

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

FRANK W. FLETCHER,
Debtor

Case No. 96-37148-WHB
Chapter 7

FRANK W. FLETCHER,
Plaintiff,

v.

Adversary Proceeding
No. 97-0008

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION ON TOLLING ISSUE

The issue before the Court is whether the three-year period for the nondischargeability of taxes under 11 U.S.C. § 507(a)(8)(A)(i) is tolled and enlarged when the debtor had a prior bankruptcy case pending during the three-year period. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). Based on the analysis below, this Court concludes that the three-year period is tolled and enlarged by virtue of the debtor's prior bankruptcy case, and therefore, the debtor's 1992 tax debts are nondischargeable.¹ The following constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

¹ A determination of the exact amount of tax owed by the debtor, pursuant to 11 U.S.C. § 505, is not discussed in this opinion, and that issue will be set for trial.

FACTUAL SUMMARY

The pertinent facts giving rise to the instant controversy are undisputed. The debtor filed a chapter 13 bankruptcy petition on March 31, 1993. One hundred and forty-nine (149) days later, on September 2, 1994, an order dismissing that prior case number 93-23457 was entered on the court docket. The pending chapter 7 case was filed on December 20, 1996.

If the three-year “look back” period described in § 507(a)(8)(A)(i) is extended by the duration of the prior bankruptcy case and by an additional six months, then the “look-back” period would extend back to January 20, 1993.² Under this method of calculation, because the debtor’s 1992 federal income tax return fell due after January 20, 1993 (on April 15, 1993), then the debtor’s 1992 taxes would remain within the three-year period and would remain nondishchargeable. However, if the three-year “look back” period is not tolled and enlarged by virtue of the prior bankruptcy case, then the due date for the debtor’s 1992 taxes fell outside of the three-year period and would be dischargeable in this chapter 7 case. The debtor’s Brief asserts that, even if the three-year period is tolled during the prior case, it should not be extended further by the six months found in Internal Revenue Code § 6503(h).

DISCUSSION

Pursuant to 11 U.S.C. § 523(a)(1)(A), certain tax debts are nondischargeable in bankruptcy.

This section provides in relevant part as follows:

² The prior case lasted 149 days. Six months added to that 149 days is 329 days. If those 329 days are added to the three-year period, then that period becomes 1429 days (365 days x 3 years + 329 = 1429 days). A priority period of 1429 days would extend back to January 20, 1993.

(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)(8) of this title, whether or not a claim for such tax was filed or allowed.

Section 507 of the Bankruptcy Code establishes the priorities for payment of allowed claims against the bankruptcy estate, and § 507(a)(8) provides, in its pertinent part:

Eighth, 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.

Taken together, § 523(a)(1)(A) and § 507(a)(8)(A)(i) link discharge of these taxes to their priority status. Generally speaking, income or gross receipts taxes for which a return becomes due within three years of the filing of a bankruptcy petition are not only excepted from the otherwise dischargeable prepetition debts, they also are accorded eighth level priority status for payment.

A clear majority of courts, including the Courts of Appeal for the Third, Seventh, Eighth, and Tenth Circuits,³ have held that the time period for the nondischargeability of taxes pursuant to § 507(a)(8)(A)(i) is tolled and enlarged when the debtor had a prior bankruptcy case pending during its three-year period. In reaching this conclusion, most of these majority-view courts have relied

³ In re Taylor, 81 F.3d 20 (3rd Cir. 1996); Montoya v. United States (In re Montoya), 965 F.2d 554 (7th Cir. 1992); Waugh v. Internal Revenue Service. (In re Waugh), 109 F.3d 489 (8th Cir. 1997), cert. denied ____ U.S. ____, 118 S. Ct. 80 (1997); United States v. Richards (In re Richards), 994 F.2d 763 (10th Cir. 1993). The Ninth Circuit in In re West, 5 F.3d 423 (9th Cir. 1993), cert. denied, 511 U.S. 1081, 114 S. Ct. 1830, 128 L. Ed. 2d 459 (1994), similarly construed § 507(a)(8)(A)(ii).

