

Law Office of Frances D. Sheehy  
5481 Wiles Road, Suite 502  
Coconut Creek, Florida 33073  
954-449-9880  
Fax: 954-449-9758  
Email: [fsheehy@att.net](mailto:fsheehy@att.net)

## **SURVEY OF DISCHARGEABILITY - RECENT CASES - 2010**

### **I. "Returns" in bankruptcy**

#### **A. "Returns" or not.**

*Beard v. US*, 2010 Bankr. LEXIS 650 (Bankr. M.D.Fla. 2010)

Where the debtor had filed late returns that were processed after 6020(b) assessments, the Debtor could not depose the IRS on how they treated the late returns.

*In re McKay*, 430 B.R. 246 (Bankr. M.D. Fla. 2010)

A tax protestor "zero" return was not a valid return for purposes of the statute of limitations on collection. The taxpayer had "revoked" his zero returns. The court found that the 6020(b) returns filed by the IRS were nondischargeable.

#### **B. Duty to file returns/ keep records and discharge**

*US Trustee v. Stevens*, 2010 Bankr. LEXIS 463 (Bankr. N.D. Ga. 2010)

The trustee's motion was denied because the debtor's failure to file tax returns for 15 years in a Chapter 7 were not required - only the most recently filed return is required and there could be cause to not have it.

### **II. Taxes Are Not Discharged.**

#### **(A) Tax Court**

none in 2010

#### **(B) Circuit Court**

*US v. Hall*, 617 F. 3d 1161 (9<sup>th</sup> Cir. 2010)

Tax on the sale of farm assets post-petition in Chapter 12 is not discharged and is not a debt of the bankruptcy estate. (This issue is before the Supreme Court in 2011)

*Maali v. US*, 432 B.R. 348 (App. Panel 1<sup>st</sup> Cir. 2010)

Taxes assessed within 240 days of the bankruptcy are not discharged and there is no "hardship" discharge for the tax.

#### **( C ) District Court**

*May v. US*, 106 AFTR 2d ¶7292 (S.D. Ala. 2010) (PRO SE)

The debtor's house was in his wife's name, his money was used to renovate it, his cars were in his wife's name, he had no personal checking account and his schedules were wrong. The court found the tax to be nondischargeable due to evasion to pay.

*US v. Beninati*, 438 B.R. 755 (D.Mass. 2010) (PRO SE)

The IRS filed suit to reduce a lien to judgement and foreclose. The property was auctioned. The court found that the taxes had not been discharged in a 2006 bankruptcy because of evasion to pay. The debtor had established trusts to buy and sell property, lived a lavish lifestyle with expensive vacations, filed frivolous offers in compromise, dealt in cash, filed late returns and took the 5<sup>th</sup> amendment.

*Sheehan v. US*, 106 AFTR 2d ¶6946 (N.D. OH. 2010)

The debtors(husband and wife) filed an adversary to determine dischargeability of tax years 1997 through 2004, and tax lien determination. The IRS won on summary judgment against the husband for evasion to pay because he didn't pay estimated taxes, didn't make payments with the returns, and took money out of his checking account to keep it from other creditors. As to the wife, the court dismissed the adversary as being "not ripe" because the IRS was not interested in pursuing her as to non-dischargeability.

#### **(D) Bankruptcy Court**

*Eskins v. US*, 2009 Bankr. LEXIS 4216 (Bankr. D. Md. 2010)

Late returns filed within 2 years of the Chapter 13, converted to a 7 were not discharged - use the initial petition date. These taxes could have been discharged under a Chapter 13 plan.

*Bryen v. US*, 433 BR 503 (Bankr. E.D. PA 2020)

A CPA with tax shelter liability, two houses, vacations and a lavish lifestyle, and dealt in cash was not relieved of his taxes due to evasion to pay. Even though the IRS waited 5 years after the tax court decision to assess the tax.

*Lyon v. US*, 106 AFTR 2d ¶6303 (Bankr. N.D. Ga 2010)

The court held for the IRS on summary judgment that the debtor evaded payment of tax because he filed late returns, didn't pay estimated taxes, and worked for his wife's company without pay.

