

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

GALE E. FERDIG
Debtor.

Bankruptcy No. 94-51263XS
Chapter 7

GALE E. FERDIG
Plaintiff

Adversary No. 94-5141XS

vs.

STATE OF IOWA (Department of Revenue)
Defendant.

ORDER RE: MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXTEND DEADLINE FOR BRIEF

Plaintiff Gale E. Ferdig has filed a motion for summary judgment on his complaint to determine the dischargeability of Iowa income tax liability. Hearing was held May 2, 1995. Donald H. Molstad appeared for the debtor. Dale T. Baker appeared for the Iowa Department of Revenue and Finance.

Ferdig filed a Chapter 7 petition on August 4, 1994. On September 15, 1994, Ferdig filed a complaint alleging that his Iowa income tax liability for tax years 1988, 1989 and 1990 is dischargeable. Ferdig's claim is that the taxes are dischargeable because they do not come within the exceptions in 11 U.S.C. §523(a)(1)(A) and (B), by reason of the dates on which the tax returns were due, the returns were filed and taxes were assessed, in relation to the date on which Ferdig filed his Chapter 7 petition. The IDOR concedes that the timing rules under §523(a)(1)(A) and (B) do not apply. The IDOR has submitted affidavits to which are attached copies of documents relating to Ferdig's tax liability for tax years 1987, 1988, 1989 and 1990. (Document Nos. 13, 14.) The affidavits and attachments confirm Ferdig's claim as to dischargeability under 523(a)(1)(A) and (B).

However, the IDOR's claim, stated in its answer to the complaint and in the pretrial statement, is that Ferdig's tax liability is nondischargeable under 11 U.S.C. §523(a)(1)(C) for willful attempt to evade or defeat the tax. The IDOR asserts that Ferdig willfully failed to pay his tax obligations despite his financial ability to do so. The IDOR argues that such willful failure constitutes willful evasion of the tax. The date of the tax year is not relevant in a claim under §523(a)(1)(C). Brackin v. United States (In re Brackin), 148 B.R. 953, 956 (Bankr. N.D. Ala. 1992).

The IDOR cites a recent case for its theory of proof of a §523(a)(1)(C) claim. In United States v. Toti (Matter of Toti), 149 B.R. 829 (E.D. Mich. 1993), *aff'd* 24 F.3d 806 (6th Cir. 1994), *cert. denied* 115 S.Ct. 482 (1994), the court held the debtor's tax liability nondischargeable. The district court rejected the bankruptcy court's conclusion, 141 B.R. 126, 130-31, that the taxing authority must show an act of

commission to prove the debtor's willful attempt to evade tax. The district court found it sufficient that the debtor knew he had a responsibility to pay taxes and that he voluntarily, consciously and intentionally failed to file and pay taxes when he had the financial ability to do so. Toti, 149 B.R. at 834. The court cited cases concluding that a deliberate choice to pay other creditors rather than taxes constitutes a willful failure to pay taxes. Id. at 833. The parties in Toti had stipulated that the debtor had made a profit in his business and had no other debts or liabilities that precluded him from paying his taxes. Id. at 830.

Other courts have required the taxing authority to offer proof of specific conduct showing fraudulent intent or an effort to mislead or conceal in order to except tax liability from discharge for willful attempt to evade taxes under 11 U.S.C. §523(a)(1)(C). A court may infer a willful attempt to defeat or evade taxes from such conduct as "keeping a double set of books, making false entries or alterations or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, [or] handling of one's affairs to avoid making the records usual in transactions of the kind." Gathwright v. United States ((In re Gathwright), 102 B.R. 211, 216 (Bankr. D. Or. 1989), citing Spies v. United States, 317 U.S. 492, 63 S.Ct. 364 (1943). The badges of fraud in a claim of willful attempt to evade taxes include "significant understatements of income made repeatedly, failure to file tax returns, repeatedly filing returns late, implausible or inconsistent behavior by the taxpayer, and failure to cooperate with ... taxing authorities." Berzon v. United States (In re Berzon), 145 B.R. 247, 250 (Bankr. N.D. Ill. 1992). Whether this court agrees with Toti or follows the reasoning in Garthwright, the court must determine whether the factual circumstances of Ferdig's failure to pay taxes create the inference of a willful attempt to evade the tax.

The court concludes that the motion for summary judgment should be denied. The IDOR's claim requires findings of fact as to Ferdig's disposition of his income during the tax years in question and Ferdig's ability to pay the tax. Ferdig claims the Farmers Home Administration received all proceeds of sale which generated income and tax liability in the tax years at issue. The IDOR claims that Ferdig had the financial ability to pay his taxes, shown in part by his ability to graduate from college in 1992. The IDOR argues that Ferdig chose to spend his money attending college rather than paying his taxes. The circumstances of Ferdig's disposition of his income and his ability to pay taxes in the years in question are issues of material fact that preclude resolution by summary judgment.

At the hearing on Ferdig's motion for summary judgment, the court set May 12, 1995 as the deadline for filing briefs. The IDOR has filed a motion to extend the deadline. The motion will be denied. The IDOR will not be prejudiced by denial of its motion for an extension because the ruling on the motion for summary judgment is in its favor.

ORDER

IT IS ORDERED that Ferdig's motion for summary judgment is denied.

IT IS FURTHER ORDERED that the IDOR's motion to extend the time for filing briefs is denied.

SO ORDERED THIS 17th DAY OF MAY 1995.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U.S. mail to: U. S. Trustee, Dale Baker, Don Molstad, Wil Forker, and U. S. Attorney.