

In the United States Bankruptcy Court

for the Northern District of Iowa

ORLAND J. DUNNE and LAVERNE M. DUNNE
Debtors.

Bankruptcy No. X88-01469D
Chapter 7

IOWA DEPARTMENT OF REVENUE AND FINANCE
Plaintiff

Adversary No. X90-0096D

vs.

ORLAND J. DUNNE
Defendant.

MEMORANDUM OF DECISION AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

The matter before the court is a motion for summary judgment filed by Plaintiff Iowa Department of Revenue and Finance ("IDORF"). The motion concerns an adversary proceeding brought by IDORF objecting to the discharge of Orland J. Dunne's liability for Iowa state inheritance taxes. This is a core proceeding under 28 U.S.C. 157(b)(2)(I).

I.

Orland and Laverne Dunne, husband and wife, filed a voluntary chapter 7 bankruptcy petition on September 27, 1988. In early 1989, a discharge order entered. Later in the year, the case was closed. On November 30, 1989, the court reopened the case at the request of IDORF to permit it to file this adversary proceeding regarding the non-dischargeability of unpaid Iowa inheritance tax.

The basis for the IDORF complaint stems from Dunne's role as executor of the probate estate of his cousin, Pearl O'Hare. O'Hare died in Dubuque County on April 5, 1984 leaving a will naming Dunne as executor and sole beneficiary. The Iowa inheritance tax return for O'Hare's estate was due on January 5, 1985. Dunne belatedly filed the inheritance tax return with IDORF on May 23, 1985. On September 4, 1986, IDORF assessed Dunne, in his capacity as executor, \$7,450.61 in additional inheritance taxes. To correct errors committed in computing penalty charges and in valuing property in O'Hare's estate, IDORF reduced its original assessment to \$2,294.46 plus accrued interest. Dunne's tax indebtedness to IDORF through the end of March 1991 was \$3,593.28.

IDORF contends that Dunne's personal liability as an executor for unpaid Iowa inheritance tax is non-dischargeable in bankruptcy pursuant to 11 U.S.C. 507(a)(7)(C) as incorporated by 11 U.S.C. 523(a)(1)(A). IDORF argues that Iowa law treats state inheritance taxes as trust fund taxes. Dunne rejects IDORF's position, claiming that Iowa's inheritance tax is actually either a gross receipts tax or an excise tax as described by 11 U.S.C. 507(a)(7)(A) and (E). Consequently, Dunne contends that since this "gross receipts or excise tax" was due more than three years before the date of this bankruptcy filing, it is a non-priority, dischargeable, unsecured debt.

IDORF filed its motion for summary judgment accompanied by supporting brief, affidavits and "Statement of Uncontested Facts." Dunne has not filed any responsive documents to IDORF'S motion. A telephonic hearing concerning this matter was held on March 5, 1991.

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. Fed.R.Bankr.P. 7056; see also, Sommers v. Budget Marketing, Inc., 667 F.2d 748, 749 (8th Cir. 1982). Dunne does not dispute the facts as set forth in IDORF's "Statement of Uncontested Facts." He does contend that IDORF is not entitled to judgment as a matter of law on the sole issue of the case-whether the inheritance tax is a non-dischargeable trust fund tax.

The non-dischargeability of certain taxes is set forth under 11 U.S.C. 523 which provides in relevant part:

- 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 period 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; ...

The pertinent provisions of 507(a)(7) are (A), (C) , and (E) "Gross receipts" and "excise" taxes as described respectively in 507(a)(7)(A) and 507(a)(7)(E) are dischargeable if the applicable tax return was due more than three years before the petition date. In contrast, taxes described in 507(a)(7)(C), often referred to as "trust fund" taxes, are never dischargeable no matter how long the unpaid tax obligations have been outstanding. In re Torres, 117 B.R. 379, 384 (Bankr. N.D. Ill. 1990); In re King, 117 B.R. 339, 341 (Bankr. W.D. Tenn. 1990); In re Avant, 110 B.R. 264, 265 (Bankr. W.D. Texas 1989).

Although a state's determination as to what constitutes a tax for 507(a)(7) purposes is not binding on a bankruptcy court, it is persuasive and is entitled to great weight. New Jersey v. Anderson, 283 U.S. 483, 491 (1906); see also, City of New York v. Feiring, 313 U.S. 283, 285 (1941). The inheritance tax presently at issue qualifies as both an excise and trust fund tax under Iowa and federal laws.⁽¹⁾

The general definition of an excise tax includes a "tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. . . ." Black's Law Dictionary, 506 (5th Ed. 1979). The Iowa Supreme Court has described Iowa's inheritance tax as an excise tax. In re Horner's Estate, 234 Iowa 624, 12 N.W.2d 166, 167 (1943). Further, the legislative history accompanying 11 U.S.C. 507(a)(7)(E) also treats "estate taxes" as excise taxes. 124 Cong. Rec. 34016 (Senate), reprinted in 1978 U.S. Code Cong. & Admin. News 6505, 6567; 124 Cong. Rec. 32416 (House), reprinted in 1978 U.S. Code Cong. & Admin. News 6436, 6498.

