

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:
WARREN RAYNER STEWART,
Debtor.

Case No. 02-38428whb
Chapter 13

ORDER DENYING DEBTOR'S EXCEPTION TO CLAIM OF
INTERNAL REVENUE SERVICE

On June 2, 2004, the Court heard the contested motion filed by the chapter 13 Debtor, in which the Debtor objected to the secured claim filed by the Internal Revenue Service ("IRS") and asked that the IRS lien be released. The IRS filed an opposition to the motion and counsel for IRS appeared at the hearing. The Debtor and his attorney also appeared at the hearing.

The IRS opposition correctly points out that the motion was not properly served as required by FED. R. BANKR. P. 7004; however, counsel for IRS and the Debtor agreed for the matter to be submitted to the Court on the questions of law presented. No proof was presented and there is no dispute of the relevant facts.

The Debtor's objection is that IRS should not have a secured claim in this case since the statute of limitations for collection of the relevant tax debt has expired. The Debtor bases this position upon the fact that IRS filed its Notice of federal tax lien for the income tax liability on

September 16, 1993 and that ten years from that date has expired.

The IRS points out that the Debtor is confusing the notice of tax lien with the assessment of the tax, and it asserts that even the notice of tax lien has not expired due to the Debtor's bankruptcy filing.

The Debtor filed this chapter 13 petition on November 1, 2002. IRS had assessed his 2002 tax liability on May 17, 1993, and had the Debtor not filed for bankruptcy protection, the ten years for collection of that assessment would have expired on May 17, 2003. See 26 U.S.C. § 6502(a). There are other assessments for other tax years, but May 17, 1993 is the earliest assessment. The Debtor's bankruptcy filing tolled the running of that ten years, however, by virtue of 26 U.S.C. § 6503(h)(2), which tolls the collection period while a debtor is in bankruptcy, plus an additional six months. Thus, the IRS still is within its statutory ten year period, as tolled, for collection of the assessed tax liabilities.

As to the notice of tax lien, that only affects whether IRS is a secured or unsecured creditor. No proof was offered as to whether there is any value in the Debtor's property to secure its claim, but the fact that IRS had filed a notice of tax lien in the Register of Deeds office for Shelby County, Tennessee, on September 16, 1993, establishes a prima facie tax lien. This Court agrees with *United States v. T.M. Building Products, Inc.*, 231 B.R. 364, 370-71 (S.D. Fla. 1998), that the time to look at whether there is a secured tax claim is the time of the bankruptcy filing. Since IRS's notice of tax lien was recorded prior to the bankruptcy filing, it has a secured claim to the extent of the value of any property to which that filed lien attached. See 11 U.S.C. § 506. As stated, this Court is making no determination about the extent of the IRS's secured claim, since no proof on that issue was offered, but as to the motion presented, IRS holds a valid prima facie secured claim.

Based upon the conclusions of law on the issues presented to the Court, IT IS THEREFORE ORDERED that the Debtor's motion excepting to the claim of the Internal Revenue Service and seeking release of its lien is DENIED.

The Clerk shall serve this order on:
Debtor and Sidney A. Feuerstein, Debtor's attorney
Jason S. Zarin, Trial Attorney, Tax Division, U.S. Dept. of Justice
Monica M. Simmons, Assistant U.S. Attorney