State followed various statutory procedures for notification and assessment of the tax liability against the plaintiff. The plaintiff did not challenge the allegations of personal liability and, pursuant to Nebraska statutory procedure, the assessments became final under state law. The liability exceeds \$125,000.00

Plaintiff then filed a Chapter 7 bankruptcy petition and received a discharge of dischargeable debts in September of 1991. Thereafter, debtor/plaintiff filed this adversary proceeding challenging her tax liability to the State. The defendant responded with an Answer and a motion requesting this Court to abstain.

Hearing was held and evidentiary materials submitted on defendant's motion to abstain.

Discussion

It is the position of the defendant that under state law, plaintiff's liability to the defendant became final, due and owing by February of 1991. Defendant did not and will not receive any payments out of this Chapter 7 no-asset bankruptcy estate. The resolution of this adversary proceeding will serve no bankruptcy purpose. Therefore, according to the defendant, the Court should abstain from considering the tax liability of the plaintiff.

Contrariwise, it is the position of the plaintiff that a very significant bankruptcy purpose will be served by this Court determining the tax liability of the plaintiff. This plaintiff is a Chapter 7 debtor. If this plaintiff actually was a responsible party as defined under state law and, therefore, liable for taxes of the corporation, the bankruptcy discharge that the debtor received will not give the debtor a fresh start, but, instead, she will exit the bankruptcy case with liabilities in excess of \$125,000.00 which she incurred in consideration of the privilege of investing in and working for a financially unsound company for approximately two years. On the other hand, if the Court were to determine that she is not such a responsible party, then she will be free to enjoy the fresh start allowed most honest Chapter 7 debtors without the burden of the tax obligations incurred by her employer.

According to the plaintiff, such an important personal matter is definitely a part of the purpose of bankruptcy and a determination of the liability of the plaintiff will serve a significant bankruptcy purpose.

The Bankruptcy Code at 11 U.S.C. § 505 permits the Bankruptcy Court to determine the amount or legality of any tax, whether or not previously assessed, and whether or not contested before and adjudicated by a judicial or administrative tribunal. However, the statute at Section 505(a)(2) prohibits the Court from making such a determination if "such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case."

In general, where a taxpayer fails to follow state procedures and take advantage of remedies to challenge state tax liability, federal courts are prohibited from entertaining challenges to such liability. City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n., 898 F.2d 122, 124 (10th Cir. 1990). However, the majority of federal courts interpret Section 505(a)(1) and (2) to mean that a bankruptcy court may determine the tax liability of a debtor unless such liability was finally determined through a prepetition contest and adjudication by a judicial or administrative tribunal. See In re 499 W. Warren Street Assoc., Ltd. Partnership, No. 91-01973, 1992 WL 186685 (Bankr. N.D.N.Y. March 10, 1992); In the Matter of East Coast Brokers & Packers, Inc., No. 89-03831-8B1, 1992 WL 159868 (Bankr. M.D. Fla. July 9, 1992); City Vending of Muskogee, Inc., supra, at 125; In re Tapp, 16 Bankr. 315 (Bankr. Alaska 1981).

In this case, there is no dispute concerning whether or not the plaintiff contested the tax assessment. She did not. According to the evidence received, she was financially unable to pay all or part of the alleged obligation, post a bond for the remainder, and request a hearing before the State Tax Commissioner, all of which were required under state law. Therefore, the assessments became final, under state law, without being "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."

The plaintiff, a debtor in a Chapter 7 case, has the right to a determination by the Bankruptcy Court of her tax liability to the State of Nebraska. The Bankruptcy Court is the only forum in which she has the ability to obtain such a determination.

The motion by the State to abstain is denied. The parties are directed to complete and file a joint preliminary pretrial statement by November 1, 1992.

A separate journal entry shall be filed.

DATED: September 1, 1992.

BY THE COURT:

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

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TERESE K. SPALDING,)	CASE NO. BK91-81259
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<u>DEBTOR(S)</u>)	
)	
TERESE SPALDING,)	CH. 7
Plaintiff(s))	Filing No. 5, 8
vs.)	<u>JOURNAL ENTRY</u>
)	
STATE OF NEBRASKA,)	
)	
<u>Defendant(s)</u>)	DATE: September 1, 1992
)	HEARING DATE: August 17,
)	1992

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion Requesting Court to Abstain Filed by the State of Nebraska.

APPEARANCES

James Bachman, Attorney for debtor

Sally Feidman, Attorney for State of Nebraska

IT IS ORDERED:

The motion to abstain filed by the defendant is denied. See memorandum filed contemporaneously herewith.

BY THE COURT:

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