

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

MARION J. KEMPERS and GENEVA  
KEMPERS

Bankruptcy No. X87-02412S

Debtors.

Chapter 7

MARION J. KEMPERS and GENEVA  
KEMPERS

Adversary No. X88-0004S

Plaintiffs

vs.

STATE OF IOWA  
DEPARTMENT OF REVENUE and  
UNITED STATES OF AMERICA, INTERNAL  
REVENUE SERVICE

Defendants.

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### **ORDER RE MOTION FOR SUMMARY JUDGMENT; DISCHARGEABILITY OF INCOME TAX LIABILITY**

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The matter before the court is a motion for summary judgment filed by United States of America. A hearing was held on the motion on August 19, 1988 in Sioux City, Iowa. The motion was taken under advisement. The court was subsequently informed that the matter was settled. A telephonic status conference was held on March 22, 1989. At the status conference, the parties stated that the settlement proposal was rejected by the Internal Revenue Service. Debtors have settled with the Iowa Department of Revenue.

The court now issues its ruling which shall constitute findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

#### **FINDINGS OF FACT**

1. The debtors, Marion J. Kempers and Geneva Kempers, filed a joint chapter 7 voluntary petition on November 25, 1987.
2. The Internal Revenue Service examined the debtors' tax returns for 1982, 1983, and 1984. Upon examination of the returns, the IRS determined that the debtors owed additional taxes for these years.
3. The debtors subsequently petitioned the United States Tax Court for a redetermination of their tax liabilities for 1982, 1983 and 1984. A stipulation of settlement was entered into between the debtors

and IRS. As a result, the U. S. Tax Court entered an order on May 8, 1987 finding that the debtors owed income tax deficiencies in the following amounts:

<b>Taxable Year Ended</b>	<b>Income Tax</b>
12-31-82	\$1,939
12-31-83	1,379
12-31-84	1,566

4. On June 26, 1987, the debtors were assessed an income tax deficiency in the amounts indicated in the paragraph above.

5. The debtors filed a complaint against the State of Iowa and United States of America on January 8, 1988 seeking a determination that the taxes due the United States of America and the State of Iowa are dischargeable. A stipulated order was entered on September 2, 1988 concluding the dispute between the debtors and the Iowa Department of Revenue.

6. A motion for summary judgment was filed by the United States on July 25, 1988. The United States requested that the court find that the debtors' federal income tax liabilities for the years 1982 and 1983 are non-dischargeable.

## DISCUSSION

### I.

"Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds." Agristor Leasing v. Farrow, 826 F.2d 732; 734 (8th Cir. 1987), citing Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987). "Where the moving party establishes the absence of any genuine issue of material fact and the opposing party submits no evidence in rebuttal, summary judgment is justified." Stovall v. City of St. Lovil, 614 F.2d 619, 621 (8th Cir. 1980). The debtors and IRS agree that there are no disputes as to any material issues of fact.

### II.

The non-dischargeability of certain taxes is set forth under 11 U.S.C. 5 523. It provides:

- a. (A) Discharge under §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 a 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 any manner to evade to defect such tax.

11 U.S.C. §523(a)(1). If a tax claim is of a type described above, it is non-dischargeable. The debtors' tax returns for 1982 and 1983 were timely filed and there is no claim of fraud. Therefore, the court must examine §523(a)(1)(A) and the priority of claims established under §507(a)(2) and 507(a)(7) to determine whether IRS's claims for taxes are non-dischargeable.

Section 507(a)(7)(A) of Title 11 provides a seventh priority for allowed unsecured claims of governmental units, only to the extent that such claims were for:

- A. a tax on or measured by income or gross receipts--
  - i. for a tax year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
  - ii. assessed within 240 days, plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
  - iii. other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

11 U.S.C. §507(a)(7)(A). Debtors are seeking a discharge of their 1982 and 1983 taxes. Since the returns for the tax years in question were due more than three years before debtors filed their petition on November 25, 1987, 11 U.S.C. 507(a)(7)(A)(i) is inapplicable. Section 507(a)(7)(A)(iii) is also inapplicable in this case. Therefore, the court must determine whether 11 U.S.C. §507(a)(7)(A)(ii) establishes a priority for the IRS's tax claims and therefore renders the tax claims non-dischargeable.

