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SURVEY OF DISCHARGEABILITY - RECENT CASES - 2011

I. "Returns" in bankruptcy

A. "Returns" or not.

After-filed returns:

Pansier v. IRS, 2011 U.S. App. LEXIS 25277 (7th Cir. 2011)

The 7th Cir. affirmed the granting of summary judgment against the taxpayer and found that returns filed after the IRS prepared 6020(b) returns were not returns for purposes of discharging taxes. (After-filed returns). See also, *Wogoman v. IRS*, 108 AFTR 2d 5891 (Bankr. D. Co. 2011); *In re Hurdle*, 2011 Bankr. LEXIS 2299 (Bankr. N.D. Miss. 2011); *Cannon v. US*, 451 B.R. 204 (Bankr. N.D. Ga. 2011). PRACTICE POINT in Wogoman case: neither the IRS nor the debtor followed local rules.

Pansier v. Wisconsin Dept. of Revenue, 417 Fed. Appx. 565 (7th Cir. 2011)

Same debtor as above. The 7th Cir. affirmed the dismissal by the bankruptcy court as a sanction for the debtor's failure to participate in discovery, the District Court also concluded that the tax was not discharged because the returns were filed late.

Late returns without any prior assessment:

McCoy v. Mississippi State Tax Commission, 2011 US Dist. LEXIS 55463 (S.D. Miss. 2011)

Tax returns filed after the deadline are never returns for purposes of dischargeability even though no assessment had been made by Mississippi, unless they are 6020(a) returns, (for which Mississippi has no such procedure). (This case was affirmed by the 7th Cir.) See also, *Brown v. Mississippi Dept. of Revenue*, 2011 Bankr. LEXIS 2130 (Bankr. N.D. Miss. 2011); *Weiland v. Mississippi Dept. of Revenue*, 2011 Bankr. LEXIS 1764 (Bankr. N.D. Miss. 2011) - these returns were hurricane Katrina returns.

State of Maryland v. Ciotti, 638 F. 3d 276 (4th Cir. 2011)

The additional assessment by Maryland, due to IRS audit and additional tax, absent a report filed by the taxpayer as required by statute is not a return for dischargeability purposes

B. Duty to file returns/ keep records and discharge

US Trustee v. Knowling, 2011 Bankr. LEXIS 4080 (Bankr. D. Or. 2011)

The debtor was denied discharge under 727(a)(3) because he failed to file tax returns and did not keep business or personal records.

II. Taxes Are Not Discharged.

(A) Tax Court

none in 2011

(B) Circuit Court

US v. Mitchell, 633 F. 3d 1319 (11th Cir. 2011)

The Circuit Court reversed the Bankruptcy Court and the District Court and found the debtor's taxes were due to evasion to pay and not discharged. **One of the factors cited by the Court was that the tax attorney had "threatened" bankruptcy in an Offer in Compromise negotiation with the IRS.** Apparently the Internal Revenue Manual provision for considering the possibility of bankruptcy in assessing whether to accept an Offer in Compromise was missed or disregarded.

US v. Krause, 637 F3d 1160 (10th Cir. 2011)

The IRS filed an adversary proceeding against a tax shelter promoter who erased his computers which held corporate records. The Court affirmed the lower courts determinations that the debtor's companies were nominees and that fraudulent transfers had occurred. The sanction for destroying corporate records resulted in a finding of nominee. The children had no standing to appeal because they were not affected by the sanctions order.

Ilko v. California Board of Equalization, 651 F. 3d 1049 (9th Cir. 2011)

The 7th Circuit reversed the BAP and found the debtor liable for sales tax of a defunct company.

Bryen v. US., 2011 U.S. App. LEXIS 22349 (3rd Cir. 2011)

The taxes were found to be non-dischargeable for evasion to pay because the taxpayer lived high on the hog after the Tax Court determined he owed \$13 million in taxes from tax shelters. He continued his lifestyle and didn't make any payments for 10 years.

(C) District Court

Bank of Kaukauna v. Vandynhoven, 2011 Bankr. LEXIS 4198 (Bankr E.D. Wisc. 2011)

The court found the individual shareholder liable for all of the monies borrowed to pay corporate employment taxes (not just the trust fund) under 523 (a)(14) and (14A) because had the corporate taxes not been paid with the borrowed funds, the debtor could have been liable for the trust fund portion. There was no mention in the decision that the contingent liability was substantially less than the total tax.

Vaughn v. US., 2011 Bankr. LEXIS 5091 (Bankr. D. Colo. 2011)

The debtor was a KPMG victim in a Son of Boss tax assessment case. The court found the taxes were not dischargeable because the taxpayer was a sophisticated business man, should have seen the red flags and known the returns were wrong, yet dissipated his assets.

