

2011 Regional Forums

Bankruptcy

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1. **Federal Tax Day - Current, J.4 Government Could Foreclose on Property Bought with Liened Funds; Transfer Not Set Aside; Fraudulent Transfer Not Proven (McCullough, DC Pa.), (Oct. 14, 2011) ©2011 Wolters Kluwer. All Rights Reserved.**
2. **Federal Tax Day - Current, L.10 Code Sec. 382: Corporation Granted Extension of Time to Elect Out of Loss Corporation Rules (LTR 201138007), (Sep. 26, 2011) ©2011 Wolters Kluwer. All Rights Reserved.**
3. **Federal Tax Day - Current, J.7 Chapter 11 Attorney's Fees Had Priority over Federal and State Tax Liens (In re J.R. Hale Contracting Company, BC-DC N.M.), (Sep. 1, 2011) ©2011 Wolters Kluwer. All Rights Reserved.**
4. **Federal Tax Day - Current, J.3 Inherited IRAs Excluded from Debtors' Bankruptcy Estate (In re Johnson, BC-DC Wash.), (Jun. 6, 2011) ©2011 Wolters Kluwer. All Rights Reserved.**
5. **USTC Cases, In re Mitchell J. Wogoman and Holly L. Wogoman, Debtors. Mitchell J. Wogoman and Holly L. Wogoman, Plaintiffs v. Internal Revenue Service, Defendant., U.S. Bankruptcy Court, D. Colorado, 2011-2 U.S.T.C. ¶50,593, (Aug. 19, 2011) ©2011 Wolters Kluwer. All Rights Reserved.**

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1. Federal Tax Day - Current, J.4 Government Could Foreclose on Property Daughter Bought with Liened Funds; Transfer Not Set Aside; Fraudulent Transfer Not Proven (McCullough, DC Pa.), (Oct. 14, 2011)

The government was entitled foreclose federal tax liens on property purchased by an individual with proceeds from the sale of her mother's liened property. Before her death, but after the tax liens attached, the mother transferred the property to the daughter who subsequently sold the property and purchased another. The daughter argued that she was entitled to protection under Code Sec. 6323 because the government's lien had not been recorded when the property was transferred. However, the daughter was not a "purchaser" within the meaning of Code Sec. 6323(h)(6) because she paid nothing for the property. The daughter's promise to care for the decedent was inadequate consideration because she failed to show what the care constituted and there was no evidentiary basis to determine what the care was worth.

However, the government was not entitled to set aside the transfer under the state (Pennsylvania) fraudulent transfer laws because genuine issues of material fact existed regarding whether the decedent or her daughter had the intention to hinder, delay or defraud the government. Moreover, it was unclear how much control the decedent had over the property after the transfer; thus, the government failed to prove actual fraud on behalf of the decedent and her daughter. Additionally, the government's contention that the transfers were constructively fraudulent was rejected because the government failed to show that the transfer rendered the decedent insolvent.

Finally, the government failed to show that the daughter should be held individually responsible for the decedent's tax liability based on lien conversion principles. The government did not show that the daughter had converted the property under state law or established its applicability to the transfer at issue.

Related case at CA-3, 97-1 ustr ¶50,104.

I.N. McCullough, DC Pa., 2011-2 ustr ¶50,668

Other References:

- Code Sec. 6323
- CCH Reference - 2011FED ¶38,160.108
- Code Sec. 7403
- CCH Reference - 2011FED ¶41,653.40
- CCH Reference - 2011FED ¶41,653.42
- Tax Research Consultant
 - CCH Reference – TRC IRS: 45,158CCH Reference – TRC IRS: 45,160CCH Reference – TRC IRS: 48,158.05

USTC Cases, United States of America, Plaintiff v. Ingrid N. McCullough, et al., Defendants., U.S. District Court, W.D. Pennsylvania, 2011-2 U.S.T.C. ¶50,668, (Oct. 6, 2011)

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United States of America, Plaintiff v. Ingrid N. McCullough, et al., Defendants.

U.S. District Court, W.D. Pennsylvania; 10-1507, October 6, 2011.

Related case at CA-3, 97-1 USTC ¶50,104.

[Code Secs. 6323 and 7403]

Tax assessments: Tax liens: Foreclosure and sale: Real property: Validity of lien: Fraudulent transfer: State (Pennsylvania) law: Purchaser: Promise to care, repair property: Inadequate consideration: Genuine issue of material facts: Intention to defraud: Actual and Constructive fraud: Lien conversion.–

The government was entitled foreclose federal tax liens on property purchased by an individual with proceeds from the sale of her mother's liened property. Before her death, but after the tax liens attached, the mother transferred the property to the daughter who subsequently sold the property and purchased another. The daughter argued that she was entitled to protection under Code Sec. 6323 because the government's lien had not been recorded when the property was transferred. However, the daughter was not a "purchaser" within the meaning of Code Sec. 6323(h)(6) because she paid nothing for the property. The daughter's promise to care for the decedent was inadequate consideration because she failed to show what the care constituted and there was no evidentiary basis to determine what the care was worth. However, the government was not entitled to set aside the transfer under the state (Pennsylvania) fraudulent transfer laws because genuine issues of material fact existed regarding whether the decedent or her daughter had the intention to hinder, delay, or defraud the government. Moreover, it was unclear how much control the decedent had over the property after the transfer; thus, the government failed to prove actual fraud on behalf of the decedent and her daughter. Additionally, the government's contention that the transfers were constructively fraudulent was rejected because the government failed to show that the transfer rendered the decedent insolvent. Finally, the government failed to show that the daughter should be held individually responsible for the decedent's tax liability based on lien conversion principles. The government did not show that the daughter had converted the property under state law or established its applicability to the transfer at issue. **Back references: ¶38,160.108, ¶41,653.40 and ¶41,653.42.**

OPINION AND ORDER

SYNOPSIS

AMBROSE, Senior Judge, U.S. District Court: This action arises out of an unpaid tax assessment against decedent, prior to her death. According to the Government, decedent died with an adjudicated tax liability, resulting in a lien against her real property. Prior to her death but after the tax lien attached, decedent transferred the property to her daughter, who then transferred it to herself and her husband. The couple later sold the property, and used the proceeds to purchase another. In this civil action, the Government seeks to foreclose a tax lien against the Defendants. property, and alleges that the initial transfer between mother and daughter was fraudulent.

Before the Court is the Government's Motion for Summary Judgment, and Defendants. opposition thereto. For the following reasons, the Motion will be granted in part and denied in part.

OPINION

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I. FACTS ¹

On March 4, 1996, the Tax Court entered a decision against wife-Defendant's nowdeceased mother, Harriet Nixon Hall (referred to herein as "Ms. Hall," "decedent," or "wife-Defendant's mother") and the estate of Ms. Hall's husband, James F. Hall. The decision found that the couple had an income tax deficiency for the tax year 1988, in the amount of \$287,624.41; notice and demand for payment of this amount, plus interest of \$258,170.52, were sent accordingly May 2, 1996. ² Neither Ms. Hall nor the estate paid the tax liabilities.

At the time, Ms. Hall resided at property located on Kings Highway in Carnegie, Pennsylvania, which the Halls had acquired in or about 1965. Following her husband's death, Ms. Hall became the sole owner of the property. By deed dated July 31, 2001, Ms. Hall transferred title to the property to her daughter, the present Defendant, in exchange for \$1.00 and "natural love and affection." Wife-Defendant asserts that she also promised her mother that she would repair and rehabilitate the property, and take care of her ill mother. Ms. Hall continued to reside at the property. In 2001, the County assessed the property at \$195,000.00, and in 2002, at \$239,500.00. On December 10, 2001, a notice of tax lien was filed with the Prothonotary of Allegheny County. In addition, on April 4, 2006, in what we shall refer to as *McCullough I*, the Government filed suit against Ms. Hall and her husband's estate in order to reduce the tax assessments to judgment.

On April 17, 2002, wife-Defendant encumbered the property with a mortgage for \$82,000. ³ She testified that a part of the proceeds were used to make repairs to the property, and a part of the proceeds were used to finance her son's education. On October 23, 2004, she was married; her husband is presently a co-Defendant to this action. By deed dated March 30, 2005, on April 4, 2005, wife-Defendant transferred the Kings Highway property to herself and her husband for \$1.00. On or about August 22, 2005, Defendants mortgaged the Kings Highway property for \$90,000. The loan proceeds were used to pay off the 2002 mortgage, and for other purposes. On November 5, 2005, Ms. Hall died. The notice of tax lien was refiled on February 1, 2006. On June 30, 2006, wife-Defendant was appointed as executrix of her mother's estate. Between approximately 1995 and 2008, wife-Defendant was engaged in a business of reselling industrial lubricants, and also worked at a day care center.

In *McCullough I*, the Government filed an amended complaint on July 7, 2006, naming wife-Defendant as a party Defendant, in her capacity as executrix of her mother's estate. On November 6, 2006, judgment was entered in *McCullough I* against wife-Defendant, as executrix of her mother's estate, in the amount of \$1,211,338.05.00 plus interest. By letter dated May 4, 2007, the Government demanded payment from wife-Defendant, from the funds and assets of her mother's estate. Subsequently, on July 30, 2009, Defendants sold the Kings Highway property for \$375,000, and used the proceeds to pay the balance of the 2005 mortgage, and to purchase property on Winthrop Road in Carnegie, Pennsylvania, for \$215,000.

In the present Complaint, the Government seeks, *inter alia*, a declaratory judgment that the federal tax lien attached to the Kings Highway property on May 2, 1996, and remained attached thereto through the July, 2001 and March, 2005 transfers; and that the lien attached to the proceeds from the sale of the property, and thus to the Defendants. Winthrop Road property. The Government also alleges that the July, 2001 transfer of the Kings Highway property from wife-Defendant's mother to wife-Defendant was fraudulent, and thus should be set aside as to the Government, and because the property was sold, wife-Defendant should be liable.

II. APPLICABLE STANDARDS

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Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the Court must examine the facts in a light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The moving party bears the burden of demonstrating the absence of any genuine issues of material fact. *United States v. Omnicare Inc.*, 382 F.3d 432 (3d Cir. 2004). Rule 56, however, mandates the entry of judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986).

III. DISCUSSION

A. Count I - Lien Tracing - 26 U.S.C. §6323

First, the Government seeks judgment as a matter of law regarding its right to foreclose on the Winthrop Road property, based on lien tracing principles. There is no dispute that notice of the assessment and demand for payment was made on May 2, 1996. Defendants contend that they are protected by the provisions of 26 U.S.C. § 6323, which protects certain purchasers of property that is subject to an as-yet unfiled lien. In that vein, Defendants assert that wife-Defendant qualifies as a protected "purchaser"; the Government contends to the contrary.

"Federal tax liens arise automatically on the date of the assessment. Once Federal tax liens arise, they "attach to all property and rights to property, whether real or personal" belonging to the taxpayer, and follow the property through subsequent transfers until satisfied or barred by the statute of limitations." *United States v. Stuler*, 8-273, 2010 U.S. Dist. LEXIS 5840, at *9 (W.D. Pa. Jan. 26, 2010); 26 U.S.C. §6322. ⁴ The relative priority of a federal tax lien is governed by federal law. *United States v. Equitable Life Assurance Soc'y*, 86-1 USTC ¶9444, 384 U.S. 323, 328, 330, 16 L. Ed. 2d 593, 86 S.Ct. 1561 (1966). Generally speaking, contrary to Defendants' suggestion, a federal tax lien need not be filed in order to gain priority over other interests. *United States v. R&E Corp.*, 98-1068, 1999 U.S. Dist. LEXIS 13317, at *11 (E.D. Pa. Aug. 31, 1999).