upon the extension-of-time provision found in 11 U.S.C. § 108(c),⁴ while other courts have used § 105(a)'s equity power to expand the three-year period.⁵

Although the “Bankruptcy Code does not contain any provisions which explicitly suspend” § 507(a)(8)(A)(i)'s three-year priority period, § 108(c) generally extends any applicable limitation periods, which are created by nonbankruptcy law, court order, or agreement, for those with causes of action against the debtor in a nonbankruptcy court and where that creditor is hampered from proceeding outside the bankruptcy court due to the automatic stay provision of 11 U.S.C. § 362.⁶ Section 108(c) provides in relevant part:

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, ... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of --

⁴ *See, e.g.*, In re Waugh, 109 F.3d 489.

⁵ *See, e.g.*, In re Richards, 994 F.2d 736. This opinion will not discuss nor rely upon § 105(a), as the Court relies upon § 108(c)'s suspension of the applicable time period and upon the congressional intent to so apply § 108(c).

⁶ In re Waugh, 109 F.3d at 492; *see also* Brickley v. United States (In re Brickley), 70 B.R. 113, 115 (Bankr. 9th Cir. 1986). Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition “operates as a stay,” as to those actions described in § 362(a)(1)-(8). Subsections (b)(1)-(18) provide exceptions to the automatic stay.

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

A provision that some courts have found to be complementary to § 108(c) is in the Internal Revenue Code (IRC), which “suspends the tax collection limitation period while the debtor’s assets are in the custody or control of any court and for an additional six months after dismissal of the debtor’s case.”⁷ The applicable IRC section, 26 U.S.C. § 6503(h), provides:

Cases under Title 11 of the United States Code. The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under Title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and -

- (1) for assessment, 60 days thereafter, and
- (2) for collection, 6 months thereafter.

Courts that follow the majority view on tolling typically have interpreted Bankruptcy Code § 108(c) as an activator of IRC § 6503, thereby preventing the periods for nondischargeability from running during the course of a debtor’s bankruptcy case and for a period of six months thereafter.

⁷ In re Taylor, 81 F.3d at 23.

There are minority-view courts,⁸ which hold that § 108(c), by its own terms, is limited to those time periods that are established by applicable nonbankruptcy law and that, therefore, Bankruptcy Code § 108(c) is inapplicable to § 507(a)(8)(A)(i). This Court has considered the opinions of the minority-view courts, finds them to be thoughtful and to raise significant issues, but nevertheless finds them unpersuasive in the final analysis.⁹ Such a literal misapplication of § 108(c) would lead to an absurd result.¹⁰ Allowing the statute of limitations to run while the debtor's assets are protected by a bankruptcy filing would render § 108(c) meaningless and "would open the door to schemes of tax avoidance by debtors who could simply dismiss and refile their case after the expiration of the three-year period of nondischargeability."¹¹ As the Ninth Circuit has observed, Code § 108(c)'s implicit incorporation of IRC § 6503 "reflects a policy determination that it would be unfair to allow the [time] to run against the government's right to enforce a tax lien when, even if the government did bring suit, it couldn't collect because it couldn't get at the taxpayer's assets" while a bankruptcy case was pending.¹² Similarly, the Third Circuit has concluded that an overly

⁸ *Quenzer v. United States (In re Quenzer)*, 19 F.3d 163 (5th Cir. 1993); *Nolan v. U.S. (In re Nolan)*, 205 B.R. 885 (Bankr.M.D.Tenn. 1997); *In re Pastula*, 203 B.R. 941 (Bankr.E.D.Mich. 1997); *Gore v. U.S. (In re Gore)*, 182 B.R. 293 (Bankr.N.D.Ala. 1995); *Turner v. U.S. (In re Turner)*, 182 B.R. 317 (Bankr.N.D.Ala. 1995).

