

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Gary E. Burton,

Debtors

Case No. 12-00676-als7

Chapter 7

**ORDER
(date entered on docket: March 18, 2013)**

COURSE OF PROCEEDINGS

The United States Trustee's contested Motion to Dismiss the Debtors' chapter 7 filing pursuant to 11 U.S.C. sections 707(a) and (b)(3) is before the Court. At a preliminary telephonic hearing, James L. Snyder, Assistant U.S. Trustee appeared and Nichole B. Hughes represented Gary and Jill Burton. The parties disagree as to whether the tax liability owing by the Debtors is properly characterized as a "consumer" debt for purposes of section 707(b). In lieu of testimony on this discrete issue, Stipulated Facts and Exhibits have been filed related to the dispute, and the matter is deemed fully submitted. The Court has jurisdiction of this proceeding pursuant to 28 U.S.C. sections 157(b)(1) and 1334. The following findings of fact and conclusions of law are entered by the Court pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. For the reasons set forth herein, the Debtors' tax liabilities are not consumer debt.

FACTS

Gary and Jill Burton ("Debtors") filed a voluntary chapter 7 proceeding on March 9, 2012. The case filing indicated that these individuals had formerly engaged in a business known as Superior Pre-Owned Auto World, Inc. ("Superior"). Liabilities were estimated in excess of

one million dollars. Specifically, the Debtors listed secured debt on Schedule D totaling \$319,975 and various tax obligations on Schedule E in the amount of \$225,000. Schedule F identifies unsecured claims in the amount of \$479,178, of which \$297,181.87 is described as “business debt.” Form 22 B, the Means Test, was not completed because the Debtors indicated that the obligations contained in their bankruptcy filing are primarily non-consumer debts. In reaching this conclusion, the Debtors rely upon the combined sum of the tax obligations set forth on Schedule E and the business debt listed on Schedule F.

The Motion to Dismiss focuses on two issues. First, that a case may be dismissed for bad faith under 11 U.S.C. section 707(a) regardless of whether debts are primarily consumer or business. Second, that Debtors’ tax debt should be classified as consumer debt. Only the second issue is currently ripe for determination.

Superior operated for approximately three years and never made a profit. Gary Burton owned a one-half interest in Superior, but neither of the Debtors made any capital investments or loans to the business. Due to an insufficient basis in the corporation, the Debtors were advised by their certified public accountant in 2008 that they would not qualify for a personal tax deduction for Superior’s losses. As a result of this determination, significant tax liability was incurred by the Debtors for tax years 2007 through 2010. Returns for these years were filed on October 11th and November 7th 2011. The following amounts are currently outstanding according to the parties’ Stipulation: Federal Income Tax \$275,697; Nebraska Department of Revenue \$10,284; and Iowa Department of Revenue \$106,714.48. At a second telephonic hearing scheduled at the Court’s direction, clarification was sought related to information contained in the stipulation of facts that the obligation owing to the Iowa Department of Revenue would be reduced to \$15,000. Based upon the representations made at the time of that hearing,

the parties agreed that even if the amount owing to the IDR was reduced, an increased amount owing to the Internal Revenue Service of \$116,457.35 would still require a determination of whether the tax debt is classified as consumer or business debt for purposes of the pending Motion to Dismiss. Both parties agree that more than fifty percent (50%) of the Debtors' debt is tax debt.

Clearly, the Debtors did not withhold sufficient amounts to meet their ongoing tax obligations. Quarterly payments were not made toward the anticipated liabilities and voluntary payments were not made to reduce the balances owed to the Internal Revenue Service or the Nebraska Department of Revenue.

DISCUSSION

The basis of the U.S. Trustee's Motion is found at 11 U.S.C. section 707(b) which provides in relevant part:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.

11 U.S.C. § 707(b) (2012). It is well settled that the language of a statute is given its plain meaning to initially determine the legislative intent. See In re Fowler, 784 N.W.2d 184, 187 (Iowa 2010); Benjegerdes v. Reindl (In re Reindl), 671 N.W. 2d 466, 469 (Iowa 2003). "The court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used." Moulton v. Iowa Emp't Sec. Comm'n, 34 N.W.2d 211, 216 (Iowa 1948), *superseded by statute on other grounds*. The goal in interpreting a statute "is to discover the true

intention of the legislature, considering the clearly stated objects and purposes involved.” Bernau v. Iowa Dep't of Transp., 580 N.W.2d 757, 761 (Iowa 1998).