If a taxpayer transfers lien-encumbered property to a "purchaser" before the government records the lien, however, then the lien no longer attaches to the property and the "purchaser" takes the property free of the lien. 26 U.S.C. §6323(a). A "purchaser" is defined as "a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice." 26 U.S.C. §6323(h)(6). A party seeking the protection of Section 6232 bears the burden of proving his entitlement to the protection of that Section. *Resolution Trust Corp. v. Gill*, 92-1 USTC ¶50,199, 960 F.2d 336, 344 (3d Cir. 1992).

Further, applicable regulations define "adequate and full consideration in money or money's worth" as "a consideration ... having a reasonable relationship to the true value of the interest in property acquired ... Adequate and full consideration in money or money's worth may include the consideration in a bona fide bargain purchase." 26 C.F.R. §301.6323(h)-1(f)(3) (1997). Further, "money or money's worth" is defined as "tangible or intangible property, services and other consideration reducible to a money value," not including such things as "love and affection ... or any other consideration not reducible to a money value." *United States v. Morrell*, 2001-1 USTC ¶50,367, 137 F.Supp.2d 130, 136 (E.D.N.Y. 2001) (citing 26 C.F.R. 301.6323(h)-1(a)(3)). This requirement of

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adequate and full consideration must be strictly applied. *United States v. Paladin*, 182-1 USTC ¶9360, 539 F.Supp. 100, 103 (W.D.N.Y. 1982).

There is no question that \$1.00 alone is insufficient consideration, in this context. In support of their argument that wife-Defendant was a “purchaser” of the Kings Highway property, however, Defendants point to her promise to care for her mother, and to repair and rehabilitate the property, as well as her payment of \$1.00.⁵ They point to similar promises in support of their contention that the later transfer to husband-Defendant is protected.⁶ Defendants, however, have not proffered sufficient grounds for finding that these promises constitute “adequate and full consideration” for the property. Even disregarding potential hearsay complications, and accepting the truth of Defendants. submissions, the consideration is not sufficient under Section 6323 or summary judgment standards.

In the first instance, “[a] promise of future support, particularly to maintain the home of one's parents, is “insufficient as a matter of law to be considered a fair equivalent of the property transferred.” *United States v. Gallina*, No. 97-5532, 2010 U.S. Dist. LEXIS 142055, at *24 (E.D.N.Y. 2010); *see also United States v. Sweeny*, 418 F.Supp.2d 492, 497-98 (S.D.N.Y. 2006). Wife-Defendant testified that she cared for her mother, but proffers absolutely no evidence of what that “care” constituted, and thus no evidentiary basis for concluding that her conduct is reducible to a money value, or for appraising that money value. The record is devoid of facts that would permit the conclusion that the promised services and repairs, or the services and repairs actually rendered, bridge the large gap between \$1.00 and the property's assessed value, so as to allow the conclusion that they are reasonably related in amount.⁷ Indeed, there is no basis for determining whether wife-Defendant's caretaking was something other than love and affection, which, while morally and otherwise laudable, is inadequate in the present tax context. Defendants bear the burden on this issue, and their submissions are not sufficient to preclude the entry of judgment against them under Fed. R. Civ. P. 56 and Section 6323. Accordingly, I am constrained to find that Defendants have not established that they were “purchasers,” such that they are entitled to the protections of Section 6323 as regards the July 31, 2001 and March 30, 2005 transfers. As Defendants. sole substantive challenge to the lien tracing claim rested on that Section,⁸ the Government is entitled to judgment as a matter of law on Count I of the Complaint, asserting the right to lien foreclosure on the Winthrop Road property.

B. Counts II and III - Fraudulent Transfer

Next, I address whether the Government is entitled to set aside the July 31, 2001 and March 30, 2005 transfers pursuant to Pennsylvania's Uniform Fraudulent Transfer Act (“PUFTA”), 12 Pa.C.S.A. §5101 *et seq.*, either as actually or constructively fraudulent.⁹

1. Actual Fraud

Pursuant to PUFTA, a “transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation: ...with actual intent to hinder, delay, or defraud any creditor of the debtor.” 12 Pa. C.S.A. § 5104. Factors to consider when assessing actual intent under this Section include whether the transfer or obligation was to an insider; whether the debtor retained possession or control of the property transferred after the transfer; whether the transfer or obligation was disclosed or concealed; whether before the transfer was made or obligation was incurred, the debtor was sued or threatened with suit; whether the transfer was of substantially all the debtor's assets; whether the debtor absconded; whether the debtor removed or concealed assets; whether the value of

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the consideration received by the debtor was reasonably equivalent to the value of the asset transferred; whether the debtor was insolvent or became insolvent shortly after the transfer; and whether the transfer occurred shortly after or before a substantial debt was incurred. *Id.* at §5104(b).¹⁰ The plaintiff bears the burden of proving actual intent under the statute. *Shubert v. Dawley*, No. 1-32215, 2005 Bankr. LEXIS 1593, at *24 (Bankr. E.D. Pa. Aug. 10, 2005). Additionally,

PUFTA is silent as to the burden of proof to be applied to PUFTA claims, and Pennsylvania courts have not addressed the level of proof required in PUFTA fraudulent transfer actions. ... There is some authority, however, which suggests clear and convincing evidence is the appropriate standard for actual fraudulent transfer claims under PUFTA.

Klein v. Weidner, No. 8-739, 2010 U.S. Dist. LEXIS 14230, at *14 (E.D. Pa. Feb. 17, 2010) (citations omitted).

I am mindful, too, that “issues involving state of mind, including fraudulent intent ... are factually intensive, require credibility determinations within the province of a jury and are generally not determined at the summary judgment stage.” *Pittsburgh Home & Garden Show, Inc. v. Scripps Networks, Inc.*, No. 3-1477, 2008 U.S. Dist. LEXIS 21020, at **8-9 (W.D. Pa. Mar. 17, 2008). “[A]t the summary judgment stage, the court is not entitled to weigh the evidence.” *Berrier v. Simplicity Mfg.*, 563 F.3d 38, 64 (3d Cir. Pa. 2009).

Here, there is a genuine issue of material fact regarding whether wife-Defendant, or her mother, acted with the “actual intent to hinder, delay, or defraud” the Government.¹¹ Wife-Defendant testified that she believed that her father had “taken care of” the tax liability, and we are without the benefit of her mother's testimony. While several of the factors weigh in favor of a finding of intent, several do not. For example, the July 3, 2001 transfer was not concealed; while it may not have been disclosed to decedent's lawyer, the deed was publicly recorded with the Prothonotary of Allegheny County the day after the transfer. Additionally, the transfer did not occur shortly after the debt was incurred. Instead, the tax lien arose, and notice and demand for payment were sent, in 1996. It is not established that the transfer involved substantially all of the decedent's assets; instead, she owned other property in Collier Township. The decedent's family believed that in 2002, she had an interest in that property amounting to \$304,150.00. The debtor did not abscond at any time prior to her death; instead, she remained at the Kings Highway property. It is unclear to what degree the debtor retained “control” over the property following the transfer. Under applicable standards and principles, I cannot find that the Government has met its burden at this juncture. Thus, the Motion is denied to that extent.¹²

2. Constructive Fraud

The Government also contends that the transfers at issue are avoidable as constructively fraudulent. Pursuant to 12 Pa.C.S. §5104(a)(2), a transfer is fraudulent when the debtor makes the transfer “without receiving a reasonably equivalent value in exchange for the transfer or obligation,” and the debtor was engaged or about to engage in a transaction for which the debtor's assets were unreasonably small, or intended to or reasonably believed he would incur debts beyond his ability to pay as they become due. Pursuant to 12 Pa.C.S.A §1505, a transfer may be fraudulent if the debtor did not receive “reasonably equivalent value,” and the debtor was insolvent at the time of the transfer, or became insolvent as a result. “Courts have consistently applied a preponderance of the evidence standard to constructive fraudulent transfer claims under PUFTA.” *Weidner*, 2010 U.S. Dist. LEXIS 14230 at *14. The burden of proof regarding all elements of such claims is on the party challenging the transfer. *Classman v. O'Brian*,

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435 B.R. 276, 287-88 (Bankr. E.D. Pa. 2010); *Fidelity Bond & Mortg. v. Brand*, 371 B.R. 708, 720 (E.D. Pa. 2007).

Whether reasonably equivalent value was exchanged is an inherently factual issue to be determined on a case-by-case basis. *Hemstreet v. Brostmeyer*, 258 B.R. 134, 138 (Bankr. W.D. Pa. 2001). “Consideration adequate to preclude a constructive fraudulent conveyance may be manifested in many different forms.” *Gardner v. Tyson*, 218 B.R. 338, 348 (Bankr. E.D. Pa. 1998). Relevant factors utilized in evaluating reasonable equivalence include: whether the value of what was transferred was equal to the value of what was received; the fair market value of what was transferred and received; whether the transaction took place at arm's length; and the good faith of the transferee. *Castle Cheese, Inc. v. MS Produce, Inc.*, No. 4-878, 2008 U.S. Dist. LEXIS 71053, at *78 (W.D. Pa. Sept. 19, 2008).

In this case, the Government has failed to meet applicable standards. Just as the lack of record evidence resulted in a finding that Defendants failed to meet their burden under federal law, above, the same is true where the burden rests on the Government. The absence of evidence regarding the transferor's assets does not conclusively establish her insolvency; the Government has not proffered sufficient evidence of decedent's financial condition at all pertinent times. Similarly, the absence of evidence regarding wife-Defendant's services to her mother does not conclusively establish the lack of reasonable equivalence. Finally, as discussed above, there are outstanding credibility issues regarding wife-Defendant's good faith. For these reasons, applicable standards mandate that I deny the Government's Motion to that extent.

I take separate note of the Government's Motion as it relates to the wife-Defendant's March 30, 2005 transfer of the Kings Road property to herself and husband-Defendant. Pennsylvania's fraudulent transfer law applies to transfers made by a “debtor”; it also defines “debtor” as “a person who is liable on a claim.” 12 Pa.C.S. §5101(b). In this case, there is no contention that wife-Defendant acted other than individually when she transferred the Kings Road property to herself and her husband. There is no suggestion that she was personally liable for the Government's claim against her parents' estates. In other words, the Government has not argued that she was a “debtor,” as she was not individually liable on a claim. “In order to establish liability under the PUFTA, a plaintiff must establish that the “person” who made the transfer in question was a “debtor” within the meaning of the statutory definition.” *Castle Cheese*, 2008 U.S. Dist. LEXIS 71053, at *68. The Government does not address this issue, and I decline to reach any conclusion thereon without illumination of the parties' positions.

Finally, because I will deny the Government's Motion for judgment pursuant to PUFTA, I must reach a similar conclusion regarding their asserted remedies for fraudulent transferee liability under 12 Pa.C.S.A “ 5107 and 5108. ¹³ Entitlement to remedies under those Sections depends on a fraudulent transfer. Accordingly, the Motion will be denied to that extent.