*Barkley v. US*, 106 AFTR 2d ¶7020 (Bankr. N.D. Ga. 2010)

The IRS won on summary judgment with respect to nondischargeability of tax due to evasion to pay because the debtor underwithheld, dealt in cash, opened a new bank account after levy and was a shopper.

*Pansier v. US*, 2010-2 USTC ¶50,759 (Bankr. E.D. Wisc. 2010) (PRO SE)

Returns filed after bankruptcy are not discharged pursuant to the two year rule.

*US v. Acker*, 106 AFTR 2d ¶6495 (Bankr. E.D. TX. 2010) (PRO SE)

The IRS filed an adversary proceeding to determine that the taxes were not discharged. The court found for the IRS because the debtor filed late returns, under withheld, was uncooperative with audits, filed multiple bankruptcies, offers in compromise and collection due process requests, hid assets, filed false financials, and took the 5<sup>th</sup> amendment.

*Bisch v. IRS*, 437 B.R. 355 (Bankr. E.D. MO 2010)

The taxes were not discharged because the bankruptcy was filed within three years of an extension of the time to file the return.

*Bisch v. Missouri Dept. of Revenue*, 437 B.R. 359 (Bankr. E.D. MO 2010)

State taxes were not discharged because the bankruptcy was filed within 240 days of the actual assessment. The debtor filed amended returns, which would normally be deemed to be assessed upon the filing. The state, however, issued a statutory notice which is not deemed assessed until after 60 days has passed.

*Hawkins v. US*, 105 AFTR 2d ¶2058 (Bankr. N.D. CA 2010)

A KPMG tax shelter resulted in a large deficiency. The debtor's monthly expenses were greater than his income for an extended time period. The Court found the taxes as to the husband/debtor non-dischargeable. The wife was relieved of the tax liability through discharge. Planning to discharge taxes after a large assessment was frowned upon.

### **III. Taxes Are Discharged**

*In re Reeder*, 2010 Bankr. LEXIS 792 (Bankr. D.C. 2010)

A pre-BACPA Chapter 13 discharged all taxes provided for in plan

### **IV. Procedural Issues:**

#### **A. Summary Judgment**

*Camangian v. US*, 2010 US Dist LEXIS 61132 (C.D. CA 2010)

The taxpayer sued for a refund of his seized tax refunds post bankruptcy. The IRS motion for summary judgment was denied because the Court needed more information to determine if the bankruptcy stay was violated.

*O'Neal v. US*, 2010-02 USTC ¶50,640 (Bankr. N.D. AL 2010)

The Court refused to grant summary judgment to the IRS for evasion to pay because even though the debtor filed late returns to avoid IRS collection, there was no evidence of willfulness.

*US v. Acker*, 2010-2 USTC ¶50,611 (Bankr. E.D. TX 2010)(PRO SE)

The IRS filed an adversary proceeding to determine dischargeability the arguments were based on tolling of the three year rule for prior bankruptcies and evasion to pay. The IRS conceded that

the penalties were discharged. The court would not grant summary judgment on evasion to pay and required a trial.

### **B. Bankruptcy Stay**

*In re Adesta Communications, Inc.*, 2010 Bankr. LEXIS 2351 (Bankr. D. NE 2010)

The state violated the bankruptcy injunction when it revoked the right to do business for unpaid franchise taxes that were discharged in bankruptcy. The revocation was void.

*Wcislak v. City of Perrysburg*, 440 B.R. 779 (Bankr. N.D. OH 2010)

The letter from the city advising that there was 2008 tax liability was not a violation of the bankruptcy stay.

*Bryant v. Commissioner*, 2010-2 USTC ¶50,669 (6<sup>th</sup> Cir.2010) (PRO SE)

The IRS applied part of a 2003 refund to a discharged tax (2003 bankruptcy) and the rest to a non-discharged tax. The taxpayer filed a CDP requesting all be applied to the non-discharged tax. The tax court punted to the bankruptcy court. The bankruptcy court ok'd the application, the tax court then granted the IRS summary judgement and the 6<sup>th</sup> Circuit found no abuse of discretion. (Waste of court time?)