In re Calabrese, 2011 U.S. Dis. LEXIS 104201 (D. N.J. 2011)

The debtor's argument that sales tax was an excise tax failed. The court found it to be trust fund tax and non-dischargeable.

Brown v. Iowa Dept. of Revenue, 2011 Bankr. LEXIS 3587 (S.D. IA. 2011)

Sloppy bookkeeping and late returns was sufficient for a finding of evasion to pay even though the taxpayer had no lavish lifestyle. This is sufficient in Iowa and known as "fraudulent practice" related to taxes.

US v. Coney, 107 AFTR 2d 1414 (E.D. LA. 2011)

A personal injury attorney paid cash for runners to get cases. He was convicted of money laundering for this. The IRS sued to reduce the tax liens to judgment. His defense of discharge in a prior bankruptcy failed even though he had paid \$1.4 million in tax. The court found evasion to pay because he paid the runners instead of the tax.

Hawkins v. Franchise Tax Board, 447 B.R. 291 (N.D. Ca. 2011)

The Bankruptcy Court determination that the tax was not discharged was affirmed. The taxpayer knew he owed the tax and continued his lavish lifestyle with 2 houses, 4 cars and monthly expenses greater than his income.

Loving v. US, 108 AFTR2d 5995 (S.D. Ala. 2011)

The taxes were not discharged because the 3 year rule is based on the due date of the return, not the filed date. (This was not pro se)

(D) Bankruptcy Court

Carson v. US, 2011 Bankr. LEXIS 3155 (Bankr. N.D. Ga. 2011)

A stockbroker was not discharged from his taxes because he had the money to pay the tax and instead, invested (and lost), gave to charity, bought a car, and went on vacation. The unpaid tax after he lost his job was discharged.

Childress v. Georgia Dept. of Revenue, 2011 Bankr. LEXIS 2321 (Bankr. N.D. GA. 2011)

The debtor is personally liable for sales tax of his corporation and it is not discharged.

Quiroz v. Michigan Dept. of Treasury, 450 B.R. 699 (Bankr. E.D. Mich. 2011)

Michigan tax on conducting business is an excise tax as to the owner and is not discharged pursuant to 507(a)(8)(E).

Washburn v. IRS, 107 AFTR2d 334 (Bankr. D. KS. 2011)

Post petition interest on trust fund tax is not a claim in the bankruptcy estate is not discharged.

III. Taxes Are Discharged

US, et al. V. Storey, 640 F. 3d 739 (6th Cir. 2011)

Failing to pay for timely filed accurate returns is not sufficient for the tax to be non-dischargeable. There was no proof of willfulness and the D. Court was reversed.

California Franchise Tax Board v. Kendall, 657 F. 3d 921 (9th Cir. 2011)

The 3 year rule was not tolled by a confirmed Chapter 13 plan for post bankruptcy taxes in the next Chapter 7.

In re: Montgomery, 446 B.R. 475 (Bankr. D. Ks. 2011)

The taxes were discharged because the three year rule is only extended by 90 days once for multiple bankruptcies (4 prior bankruptcies).

Kolve v. IRS, 108 AFTR 2d 6415 (Bankr. W.D. Wisc. 2011)

Chapter 13 does not toll the 3 year rule for post Chapter 13 tax years because there is no stay on collection.

Appollo Printing & Thermography, Inc. v. St. Joseph County Treasurer, 2011 Bankr. LEXIS 3211 (Bankr. N.D. In. 2011)

The county failed to file an estimated claim for pre-bankruptcy taxes. The tax was discharged by the Chapter 11 plan.

Chase v. Mueller, 455 B.R. 151 (Bankr. W.D. Wisc. 2011)

Credit card debt used to make estimated tax payments which were then refunded to the taxpayer were discharged because no tax was owed when the money was borrowed.

Lindros v. US., 2011 Bankr. LEXIS 4152 (M.D. Fla.2011)

The debtor's tax was discharged because he changed his lifestyle after he found out the tax was due. The tax was the result of stock options and the tech stock market meltdown. There was no evasion to pay.

Watson v. White, 455 B.R. 141 (Bankr. N.D. In. 2011)

Employment taxes advanced by the accountant were not excepted from discharge as to the potential responsible officer because the debtor was not subject to tax. The pre-conditions that the debtor be a responsible person and willful non-payment were not met because no tax was due.

