THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE JAMES CURTIS PALMER, Debtor.	))))))	CASE NO. 97-52403
	))	ADV. NO. 97-5150
JAMES CURTIS PALMER, Plaintiff,	)))))	CHAPTER 7
v.		JUDGE MARILYN SHEA-STONUM
U.S.A. INTERNAL REVENUE SERVICE, Defendant.		OPINION

This matter came before the Court for a trial on the issue of the dischargeability of the debtor's tax obligation for the years 1991 and 1992. Appearing at the trial were James Bickett, counsel for the defendant, and Robert Whittington, counsel for the plaintiff. The Court heard the testimony of the debtor James Curtis Palmer. After the trial the Court provided counsel the opportunity on June 12, 1998 to comment on the application of 11 U.S.C. § 523(a)(1)(C) to this case. The Court considered that testimony and all other evidence admitted during the trial. This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (I). This Court has jurisdiction to enter a final order in this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and the Standing Order of Reference entered in this District on July 16, 1984.

Prior to the trial in this matter, the Court entered an order denying the defendant's motion for summary judgment. That order and opinion entered on March 23, 1998 is hereby incorporated in this order and is attached as Annex A. In the order denying the defendant's motion for summary judgment, this Court found that the dischargeability of the debtor's tax obligation for the years 1991 and 1992 turned on whether the three year reach back period provided for in 11 U.S.C. § 507(a)(8)(A)(i) was tolled during the pendency of the debtor's prior

Chapter 13 case which was filed on February 25, 1993 and not dismissed until June 1, 1995. When the calculation of time periods under 11 U.S.C. § 507(a)(8)(A)(i) is done in relation to the filing date of this case as relates to the tax years 1991 and 1992, the claim of the IRS for those taxes would be rendered a general unsecured claim. As stated in this Court's prior opinion in this case, the three year reach back period is not automatically tolled or extended pursuant to the operation of 11 U.S.C. § 105 by the filing of a prior bankruptcy absent proof of debtor misconduct. See Annex A at 10. 11 U.S.C. § 105 provides in part, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The invocation of § 105 is not necessary or appropriate in this situation, particularly in light of the evidence presented to the Court in this case and recited below.

In addition, the broad scope afforded by the Sixth Circuit to the language in 11 U.S.C. § 523(a)(1)(C) supports the conclusion that the invocation of § 105 in this situation is not necessary or appropriate. In section 523(a)(1)(C), Congress provided for the non-dischargeability of debts for a tax resulting from the debtor willfully attempting in any manner to evade or defeat a tax. The Sixth Circuit held that a plain reading of that section includes both acts of commission and acts of omission which were done by the debtor voluntarily, consciously and intentionally to evade or defeat a tax. *Toti v. United States(In re Toti)*, 24 F. 3d 806, 808 (6th Cir. 1994); *United States v. Sumpter (In re Sumpter),* 64 F.3d 663 (6th Cir. 1995); *Myers v. Internal Revenue Service (In re Myers)*, 216 B.R. 402 (6th Cir. BAP 1998). This section of the Bankruptcy Code directly addresses a debtor who is attempting to evade or defeat a tax, including, without limitation, through the manipulation of the bankruptcy process and protections of the automatic stay, than does the result of the routine resort to 11 U.S.C. §§ 105, sought by the IRS. The IRS seeks to give §§ 507(a)(8)(A) and 523(a)(1)(A) the opposite meaning of the statutory language.[1] Section 105(a) should not be used

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[1]This Court recognizes that the Court in *In re Turner*, 195 B.R. 476 (Bankr. N.D. Ala. 1996), after a thorough discussion of the subject, reaches a different conclusion with respect to the use of 11 U.S.C. § 523(a)(1)(C) in these situations. However, the Court notes that the *Turner* court was constrained by the interpretation given to that section by the Eleventh Circuit in *In re Haas,* 48 F.3d 1153 (11th Cir. 1995).

to override the language of other sections of the Bankruptcy Code. *Architectural Building Components v. McClarty (In re Foremost Manufacturing Company)*, 137 F.3d 919, 924 (6th Cir. 1998).

UNDISPUTED FACTS

The debtor, James Curtis Palmer, filed a petition for relief under Chapter 13 of the Bankruptcy Code sometime during the 1980's and completed the plan around 1984. Then, on February 25, 1993, the debtor filed another petition for relief under Chapter 13 of the Bankruptcy Code. The debtor's plan, which provided for a 2% dividend to unsecured creditors, required payments of $175.00 twice a month for 60 months to the trustee. Government Exhibit("GX") E. Each week the debtor contributed $90.00 through payroll deductions. Plaintiff's Exhibit("PX") 1. On February 2, 1995, the debtor's required monthly payment was increased to $390.00 a month. PX 2. Then, on February 9, 1995, the IRS amended its proof of claim filed on June 29, 1993. The amended proof of claim indicated a priority claim in the amount of $5,116.30 and unsecured claim in the amount of $79.89.

By letter dated April 18, 1995, the trustee informed the debtor that the plan was underfunded by $8,997.51. PX 3. As a result of the plan being underfunded the debtor's payment was eventually increased to $149.00 per week or approximately $600.00 per month. PX 4 and PX 5. In addition, to his Chapter 13 payments, the debtor was making payments of $200 per month in child support during the pendency of his Chapter 13 plan. Despite the fact that the debtor obtained a second job which he worked part-time to help make the payments, the debtor still could not make the increased monthly payments. As a result the debtor obtained a voluntary dismissal of his Chapter 13 on June 1, 1995.

The Chapter 13 Trustee's final report shows the total funds received and disbursed pursuant to the debtor's plan to be $10,607.00. Those funds were distributed as follows: $651.75 to administrative claimants; $2,469.82 to priority claimants; $4,095.19 plus $2,422.56 in interest to secured claimants; and $153.62 to unsecured claimants. The IRS, as a priority claimant, received $861.00 of the $2,469.82 distribution to priority claimants from the Chapter 13 case.

The debtor's current Chapter 7 case, the facts of which are more fully

discussed in Annex A, was not filed until August 27, 1997, more than two years after the voluntary dismissal of his second Chapter 13 case. From June, 1995 until August, 1997, the IRS assessed the debtor's income tax liabilities for the tax years 1990, 1991, 1992 and 1994. In addition, the IRS filed a tax lien on October 1, 1996 for each year of tax liabilities at issue at that time. However, the IRS did not at any time seek to garnish the debtor's wages to collect the debtor's income tax liabilities.

This Court finds that the defendant failed to show any misconduct on the part of the debtor, let alone any misconduct sufficient to toll or extend the three year period provided for in 11 U.S.C. § 507(a)(8)(A)(i) pursuant to 11 U.S.C. § 105. Further, the IRS failed to show that the debtor willfully attempted in any manner to evade or defeat a tax sufficient to render the tax liability for the years 1991 and 1992 non-dischargeable. In fact the defendant was emphatic about its routine right to look to § 105 to overlay an *ad hoc* tolling into the time calculations in § 507(a)(8)(A) in cases where there had been any prior bankruptcy case filed by the same debtor. The defendant declined to offer evidence of intentional manipulation by the debtor, seeking instead a ruling by this Court that §§ 507(a)(8)(A) and 105(a) should be employed by all bankruptcy courts to rewrite § 523(a)(1)(A). The defendant further declined the specific opportunity to present evidence of manipulation by the debtor in order to trigger § 523(a)(1)(C).

Therefore, this Court finds that the debtor’s tax obligations for the years 1991 and 1992 are dischargeable.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 3/23/98