C. Counts IV and V - Lien Conversion

Finally, the Government seeks to hold wife-Defendant liable for her conduct in encumbering and selling the Kings Highway property following the July 31, 2005 transfer. Essentially, the Government seeks to recover the \$375,000.00 value of the Kings Highway property, because the Winthrop Road property is of lesser value. The Government, however, has not proffered facts or case law that persuades me that Defendants should be held individually responsible for decedent's tax liability based on conversion principles. It has not identified the parameters of the tort in Pennsylvania, nor established its applicability in the present context. I decline to issue a summary finding of liability on such scant grounds, even absent substantive opposition from Defendants. Therefore,

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summary judgment will be denied to that extent.

CONCLUSION

In sum, I am without authority to undermine or avoid the operation of tax laws and principles, as interpreted by federal appellate courts. As Defendants have not demonstrated that they qualify as protected purchasers of the lien-encumbered property, the Government is entitled to follow the proceeds from the sale of the lien-encumbered property and proceed against the Winthrop Road property. I do, however, find that the Government is not entitled to judgment in their favor, on this record and on these briefs, on its remaining claims.¹⁴

An appropriate Order follows.

ORDER

AND NOW, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment (Docket No. 17) is GRANTED in part and DENIED in part. The Motion is granted as to Count I of the Complaint, and denied in all other respects.

Accordingly, the federal tax lien that arose on May 2, 1996 in connection with the assessed federal income tax liability of Harriet Nixon Hall attached to and is foreclosed upon the real property located at 2 Winthrop Road, Carnegie, Pennsylvania, also known as parcel or Block and lot number 105-K-88 on the land records of Allegheny County, PA, since that property is substituted for the prior real property that had been attached by the federal tax lien, 200 Kings Highway, Carnegie, PA that was sold in July 2009, and that the 2 Winthrop Road property be sold. The United States is directed to submit a proposed post-judgment order of sale to the Court within thirty (30) days from the entry of this Order.

A pretrial settlement conference on Plaintiff's remaining claims will be held on October 20, 2011 at 11:30 A.M.

Footnotes

- 1 The following summarizes the facts in light of Local Rule 56.1, which requires that a responsive concise statement of material fact contain appropriate reference to the record, if any fact is not admitted in its entirety.
- 2 Defendants contend that when she transferred the home to wife-Defendant, Ms. Hall was indebted solely in her capacity as executor for her husband's estate. The Court's Opinion in *McCullough I*, however, makes clear that both Ms. Hall and the estate were jointly liable for the tax deficiency.
- 3 Defendants assert that the fact that they were able to mortgage the property demonstrates that it was not subject to a tax lien, because the bank would not have granted a mortgage on a lien-encumbered property. This speculation, however, does not provide a sufficient basis to challenge the validity of the lien.
- 4 To perfect a lien against real property, a notice of federal tax lien must be filed in the real property records of the county where the property is located. 26 U.S.C. §6323(f)(1)(A)(I) and (2)(A). "That the Government might not file notice [pursuant to 26 U.S.C. §6323] until some future date, if at all, does not affect the immediate attachment of a tax lien when liability is admitted or assessed." *Sgro v. United States*, 79-2 USTC ¶9733, 609

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F.2d 1259, 1261 (7th Cir. 1979). In this case, the notice of tax lien was filed subsequent to the July 31, 2001 transfer.

- 5 Both the July and March deeds at issue identify consideration as \$1.00 and natural love and affection. The now-identified oral promises do not appear on the deed, causing potential complications in light of Pennsylvania's Statute of Frauds. An oral modification to a written agreement falls within the statute, and an alleged "oral contract cannot be inferred only from the declarations of one of the parties [because] to hold otherwise is tantamount to setting aside the Statute of Frauds." *Mill Run Assocs. v. Locke Prop. Co.*, No. 2-8042, 2003 U.S. Dist. LEXIS 18096, at **13-14, 19-20 (E.D. Pa. Sept. 22, 2003).
- 6 It appears as though the lien is effective against husband-Defendant whether or not he was a "purchaser" under Section 6323, because the Government filed notice of the lien prior to the March 30, 2005 transfer that gave rise to his interest in the Kings Highway property. *See, e.g., Moco Investments, Inc. v. U.S.I.*, 2010-1 USTC ¶50,185, 362 Fed.Appx. 305 (3d Cir. 2010).
- 7 Defendants argue that whether the services and repair constitute "adequate consideration" is a question of fact. They cite to *United States v. Rocky Mt. Holdings, Inc.*, No. 8-3381, 2009 U.S. Dist. LEXIS 52203 (E.D. Pa. Mar. 4, 2009). That case arose on a motion to dismiss, rather than on summary judgment, and does not deal with the issue of proper consideration under Section 6323.
- 8 The Government premises its theory on the principle that a tax "lien follows any property substituted for what the taxpayer owned, provided the chain of substitution can be traced." *Municipal Trust & Sav. Bank v. United States*, 97-1 USTC ¶60,275, 114 F. 3d 99, 101 (7th Cir. 1997); *see also United States v. Callahan*, 442 B.R. 1, 7 (D. Mass. 2010). Defendants do not contest the viability of this principle, or that the chain of substitution leads to the Winthrop Road property. I do note that it is undisputed that that the remainder of that chain leads to funds repaid to a bank to fulfill a mortgage on the Kings Highway property, which was taken after the tax lien was filed with Allegheny County. No bank is a party to this action, and there is no suggestion that the Government has pursued funds from a bank; instead, the Government seeks to recover any shortfall from the Defendants individually.
- 9 Defendants assert several defenses to this action. First, they assert the four-year statute of limitations applicable under the PUFTA, and the defense of laches. The United States, however, is not bound by state statutes of limitations in fraudulent conveyance actions, and is not subject to the defense of laches. *United States v. Evans*, 340 Fed. Appx. 990 (5th Cir. Tex. 2009) (citing *United States v. Summerlin*, 40-2 USTC ¶9633, 310 U.S. 414, 416, 84 L. Ed. 1283, 60 S.Ct. 1019 (1940)).
- 10 Comment (5) to Section 5104(b) states that evidence of one or more of the enumerated factors "does not create a presumption that the debtor has made a fraudulent transfer."
- 11 "The fact that a transfer has been made to a relative ... has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged." *Dawley*, 2005 Bankr. LEXIS 1593 at *26.

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- 12 The Government points to *United States v. Green*, 2000-1 USTC ¶50,151, 201 F. 3d 251 (3d Cir. 2000), and similar cases, which apply a presumption of fraud to interspousal transfers, not inter-family transfers generally.
- 13 Moreover, the Government relies on *United States v. Verduchi*, 2006-1 USTC ¶50,113, 434 F. 3d 17 (1st Cir. 2006). That case dealt with Rhode Island's fraudulent transfer statute, which differs from that of Pennsylvania.
- 14 I do not reach the "defenses" raised regarding amount of liability, because it would be a waste of resources at this time. The tax court's judgment exceeds a million dollars, and the Government contends that the Winthrop Road property is worth approximately \$200,000.00. Because of this differential, any alleged reduction in liability would not affect the Government's right to collect the full proceeds of the sale of the Winthrop Road property.

2. Federal Tax Day - Current, L.10 Code Sec. 382: Corporation Granted Extension of Time to Elect Out of Loss Corporation Rules (LTR 201138007), (Sep. 26, 2011)

A loss corporation was granted an extension of time in which to elect out of the Code Sec. 382(l)(5) provisions. The taxpayer reasonably relied upon a qualified tax professional who failed to make, or to advise the taxpayer to make, the election and the request for relief was filed before the failure to make the election was discovered by the IRS. The taxpayer was under the jurisdiction of a court in a Title 11 case immediately prior to an ownership change.

IRS Letter Ruling 201138007

Other References:

- Code Sec. 382
 - CCH Reference - 2011FED ¶17,115.40
- Tax Research Consultant
 - CCH Reference – TRC CONSOL: 47,302

IRS Letter Rulings and TAMS (Current), UIL No. 0301.00-00 Distributions of property. UIL No. 0382.00-00 Limitation on net operating loss carry-forwards and built-in losses following ownership changes. UIL No. 0382.12-00 Limitation on net operating loss carry-forwards and built-in losses following ownership changes; Operating rules. UIL No. 0382.12-13 Limitation on net operating loss carry-forwards and built-in losses following ownership changes; Operating rules; Election out. UIL No. 9100.00-00 Extension of time for making certain elections. UIL No. 9100.22-00 Extension of time for making certain elections; Other. IRS Letter Ruling 201138007 (Jun. 28, 2011), (Jun. 28, 2011)

LTR 201138007, June 28, 2011

Symbol: CC:CORP:B05-PLR-108277-11

Uniform Issue List Nos. 0301.00-00, 0382.00-00, 0382.12-00, 0382.12-13

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[Code Secs. 301 and 382]

Distributions of property; Limitation on net operating loss carry-forwards and built-in losses following ownership changes; Limitation on net operating loss carry-forwards and built-in losses following ownership changes; Operating rules; Limitation on net operating loss carry-forwards and built-in losses following ownership changes; Operating rules; Election out; Extension of time for making certain elections; Extension of time for making certain elections; Other.

This letter responds to a letter dated February 17, 2011, submitted on behalf of Taxpayer, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election under § 1.382-9(i) not to have the provisions of § 382(l)(5) apply to an ownership change in a title 11 or similar case (the "Election"). Additional information was received in letters dated April 25, May 19, and May 31, 2011. The material information submitted in the request and later correspondence is summarized below.

On Date 1, Taxpayer, a loss corporation, underwent an ownership change as defined by § 382(g). Immediately before the ownership change on Date 1, Taxpayer was under the jurisdiction of a court in a title 11 case.

Section 382(l)(5) provides that if certain requirements are met, § 382(a) shall not apply to an ownership change. If § 382(l)(5) applies, certain limitations are placed on a corporation.

Section 382(l)(5)(H) provides that a new loss corporation may elect, subject to terms and conditions as the Secretary may prescribe, not to have the provisions of § 382(l)(5) apply. If a new loss corporation wishes to elect out of § 382(l)(5), such election must be made by the due date (including extensions of time) of the loss corporation's tax return for the taxable year which includes the change date. Section 1.382-9(i).

The Election was required to be filed by the due date (including any extensions of time) of Taxpayer's tax return for the taxable year which includes Date 1, but for various reasons a valid Election was not filed. After the due date for the Election, it was discovered that the Election had not been filed. Subsequently, this request was submitted by Taxpayer under § 301.9100-3, for an extension of time to file the Election.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making certain elections that do not meet the requirements of § 301.9100-2. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

In this case, the time for filing the Election is fixed by the regulations (*i.e.*, § 1.382-9(i)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Taxpayer to file the Election, provided Taxpayer acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

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Information, affidavits, and representations submitted by Taxpayer, Company Official, and Tax Professional, explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Taxpayer reasonably relied upon a qualified tax professional who failed to make, or advise Taxpayer to make, the Election, and the request for relief was filed before the failure to make the Election was discovered by the Internal Revenue Service. See §§ 301.9100-3(b)(1)(i) and (v).

Based on the facts and information submitted, including the representations made, we conclude that Taxpayer has established that it acted reasonably and in good faith in failing to timely file the Election, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Accordingly, we grant an extension of time under § 301.9100-3, until 45 days from the date on this letter, for Taxpayer to file the Election.

Taxpayer should file the Election by filing the statement described in § 1.382-9(i). A copy of this letter should be attached to the Election statement.

