

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 13-17204
)
)
MINNIE M. BOWERS SMITH and) Chapter 11
JAMES SMITH,)
)
) Chief Judge Pat E. Morgenstern-Clarren
Debtors.)
) **ORDER RE IRS'S MOTION TO STRIKE**

The key dispute in this chapter 11 case is between the debtors and the United States of America through its agent the Internal Revenue Service. The parties litigated part of the dispute through an adversary proceeding, leaving some issues to be resolved through an objection to the IRS's claim. The parties now are unable to agree about the scope of the issues to be heard at the June 2, 2015 evidentiary hearing on the debtors' objection to the claim. As a result, the IRS filed a motion to strike the debtors' supplemental brief. The debtors oppose the motion.¹

The debtors filed an objection to the claim identifying these issues:²

1. Is the IRS required to return wages levied on August 13, 2013 because the 10-year statute of limitations expired before the levy?³
2. Is the IRS's March 1, 2004 tax assessment invalid because the IRS did not send certain required notices?⁴

¹ Docket 96, 102.

² Docket 62.

³ Docket 62 at 7.

⁴ Docket 62 at 11.

3. Did the IRS fail to mail a Notice of Assessment and Demand for Payment to the debtors in connection with tax year 2001?⁵

4. Has the IRS overstated the amount of taxes for tax year 2006 which is more than the amount shown on the debtors' amended 1040X for that year?⁶

5. What is the appropriate interest rate to be used for payment on the priority tax claim?⁷

6. Is the IRS entitled to postpetition interest on its secured tax claim?⁸

7. Is the IRS entitled to postpetition interest on its general unsecured claim?⁹

The debtors' supplemental brief raises a new ground for objecting: that the non-employee compensation that the debtors failed to report to the IRS is incorrect because the IRS did not substantiate by any other means that the debtors received such income for the 2001 tax period.¹⁰

Discussion

I.

The IRS argues that the new ground should be excluded because the debtors did not include it in their objection to the IRS claim and the issue would require discovery, thus forcing an adjournment of the hearing. The debtors respond that when they filed their objection they did

⁵ Docket 62 at 15.

⁶ Docket 62 at 18.

⁷ Docket 62 at 19.

⁸ *Id.*

⁹ Docket 62 at 20.

¹⁰ Docket 92.

not know the nature or source of the unreported income. And it was not until the IRS recently subpoenaed the debtors' former authorized tax power of attorney and obtained his records that the debtors obtained this information. They contend that this makes it "newly-discovered evidence" that supports raising the new claim.

This is, as the court has noted before, a long-running dispute between the IRS and the debtors that is set for an evidentiary hearing on June 2, 2015. The evidence is not newly-discovered in the sense that it could not have been obtained by the debtors at any time in the years since they filed their chapter 11 case. Neither is this a situation in which the IRS withheld information in its possession, turning it over only at the last minute. It is instead evidence that the IRS obtained from a third party through a subpoena, an action that the debtors could just as easily have taken to obtain the information at an earlier time.

The debtors also argue that they referred to this issue during a pretrial conference. Be that as it may, mentioning something in an informal setting is not the equivalent of raising it through the agreed-upon process of objecting to the IRS's claim.

The motion to strike is, therefore, granted, not in the sense that the brief will be physically removed from the court record but in the sense that the hearing issues will not be expanded to include the "unreported income" issue addressed in the brief.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge