In the United States Bankruptcy Court

for the Northern District of Iowa

THOMAS ADOLPH LENZ and KAREN LENZ *Debtors.*	Bankruptcy No. 87-00501F
THOMAS ADOLPH LENZ and KAREN LENZ *Plaintiffs* vs. UNITED STATES OF AMERICA *Defendant*	Adversary No. X87-0207F

ORDER RE MOTION FOR SUMMARY JUDGMENT

The matter before the Court is the Motion for Summary Judgment by Plaintiffs-Debtors Thomas and Karen Lenz and the Cross-Motion for Summary Judgment by Defendant United States of America. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

I.

Debtors Thomas Lenz and Karen Lenz (Debtors) filed a complaint to determine the dischargeability of certain taxes on June 12, 1987. Debtors filed a Motion for Summary Judgment on November 16, 1987. IRS's Motion to Dismiss for lack of personal jurisdiction was denied and a summons and notice was reissued. IRS resisted Debtors' Motion for Summary Judgment and cross-motioned for Summary Judgment on January 4, 1988. On April 14, 1988, Debtors informed the Court that the parties had stipulated to facts relevant to a determination of the complaint. The matter was submitted to the Court on April 21, 1988.

The parties stipulate that Debtors' 1985 income tax liability of $16,635.00 includes $13,926.08 of recaptured investment credit. Debtors argue that the amount attributable to the investment credit recapture is not an income tax which is non-dischargeable under 11 u C. § 523. They rely on a 1985 U.S. Claims Court case, Berkshire Hathaway, Inc. **v.** United States, 8 Cls. Ct. 780 (1985), aff'd., 802 F.2d 429 (Fed. Cir. 1986).

IRS counters that the amount of the investment credit recapture is indeed an income tax which is non-dischargeable under § 523. IRS relies on a previous decision of this Court, In re Higgins, 29 B.R. 196 (Bankr. N.D. Iowa 1983), in which it was determined that recaptured investment credit is an income tax.

II.

Summary judgment is proper when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Sommers v. Budget Marketing, Inc., 667 F.2d 748, 749 (8th Cir. 1982); Bankr. R. 7056. The facts are considered in a light most favorable to the nonmovant and the nonmovant is entitled to all reasonable inferences which may be derived from the underlying facts as shown by the pleadings, depositions and affidavits presented. Sommers, 667 F.2d at 749-50. If the moving party fails to show the absence of a genuine issue of material fact, summary judgment will be denied even though there are no conflicting evidentiary matters. Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 393 (8th Cir. 1986).

The non-dischargeability of certain taxes is set forth under 11 U.S.C. § 523. It provides:

> a. A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt--
> 1. for a tax . . . --
> A. of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;
> B. with respect to which a return, if required-
> i. was not filed; or
> ii. was filed after the date on which such return was last due, under applicable law or under any extension, after two years before the date of the filing of the petition; or
> C. with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax[.]

11 U.S.C. § 523(a)(1). In other words, if a tax claim is of a type described above, it is non-dischargeable. Since there is no contention that Debtors' 1985 return was filed untimely or fraudulently, the Court will examine § 523(a)(1)(A), and consequently, the kind of tax specified under § 507(a)(7)(A)[(1)] to determine whether an assessment for recaptured investment credit is a tax which is non-dischargeable.

The kind of tax specified in § 507(a)(7)(A)[(2)] is "a tax on or measured by income or gross receipts . . ." 11 u.s.c. § 507(a)(7)(A) (emphasis added). Therefore, if recaptured investment credit as established by the appropriate provisions of Title 26 is an income tax, it will be non-dischargeable under § 523.

III.

Summary judgment will enter in favor of IRS. Upon consideration of 26 U.S.C. § § 38 and 47(a), the Court can only conclude that a recaptured investment credit is indeed an income tax which is non-dischargeable under § 523 since it is essentially a reassessment of that amount of a prior year's income tax burden which was allowed as a credit. Se 26 U.S.C. § § 38 and 47(a).

Debtors' reliance on the Court of Claims' decision in Berkshire, 8 Cls. Ct. 780, is misplaced. The court in Berkshire held that payments of recaptured investment credit pursuant to 26 U.S.C. § 47 did not constitute a tax for determining an exception under 26 U.S.C. § 6655(d)(2) to a penalty keyed to corporations' estimated quarterly income tax payments. Id. Debtors have failed to show why that conclusion is applicable here. To the contrary, this Court has previously held that recaptured investment credit is an income tax specified in § 507(a)(7)(A).[(3)] Higgins, 29 B.R. at 201. The Court finds no basis for disturbing that conclusion here.

ORDER

IT IS HEREBY ORDERED that the cross-motion for summary judgment by Defendant United States (Internal Revenue Service) is granted. Judgment shall enter accordingly.

SO ORDERED THIS 23rd DAY OF MAY, 1988.

William L. Edmonds
Chief Bankruptcy Judge

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1. Section 507(a)(2) which incorporates § 502(f) by reference is not applicable here. Moreover, Debtors only dispute that recaptured investment credit is not an income tax under § 523(a)(1). Accordingly, statute of limitation or assessed/assessable issues under § 507(a)(7)(A)(i through iii) are not addressed herein.

2. At the time of the Court's decision in In re Higgins, 29 B.R. 196 (Bankr. N.D. Iowa 1983), the provisions of § 507(a)(7) were set forth at § 507(a)(6).

3. See n. 2, page 4.