The above extension of time is conditioned on Taxpayer's tax liability (if any) being not lower, in the aggregate, for all years to which the Election applies, than it would have been if the Election had been timely made (taking into account the time value of money). No opinion is expressed as to Taxpayer's tax liability for the years involved. A determination thereof will be made upon audit of the Federal income tax returns involved.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely, Ken Cohen, Senior Technician Reviewer, Branch 3, Office of Associate Chief Counsel (Corporate).

3. Federal Tax Day - Current, J.7 Chapter 11 Attorney's Fees Had Priority over Federal and State Tax Liens (In re J.R. Hale Contracting Company, BC-DC N.M.), (Sep. 1, 2011)

A Chapter 11 debtor's attorney's fees and costs had priority over federal and state tax liens. Prior to the amendment of 11 U.S.C. §724(b) by the Bankruptcy Technical Corrections Act of 2010 (BTCA), the attorney's fees were an administrative expense of the bankruptcy estate to be paid prior to the tax liens. The government's analysis that the Chapter 11 attorney's fees were expenses, not claims and, therefore, excluded from favored treatment was rejected. The BTCA did not specify the effective date of the amendment and the court found that applying the BTCA retroactively would impair the rights the attorney possessed at the time of filing the action because it would subordinate his claim to the tax liens and, thus, prevent the fees from being paid.

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In re J.R. Hale Contracting Company, Inc., BC-DC N.M., 2011-2 ustr ¶50,604

Other References:

- Code Sec. 6871
- CCH Reference - 2011FED ¶40,630.104
- CCH Reference - 2011FED ¶40,630.325
- Tax Research Consultant
 - CCH Reference – TRC IRS: 57,106.10

USTC Cases, In re J.R. Hale Contracting Company, Inc., Debtor. William F. Davis & Associates, P.C, Plaintiff v. Michael J. Caplan, Trustee, United States Department of the Treasury, Internal Revenue Service, and New Mexico Department of Taxation and Revenue, Defendants., U.S. Bankruptcy Court, D. New Mexico, 2011-2 U.S.T.C. ¶50,604, (Aug. 29, 2011)

In re J.R. Hale Contracting Company, Inc., Debtor. William F. Davis & Associates, P.C, Plaintiff v. Michael J. Caplan, Trustee, United States Department of the Treasury, Internal Revenue Service, and New Mexico Department of Taxation and Revenue, Defendants.

U.S. Bankruptcy Court, D. New Mexico; 7-11625-s7, August 29, 2011.

[Code Sec. 6871]

Bankruptcy: Tax liens: Priority of liens: Chapter 11 proceedings: Attorney's fees and costs: Prior law: Amendment: Retroactive application. –

A Chapter 11 debtor's attorney's fees and costs had priority over federal and state tax liens. Prior to the amendment of 11 U.S.C. §724(b) by the Bankruptcy Technical Corrections Act of 2010 (BTCA), the attorney's fees were an administrative expense of the bankruptcy estate to be paid prior to the tax liens. The government's analysis that the Chapter 11 attorney's fees were expenses, not claims and, therefore, excluded from favored treatment was rejected. The BTCA did not specify the effective date of the amendment and the court found that applying the BTCA retroactively would impair the rights the attorney possessed at the time of filing the action because it would subordinate his claim to the tax liens and, thus, prevent the fees from being paid. **Back references: ¶40,630.104 and ¶40,630.325.**

Starzynski, Bankruptcy Judge: This is an action to determine the priority of Chapter 11 attorney's fees under 11 U.S.C. §724(b) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Plaintiff William F. Davis & Associates, P.C. ("Davis") represented Debtor prior to this underlying bankruptcy case's conversion from Chapter 11 to Chapter 7, and is owed \$25,127.50 in fees and costs from that representation. However, Debtor is subject to \$1,405,311.83 in secured tax claims and does not have sufficient funds to pay both the tax liens as well as Davis' attorney fees. Davis argues that its claim has priority over the tax liens under BAPCPA §724(b). Defendants United States of America on behalf of the Internal Revenue Service and the State of New Mexico, Taxation and Revenue Department (collectively "Defendants") disagree and have jointly moved to dismiss. For the reasons set forth herein, the Court denies the motion to dismiss.¹

Background

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This case was initiated with the filing of a chapter 11 petition by the Debtor on July 5, 2007. It was converted to chapter 7 on February 6, 2009. Davis filed a complaint (doc 1) and an amended complaint (doc 4) seeking the referenced relief based on its services rendered during the chapter 11 phase of the case. Defendants answered (doc 8)² and shortly thereafter filed a Joint Motion to Dismiss the Amended Complaint (“Joint Motion”) (doc 9). At the request of the Court, Defendants supplemented their Joint Motion (doc 13). Davis objected to the Joint Motion (doc 14), to which Defendants replied (doc 18).³

Effect of BAPCPA §724(b)(2)

The parties present opposing views of the meaning of §724(b)(2). The BAPCPA version of the statute reads as follows:

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title ... and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed...

(2) second, to any holder of a claim of a kind specified in section 507(a)(1)(except that such expenses other than claims for wages, salaries, or commissions that arise after the date of filing of the petition, shall be limited to expenses incurred under chapter 7 of this title, and shall not include expenses incurred under chapter 11 of this title), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;....

11 U.S.C. §724(b)(2) (2006). The Bankruptcy Technical Corrections Act of 2010 (“BTCA”), signed into law on December 22, 2010, during this adversary proceeding, made several additional changes to the language of §724(b)(2). As amended, §724(b)(2) now reads as follows:

(2) second, to any holder of a claim of a kind specified in section *507(a)(1)(C) or 507(a)(2)*(except that such expenses *under each such section*, other than claims for wages, salaries, or commissions that arise after the date of filing of the petition, shall be limited to expenses incurred under *this chapter*, and shall not include expenses incurred under chapter 11 of this title), *507(a)(1)(A), 507(a)(1)(B), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7)* of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;....

11 U.S.C. §724(b)(2) (2011) (changes italicized).

Davis' fees are §507(a)(2) expenses (“administrative expenses allowed under section 503(b)”). Davis therefore argues that the plain meaning of the BAPCPA version of the statute dictates that its attorney's fees be paid prior to the tax liens.⁴ Defendants, on the other hand, argue that the BAPCPA version of the statute was erroneously drafted and is widely recognized as such, and that the BTCA version of the statute is the one the Court ought to apply. Under that interpretation, only chapter 7 administrative expenses (and chapter 11 “wages, salaries and commissions”) obtain the benefit of being slotted into the “vacated” position of the subordinated taxes, and thus Davis' chapter 11 fees would be excluded from payment.

More specifically, Defendants argue that because §507(a)(1) deals only with domestic support obligations, it makes no sense that the parenthetical phrase immediately following the citation to that section talks about expenses of chapter 7 and 11 cases. Rather, what Congress sought was to address §503(b)(2) as well, which deals with many of the administrative claims against the estate, and thereby by means of the parenthetical phrase excludes chapter 11 administrative claims⁵ from the favored payment treatment. And in fact Congress made this amply clear with the

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BTCA version of the statute. Defendants also cite abundant authority for their position derived from the history of the statutory provisions and from various commentaries.

The conundrum created by Congress' poor drafting is not limited to this statute. Specifically, for example, in *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), the United States Supreme Court interpreted §330(a)(1), which had been amended in 1994 to delete payment of debtor's chapter 7 attorney fees as a chapter 7 administrative expense. *Id.* at 529-530. The problem arose because the previous version of the statute specifically allowed such a payment, and the 1994 legislation rather clearly deleted the words "or to the debtor's attorney" from §330(a)(1) in error (that is, unintentionally). *Id.* at 530-31. Faced with that dilemma, the court ruled that the statute be interpreted the way it read, not the way it "should have" read. "The starting point in discerning congressional intent is the existing statutory text." *Id.* at 534 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). "It is well established that 'when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Lamie*, 540 U.S. at 534 (quoting *Hartford Underwriters Ins. Co v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (further internal quotations omitted)). While "the statute is awkward...that does not make it ambiguous." *Id.* Thus *Lamie* requires this Court to interpret the BAPCPA version of the statute literally, and thereby to permit the Davis fees to be paid.

The literal reading of BAPCPA §724(b)(2) is that the parenthetical only applies to §507(a)(1) and not §507(a)(2). Defendant contends that this is an unacceptable interpretation for two reasons: (1) the literal reading is not reasonable and (2) legislative history and secondary sources show that the placement of the parenthetical was clearly a drafting error. The Court will first address the reasonableness of the statute.

Defendants contend that the parenthetical has no meaning if it applies only to §507(a)(1). The parenthetical creates a distinction between "expenses incurred under chapter 7" and "expenses incurred under chapter 11." 11 U.S.C. §724(b)(2) (2006). Defendants argue that §507(a)(1) covers only domestic support obligations, which are claims and not expenses. Thus, according to Defendants' reading, under the literal reading, the parenthetical has no meaning. There is no distinction it can create, because there are no expenses in §507(a)(1) for it to distinguish between. The parenthetical clearly cannot be intended to refer to domestic support obligations.

The flaw with Defendant's analysis of §724(b)(2), however, is that domestic support obligations are not the only kind of estate obligation referenced in §507(a)(1). 11 U.S.C. §507(a)(1)(C) also includes administrative expenses of the trustee:

(C) If a trustee is appointed or elected under 701, 702, 703, 1104, 1202 or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2) and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

If the parenthetical in BAPCPA §724(b)(2) is read to apply to §507(a)(1)(C) claims, the text is rather straightforward, since the trustee certainly may incur expenses under chapters 11 and chapter 7, including the "wages, salaries or commissions" mentioned in the parenthetical. 11 U.S.C. §724(b)(2). This meaning is supported by the fact that Congress, in enacting BTCA, left the parenthetical phrase still applicable to a portion of §507(a)(1) - specifically, subsection (a)(1)(C). 11 U.S.C. §724(b)(2) (2011). Thus, pre-BTCA, the §724(b)(2) parenthetical does have a reasonable meaning, limited though that might be: it makes a distinction between §507(a)(1)(C) administrative expenses incurred in chapter 7 and those incurred in chapter 11.

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Defendants have marshaled lengthy legislative history and secondary sources that rather clearly show that the placement of the parenthetical was a drafting error, and runs directly contrary to Congress' intention of eliminating the "shocking result" of "extinguish[ing] the tax lien of a city, a prior perfected property right, and ... redistribut[ing] public revenues to a group of Chapter 11 administrative creditors...." *Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.)*, 816 F.2d 238, 248 (6th Cir. 1987) (Merritt, Chief Judge, dissenting). However, given the fact that the BAPCPA version of the statute makes sense as it was written, the Court need not address the legislative history or secondary sources. "The language before us expresses Congress' intent ... with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary." *U.S. v. Ron Pair Enter., Inc.* [89-1 ustc ¶9179], 489 U.S. 235, 241 (1989) (ruling that postpetition interest is permitted on nonconsensual oversecured claims).

That being said, the Court concedes that Defendants and their sources are undoubtedly correct in asserting that Congress did not mean, when it passed BAPCPA, to continue to allow chapter 11 professional expenses to be paid from the funds that would otherwise go to a properly perfected property tax lien. BTCA makes that clear in correcting Congress' BAPCPA error, and the commentaries reinforce that conclusion. Had this issue arisen some years earlier, the then prevailing standards for statutory interpretation might well have resulted in a conclusion opposite what the Court rules today. *See, e.g., Dewsnup v. Timm*, 502 U.S. 410 (1992):

We conclude that respondents' alternative position, espoused also by the United States, although not without its difficulty, generally is the better of the several approaches. Therefore, we hold that §506(d) does not allow petitioner to "strip down" respondents' lien, because respondents' claim is secured by a lien and has been fully allowed pursuant to §502. Were we writing on a clean slate, we might be inclined to agree with petitioner that the words "allowed secured claim" must take the same meaning in §506(d) as in §506(a). But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.