The bankruptcy code defines “consumer debt” as “debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8). This broad definition does not specifically address the issues raised by the parties in this case. The term “consumer debt” is used multiple times in the Code, and it must be given a consistent meaning throughout the statute. See In re Stovall, 209 B.R. 849, 852 (Bankr. E.D. Va. 1997). Courts, therefore, use guidance from interpretations of different statutes using the term “consumer debt” to apply to other statutes. See id. (“[i]t is proper to examine other sections in which the term “consumer debt” is used as an aid in determining its meaning and application in § 1301”).

The Fourth Circuit explained the following method to determine whether debt is for “personal family or household purposes” under section 101(8).

[c]ourts look to the purpose for which the debt was incurred. And, courts have concluded uniformly that debt incurred for a business venture or with a profit motive does not fall into the category of debt incurred for “personal, family, or household purposes.” In short, debt incurred for a business venture is not ‘consumer debt.’

In re Runski, 102 F.3d 744, 747 (4th Cir. 1996) (citations omitted).

A similar position has been adopted in the Eighth Circuit where courts have looked at the debtor’s purpose in incurring the debt to determine whether an obligation is classified as consumer debt. In re Lapke, 428 B.R. 839, 843 (B.A.P. 8th Cir. 2010). “If the credit transaction involves a profit motive, then it is not a consumer debt. On the other hand, if a debt does not involve a business transaction or potential profit motive, then the debt is ordinarily considered a consumer debt.” In re Palmer, 117 B.R. 443, 446 (Bankr. S.D. Iowa 1990). Here the Debtors believed that business losses could be used to offset personal income tax obligations, which

would result in them retaining more of their earnings. Such planning, even if it was mistaken or unsuccessful, bears more of a relationship to an eventual profit motive, than a consumer transaction.

Most courts that have addressed the issue of tax obligations, albeit under other bankruptcy code sections, have declined to conclude that it is consumer debt. The Sixth Circuit Court of Appeals examined this issue as one of first impression and agreed with the majority of bankruptcy courts that hold that tax debt is not consumer debt for purposes of section 1301. IRS v. Westberry (In re Westberry), 215 F.3d 589, 594 (6th Cir. 2000). That court relied upon four bases for that conclusion. First, the “tax debt is ‘incurred’ differently from a consumer debt” because it is not “voluntary on the part of the taxpayer.” Id. at 591. “Second, consumer debt is incurred for personal or household purposes, . . . while taxes are incurred for a public purpose.” Id. “Third, taxes arise from the earning of money, while consumer debt results from its consumption.” And fourth, “unlike taxes, consumer debt normally involves the extension of credit.” Id. Other cases have held similarly. See, e.g., In re Stovall, 209 B.R. 849, 854 (Bankr. E.D. Va. 1997) (holding that tax is not a consumer debt because it is not voluntarily incurred); In re Goldsby, 135 B.R. 611, 613-14 (Bankr. E.D. Ark. 1992) (federal tax obligations are not “consumer debt” for purposes of 11 U.S.C. section 1301); In re Gault, 136 B.R. 736, 738 (Bankr. E.D. Tenn. 1991) (holding that federal income tax debt is not consumer debt “because it is not incurred in the course of a consumptive activity”).

Similar reasoning has been applied to cases examining whether income taxes constitute “consumer debt” in the context of section 707(b). See In re Brashers, 216 B.R. 59, 60 (Bankr. N.D. Okla. 1998) (tax liability is not consumer debt because it is not voluntarily incurred and is imposed by the government for the public welfare in the course of earning income); In re

Traub, 140 B.R. 286, 288 (Bankr. D.N.M. 1992) (holding that taxes are not consumer debts and that the cases interpreting section 1301 apply to section 707(b) as well). The Debtors here did not voluntarily incur their tax debt, but rather it was involuntarily imposed upon them. Furthermore, the tax debt did not result from consumption or the extension of credit.

For the reasons stated herein it is hereby ORDERED

1. The Debtors' tax debt is not consumer debt.
2. The parties shall provide a status report to the Court if further hearing is required under the issues raised under 11 U.S.C. section 707(b)(3) raised in the pending Motion to Dismiss.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Chapter Case