IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

IN RE:	)	
	)	
GEORGE W. BERGSTROM and HELEN M. BERGSTROM,	)	CV. 84-0-593 BK. 82-1436
	)	
Debtors.	)	MEMORANDUM OPINION
	)	

This matter is presently before the Court on appeal from an order of the United States Bankruptcy Court for the District of Nebraska entered on August 31, 1984. Debtors George and Helen Bergstrom appeal from the bankruptcy court's order granting a motion to dismiss their voluntary Chapter 13 proceeding on the grounds that they were not eligible for Chapter 13 relief. This Court, after careful review of the record submitted on appeal and the briefs filed by the respective parties is of the view that the August 31, 1984, order of the bankruptcy court should be reversed and the case remanded for proceedings consistent with this opinion.

The facts pertinent to this appeal are these. On January 15, 1982, Tomahawk Inn Company initiated a suit in the District Court of Douglas County, Nebraska, against debtors George W. Bergstrom and Helen M. Bergstrom. The district court entered judgment on July 27, 1982, in favor of Tomahawk Inn Company and against the debtors in the sum of $96,009.47. The judgment has become final in that no timely appeal was taken from the decision.

Thereafter, Tomahawk Inn Company was voluntarily dissolved by its shareholders. Pursuant to the dissolution agreement, appellee Don R. Battiato, a majority shareholder, received an assignment of the Tomahawk Inn claim against the debtors.

The debtors filed a joint Chapter 7 petition on August 12, 1982. The estate schedules reflected total assets of $62,543, and total liabilities of $171,723. The assets included the Bergstrom's residence valued at $50,000 and a claim for the refund of overpaid federal income taxes for the year 1981 in the approximate amount of $7,000. The scheduled debts were (1) a first mortgage loan of $45,000, secured by their residence; (2) the aforementioned district court judgment of $96,010; and (3) taxes due the United States and the State of Nebraska of $30,713.

On November 15, 1982, appellee initiated a complaint for denial of debtors' Chapter 7 discharge, which was designated as Adversary No. 82-773. The complaint was based upon the Bergstrom's sale of property immediately prior to the filing of their petition, which was claimed to have the effect of defrauding creditors of the estate as prohibited by 11 U.S.C. § 727(a)(2)(A). After trial before the Court, the Honorable David L. Crawford, Bankruptcy Judge, found generally in favor of Mr. Battiato and the court ordered that debtors' discharge be denied pursuant to 11 U.S.C. § 727(a)(2)(A).

After the debtors withdrew an appeal of the bankruptcy court ruling, appellee commenced a garnishment proceeding in the District Court of Douglas County to enforce the July 27, 1982,

judgment. The garnishment proceeding was stayed, however, when debtors filed a motion on May 17, 1984, to convert the Chapter 7 proceeding to a Chapter 13 proceeding. Thereafter, appellee filed a motion to dismiss debtors' Chapter 13 proceeding claiming the debtors do not meet the eligibility requirements for Chapter 13 as set forth in 11 U.S.C. § 109(e). More specifically, it was alleged that the Bergstroms noncontingent, liquidated, unsecured debts exceeded the sum of $100,000. A hearing on the motion was set for August 31, 1984.

Subsequent to the filing of a motion to dismiss, the Bergstroms filed amendments to their liability schedules and both the State of Nebraska and the I.R.S. filed revised proofs of claim. The schedules now indicate that the State of Nebraska is a holder of a priority claim for unpaid taxes in the amount of $2,825.87, and that the I.R.S. is a holder of a similar priority claim in the amount of $1,375.68.

The schedules correctly reflect that which is stated in the State of Nebraska proof of claim. The schedules do not, however, completely reflect the revised I.R.S. proof of claim filed on August 30, 1984. Therein, the Bergstroms are said to be indebted to the United States in the sum of $18,516.70, but a refund of $17,141.02 is presently due to the debtors. On that subject, the I.R.S. proof of claim recites the following:

> The Internal Revenue Service has the right to set off ($17,141.02) which represents all of the debtors' 1040 refunds for 1981 and 1982 and 1983. Therefore, the amount claimed in the proof of claim is secured under 11 U.S.C. § 506(a) to the extent of the right of setoff * * *.

A status hearing on the motion to dismiss was held August 31, 1984. After hearing the above evidence with regard to the Bergstroms' debts, Judge Crawford held as follows:

> THE COURT: Section 109(e) uses some language in a very strict way, and it says that only an individual with regular income who owes on the date of the petition noncontingent liquidated unsecured debts of less than $100,000 is eligible.
>
> The word that is conspicuously absent is the word "disputed." * * *
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> * * * *
>
> Disputed debts, as I read the statute, are included in determining eligibility. The debt due the Internal Revenue Service is not a contingent debt. It is not an unliquidated debt, as I understand it. It is subject to the debtors' -- It is subject to the right of setoff, but that, at best, it seems to me, makes this a disputed debt * * *.
>
> The result of the foregoing is that, in my view, the Full $18,000 due the IRS as a claim, which was due on the date of the petition, is entitled to inclusion in computation and taken together with the $96,000 judgment, which can only be minimally secured, if secured at all it is.
>
> The debtors' total unsecured debt exceeds -- and I am excluding the right of setoff -- exceeds $100,000; therefore, I conclude that this debtor is not eligible for Chapter 13 relief.
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> Transcript of hearing at 11-13.