Chase v. Peters, 2011 Bankr. LEXIS 1454 (Bankr. N.D. Ga. 2011)

A credit card was used to pay the tax. The court denied a motion for default judgment and required the bank to amend the complaint. The bank had failed to plead non-dischargeability of tax.

IV. Procedural Issues:

A. Summary Judgment

None in 2011 or categorized elsewhere.

B. Bankruptcy Stay

Marcinek v. Commissioner, 107 AFTR 2d 1596 (3rd Cir. 2011)

A Tax Court decision during a pending bankruptcy is void ab initio and the case was remanded to Tax Court.

Sarner v. Massachusetts Dept. of Revenue, 2011 Bankr. LEXIS 4228 (D. Mass. 2011)

Massachusetts can levy a non-debtor husband's bank account during the wife's Chapter 13 bankruptcy even though it is a joint debt.

Malec v. Cook County, 442 B.R. 130 (Bankr. N.D. Ill. 2011)

The Chapter 13 plan provided that real estate taxes would be paid through the plan without interest. The sale of the tax lien by the taxing authority was a violation of the discharge injunction and resulted in sanctionable damages. The county failed to object to the Plan.

In re Cooper, 107 AFTR 2d 580 (MD. NC 2011)

A wage levy after bankruptcy is a violation of the stay. No damages were asserted against the IRS because the taxpayer failed to exhaust administrative remedies.

In re Schneider, 2011 Bankr. LEXIS 93 (Bankr. N.D. CA. 2011)

The court was willing to value the tax lien at zero for plan purposes but required an adversary proceeding to determine if the tax was dischargeable to avoid the lien.

C. Certain tax claims and their treatment

In re Boutwell, 108 AFTR 2d 6369 (D. N.H. 2011)

The IRS is entitled to post bankruptcy interest on non-discharged tax.

US v. Corry Communications et. al., 108 AFTR 2d 6521 (W.D. Pa. 2011)

The IRS cannot foreclose its tax lien on an FCC broadcasting license.

Dawes v. US., 652 F.3d 1236 (10th Cir. 2011)

The 10th Circuit reversed the District Court and determined that a Chapter 12 sale of assets post petition are priority taxes. The court noted that only pre-bankruptcy sale of farm assets are general unsecured taxes. (This issue is pending before the Supreme Court.)

Smith v. US, Pennsylvania Dept of Revenue and Chapter 12 Trustee, 447 B.R. 435 (Bankr. W.D. Pa. 2011)

Post confirmation sale of farm assets which were not part of the Chapter 12 plan are not general unsecured taxes as to the capital gains.

In re Waters, 2011 Bankr. LEXIS 3245 (Bankr. D. Ct. 2011)

PRO SE The debtor stipulated to a distribution of monies to the IRS and the state then tried to get out of the stipulation. The court didn't allow it.

In re Diaz, 2011 Bankr. LEXIS 3743 (Bankr. D. Ca. 2011)

A pre-chapter 13 refund is property and not income. Therefore the Chapter 13 trustee was not successful in getting it turned over as income of the estate.

Kail v. US, 108 AFTR 2d 5415 (Bankr. D. Vt. 2011)

The bankruptcy court will determine trust fund liability to see who gets proceeds. Third parties have no standing to litigate tax liabilities.

Michigan Dept. of Treasury v. Senczyszyn, 444 B.R. 750 (E.D. Mich. 2011)

Chapter 13 taxes are pre-petition taxes if the tax year ends before the bankruptcy is filed under Section 1305 of the bankruptcy code.

US v. Walter Williams Inc., 107 AFTR 2d 1463 (C.D. Ca. 2011)

The IRS appealed an order confirming a Chapter 11 plan that provided for 3.5% interest. The case was remanded because an analysis is required and the federal rate is not always the correct bankruptcy rate, the order also needed clarification as to designation of payments, gap interest and segregation of inventory.

IRS v. Hayes, 453 B.R. 270 (E.D. Mich. 2011)

There is no interlocutory appeal of a bankruptcy court decision to determine trust fund taxes in a Chapter 7 asset case.

Ogle, Trustee of Agway v. IRS, 2011 U.S. Dist. LEXIS 86774 (N.D. NY 2011)

A liquidating trustee was entitled to a 505 determination of tax when the IRS did not respond to requests for prompt determination.

Mukamal, Trustee v. Weisenfeld, 2011 Bankr. LEXIS 1021 (Bankr. S.D. Fla. 2011)

PRO SE. A disbarred attorney, felon, was denied discharge due to unfiled tax returns under 727(a)(3).

D. Jurisdiction

US v. Cuda and Dankis, 107 AFTR 2d 6656 (W.D. Pa. 2011)

The bankruptcy of a corporation has no bearing on the determination of trust fund for the responsible persons.