⁹ In fact, this Judge has co-authored an article, "*Tolling the Three-year Period for Discharge of Income Taxes: Is There Plain Meaning in 11 U.S.C. § 507(a)(8)(A)(i)?*", which will be published in a bankruptcy symposium issue of the MISSISSIPPI COLLEGE LAW REVIEW this winter. That article concludes with a recommendation that the statute be amended to add a reference to Internal Revenue Code § 6503(h) and, by so doing, to eliminate further litigation over this issue.

¹⁰ *In re Taylor*, 81 F.3d at 23.

¹¹ *In re Brickley*, 70 B.R. at 115.

¹² *In re West*, 5 F.3d at 426 (applying § 507(a)(8)(A)(ii)); *See also In re Montoya*, 965 F.2d at 557 ("Section 108(c) implicitly incorporates the limitations period of § 6503 by preserving nonbankruptcy statutes of limitations which have not expired.").

restrictive application of § 507(a)(8)(A) “would lead to absurd results, as the government would lose its priority claim to back taxes as a result of the taxpayer’s abuse of the bankruptcy process.”¹³

Because a literal reading of § 108(c) would lead to an absurd result, it is important to look at the legislative history behind § 108(c) in order to ascertain Congress’s intent.¹⁴ The legislative history provides comments, such as the following:

In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a

¹³ In re Taylor, 81 F.3d at 23.

¹⁴ *Id.*, at 25 (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 243, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989) for authority that the Bankruptcy Code must not be read too strictly if it would “conflict with any other section of the Code, or with any important state or federal interest, or a contrary view suggested by the legislative history.”).

court and for 6 months thereafter(sec. 6503(b) of the Code). The Amendment applies this rule in a title 11 proceeding. Accordingly, the statute of limitations on collection of a nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.¹⁵

Such legislative history makes it absolutely clear that Congress intended to allow the IRS three full years to collect delinquent taxes without the restraints of the automatic stay. Moreover, referring to an amendment of IRC § 6503(h), the Senate Committee on Finance explained, "if the Internal Revenue Service is prohibited for a period of time by reason of a bankruptcy case from assessment or collection of tax (for example, because of the automatic stay under 11 U.S.C. § 362(a)(6)), the running of the period of limitations is suspended for assessment, for the prohibition period and for 60 days thereafter; and for collection, for the prohibition period and for 6 months thereafter."¹⁶

CONCLUSION

¹⁵ In re Brickley, 70 B.R. at 115 (quoting S.Rep. No. 989, 95th Cong., 2nd Sess. 30-31 (1978), reprinted in U.S.Code Cong. & Admin.News 1978, pp. 5787, 5816-5817).

¹⁶ S. Rep. No. 1035, 96th Cong., 2d Sess. at 50-51.

This court concludes that Bankruptcy Code § 108(c), in conjunction with IRC § 6503(h), tolls and enlarges the three-year “look back” period found in § 507(a)(8)(A)(i). This opinion is consistent with other decisions in this judicial district. See Judge Kennedy’s unpublished opinion in the case of *In re Robbins*;¹⁷ this Court’s previous ruling in the case of *In re Dotson*;¹⁸ and the published opinions of Judges Donald and Gibbons in *Acosta v. Internal Revenue Service*, 170 B.R. 124 (Bankr. W.D. Tenn. 1994), affirmed 184 B.R. 544 (W.D. Tenn. 1995) (the latter two opinions concerning § 507(a)(8)(A)(ii)). It is consistent also with the rationale of the Bankruptcy Appellate Panel for this Circuit, whose recent opinion in *Klingshirn v. United States (In re Klingshirn)*, 209 B.R. 698 (Bankr. 6th Cir. 1997), applied IRC § 6503(h) in a bankruptcy case. A separate order will be issued, and a trial date for the remaining § 505 issue will be set.

UNITED STATES BANKRUPTCY JUDGE

Dated: November 5, 1997

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¹⁷ *In re Robbins*, Case No. 96-36328, Adversary Proceeding 97-0134 (Bankr.W.D.Tenn. 1997).

¹⁸ *In re Dotson*, Case No. 93-23811, Adversary Proceeding 93-0968 (Bankr.W.D.Tenn. 1993).

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