### **C. Certain tax claims and their treatment**

*In re Barnhill's Buffet Inc.*, 2010 Bankr. LEXIS 577 (Bankr.M.D, Tn 2010)

The County cannot collect tax because it failed to file a proof of claim in the Chapter 11.

*In re Owens*, 2010 Bankr. LEXIS 637 (Bankr. E.D. NC 2010)

The debtor is not required to modify a Chapter 13 plan once all the payments have been made for a late-filed IRS proof of claim. The debtor gets the discharge and the IRS can still collect the non-discharged tax.

*US v. Brae Asset Fund and Martin*, 2010 U.S. Dist. LEXIS 21594 (W.D. Mich. 2010)

A creditor was successful in objecting to the priority status of the IRS claim for tax due to fraudulent returns. The Court noted that the decision was not res judicata on the debtor to dispute the dischargeability.

*In re: Wilshire Courtyard*, 437 B.R. 380 (Bankr. C.D. Ca. 2010)

The court granted summary judgement to the debtor. The court held that the attempt to re-characterize a transaction at the partner level was in violation of the confirmed plan because the plan prohibited taxing the partners as if it were a sale of partnership property. (Practitioner tip: this is a drafting tip.)

*Szostek v. Texas Comptroller*, 433 B.R. 611 (Bankr. W.D. TX 2010)

The court held the sales tax non-dischargeable even though the debtors did not collect the tax.

*Haysman v. State of GA*, 432 B.R. 336 (Bankr. N.D. GA 2010)

The debtor was a 50% shareholder, an officer, but not an employee. His brother ran the stores that failed to pay state tax. The debtor had check signing authority but only signed checks if brother wasn't there. The court found that he was not a responsible person, had titles but no authority, and was not willful. (Great trust fund case.)

*In re: BHS&B Holdings, LLC*, 435 B.R. 153 (S.D. NY 2010)

Texas taxing authority filed a late claim which was barred, because they could have filed a timely estimated claim.

*Ford v. Cicoletti*, 2010 US Dist. LEXIS 43,417 (N.D. CA 2010)

The trust fund tax paid by a co-owner prior to bankruptcy was discharged. Had the co-owner paid the tax after bankruptcy, there would have been a viable right of contribution claim.

*In re Velez*, 107 AFTR 2d 2220 (D. P.R. 2010)

The debtor's Chapter 13 was dismissed because he failed to modify the plan for post-petition tax claims.

### **C. Jurisdiction**

*McVey v. US*, 2010 Bankr. LEXIS 659 (D. Ct., KS 2010)

The debtor was dismissed from Chapter 13 because he was over the debt limit with the Trust fund taxes, and he could not pay them within the 5 year limit for priority.

*Paolo v. US*, 619 F. 3d 100 (1<sup>st</sup> Cir. 2010)

In a Chapter 7, no asset case, the bankruptcy court abstained from hearing whether the debtor was liable for trust fund taxes. The Court dismissed the appeal because abstention is not appealable under 1334(d). (See also, *Goins v. IRS*, 437 B.R. 372 (Bankr. E.D. MO 2010) and *Rowland v. US*, 426 B.R. 874 (Bankr. N.M. 2010).

*Swain v. US*, 437 B.R. 549 (Bankr. E.D. Mich. 2010)

The bankruptcy court dismissed the debtors challenge to unassessed trust fund taxes for lack of jurisdiction.

*Carey v. US*, 107 AFTR 2d 301 (9<sup>th</sup> Cir. 2010) (PRO SE)

The court held that the bankruptcy court lacked jurisdiction to enjoin the IRS from foreclosing a tax lien.

### **D. Liens after Bankruptcy**

*Callahan v. US*, 442 B.R. 1 (D.MASS. 2010)

In a Chapter 11, the bankruptcy court determined that the nominee tax liens on the debtor's property as nominee for her husband could not be supported under Massachusetts law.

*US v. Wilson*, 2010 US Dist. LEXIS 32464 (E.D. Ok. 2010)

The IRS can foreclose on property abandoned by the bankruptcy trustee after bankruptcy even if the property has been transferred after the lien was filed.

*Indiana Bank and Trust v. US*, 2010 U.S. Dist. LEXIS 18505(S.D. In. 2010)

The tax lien does not attach to property acquired after the bankruptcy because the taxes were discharged.