The debtors vigorously contend that the $18,000 due the I.R.S. should be reduced by the $17,000 refund owed to them. Mr. Battiato, on the other hand, claims that the bankruptcy judge's conclusion was correct and should be sustained. Thus, the issue

before this Court is whether a tax debt should be reduced by a tax refund, admitted by the I.R.S. as being owed to the debtors, when Chapter 13 eligibility requirements are being considered.

Before this Court addresses the merits of the appeal, it is prudent to state the general standard of review that guides the Court in matters such as this. Although on appeal the bankruptcy judge's findings of fact are generally entitled to stand unless clearly erroneous, where there are presented mixed questions of law and fact, the clearly erroneous rule is not applicable, **In re American Beef Packers, Inc.**, 457 F.Supp. 313, 314 (D.Neb. 1978), and the bankruptcy judge's decision cannot be approved without this Court's independent determination of the law. **In re Werth**, 443 F.Supp. 738, 739 (D.Kansas 1977), **citing Stafos v. Jarvis**, 477 F.2d 369, 372 (10th Cir.), **cert. denied**, 414 U.S. 944 (1973).

A bankruptcy court must first look to 11 U.S.C. § 109(e) when it makes a Chapter 13 eligibility determination. Section 109(e) reads in pertinent part:

> Only an individual with regular income that owes, on the date of the filing of the petition, non-contingent, liquidated, unsecured debts of less than $100,000 * * * may be a debtor under Chapter 13 of this title.

While the Bankruptcy Code does not define either continent or liquidated, it does define claim in 11 U.S.C. § 101(4)(A) as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured * * *." A debt is the liability on a claim. 11 U.S.C. § 101(11). It seems

clear, therefore, that disputed, contingent and unliquidated have different meanings, and that disputed unsecured debt is not excluded when determining whether the $100,000 limitation is exceeded. In re Sylvester, 19 B.R. 671, 672-73 (9th Cir. Bky.App.Panel 1982). More specifically, "the quoted sections evidence congressional intent to make individuals who owe, at the commencement of the case, unsecured debt in excess of $100,000 ineligible for Chapter 13, even though the debtor disputes all or part of that indebtedness. Only contingent or unliquidated debt is excluded from the computation." Id.

As Judge Crawford accurately stated, a plain reading of Section 109(e) indicates that disputed debts should be included in determining eligibility. Indeed, a majority of the courts so hold. In re Lambert, 43 B.R. 913, 917 (Bankr. D.Utah 1984). The question remains, however, whether the debt in issue is in fact "disputed."

This Court fails to find any concise definition of "disputed unsecured debt." It seems, however, that the bankruptcy court below clearly erred in classifying the I.R.S. as being disputed. The revised I.R.S. proof of claim stated that a $18,516.70 tax was owed to it by the debtors. But, it also states that a $17,141.02 refund is due the debtors. The debtors clearly adopted these figures when they scheduled their debt owed to the I.R.S. at $1,375.68. The debt can hardly be said to be "disputed" when both parties agree to the amount owed. The fact that a claim is subject to the debtors' setoff does not automatically render it "disputed," especially when the creditor acknowledges the setoff.

The Bankruptcy court's decision is reversed solely on the issue of whether the I.R.S. debt should be classified as "disputed." This Court does not reach the issue of whether the debt should be viewed as partially secured pursuant to 11 U.S.C. § 506(a). Even though both parties focus their briefs upon a Section 506(a) application, Chapter 13 eligibility was denied by the bankruptcy court solely because it found the I.R.S. debt to be disputed. Moreover, the bankruptcy court failed to make a determination as to whether post-judgment interest on the district court judgment should be allowed in computing the $100,000 debt limitation.

On remand, therefore, the bankruptcy judge should examine the following issues:

1) Whether a Section 506(a) analysis should be performed in determining whether the I.R.S. debt is partially secured for purposes of Section 109(e) and, if so, what is the outcome; and

2) Whether any post-judgment interest should be included in making a Section 109(e) unsecured debt determination and, if so, how much.

Accordingly, an order reversing the August 31, 1984, decision of the bankruptcy court will be entered contemporaneously with this memorandum opinion.

DATED this 26 day of September, 1985.

BY THE COURT:

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE

I certify this to be a true copy of the original record in my custody.
WILLIAM I. JOHNSON, CLERK
By _____
Deputy Clerk