NO. CV 04 4002676

ROSE KRAIZA	:	SUPERIOR COURT
	:	TAX SESSION
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN
COMMISSIONER OF REVENUE SERVICES STATE OF CONNECTICUT	:	FEBRUARY 2, 2009

MEMORANDUM OF DECISION ON MOTION FOR SUMMARY JUDGMENT (#108)

This action is an appeal from the decision of the commissioner of revenue services (commissioner) imposing deficiency income tax assessments against the gross winnings of the plaintiff, Rose Kraiza (Kraiza), derived from her gambling activities.

The plaintiff is a Connecticut resident and filed income tax returns for the years 1997 through 2000 (hereinafter "the taxable years"). During this time period, the plaintiff engaged in gambling at casinos located in Connecticut. As a result of these gambling activities, the plaintiff won several jackpots which required reporting to the federal and state governments following the issuance to the plaintiff of Internal Revenue Service (IRS) forms W-2G. The plaintiff reported the income from gambling and losses attributed to the gambling on her federal and state income tax returns for the taxable years.

The department of revenue services (DRS) conducted an audit of the plaintiff's state income tax returns for the taxable years and concluded that the plaintiff was not entitled to deduct her gambling losses from her gambling winnings, as she could for her federal income tax return. By letter dated March 20, 2001, DRS issued deficiency assessments for the taxable years and requested payment on or before April 15, 2001.

The plaintiff filed a protest of the deficiency assessments with the DRS Appellate Division. However, on November 4, 2004, the commissioner notified the plaintiff that her protest was disallowed and upheld the deficiency assessments because the commissioner determined that the plaintiff was not a professional gambler engaged in the trade or business of gambling. The plaintiff, in claiming that she was a professional gambler entitled to deduct her gambling losses against her gambling winnings, commenced an appeal of the commissioner's decision to the court on November 24, 2004.

On October 14, 2005, while the present appeal was pending, the plaintiff filed a voluntary Chapter 7 petition for bankruptcy with the United States Bankruptcy Court for the District of Connecticut. On Schedule F of the petition, the plaintiff claimed the $160,000 Connecticut income tax assessment as her only debt.

On February 20, 2006, the Bankruptcy Court issued an order of discharge pursuant to 11 U.S.C. § 727, discharging the plaintiff from the income tax debt.[1]

Following the Bankruptcy Court's Chapter 7 discharge[2], the plaintiff filed the present motion for summary judgment, claiming that there are no genuine issues as to any material fact and that the discharge of the debt entitles the plaintiff to relief from the obligation to pay the subject assessments.

From a procedural standpoint, the plaintiff's complaint challenges the commissioner's determination that the plaintiff was not a professional gambler entitled to deduct gambling losses against gambling winnings. With the plaintiff's filing of the present motion for summary judgment, the plaintiff disregards the issue of whether or not she was a professional gambler. The plaintiff also sidesteps the gambling issue by

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The Bankruptcy Court order, dated February 20, 2006, recites the following:

"**DISCHARGE OF DEBTOR**

"It appearing that the debtor [Rose E. Kraiza] is entitled to a discharge.

"**IT IS ORDERED**:

"The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code)."

See Bankruptcy Order attached to plaintiff's motion for summary judgment.

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"A discharge is a written federal court order signed by a United States Bankruptcy Judge determining that a person is entitled to immunity from any actions by creditors to collect debts existing on the filing date of the bankruptcy petition." 2 Daniel R. Cowans, Cowans Bankruptcy Law and Practice (7th Ed.), § 5.2, at 60.

claiming that her discharge in bankruptcy on February 20, 2006 bars the commissioner from collecting on the debt.

The commissioner contends that the plaintiff's discharge in bankruptcy does not discharge her debt for the deficiency income taxes due. The commissioner reasons that because the plaintiff's debt was not a final assessment, pursuant to 11 U.S.C. § 523 (a) (1) (A), which incorporates 11 U.S.C. § 507 (a) (8) (A) (iii), the plaintiff's debt is excepted from the discharge.[3]

The commissioner agrees with the plaintiff that the issue of whether the tax debt in the subject case was discharged in bankruptcy is governed exclusively by § 523 (a) (1) (A), which references and incorporates the provisions of § 507 (a) (8). Further, the parties agree that the validity of the tax debt at issue turns solely on whether it fits within the exception set forth at § 507 (a) (8) (A) (iii), that is, whether the plaintiff was assessed before the commencement of the petition in bankruptcy.

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[3] Section 507 provides for the priority of expenses and claims with subsection (a) (8) reciting that "allowed unsecured claims of governmental units, only to the extent that such claims are for— (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition— . . . (iii) other than a tax of a kind specified in section 523 (a) (1) (B) or 523 (a) (1) (C) of this title [11 U.S.C.], not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]"

The issue in this motion for summary judgment is whether the term "assessed" should be defined under federal or state law in determining whether the tax debt of the plaintiff was discharged by the bankruptcy proceedings or excepted from the discharge.

Pertinent to this issue is the plaintiff's argument that, pursuant to 11 U.S.C. § 507 (a) (8) (A) (iii), the operative date is the date when the tax liability is assessed. However, both parties cite In re King, 961 F.2d 1423, 1426 (9th Cir. 1992), which recognizes that the Bankruptcy Code does not define the term "assessed."