The IRS argues that the taxes were assessed within 240 days of the filing of the bankruptcy petition and therefore are entitled to priority under 11 U.S.C. §507(a)(7). IRS argues that the income tax liabilities for the years 1982 and 1983 are non-dischargeable as a matter of law since the assessed tax is entitled to priority under 11 U.S.C. §507(a)(7).

The debtors argue that the taxes in question were for tax years more than three years between the filing of the petition and therefore are not priority tax claims. The debtors say that it is the due date that the tax returns were filed that is the operative date to use when determining whether taxes are dischargeable. The income tax deficiencies for the tax years 1982 and 1983 were assessed on June 26, 1987. The IRS assessed deficiencies of \$1,939 for the taxable year ended December 31, 1982 and \$1,379 for the taxable year ended December 31, 1983. The assessment was made 152 days prior to the bankruptcy petition date of November 25, 1987.

This court believes that the assessment date of June 26, 1987 should be used to determine whether the tax deficiencies for 1982 and 1983 are dischargeable. Section 6203 of Title 26 (Internal Revenue Code) provides that: "The assessment shall be made by recording the liability of the taxpayer in the

office of the Secretary in accordance with the rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment." 26 U.S.C. 6203. The regulations provide that the date of the assessment is a date the assembly record is signed by an assessment officer. 26 C.F.R. §301.6203-1 (1988). There does not appear to be any dispute that the tax deficiencies for 1982 and 1983 were assessed on June 26, 1987.

The court does not agree with debtors' argument that the assessment date is the date upon which the tax returns for 1982 and 1983 were actually filed. The returns for 1982 and 1983 were timely filed and it appears that the debtors paid any taxes they thought were due at that time. However, the IRS subsequently reviewed the tax returns for 1982 and 1983 and through a stipulation between the debtors and the IRS, the tax court determined that there was a deficiency in the amount of taxes paid in 1982 and 1983. Therefore, the IRS assessed the debtors on June 26, 1987 for the deficiency. This court sees no reason why the assessment date should relate back to the original due date of the 1982 and 1983 tax returns. This would be contrary to the Internal Revenue Code and regulations which indicate that the assessment date is a date the summary record is signed by an assessment officer. See In re Kostogiou, 74 B.R. 202, 203 (Bankr. N.D. Ohio 1987).

As a general rule, any income tax must be assessed within three years after a return was filed. 26 U.S.C. §6501(a). However, the commencement of a proceeding in the Tax Court suspends the running of the three-year period of limitation. 26 U.S.C. §6503(a).

The United States Tax Court entered an order on May 9, 1987 finding that the debtors owed the income tax deficiencies. Therefore, the assessment of the tax deficiencies on June 26, 1987 was within the period of limitation as set forth in 26 U.S.C. §6503(a)(1).

### III.

The IRS also argues that any pre-petition interest and postpetition interest are non-dischargeable. The debtors argue that any post-petition interest or penalty on non-dischargeable taxes is dischargeable.

This issue has previously been decided by the bankruptcy court for this district and affirmed by the district court. Hanna v. United States of America (In re Hanna), slip op. no. 86-0502S (Bankr. N.D. Iowa, June 10, 1987); aff'd. Case No. C87-405 (N.D. Iowa, Feb. 22, 1988). The court in Hanna held that any prepetition interest owed to IRS for a non-dischargeable priority debt is non-dischargeable. Id. at 3. The court in Hanna also concluded that post-petition interest charged by the IRS is a dischargeable debt, relying on the language of §502(b)(2) and "fresh start" policy of bankruptcy. id. at 5. Additionally, the court concluded that post-petition penalties charged by the IRS are a dischargeable debt. Id.

The IRS has appealed to the Eighth Circuit the district court's decision in Hanna concerning the dischargeability of postpetition interest. The Eighth Circuit Court of Appeals has not rendered its decision in the Hanna case. Therefore, this court must follow the district court's decision in Hanna.

Any pre-petition interest on the tax deficiencies is nondischargeable. However, any post-petition interest or penalties on the tax liability is dischargeable.

### ORDER

IT IS ORDERED that the Internal Revenue Service's motion for summary judgment is granted.

IT IS FURTHER ORDERED that the 1982 and 1983 tax deficiencies are non-dischargeable.

IT IS FURTHER ORDERED that pre-petition interest and penalties on the tax deficiencies are non-dischargeable.

IT IS FURTHER ORDERED that post-petition interest and penalties are dischargeable.

Judgment shall enter accordingly.

SO ORDERED THIS 14th OF APRIL, 1989.

William L. Edmonds  
Bankruptcy Judge