

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

MICHAEL ALLEN BROUGHTON,
ROBERTA A. BROUGHTON,

Case No. 85-1470-C

Debtors.

MICHAEL ALLEN BROUGHTON,
ROBERTA A. BROUGHTON,

Adv.Pro.No. 88-0012

Plaintiffs,

V.

IOWA DEPARTMENT OF REVENUE
AND FINANCE,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT

On April 1, 1988 a telephonic hearing on motion for summary judgment filed on behalf of the defendant on February 29, 1988 and on behalf of the plaintiffs on March 18, 1988 was held before this court in Des Moines, Iowa. Herbert Rogers, Sr. appeared on behalf of the defendant, Iowa Department of Revenue and Finance (the Department). Bruce E. Bergman appeared on behalf of the plaintiffs (debtors). At the time of the hearing the court noted that stipulated facts and briefs were contained in the file. Accordingly, the matter was considered fully submitted on April 1, 1988.

This is a core proceeding pursuant to 28 U.S.C. section

157(b)(2)(I). Having reviewed the stipulated facts and briefs submitted by the parties and being fully advised in the premises, the court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

Factual Background

The parties have stipulated that the following facts constitute the material facts surrounding this adversary proceeding:

Michael Broughton filed a 1977 Iowa income tax return individually with attachments on or about April 15, 1978. On April 19, 1978, Michael Broughton was advised what he filed was not acceptable as a tax return.

Thereafter on April 24, 1978 Michael Broughton filed a subsequent tax return for 1977 with attachments. on July 2, 1981, a further tax return was filed for 1977 by Michael Broughton.

Michael and Roberta Broughton, the debtors/plaintiffs in this case, filed their tax returns for the State of Iowa for the years 1977 through 1982. All returns were received by the Department of Revenue on or before February 4, 1983. The returns were prepared by a professional tax preparer. The Broughtons' total tax liability for these five years was \$4,265.00.

As a result of the nonpayment of these taxes by the Plaintiffs the Department is also claiming pre-petition interest of \$2,359.46 and post-petition interest of \$1,0418.79, and pre-petition penalties of \$964.86 as of February 15, 1988, for a total of \$8,638.11.

On November 26, 1984 the Department of Revenue and Finance issued, and the Broughtons received, a "Notice of Assessment" for the delinquent taxes.

No assessment was made for any taxes which were not listed on the returns already filed.¹ At this time the Department claimed the tax liability, plus penalty and interest, totalled \$7,308.20.

On July 5, 1985 the Broughtons filed a Petition for relief under Chapter 7 of the U.S. Bankruptcy Code. The Department of Revenue and Finance was listed as creditor with priority on the Debtor's Schedule A-1. No objection was filed by the Iowa Department of Revenue and Finance. The Broughtons received their discharge in bankruptcy on November 8, 1985, and the case was closed on February 27, 1986.

Subsequent investigation by the debtor's attorney revealed that the Department still claimed tax liability on the part of the Broughtons. On September 17, 1987 the Department informed the Broughtons that their 1986 tax refund was going to be applied to the delinquent taxes and that a balance due of \$6,724.12 remained at that time.

The Department had applied the refund to the taxpayers' claimed liability, but has reversed the offset, and is holding the refund pending the outcome of this litigation.

On October 1, 1987 the Department held further collection efforts in abeyance pending the outcome of this dispute. Debtors attorneys moved to reopen the bankruptcy estate, and the Court granted the motion on January 12, 1988. Debtors filed a Complaint to determine dischargeability on January 21, 1988.

(Reference to exhibits omitted.)

The debtors' complaint seeks a determination that the

¹ The Department's assessment of tax for the periods of 1978, 1979, and 1981 are different than the taxes reported due by the debtors for those periods.

debts to the Department are dischargeable and were discharged in bankruptcy because they were based on returns filed more than two years prior to filing the petition. The Department asserts that the debtors' tax liability is a type entitled to priority pursuant to 11 U.S.C. section 507(a)(7)(A)(ii) since the taxes were assessed within 240 days of the date the debtors' petition was filed. Therefore the Department contends that the tax liabilities are nondischargeable pursuant to 11 U.S.C. section 523(a)(1)(A) and 523(a)(7).

Both parties agree that there is no genuine issue of material fact. Each dispute, however, that the other is entitled to judgment as a matter of law. The key to the dispute is the interpretation of "assessment" for purposes of 11 U.S.C. section 507(a)(7)(A)(ii). The Department contends that it alone has the power to make an assessment and that such an assessment was made on November 26, 1984, within 240 days of the debtors' petition. The debtors assert that the Department's "notice of assessment" created no new liability but merely restated what the taxpayers already knew - the tax liability reflected on their returns filed in 1983.

Analysis

Section 523(a) of the Bankruptcy Code provides in part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed:

Section 507(a) of the Bankruptcy Code provides in part:

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

....

(7) Seventh, 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;

A debt for taxes assessed within the period set forth in section 507(a)(7)(A)(ii) is not released from discharge even though the tax became due prior to three years before the date of the filing of the petition. 3 Collier on Bankruptcy, ¶ 523.06 at 523-24 (15th ed. 1987); In re Easton, 59 B.R. 714, 717 (Bankr. C.D. Ill. 1986).

The parties' dispute over the interpretation of "assessment" for purposes of 11 U.S.C. section 507(a)(7)(A)(ii) is identical to the situation presented in In re Schumacher, 61 B.R. 396 (Bankr. N.D. Wis. 1986). In Schumacher the debtors sought to determine the dischargeability of a tax obligation owed to the Wisconsin Department of Revenue. The debtors had filed a tax return, subsequently became aware of an error and filed an amended return admitting a tax liability. Id. After reviewing the amended return the Wisconsin Department found the return to be substantially correct and mailed to the debtors a "notice of amount due" stating the principal amount and interest due within 240 days of the filing of a bankruptcy petition. Id. at 396-97.

In Schumacher, as in this case, the debtors argued that the date of the amended return, rather than the "notice of amount due" was the date the tax liability was assessed. The debtors in Schumacher further argued that if the taxing authorities can "assess" a tax return any time they wish to, they would exercise such discretion to thwart the discharge provisions of the Bankruptcy Code. Id. at 397. This court,

like the Schumacher. court, is not persuaded by the debtors' argument.

Iowa Code section 422.25 provides that "the department shall examine [a tax return] and determine the correct amount of tax and the amount determined by the department is the tax." The section further provides for notice to the taxpayer of the amount due, together with interest or penalty. It is the conclusion of this court that the notice provided by Iowa Code section 422.25 constitutes an assessment pursuant to 11 U.S.C. section 507(a)(7)(A)(ii) and section 523(a)(1)(A). Accordingly, the debtors' tax liability owed to the Iowa Department of Revenue and Finance is nondischargeable.

WHEREFORE, based on the foregoing analysis, the court hereby finds that there are no genuine issues of material fact and the defendant, Iowa Department of Revenue and Finance, is entitled to judgment as a matter of law.

THEREFORE, the motion for summary judgment filed on behalf of the debtors is denied and the motion for summary judgment filed on behalf of the Iowa Department of Revenue and Finance is granted. Judgment shall enter accordingly.

Signed and dated this 31st day of May, 1988.

LEE M. JACKWIG
CHIEF U.S. BANKRUPTCY JUDGE