Luke and Chandra Adams v. US., 2011 U.S. Dist. LEXIS 149312 (C.D. Ca. 2011)

A quiet title action was dismissed because the court found that the nominees have no standing to challenge the tax liens. Nominee analysis in California uses the federal criteria.

J.J. ReBar Corp, Inc. v. US., 644 F. 3d 952 (9th Cir. 2011)

The Anti-Injunction Act precludes the Bankruptcy Court from stopping the IRS trust fund determination because the owners not the company are the primary obligors of the trust fund tax. *In re: Daniel Gordon*, 108 AFTR 2d 6072 (Bankr. S.D. NY 2011)

The Bankruptcy Court abstained from making a prompt determination in a Chapter 7 case because there was a pending Tax Court case, a potential innocent spouse claim of the non-debtor spouse and “complex tax issues.”

Hensen v. US, 108 AFTR 2d 5098 (Bankr. N.D. OH 2011)

The debtor filed an adversary proceeding to determine whether tax was discharged. The IRS moved to dismiss because they did not contest the dischargeability. The Court dismissed the case for lack of jurisdiction because there was no case or controversy. The court declined to issue a “comfort order”.

Hinton v. US, 107 AFTR 2d 2324 (N.D. Ill. 2011)

The court determined there was no case or controversy and a lack of jurisdiction. The debtor had filed an adversary proceeding and wanted a determination that the tax was discharged even though the IRS had released the lien and abated the tax.

California Franchise Tax Board v. Wilshire Courtyard et. al.,

2011 Bank LEXIS 3925 (BAP 9th Cir. 2011)

The 9th Circuit vacated the BAP decision because the court lacked jurisdiction to uphold the Partnership bankruptcy plan that precluded taxation of the partners for the plan transaction.

In re Lever, 108 AFTR 2d 6294 (Bankr. W.D. NC 2011)

The Court abstained from determining trust fund taxes of the debtor because they were non-dischargeable.

Black v. US, 2011 Bankr. LEXIS 1560 (Bankr. E.D. Wa. 2011)

PRO SE. The debtors could not re-litigate a prior District Court determination that the taxes were non-dischargeable and nominee issues. There were multiple bankruptcies.

US v. Black, 2011 Bankr. LEXIS 1548 (Bankr. E.D. Wa. 2011)

PRO SE. The taxpayer tried to get an adversary proceeding dismissed for lack of jurisdiction based on no delegation of authority. The motion was denied even though the IRS FOIA response to the taxpayer stated there was no such delegation of authority.

E. Liens after Bankruptcy

US v. O’Callaghan, 108 AFTR 2d 5148 (M.D. Fla. 2011)

The taxpayer defeated the IRS claim that the tax was not discharged due to evasion to pay in bankruptcy court. The IRS then foreclosed on the tax liens post-bankruptcy.

US v. O’Callahan , 107 AFTR 2d 2745 (M.D. Fla. 2011)

The taxpayer tried to block the IRS sale and lost.

US v. Washington, 108 AFTR 2d 6121 (S.D. TX 2011)

The IRS suit to reduce the tax lien to judgement was timely because the bankruptcy case extended the statute of limitations almost 10 years and there was an offer in compromise extension as well. The secret lien attached to the property.

Matthews v. US Bank and IRS, 2011 Bankr. LEXIS 1963 (Bankr. E.D. VA. 2011)

The court did not allow tax lien stripping when property was transferred among owners for the purpose of stripping the second mortgage. The second mortgage holder defaulted, the debtor did not know about the tax lien when the property was transferred.

F. Fees and Follies

US v. Clayton, 2011 US Dist. LEXIS 144031 (M.D. NC 2011)

The IRS was required to amend their complaint because they failed to plead evasion to pay. The bankruptcy case was filed after the IRS sued to foreclose.

In re Byron JHA, 108 AFTR 2d 6784 (Bankr. N.D. CA. 2011)

It is a violation of the stay for the IRS to send levy notices. The court granted actual damages under 7433(e)(2)(A) without exhaustion of administrative remedies.

Kovaks v. US, 2011 Bankr. LEXIS 4231 (Bankr. E.D. Wisc. 2011)

The IRS violated the bankruptcy stay and ignored the debtors claims for fees. The debtor was awarded actual damages of \$3750.

US v. Neal, 107 AFTR 2d 617 (W.D. Ark. 2011)

PRO SE. The taxpayer tried to keep the IRS at bay by filing 2 bankruptcies and bogus liens and notes against IRS employees. The court found all liens and notes void and issued an injunction against the taxpayer.