Id. at 417. (Footnote omitted.) The *Dewsnup* Court went on to add the following:

When Congress amends the bankruptcy laws, it does not write "on a clean slate." *See Emil v. Hanley*, 318 U.S. 515, 521, 63 S.Ct. 687, 690-691, 87 L.Ed. 954 (1943). Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. *See United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380, 108 S.Ct. 626, 634, 98 L.Ed.2d 740 (1988). *See also Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563, 110 S.Ct. 2126, 2133, 109 L.Ed.2d 588 (1990); *United States v. Ron Pair Enterprises, Inc.* [89-1 ustc ¶9179], 489 U.S. 235, 244-245, 109 S.Ct. 1026, 1032-1033, 103 L.Ed.2d 290 (1989). Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent that they become "unsecured" for purposes of §506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Id. at 419-420. *See also Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 507 (1986), characterized in *Ron Pair Enter., Inc.* [89-1 ustc ¶9179], 489 U.S. at 243 as holding that section "554(a), which provides that 'the trustee may abandon any property of the estate that is burdensome to the estate,' does not give a trustee the authority to violate state health and safety laws by abandoning property containing hazardous wastes."

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In so ruling, the Court sympathizes with those faced with the difficulty of drafting legislation. Creating the text of a statute that accurately states the intention of the drafter (to say nothing of actually solving the problem addressed) while avoiding unintended consequences can be devilishly exacting and tedious. In consequence, courts have developed rules of construction whose general aim is to uphold a statute and discern and implement Congressional intent whenever reasonably possible - that is, to "make it work." And these rules even apply when the problem arises from fundamental negligence on the part of Congress, such as by hurriedly passing legislation without proofreading it.

But at what point does a court go from the judicial function of interpreting a statute to the legislative function of rewriting a statute, especially when the legislative history upon which a "rewriting" of the statute would be based is rather sketchy. *Lamie* illustrates that problem in that the majority found the legislative history to be ambiguous, *id.* at 538-542, and the concurrence found the legislative history in fact supported the statute as written. *Id.* at 542-43.

These uncertainties illustrate the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text.

Lamie, at 542. Once a Court begins to depart from the direct meaning of a given text in a search for what Congress intended (or perhaps should have intended), it quickly becomes difficult and even random where to draw the line between mere interpretation and rewriting the statute. In consequence, a less intrusive and more restrained approach, such as that exhibited in *Lamie*, seems appropriate. That leads to what the Court concedes is an anomalous result in this instance: an interpretation and application of the statute that honors its literal (and reasonable) wording while almost certainly running contrary to what Congress actually intended when it was rewriting the statute. Defendants reasonably will frown at the result, but they do have a remedy: have Congress change the statute, as it in fact has done in this case.

If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." *United States v. Granderson*, 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (concurring opinion). This allows both of our branches to adhere to our respected, and respective, constitutional roles. In the meantime, we must determine intent from the statute before us.

Id. at 542.

It is true in this case that, as Defendants emphasize, one of the sponsors of BTCA made clear his view that BTCA merely "correct[ed] these purely technical errors" and "[i]t is important to highlight on the record that this bill does not, and is not intended to, enact any substantive change to the Bankruptcy Code." Cong. Rec. H7158 (daily ed. Sept. 28, 2010) (Statement of Rep. Scott). An after-the-fact (indeed, half a decade after the fact) declaration by a sponsor of BTCA interpreting the statute is not a dependable mechanism for statutory interpretation. More to the point, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 178 (1803).

The disposition required by the text, that Davis be paid for its work prior to payment of the tax liens, is not clearly absurd, and thus this Court finds that BAPCPA §724(b)(2) did not differentiate between chapter 11 and chapter 7 attorneys fees.

Retroactivity

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However, Defendants have done *Lamie* one better: they have in their support BTCA, which in effect is a clear admission by Congress that it got the statute wrong in the BAPCPA version but is also an attempt to fix the problem after the fact. BTCA does not however suffice to change the result in this case.

The amended language makes clear that the parenthetical does not apply to all of §507(a)(1), but was rather only to 507(a)(1)(C), and additionally to §507(a)(2). If the 2010 amendments apply retroactively, then Defendants' tax liens have priority over Plaintiff's expense, and Davis will not get paid. Thus, whether the 2010 amendments apply retroactively is a dispositive issue in this proceeding.

The Supreme Court dealt with an analogous situation in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994):

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect.

Id. at 281. In the instant case, BTCA itself contains neither an effective date, nor any instruction about its application. Pub.L. No. 111-327, Bankruptcy Technical Corrections Act of 2010. Thus, this Court must infer whether the statute has retroactive effect.

Following *Landgraf*, a statute has retroactive effect when it “impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed”. *Landgraf*, 511 U.S. at 281.

Applying BTCA would have the effect of “impair[ing] a right a party possessed when he acted” since it would subordinate Davis' claim to the tax liens and thus prevent the claim from being paid. *Landgraf*, 511 U.S. at 281. Thus, applying BTCA would run afoul of the presumption against retroactivity. As the Supreme Court instructs, “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Id.* (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). The language of BTCA cannot be said to “require” retroactivity. Pub.L. No. 111-327, Bankruptcy Technical Corrections Act of 2010. The acknowledgment of an error and a command to apply the correcting statute retroactively are obviously two different things; BTCA is effectively the former without being the latter.

There is precedent in this district for precisely this result. *In re Meyer*, 355 B.R. 837 (Bankr. D.N.M. 2006), this Court ruled, based upon the wording of §§1325(b) and 707(b), as amended by BAPCPA, that over median income chapter 13 debtors may not take charitable contributions into account in computing their monthly plan payment. As that opinion was being written and issued, Congress amended the statute to change that interpretation, and so the Meyer debtors and the United States Trustee moved the Court to change its decision. *In re Meyer*, 357 B.R. 635 (Bankr. D.N.M. 2006). This Court reviewed the new statute⁶ and determined that it did not explicitly call for retroactive application. *Id.* at 637. The Court then ruled as follows:

“Absent manifest injustice or intent to the contrary, the court generally applies the law as it exists when a decision is made.” *Branding Iron Motel, Inc. v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.)*, 798 F.2d 396, 399 n. 2 (10th Cir.1986). In this case, the Court applied the law as it existed at the time of the decision. If Congress wishes to pass or amend a civil law and make it retroactive, it can do that. *See, e.g., Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 863 (8th Cir.2002). However, there is a judicial presumption against retroactivity that can only be overcome by a clear expression of congressional intent. *Id.* The Act contains no language that would make it retroactive. Therefore,

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there is no ground for reconsideration. If the Act were signed into law and amended to be retroactive, a Motion for Reconsideration might be well taken.

Finally, the Court finds that the Act is an acknowledgment that BAPCPA as originally enacted prevented above-median income debtors from deducting charitable contributions in arriving at their plan payment. Applying the statute as it existed when Debtors filed their petition rather than the way that Congress apparently had intended the statute to read may be harsh. But, “[o]ur unwillingness to soften the import of Congress’ chosen words even if we believe the words lead to a harsh outcome is longstanding.” *Lamie v. United States Trustee*, 540 U.S. 526, 538, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). This Court should not rewrite the statute as Congress may have intended; rather, it must enforce the law as written.

Id.

Conclusion

It is frequently remarked that “elections have consequences”, and sometimes that is even true. It is perhaps more often true that the passage of legislation has consequences. That is so in the instance of this statute in its BAPCPA form, although at least one of the consequences has been unintended.

For the foregoing reasons, Defendants’ Joint Motion to Dismiss should be denied, as the relief Davis requests is properly available. An order in conformity with this memorandum opinion will issue.

Footnotes

¹ The Court has subject matter and personal jurisdiction pursuant to 28 U.S.C. §§1334 and 157(b); this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (K); and these are findings of fact and conclusions of law as may be required by Rule 7052 F.R.B.P.

² Exemplifying an eminently utilitarian approach, the Trustee has merely asked for directions on how to distribute the funds (doc 8).

³ Davis generated a minor procedural brouhaha when it served the amended complaint by certified mail rather than merely first class mail. *See* F.R.B.P. 7004(b)(4) and (6). It then re-served the amended complaint and an alias summons on Defendants by first class mail, and Defendants, in another demonstration of utilitarianism, have ceased their protests on this subject.

⁴ Other than the chapter 7 trustee’s expenses and commissions and Davis’ fees, there are no claims to be paid under §§507(a)(1)-(7).

⁵ To be more accurate, there is in effect an exclusion from the exclusion; whereas chapter 11 administrative expenses for the most part may not (now) be paid from the funds that would otherwise go to pay the tax liens, post-petition wages, salaries and commissions may be paid. §724(b)(2) (parenthetical phrase).

⁶ The legislation was titled the Religious Liberty and Charitable Donation Clarification Act of 2006.

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4. Federal Tax Day - Current, J.3 Inherited IRAs Excluded from Debtors' Bankruptcy Estate (In re Johnson, BC-DC Wash.), (Jun. 6, 2011)

Individual retirement accounts (IRA) inherited by a nonspouse beneficiary debtor prior to bankruptcy were excluded from the debtors' bankruptcy estate under 11 U.S.C. §522(d)(12). The accounts qualified as "retirement funds" because they were transferred to the debtors' IRA through a direct trustee-to-trustee transfer from his deceased parents' IRAs and were exempt from taxation under Code Sec. 408. Section 522(d)(12) does not require the debtor to make contributions to the accounts in order for them to be excluded from the bankruptcy estate. Although the inherited IRAs did not contain any contributions from the debtor, they were originally deposited by the debtors' parents as retirement funds and retained that status when directly transferred to the debtors' IRA.

In re B.E. Johnson, BC-DC Wash., 2011-1 ustc ¶50,411

Other References:

- Code Sec. 408
- CCH Reference - 2011FED ¶18,922.1057
- Code Sec. 6871
- CCH Reference - 2011FED ¶40,630.365
- Tax Research Consultant
 - CCH Reference – TRC RETIRE: 66,800CCH Reference – TRC IRS: 57,060

USTC Cases, In re Brian Eugene Johnson and Toni Palzer-Johnson, Debtors., U.S. Bankruptcy Court, W.D. Washington, 2011-1 U.S.T.C. ¶50,411, (May 4, 2011)

In re Brian Eugene Johnson and Toni Palzer-Johnson, Debtors.

U.S. Bankruptcy Court, W.D. Washington, at Tacoma; 10-48287, May 4, 2011.

[Code Secs. 408 and 6871]

Bankruptcy: Inherited IRA: Retirement funds: Bankruptcy estate: Inclusion: Tax-exempt account.–

Individual retirement accounts (IRA) inherited by a nonspouse beneficiary debtor prior to bankruptcy were excluded from the debtors' bankruptcy estate under 11 U.S.C. §522(d)(12). The accounts qualified as "retirement funds" because they were transferred to the debtors' IRA through a direct trustee-to-trustee transfer from his deceased parents' IRAs and were exempt from taxation under Code Sec. 408. Section 522(d)(12) does not require the debtor to make contributions to the accounts in order for them to be excluded from the bankruptcy estate. Although the inherited IRAs did not contain any contributions from the debtor, they were originally deposited by the debtors' parents as retirement funds and retained that status when directly transferred to the debtors' IRA. **Back references: ¶18,922.1057 and ¶40,630.365.**

SNYDER, United States Bankruptcy Judge: THIS MATTER came before the Court on April 18, 2011, on an Objection to Exemption filed by the Chapter 7 Trustee (Trustee). At the conclusion of the hearing, the Court took the matter under advisement. This Memorandum Decision shall constitute Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts in this case are undisputed. Brian and Toni Johnson (Debtors) filed a voluntary Chapter 7 petition on October 6, 2010. In their amended Schedule B filed December 1, 2010, the Debtors list Individual Retirement Account (IRA) #7822, with a value of \$27,319.04, and IRA/Annuity Account #7171, with a value of \$30,411.46. On Schedule C, the Debtors claim the full value of both accounts exempt pursuant to 11 U.S.C. §522(d)(12).¹

Brian Johnson (Debtor) acquired the funds in Account #7822 as a beneficiary of his mother's IRA. Following her death, the retirement funds were transferred via a trustee-to-trustee transfer to an account the Debtor established on August 7, 2003, with the New York Life Insurance and Annuity Corporation (NYL). The Debtor elected distributions over his life expectancy and has been receiving distributions since 2003.

The Debtor acquired the funds in Account #7171 as a beneficiary of his father's IRA. Following his father's death, the retirement funds were transferred via a trustee-to-trustee transfer to an account the Debtor established with NYL on February 7, 2007. The Debtor elected distributions over his life expectancy and has been receiving distributions since 2007.

As the Debtor acquired the transferred retirement funds as a non-spouse beneficiary, both Account #7822 and Account #7171 are classified by the Debtor as inherited Individual Retirement Accounts (collectively referred to herein as "Inherited IRAs"). On December 29, 2010, the Trustee objected to the Debtors' claim of exemption in the Inherited IRAs arguing that they are not exempt under §522(d)(12).

Exemptions are to be liberally construed in favor of the debtor who claims the exemption. *In re Arrol*, 170 F.3d 934, 937 (9th Cir. 1999). A claim of exemptions is presumed valid and the party objecting to the exemptions has the burden of proving that the exemptions are not properly claimed. Fed. R. Bankr. P. 4003(c).

The Debtors in this case elected the federal exemptions and assert that the Inherited IRAs are exempt under §522(d)(12). This section provides that the following property may be exempted under §522(b)(2): "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." This section was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to "expand the protection for tax-favored retirement plans or arrangements that may not be already protected under Bankruptcy Code section 541(c)(2) pursuant to *Patterson v. Shumate*, or other state or Federal law." H.R. Rep. No. 109-31(I), at 63-64 (2005), *reprinted in* 2005 WL 832198, 2005 U.S.C.C.A.N. 88 (footnote omitted). Section 522(b)(3)(C), which is equivalent to §522(d)(12), was added to provide debtors in opt-out states the same retirement protections provided to debtors who are able to select the federal exemptions.

Thus, in order to be exempt under §522(d)(12), the funds must meet two requirements: (1) the amount the debtor seeks to exempt must be retirement funds, and (2) those retirement funds must be in an account that is exempt from taxation under one of the designated provisions of the Internal Revenue Code (IRC) set forth therein. *In re Nessa*, 426 B.R. 312, 314 (8th Cir. BAP 2010).

The Court is not aware of any controlling appellate case law on this issue in the Ninth Circuit. The issue of whether a debtor has the ability to claim an exemption in an inherited IRA, however, is not novel. As indicated by the Trustee, there are multiple prior decisions in which courts have concluded that such funds do not qualify as exempt.

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This Court, however, notes that most of these decisions are distinguishable in that the courts in those cases were analyzing the ability to exempt inherited IRAs under state exemption statutes, not the Bankruptcy Code. *See, e.g., In re Jarboe*, 365 B.R. 717 (Bankr. S.D. Tex. 2007); *In re Kirchen*, 344 B.R. 908 (Bankr. E.D. Wis. 2006); *In re Navarre*, 332 B.R. 24 (Bankr. M.D. Ala. 2004); *In re Greenfield*, 289 B.R. 146 (Bankr. S.D. Cal. 2003); *In re Sims*, 241 B.R. 467 (Bankr. N.D. Okla. 1999); *Robertson v. Deeb*, 16 So.3d 936 (Fla. Dist. Ct. App. 2009). The courts in the above cases generally determined that an inherited IRA did not meet the requirements of a particular state exemption statute because the statute was either worded or interpreted to require, in order to be exempt, a retirement purpose or contributions by an owner of the account. The majority of these decisions were also rendered pre-BAPCPA and therefore prior to the enactment of either §522(b)(3)(C) or §522(d)(12).

Since the enactment of BAPCPA, however, in those cases in which courts have analyzed the ability to exempt inherited IRAs under either §522(b)(3)(C) or § 522(d)(12), the clear trend appears to be to allow the exemption. *See Nessa*, 426 B.R. at 315; *Chilton v. Moser (In re Chilton)*, 2011 WL 938310, at *3 (E.D. Tex. March 16, 2011); *In re Mathusa*, 2011 WL 1134680, at *2 (Bankr. M.D. Fla. March 28, 2011); *In re Thiem*, 443 B.R. 832, 847 (Bankr. D. Ariz. 2011); *In re Weilhammer*, 2010 WL 3431465, at *6 (Bankr. S.D. Cal. Aug 30, 2010); *In re Tabor*, 433 B.R. 469, 476 (Bankr. M.D. Pa. 2010); and *In re Kuchta*, 434 B.R. 837, 844 (Bankr. N.D. Ohio April 16 2010).

In the recent case of *Chilton v. Moser*, 2011 WL 938310 (E.D. Tex. March 16, 2011), the United States District Court for the Eastern District of Texas (U.S. District Court), reversed the bankruptcy court in *In re Chilton*, 2010-1 USTC ¶50,275, 426 B.R. 612 (Bankr. E.D. 2010), which had held that an inherited IRA was not exempt. The debtor in *Chilton*, similar to the Debtor in the case before this Court, was the account beneficiary on her mother's IRA. When her mother passed away, the debtor transferred the funds through a direct trustee-to-trustee transfer to an inherited IRA account. When the debtor filed bankruptcy, she claimed the property exempt under §522(d)(12). Unable to find any published case law analyzing an exemption in an inherited IRA under §522(d)(12), the Texas bankruptcy court concluded that the an inherited IRA was not equivalent to a traditional IRA for purposes of determining whether the account contains "retirement funds" and was not a traditional IRA exempt from taxation under 26 U.S.C. §408(e)(1). The debtor subsequently appealed to the U.S. District Court.

The U.S. District Court in *Chilton* reviewed five decisions issued subsequent to the bankruptcy court's decision and noted that in all five cases an inherited IRA was found to be exempt under either §522(d)(12) or §522(b)(3)(C). *See Nessa*, 426 B.R. at 315; *Thiem*, 443 B.R. at 847; *Weilhammer*, 2010 WL 3431465 at *6; *Tabor*, 433 B.R. at 476; and *Kuchta*, 434 B.R. at 844. The U.S. District Court adopted the reasoning set forth by those courts and reversed the bankruptcy court.

Although this Court is aware of a few recent decisions that have reached the opposite conclusion, the Court is not persuaded by their analysis. For instance in *In re Klipsch*, 435 B.R. 586, 589 (Bankr. S.D. Ind. 2010), the bankruptcy court determined that a debtor could not claim an exemption in an inherited IRA under Indiana law. This decision, however, was correctly criticized by the court in *Thiem* for failing to conduct any analysis of the issue under §522(b)(3)(C) or §522(b)(4)(C). *Thiem*, 443 B.R. at 843. This Court agrees that such an analysis is necessary to properly evaluate this issue.

After a thorough review of all of the relevant case law, it appears that the prevailing view in those cases where the courts correctly analyzed the ability to claim an exemption in an inherited IRA under either §522(d)(12) or §(b)(3)(C) is to find the exemption valid. This Court agrees with that analysis and also finds the decisions by the 8th

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Circuit Bankruptcy Appellate Panel (BAP) in *Nessa*, the U.S. District Court for the Eastern District of Texas in *Chilton*, and the bankruptcy court in *Thiem* to be particularly persuasive.

Applying the two-prong analysis set forth above to the facts of this case, it is undisputed that both accounts of the Debtor's parents qualified as "individual retirement accounts" as that term is defined under 26 U.S.C. §408(a), and were the parents' retirement funds prior to their death. As the Debtor was not the account owner's spouse, his interest in the IRAs is characterized as an inherited IRA. 26 U.S.C. §408(d)(3)(C)(ii). Under the IRC, an inherited IRA may be transferred via a direct trustee-to-trustee transfer without any tax consequences. 26 U.S.C. § 408(d)(3). It is undisputed that the Debtor transferred the funds in both accounts via a direct trustee-to-trustee transfer. Thus, the only evidence before the Court is that the Debtor's interest in the funds is an inherited IRA that was transferred in compliance with the IRC.

The Trustee, however, argues that the Inherited IRAs do not constitute "retirement funds" because they do not contain any contributions from the Debtor. 11 U.S.C. §522(d)(12), however, contains no such requirement. "Section 522(d)(12) requires that the account be comprised of retirement funds, but it does not specify that they must be the debtor's retirement funds." *Nessa*, 426 B.R. at 314. The plain language of a statute is determinative under federal law. *Patterson v. Shumate*, 504 U.S. 753, 757, 112 S.Ct. 2242, 2246 (1992). By its plain terms, all that the Bankruptcy Code requires is that the funds at issue be retirement funds. Even though the Inherited IRAs do not contain the Debtor's own retirement funds, they were originally deposited by his parents as retirement funds and retained their status as such when properly transferred to the Debtor's account in compliance with the IRC.

Secondly, in order to qualify for an exemption under §522(d)(12), the funds must also be exempt from taxation under one of the designated sections of the IRC. This requirement is also met in this case. The Inherited IRAs are exempt from taxation under 26 U.S.C. § 408. According to this section, "[a]ny individual retirement account is exempt from taxation." 26 U.S.C. §408(e)(1). This Court agrees with the conclusion of other courts that have addressed this issue and determined that it is irrelevant whether traditional and inherited IRAs have different rules regarding distribution, use and the taxation of funds. The plain language of 26 U.S.C. §408(e) provides that "any" individual retirement account is exempt from taxation. The statute does not distinguish between an inherited IRA and a traditional IRA. *See Nessa*, 426 B.R. at 315; *Chilton*, 2011 WL 938310, at *3; and *Thiem*, 443 B.R. at 845 (all holding that an inherited IRA is tax exempt under 26 U.S.C. §408).

If the Debtor in this case had instead chosen to withdraw the funds from the Inherited IRAs, the distribution would have been taxable as income and thus not exempt. 26 U.S.C. §408(d)(1). A beneficiary, however, is not required to withdraw the funds. The beneficiary may elect to transfer the funds via a trustee-to-trustee transfer without incurring any tax liability. The Debtor in this case elected to transfer rather than withdraw the funds. As such, these funds are still exempt under 26 U.S.C. §408(e) of the IRC.