*In re Vanderhouwen*, 2010 Bankr. LEXIS 156 (Bankr. E.D. Wa. 2010)

The IRS can levy post-bankruptcy assets and exempt assets for non-discharged tax.

*Drake v. Mass. Dept. of Revenue*, 434 B.R. 11 (D. Mass. 2010)

The state tax liens on pre-bankruptcy property survive discharge.

*US v. Domenico*, 106 AFTR 2d 5343 (M.D. FL. 2010) (PRO SE)

The court held that the tax lien remained on property after the bankruptcy and a quit claim deed. The IRS could foreclose on the lien and the claim for innocent spouse was too late.

*Carey v. US*, 107 AFTR 2d 483 (E.D. CA. 2010) (PRO SE)

In a quiet title action, the IRS motion to dismiss was granted based on res judicata because the bankruptcy court had found the tax to be nondischargeable, and a prior foreclosure action determined the nominee liens to be valid.

*US v. Black*, 725 F. Supp. 1279 (E.D. WA 2010) (PRO SE)

In a suit to reduce tax liens to judgment, the taxpayer (tax protestor) claimed the taxes were discharged. The IRS was granted summary judgement against the taxpayer because nominee was proven and the taxes were not discharged because of the fraudulent transfers to various entities.

*US v. Gustafson*, 106 AFTR 2d 5799 (D.TX 2010) (PRO SE)

The IRS sued to reduce liens to judgment and foreclose. The IRS had tax liens in place. WAMU bot the property at a foreclosure sale which extinguished the liens. Then a third party took out a mortgage and bought the property from WAMU, but it was deeded to the taxpayer. The taxpayer then deeded it to the third party, and filed bankruptcy. The court held that the tax was not discharged, but required a trial as to lien priority.

*US v. Boyd and Moeri*, 2010-2 USTC ¶50,630 (D MN 2010) (PRO SE)

In a suit to reduce a lien to judgment and foreclose, the property was sold and the IRS got ½ the proceeds. The court determined the existence of a fraudulent conveyance and alter ego under Minnesota law. (A disbarred attorney who was convicted of criminal failure to file returns.)

*McMahon v. US*, 2010-2 USTC ¶50,704 (D. CT 2010)

In a Chapter 7 bankruptcy the IRS prevailed under the nominee theory for a lien on property to the extent that the debtor made mortgage payments, basically a lien on income.

## **E. Fees and Follies**

*Kovacs v. US*, 614 F. 3d 666 (7<sup>th</sup> Cir. 2010)

The IRS violated the bankruptcy stay/injunction because it counted the 240 days from the date the tax was re-assessed after a defaulted offer in compromise. The court awarded \$25000 to the debtor and stated that both sides over-litigated.

*Crisci v. US*, 407 Fed. Appx. 573 (3<sup>rd</sup> Cir. 2010)

The IRS Revenue Officer told the taxpayer to sell the business assets at auction and designate the payment to trust fund, then levied the auction money and applied it to non-trust fund. The court found that detrimental reliance was not misconduct.

*Matney v. Zeman*, 2020 U.S. Appl LEXIS 2800 (10<sup>th</sup> Cir. 2010)

A Chapter 13 debtor's attorney's fees were reduced because the Court found the adversary to resolve the tax issues was unnecessary and could have been administratively resolved with the IRS.

*US. v. Brown*, 2010 Bankr. LEXIS 427 (Dist. N.M. 2010)

Bankruptcy petition preparers were enjoined from continued practice and ordered to return double the fees collected and paid triple fines because they didn't put their name on their petitions.

*In re: Thain*, 106 AFTR 2d 5607 (D. ID 2010)

The IRS levied in violation of bankruptcy injunction. The court held that the taxpayer was not entitled to damages because he failed to file a written administrative claim for damages, even though he asked for it in the context of a CDP and told the IRS. (Must exhaust administrative remedies: See also, *Ray v. US*, 106 AFTR 2d 6054 (Bankr. D.Ct. 2010); and *Swensen v. US*, 438 B.R. 195 (Bankr. N.D. IA 2010).)