A tax under 507(a)(7)(C), often called a "trust fund tax", is one that is required to be collected or withheld and for which the debtor is liable in whatever capacity. Rosenow v. Illinois Dept. of Revenue, 715 F.2d 277, 280 (7th Cir. 1983). Iowa Code 450.57 pertaining to inheritance tax requires that "Every personal representative . . . shall deduct the tax from the property or shall collect the tax from the legatee or person entitled to the property. Additionally, Iowa Code 450.5 and 450.7(3) impose personal liability upon personal representatives for payment of all inheritance taxes."⁽²⁾

The statutory language of 507(a)(7) creates an overlap between the provisions for trust fund and excise taxes. DeChiaro v. New York State Commission, 760 F.2d 432, 435 (2nd Cir. 1985). This overlap exists in this case because of Dunne's dual role as executor and beneficiary. If Dunne were merely a beneficiary, the unpaid inheritance tax, as an excise tax, would be dischargeable if he could show it were stale. Section 507(a)(7)(E). But as an executor, Dunne's failure to pay the tax may place the dischargeability of the debt at risk despite its age. Section 507(a)(7)(C).

Those appellate courts addressing the issue of overlap between excise and trust fund taxes have held that although a tax may be an excise tax as contemplated in 507 (a) (7) (E) , it may nonetheless be deemed a trust fund tax pursuant to 507(a)(7)(C), if it is required to be collected. DeChiaro, 760 F.2d at 435; In re Groetken, 843 F.2d 1007, 1014 (7th Cir. 1988); Rosenow, 715 F.2d at 280; In re Shank, 792 F.2d 829, 833 (9th Cir. 1986). As noted by the Second Circuit Court

of Appeals in DeChiaro:

Congress may have intended to differentiate between two categories of excise taxes: those not collected from third parties, which are dischargeable if stale, and those collected from third parties, which are not dischargeable. Alternatively, Congress may have intended to differentiate between two categories of trust fund taxes: those that are also sales taxes and hence dischargeable if stale, and all other taxes collected from third parties, which are not dischargeable. . . . our reading of the legislative history persuades us that the overlap between these provisions must be resolved by holding that Congress intended to differentiate between two categories of excise taxes and that the trust fund tax provision excepts from discharge those excise taxes required to be collected from third parties.

760 F.2d at 435.

While the aforementioned appellate court cases involved excise taxes in the form of state retail sales taxes and not inheritance taxes, the court finds this difference to be immaterial to the outcome of this case. Dunne's situation is similar to that of the retailer-debtors in DeChiaro, Groetken, Rosenow and Shank. In those cases, the retailers attempted to discharge unpaid retail sales taxes as excise taxes due more than three years prior to the filing of bankruptcy. Although the courts agreed that the sales taxes constituted excise taxes, they found also that excise taxes which are required to be collected are treated also as non-dischargeable trust fund taxes under 507(a)(7)(C). By similarly applying 507(a)(7)(C), the undersigned concludes that Dunne, in his role as executor, was required to collect the state inheritance tax pursuant to Iowa Code 450.57. Dunne, as executor, remained personally liable for all inheritance taxes to be paid. Iowa Code 450.7(3). The court agrees with the foregoing line of circuit court cases holding that Congress intended liability for all trust fund taxes, including those categorized as excise taxes, to survive bankruptcy. DeChiaro, 760 F.2d at 435, n.5.

ORDER

IT IS ORDERED that the motion for summary judgment filed by Iowa Department of Revenue and Finance is sustained. Judgment shall enter that the indebtedness of Orland J. Dunne to the Iowa Department of Revenue and Finance, arising in Dunne's capacity as Executor of the Estate of Pearl O'Hare, is a non-dischargeable debt pursuant to 11 U.S.C. 507(a)(7)(C). The amount of such debt as of March 31, 1991 was \$3,593.28.

SO ORDERED ON THIS 23rd DAY OF MAY, 1991.

William L. Edmonds
Bankruptcy Judge

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1. The court could not find, nor has Dunne provided, any authority for his claim that the Iowa inheritance tax is a "income or gross receipts tax" pursuant to 507(a)(7)(A). However, determining whether the tax is an "income or gross receipts tax" is not necessary since the court concludes that even if a tax is a "income or gross receipts tax" as those terms are used in 507(a)(7)(A), it nonetheless falls also within the ambit of 507 (a) (7) (C) .
 2. Iowa Code 450.5 provides in pertinent part: "Any person becoming beneficially entitled to any property or interest in property by any method of transfer as specified in this chapter, and all personal representatives . . . of estates or transfers taxable under this chapter, are respectively liable for all taxes to be paid by them respectively" (emphasis added). Similarly, Iowa Code 450.7(3) provides: "The proceeds from . . . sale, exchange, mortgage, or pledge shall be held by the personal representative subject to the same priorities for the payment of the tax as existed with respect to the property before the transaction, and the personal representative is personally liable for payment of the tax to the extent of the proceeds."