The parties also recognize that for federal income tax purposes, federal courts have adopted the Internal Revenue Code (IRC) definition of the term "assessed,"[4] and for state tax purposes, courts have used the date of assessment as provided under the state's

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"In the federal scheme the Secretary of the Treasury makes assessments. 26 U.S.C. § 6201 (a). Prior to making an assessment, the Secretary must send the taxpayer a notice of deficiency. Id. § 6212 (a). The Secretary may not assess a deficiency until a specified period of time after the notice is sent, or, if the taxpayer seeks a determination by the tax court, until a final determination by the tax court, which determination includes rights of appeal. Id.

"The assessment shall be made by an assessment officer signing the summary record of assessment. . . . The date of the assessment is the date the summary record is signed by an assessment officer. 26 C.F.R. § 301.6203-1; see 26 U.S.C. § 6203. . . . Assessment of tax by the IRS creates a valid tax lien, [albeit] unrecorded [and] not enforceable against third parties until notice of the lien is given. 2 Daniel R. Cowans, Cowans Bankruptcy Law and Practice § 13.6, at 674 (1989). Accordingly, in the federal scheme assessment involves the taking of an interest in the taxpayer's property after affording the taxpayer notice of an alleged deficiency and an opportunity to challenge the deficiency."

(Internal quotation marks omitted.) In re King, 961 F.2d 1425.

tax law. As the court noted in In re Lewis, 199 F.3d 249, 251-52 (5th Cir. 2000), "[d]etermining when taxes were 'assessed' within the meaning of the Bankruptcy Code is a question of federal law. The Code does not supply a definition. Generally, when that is the case, we turn to the legislative history in an attempt to glean congressional intent. Regrettably, our effort in that regard bore no fruit. Dictionaries are similarly unhelpful, not because they do not supply a definition, but because they assign so many different meanings to this term." As further noted by the Lewis court, when dealing with the federal income tax, most courts have adopted the IRC definition of the term "assessed". Id., 252. However, when dealing with the issue of defining "assess" as applied to state income taxes, the Lewis court agreed with the King court that it is the finality of the assessment that should be the "touchstone" and turned to Louisiana tax procedures. Id., 252-53.

Given these parameters, the plaintiff argues that in Connecticut, the final act of assessment occurs when the taxing authority makes an assessment and issues a notice thereof immediately following the denial of the taxpayer's protest to the commissioner.

As noted in Schatz v. Franchise Tax Bd., 81 Cal. Rptr. 2d 719, 720 (1999), and applicable to this case, the principal issue is at what time are state income tax deficiencies

"assessed" for federal bankruptcy discharge purposes under 11 U.S.C. § 507 (a) (8) (A) (ii) and (iii).[5]

The plaintiff contends that the deficiency taxes imposed by the commissioner were assessed on November 4, 2004, the date on which the commissioner denied the plaintiff's protest. The commissioner contends that the taxes have not been finally assessed, and will not be, until the plaintiff's present appeal is disposed.

In this case, the plaintiff filed her bankruptcy petition on October 14, 2005. In considering the issue of when a tax deficiency has been "assessed", for federal bankruptcy discharge purposes, the Schatz court concluded that "in line with King, . . . a state income tax deficiency is assessed for bankruptcy discharge purposes when the assessment contained in a notice of proposed deficiency assessment becomes final, either through the passage of time or at the end of an appeal period. This is the point at which the state, the taxing sovereign, has formally acted to finally fix the tax liability." Id., 720.

The Schatz decision is also in line with the decisions in In re Lewis, supra, 199 F.3d 252-53, and In re Bracey, 77 F.3d 294, 295 (9th Cir. 1996), which stated that "[a] tax

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"This federal statute, together with [11 U.S.C. § 523 (a) (1) (A)], generally specifies that income taxes that are assessed within 240 days of filing of a bankruptcy petition or are assessed after the petition is filed are not dischargeable." Schatz v. Franchise Tax Bd., 81 Cal. Rptr. 2d 720.

deficiency is 'assessed' for purposes of rendering the assessment nondischargeable not when the notice of the assessment is filed, but when the assessment becomes 'final.'"

The commissioner seeks support for her argument, that it is the end of the judicial appellate process that fixes the finality of the deficiency assessment, by pointing to General Statutes § 12-729 (d) which provides that "[t]he action of the commissioner on the taxpayer's protest shall be final upon the expiration of one month from the date on which he mails notice of his action to the taxpayer unless within such period the taxpayer seeks judicial review of the commissioner's determination."

As the commissioner points out, if the plaintiff had not taken an appeal from the commissioner's denial of her protest, the bankruptcy proceeding would have discharged her deficiency assessment of $160,000. However, because the plaintiff took an appeal from the commissioner's denial, the discharge in bankruptcy does not wipe out the deficiency assessment.

The commissioner's point is well-taken that the deficiency assessment in Connecticut is not final until the completion of the taxpayer's action seeking a judicial review of the commissioner's denial of her protest. It is clear that § 12-729 (d) specifically provides that the action of the commissioner shall be final unless one of two events occur: the passage of one month in time from the date of the notice of the assessment or a judicial appeal of the commissioner's decision. In other words, if the

taxpayer does not take a judicial appeal from the commissioner's decision within one month from the issuance of the notice of the commissioner's decision, the assessment becomes final. The commissioner's deficiency assessment of income taxes, as challenged by the plaintiff, is not a final assessment until the appellate process, which the plaintiff instituted, has been resolved.

Accordingly, for the foregoing reasons, the plaintiff's motion for summary judgment is denied.

Arnold W. Aronson
Judge Trial Referee