This Court's conclusion that the Debtor's funds in the Inherited IRAs are exempt under §522(d)(12) is further supported by §522(b)(4)(C). This section provides that a direct transfer from an account under section 408 of the IRC does not lose its exempt status due to such transfer. The funds at issue in this case were originally held in an IRA under 26 U.S.C. § 408. Upon the owner's death, the Debtor transferred such funds to his Inherited IRAs through a direct trustee-to-trustee transfer. According to §522(b)(4)(C), such transfer did not negate the Debtor's ability to claim such funds as exempt under §522(d)(12).

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Based on the analysis set forth above, this Court concludes that the Debtor's Inherited IRAs are exempt under §522(d)(12). The Trustee's objection is overruled.

Footnotes

¹ Unless otherwise indicated, all "Code," Chapter and Section references are to the Federal Bankruptcy Code, 11 U.S.C. §§101-1532, as amended by BAPCPA, Pub. L. 109-8, 119 Stat. 23, as this case was filed after October 17, 2005, the effective date of most BAPCPA provisions.

5. USTC Cases, *In re Mitchell J. Wogoman and Holly L. Wogoman, Debtors. Mitchell J. Wogoman and Holly L. Wogoman, Plaintiffs v. Internal Revenue Service, Defendant., U.S. Bankruptcy Court, D. Colorado, 2011-2 U.S.T.C. ¶50,593, (Aug. 19, 2011)*

A debtor couple's tax liabilities were nondischargeable in bankruptcy because their untimely tax return was filed after the IRS's assessment of their tax deficiencies. The Form 1040 filed by the debtors after the IRS filed a substitute return and assessed their tax obligation did not constitute a "return" for the purposes of 11 U.S.C. 523(a)(1)(B)(i).

In re Wogoman, BC-DC Colo., 2011-2 ustc ¶50,593; TRC FILEBUS: 3,102.

USTC Cases, *In re Mitchell J. Wogoman and Holly L. Wogoman, Debtors. Mitchell J. Wogoman and Holly L. Wogoman, Plaintiffs v. Internal Revenue Service, Defendant., U.S. Bankruptcy Court, D. Colorado, 2011-2 U.S.T.C. ¶50,593, (Aug. 19, 2011)*

In re Mitchell J. Wogoman and Holly L. Wogoman, Debtors. Mitchell J. Wogoman and Holly L. Wogoman, Plaintiffs v. Internal Revenue Service, Defendant.

U.S. Bankruptcy Court, D. Colorado; 11-11044-SBB, August 19, 2011.

[Code Secs. 6020 and 6871]

Bankruptcy: Tax liabilities: Nondischargeable tax debt: Untimely tax returns: Filing after petition date: Exceptions to discharge: Substitute returns.—

A debtor couple's tax liabilities were nondischargeable in bankruptcy because their untimely tax return was filed after the IRS assessed their tax deficiencies. The couple filed their Form 1040, Individual Income Tax Return, for the tax year at issue after the IRS created a substitute return under Code Sec. 6020(b) assessed the liability; therefore, the couple's Form 1040 did not constitute a "return" for purposes of section 523(a)(1)(B)(i) of the Bankruptcy Code. Because the tax debt was assessed before the debtors' filed their Form 1040, it was a debt for which no return was filed; therefore, the debt was nondischargeable. **Back references: ¶35,242.22 and ¶40,630.175.**

Brooks, Bankruptcy Judge: THIS MATTER comes before the Court for consideration of:

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1. The Motion for Summary Judgment filed by the Internal Revenue Service (the “Defendant”) on July 1, 2011,¹ to which no pleading in opposition has been filed by the Mitchell J. Wogoman and Holly L. Wogoman (the “Wogomans”).²
2. The Motion for Summary Judgment filed by The Wogomans on July 6, 2011,³ and the IRS's Opposition thereto filed on July 20, 2011.⁴

The Court, having reviewed the pleadings and the within case file, makes the following findings of fact, conclusions of law, and enters the following Order.

I. Summary

In their original Complaint, the Wogomans are seeking to discharge income taxes, penalties and interest for the 1998, 2000, 2001, 2002, and 2005. The IRS admits that the Wogomans have no tax liability for the 2000 tax year and that the Wogomans' income tax liabilities for the 1998, 2002, and 2005 tax years are dischargeable. The parties, however, dispute whether the Wogomans' income tax liability, including penalties and interest, for the 2001 tax year is dischargeable.⁵

The Court hereby concludes that the Wogomans have no tax liability for the 2000 tax year and that the Wogomans' income tax liabilities for the 1998, 2002, and 2005 tax years are dischargeable. The Court concludes, however, that for the reasons set forth herein, the 2001 federal individual income tax liability, together with penalties and interest, is not dischargeable under 11 U.S.C. §523(a)(1)(B)(i).

II. Issue

The sole issue before the Court is whether the Wogomans' 2001 tax liability, including penalties and interest, is excepted from discharge because it is not a debt for which a return was not “filed” within the meaning of 11 U.S.C. §523(a)(1)(B)(i).

III. Jurisdiction

The Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334. The matters at issue constitute a “core proceeding” pursuant to 28 U.S.C. §157(b). Venue is proper in this Court pursuant to 28 U.S.C. §1409. Further, the parties do not dispute the jurisdiction or venue of this Court in this matter.

IV. Standard for Summary Judgment

“The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁶ Generally, the Court must examine the factual record and make reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.⁷ Once the moving party has demonstrated the absence of material facts in dispute, then the burden shifts to the opposing party to demonstrate material facts are in dispute and thus summary judgment is not appropriate. In this case most, if not all of the material facts are not disputed.

V. Parties' Compliance with this Court's Standing Order 2004-1-SBB & L.B.R. 7056-1

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It appears that neither the Wogomans nor the IRS have complied with this Court's requirements for dispositive motions.⁸ In particular, the Wogomans have failed to file a response to the IRS's Motion for Summary Judgment. Consequently, this Court could rule in favor of IRS's Motion for Summary Judgment simply because the Wogomans did not provide opposition to the Motion. On the other hand, among other pleading inadequacies, the IRS has not set forth the burden of proof and the elements of the claim that must be proved in order to prevail.

Nevertheless, the Court believes that it has sufficient undisputed facts, affidavits, and admissible evidence before this Court such that it can conclude that the IRS is entitled to judgment as a matter of law.⁹

VI. Material Undisputed Facts

A. Statement Regarding Material Undisputed Facts

This Court has, in *accord* with former FED.R.CIV.P. 56(d) and, now, current Fed.R.Civ.P. 56(g), attempted to specify those facts that *are not* genuinely in dispute and those facts that *are* genuinely in dispute. To the extent feasible, the Court examines motions for summary judgment before it pursuant to the standards prescribed in Rule 56(c) and (e).

As noted in the footnotes, the following findings of fact are set forth in the Plaintiff's Motion for Summary Judgment. The IRS has, in *accord* with Rule 56(c) and this Court's Standing Order 2004-1-SBB and L.B.R. 7056-1, responded to Plaintiff's stated findings of fact and conclusions of law (unlike the Wogomans in their *lack of response* to the IRS's Motion for Summary Judgment). Consequently, the Court is adopting those findings of fact expressly admitted herein and as set forth below.¹⁰ The Court is also accepting the statement of undisputed facts as contained in the IRS's Motion for Summary Judgment as undisputed because no response was filed to the IRS's Motion for Summary Judgment and these are also set forth below and reference to the same is contained in the footnotes. With respect to any outstanding contested material facts, this Court concludes that there are no remaining material facts that are genuinely in dispute. The only remaining issue here is a question of law.

B. The Material Undisputed Facts

On January 20, 2011, the Wogomans filed a Voluntary Petition along with appropriate supporting schedules seeking protection under Chapter 7 of the United States Bankruptcy Code.¹¹

On February 18, 2011, the Wogomans filed this Adversary Proceeding seeking to determine the discharge of the Wogomans' 1998, 2000, 2001, 2002 and 2005 income tax liability.¹² The IRS filed its Answer on March 21, 2011, and its Amended Answer on March 25, 2011.¹³

In its Answer, the IRS stated that the Wogomans have no outstanding tax liability for the year ending December 31, 2000.¹⁴ In its Answer, the IRS stated that the Wogomans' income tax liability for the 2005 tax year is dischargeable.¹⁵ In paragraph 8 of its Amended Answer, the IRS admitted that the Wogomans' tax liabilities for the 1998, 2002, and 2005 tax years are dischargeable.¹⁶

The Court entered its Order Discharging the Wogomans on May 16, 2011, in the Chapter 7 bankruptcy case underlying this Adversary Proceeding.¹⁷

The only year for which the dischargeability of tax liabilities remains in question is 2001.¹⁸

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The Wogomans' tax return for the year ending December 31, 2001, was due on April 15, 2002.¹⁹ The Wogomans failed to file their federal income tax return for the year ending December 31, 2001, on or before the April 15, 2002 due date and did not request an extension to file their 2001 Return.²⁰

The Wogomans' tax return for the year ending December 31, 2001, was due more than three years prior to the filing of the Wogomans' petition.²¹

The Wogomans' tax preparer sent a letter to the Wogomans, dated October 27, 2003, noting that they had not filed a tax return for their 2001 federal income taxes and needed to take action.²²

Because of the Wogomans' failure to file a tax return, in 2004, the IRS commenced an examination to determine the Debtors' delinquent 2001 income tax liability. At the conclusion of its examination, the IRS issued a statutory notice of deficiency permitting the Wogomans to challenge the IRS's proposed tax deficiency in the United States Tax Court. *After the Wogomans failed to file a timely Tax Court Petition, on February 21, 2005, the IRS assessed the deficiency.*²³

On August 1, 2006, the Wogomans delivered to the IRS a signed Form 1040 for the tax year ending December 31, 2001.²⁴

The 2009 and 2011 Transcripts state that on April 15, 2002, an Extension of Time to File was filed by the Wogomans extending the filing date to August 15, 2002.²⁵

The 2009 and 2011 Transcripts each state that the IRS received a payment toward their 2001 tax liability of \$29,471.00 on April 15, 2002.²⁶

The 2009 and 2011 Transcripts each state that the Wogomans and the IRS established an Installment Agreement on March 23, 2007.²⁷

The 2009 and 2011 Transcripts each shows that approximately 20 payments were made by the Wogomans in the amount of \$551 each pursuant to an Installment Agreement.²⁸

The Wogomans have engaged, at least, three tax professionals to assist them in filing their 2001 tax returns, including Linda Donnelly, JK Harris & Company and Michael Noyes.²⁹

The IRS made its original assessments of tax, interest and penalties on February 21, 2005, according to the Declaration of Yvonne Tibbs. An abatement of the Wogomans' 2001 income tax (and associated penalties) was made on November 13, 2006.³⁰

The Wogomans do not recall there being any indication that there were problems with their 2001 tax filing or that the IRS did not believe they filed their 2001 tax returns until sometime later in 2005.³¹

The Wogomans were not contemplating bankruptcy when the August 1, 2006, return was filed.³²

VII. Discussion

A. 11 U.S.C. §523(a)(1)(b)(i) Exceptions to Discharge

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Exceptions to discharge are to be narrowly construed.³³ The burden of proving that the Wogomans' tax liabilities are nondischargeable ultimately lies with the IRS.³⁴ The burden of proof required to establish an exception to discharge is a preponderance of evidence.³⁵

11 U.S.C. §523(a)(1)(b)(i) provides that:

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 —

(b) with respect to which a return, or equivalent report or notice, if required

(i) was not filed or given.

Section 523(a) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Pre-BAPCPA, a number of Circuits held that an individual federal income tax return filed *after* an assessment did not qualify as a return for purposes of 11 U.S.C. §523(a)(1)(B)(i).³⁶ The Eighth Circuit disagreed, instead concluding that a document that on its face evinces an honest and reasonable attempt to satisfy the tax laws qualifies as a return, whether or not it was filed after an assessment of taxes had been made.³⁷ In a post-BAPCPA case, a bankruptcy court, agreeing with the dissent by Judge Easterbrook in *In re Payne*, concluded that a late-filed federal income tax returns prepared by a debtor in *response* to the filing of a substitute return filed by the IRS *cannot qualify as a return for purposes of determining dischargeability*.³⁸

There is very little precedent in this Circuit or elsewhere *since the enactment of BAPCPA* with respect to the issue before this Court. Moreover, this Court must address the confluence of two laws, (a) the Internal Revenue Code of 1986, specifically, 26 U.S.C. §6020(b), and (b) the Bankruptcy Code, in particular, 11 U.S.C. §523(a)(1)(B)(i) and an unnumbered paragraph at the end of 11 U.S.C. §523(a).

B. The Arguments Before the Court

The IRS asserts that for bankruptcy discharge purposes, a debt for an income tax recorded by an assessment should be considered *independently* of any part of the tax for the same tax year that may be assessed *later*. By way of example, the IRS contends that if at the time of the assessment no return had been filed, then the debt recorded by the assessment is a debt with respect to which a return was *not* filed and 11 U.S.C. §523(a)(1)(B)(i) applies to except it from discharge. If a debtor then later files a tax return that reports an additional amount of tax, only the portion of the tax that was not previously assessed would be dischargeable debt based upon that subsection. The portion of the tax that was assessed by way of a return filed consistent with 26 U.S.C. §6020(b), before a Form 1040 was filed voluntarily by the Wogomans, would be a debt for which no return was “filed” within the meaning of section 523(a)(1)(B)(i) because at the time of the assessment the debtor had not met the filing requirements for that portion of the tax and the assessed portion was not calculated based upon the tax reported on the tax return.

The Wogomans respond to the IRS's argument asserting that Courts have rejected that argument on the ground that it requires reading a requirement into the Bankruptcy Code that is not explicitly there. In other words, Plaintiff asserts that 11 U.S.C. §523(a)(1)(B) does not state that the return must be filed prior to an assessment by the IRS in order to be effective for dischargeability purposes. Plaintiffs maintain that would lead to an absurd result - a result that would mean a debtor who prepares substitute returns, could never discharge taxes.

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C. Conclusions

In yet another example of Congress's drafting skills, at the very end of 11 U.S.C. §523(a), there is still another hanging paragraph in BAPCPA, which states:

For the purposes of this subsection, the term “return” means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.³⁹

26 U.S.C. §6020 provides for the preparation of a tax return by the Internal Revenue Service (“IRS”). Specifically, the statute provides:

(a) Preparation of return by Secretary. - If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, and in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

(b) Execution of return by Secretary. -

(1) Authority of Secretary to execute return. - If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) Status of returns. - - Any return so made and subscribed by the Secretary shall be *prima facie* good and sufficient for all legal purposes.

The Tenth Circuit and other courts have found that Forms 1040 submitted *only after the filing of a substitute return by the IRS and an assessment of tax by the IRS do not constitute “returns”* under 11 U.S.C. §523(a)(1)(B)(i).⁴⁰ The hanging paragraph in 11 U.S.C. §523(a) implements or further reinforces the Tenth Circuit's holding in *In re Bergstrom* [91-2 usc ¶50,558], wherein the Court held that substitute returns under 26 U.S.C. §6020(b), as here, do not constitute filed returns in the absence of the signature of the taxpayer.⁴¹ It would seem that Congress specifically intended to exclude “returns” filed under 26 U.S.C. §6020(b).

Moreover, it would appear that whether or not the Form 1040 submitted by the Wogomans is deemed a “return” for the purpose of 11 U.S.C. §523(a)(1)(B)(i), the tax debt here was based upon the IRS's examination and assessment on February 21, 2005, and not any return filed by the Wogomans. Moreover, the 2001 tax obligation, by way of the 26 U.S.C. §6020(b) assessment, was established well before the Form 1040 was filed in 2006 and, therefore, it is not dischargeable under the facts and circumstances of this case.⁴²

The Court concludes that the tax debt here is nondischargeable because it came into existence prior to the filing of the Form 1040 by the Wogomans in 2006.

VIII. Order

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IT IS THEREFORE ORDERED that:

1. The Motion for Summary Judgment filed by the IRS is GRANTED, in part, and DENIED, in part. The Motion for Summary Judgment filed by the Wogomans is GRANTED, in part, and DENIED, in part.
2. The Wogomans have no tax liability for the 2000 tax year and that the Wogomans' income tax liabilities for the 1998, 2002, and 2005 tax years are dischargeable.
3. Judgment will enter in favor of the IRS and against the Wogomans with respect to the 2001 federal individual income tax liability, together with penalties and interest. Said income tax liability, together with penalties and interest is determined to be not dischargeable under 11 U.S.C. §523(a)(1)(B)(i).

IT IS FURTHER ORDERED that the Trial in this matter scheduled for **August 30, 2011** is **VACATED**. This ruling further resolves and **GRANTS** the Joint Motion to Vacate Evidentiary Hearing filed on August 17, 2011.⁴³

Footnotes

¹ Docket #15.

² Ostensibly, this Court *could* construe the Plaintiff's own Motion for Summary Judgment docketed at number 17 as a response to the IRS's Motion, however, it was not designated as such and it does not comply with this Court's Standing Order 2004-1-SBB or L.B.R. 7056-1(b).

³ Docket #17.

⁴ Docket #22. Also resolved by this Order is the Joint Motion to Vacate Hearing filed on August 19, 2011 (Docket #26).

⁵ Per the IRS's filed proof of claim, the unpaid balance for the 2001 taxes is \$276,687.17.

⁶ FED.R.CIV.P. 56(a), made applicable to adversary proceedings by FED.R.BANKR.P. 7056.

⁷ *Thournir v. Meyer*, 909 F.2d 408, 409 (10th Cir. 1990).

⁸ See Standing Order 2004-1-SBB and L.B.R. 7056-1.

⁹ FED.R.CIV.P. 56(c)(2).

¹⁰ These findings forth herein are verbatim to those set forth in the Plaintiff's Motion for Summary Judgment with only stylistic alterations and changes for correctness and/or continuity.

¹¹ Plaintiff's Motion for Summary Judgment, ¶ 1, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 1, p. 1; Docket # 1 in Case No. 11-11044-SBB.

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¹² Plaintiff's Motion for Summary Judgment, ¶ 2, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 2, p. 1

¹³ Plaintiff's Motion for Summary Judgment, ¶ 3, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 3, p. 1.

¹⁴ Plaintiff's Motion for Summary Judgment, ¶ 4, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 4, p. 1.

¹⁵Plaintiff's Motion for Summary Judgment, ¶ 5, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 5, p. 1¹⁶Plaintiff's Motion for Summary Judgment, ¶ 6, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 6, p. 2.¹⁷Plaintiff's Motion for Summary Judgment, ¶ 7, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 7, p. 2; Docket # 24 in Case No. 11-11044 SBB.¹⁸ Plaintiff's Motion for Summary Judgment, ¶ 8, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 8, p. 2.

¹⁹ Plaintiff's Motion for Summary Judgment, ¶ 9, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 9, p. 2.

²⁰ IRS's Motion for Summary Judgment, ¶ 3, p. 2.

²¹ Plaintiff's Motion for Summary Judgment, ¶ 10, p. 5; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 10, p. 2.

²² IRS's Motion for Summary Judgment, ¶4, p. 2

²³ IRS's Motion for Summary Judgment, ¶ 5, p. 2. The assessment of the deficiency on February 21, 2005, is an essential finding in this case for the subsequent legal conclusions.

²⁴ Plaintiff's Motion for Summary Judgment, ¶ 12, p. 6; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 12, p. 2.

²⁵ Plaintiff's Motion for Summary Judgment, ¶ 13, p. 6; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 13, p. 2.

²⁶ Plaintiff's Motion for Summary Judgment, ¶ 14, p. 6; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 14, p. 2.

²⁷ Plaintiff's Motion for Summary Judgment, ¶ 15, p. 6; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 15, p. 2.

²⁸ Plaintiff's Motion for Summary Judgment, ¶ 16, p. 6; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 16, p. 2.

²⁹ Plaintiff's Motion for Summary Judgment, ¶ 18, p. 7; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 18, p. 2.

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³⁰ Plaintiff's Motion for Summary Judgment, ¶ 19, p. 7; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 19, p. 2.

³¹ Plaintiff's Motion for Summary Judgment, ¶ 20, p. 7; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 20, p. 2.

³² Plaintiff's Motion for Summary Judgment, ¶ 22, p. 7; IRS's Opposition to Plaintiff's Motion for Summary Judgment ¶ 22, p. 2.

³³ *Belco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997); *Driggs v. Black (In re Black)*, 787 F.2d 503, 505 (10th Cir. 1986).

³⁴ *In re Crawley* [2000-1 ustc ¶50,461], 244 B.R. 121 (Bankr. N.D. Ill. 2000)(the party seeking to establish an exception to the discharge of a debt bears the burden of proof).

³⁵ *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755.

³⁶ *See In re Hindenlang* [99-1 ustc ¶50,214], 164 F.3d 1029 (6th Cir.), *cert. denied*, 528 U.S. 810 (1999); *In re Payne*, 431 F.2d 1055 (7th Cir. 2005); *In re Moroney* [2004-1 ustc ¶50,141], 352 F.3d 902 (4th Cir. 2003); *In re Hatton* [2000-2 ustc ¶50,651], 220 F.3d 1057(9th Cir. 2000).

³⁷*In re Colsen*, 446 F.3d 836 (8th Cir. 2006).³⁸*In re Creekmore*, 401 B.R. 748, 751 (Bankr. N.D. Miss. 2008). The *Creekmore* court concluded that:

The definition of "return" in amended §523(a) apparently means that a late filed income tax return, unless it was filed pursuant to §6020(a) of the Internal Revenue Code, can never qualify as a return for dischargeability purposes because it does not comply with the "applicable filing requirements" set forth in the Internal Revenue Code, concerning the timeliness of filing tax returns...³⁹Emphasis added.⁴⁰*See, e.g., In re Bergstrom* [91-2 ustc ¶50,558], 949 F.2d 341, 343 (10th Cir. 1991); *see also, In re Crawford*, 115 B.R. 381, 383 (Bankr. N.D. Ga. 1990); *In re Pruitt*, 107 B.R. 764, 766 (Bankr. D.Wyo. 1989); and *In re Hofmann*, 76 B.R. 853, 854 (Bankr. S.D. Fla. 1987).⁴¹949 F.2d 341, 343 (10th Cir. 1991).⁴²*See United States v. Hindenlang (In re Hindenlang)* [99-1 ustc ¶50,214], 164 F.3d 1029, 1035 (6th Cir. 1999)(after the government had assessed a deficiency, the filing of a Form 1040 served no tax purpose and the IRS met its burden to demonstrate that the debtor's actions were not an honest and reasonable effort to satisfy the tax law).

⁴³ Docket #26.