UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,

Appellant,

v.

DICK T. VAN MANEN,

Debtor-Appellee

97-CV-6496T

DECISION and ORDER

NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,

Appellant,

v.

SAMUEL J. CHATMAN, JR.,

Debtor-Appellee

97-CV-6495T

DECISION and ORDER

INTRODUCTION

In appeals taken from a decision issued on September 5, 1997 by United States Bankruptcy Judge John C. Ninfo, II, the question presented is whether or not certain tax debts owed to the State of New York by debtors Samuel J. Chatman, Jr., ("Chatman"), and Dick T. VanManen, ("VanManen") are dischargeable under federal bankruptcy law. The New York State Department of Taxation, ("the Department"), contends that the tax debts are non-dischargeable

because the appellees failed to comply with New York State law which requires a taxpayer to file a "report" with the State Department of Taxation following a federal audit which results in a change in the taxpayer's tax status. In support of its argument, appellant relies on 11 U.S.C. § 523(a)(1)(B)(i), which provides that a tax debt may not be discharged in a bankruptcy proceeding where the debtor has failed to file a tax "return" for the year for which the debt is owed. 11 U.S.C. § 523(a)(1)(B).

Appellees oppose the Department's position claiming that they both filed tax returns for the years in question, and therefore have complied with the provisions of § 523(a)(1)(B). They contend that their failure to file a report following their federal audits does not constitute a failure to file a return under § 523(a)(1)(B), and thus their tax debts are dischargeable.

Because I find that § 523(a)(1)(B) requires the filing of a return and not a report, and because both debtors had complied by filing original returns with the State Department of Taxation, I hereby affirm the decision of the Bankruptcy Court.

BACKGROUND

On April 30, 1996, appellee Samuel Chatman, Jr. filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Chatman listed the appellant New York State Department of Taxation as an unsecured creditor in the amount of $8,619.34 for claims

arising from unpaid taxes for calender years 1983, 1985, and 1986. It is undisputed that Chatman filed both state and federal returns for those three years. Thereafter and between 1988 and 1990, Chatman was audited by the Internal Revenue Service, and was found to have additional unreported income affecting both his State and federal tax returns for 1983, 1985, and 1986. As a result, the I.R.S. determined that Chatman owed additional federal taxes.

New York Tax Law § 659 provides that when a taxpayer's income is adjusted as the result of a federal audit, the taxpayer is required to report that change to the State Department of Taxation which Chatman failed to do. Instead, the IRS directly reported the changes to the Department which assessed additional taxes against Chatman. Chatman thereafter sought to have these tax liabilities discharged in his bankruptcy proceedings which the Department opposed.

On December 30, 1996, appellee Dick VanManen filed for bankruptcy under Chapter 7. He listed the Department as an unsecured creditor in the amount of $14,141.44 representing unpaid taxes for the calender years 1981 and 1982. Like Chatman, VanManen's federal tax returns were thereafter audited by the IRS, and he was found to have additional unreported income, which he also failed to report to the Department.

On August 2, 1996, and January 28, 1997, respectively, Chatman and VanManen initiated adversary proceedings to determine that the amounts owed to the Department for unpaid taxes were dischargeable under the bankruptcy code. In a Decision and Order dated September 5, 1997, Bankruptcy Judge John C. Ninfo, II, determined the tax debts owed by both debtors to be dischargeable under bankruptcy law. This appeal followed.

On appeal the Department claims that Judge Ninfo erred in determining that the "reports" which appellees were required to file under New York law did not constitute "returns" for purposes of 11 U.S.C. § 523(a)(1)(B). The Department contends that the appellees' failure to file reports documenting the changes in their incomes is the equivalent to the failure to file a return under § 523(a)(1)(B), and therefore, their tax debts should not be subject to discharge.

DISCUSSION

Section 523 of Title 11 of the United States Code provides in relevant part that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
>
> (1) for a tax . . .
> . . .
> (B) with respect to which a return, if required-
> (i) was not filed . . . .

11 U.S.C.A. § 523(a) (West 1993). Pursuant to this section, a tax debt that ordinarily would be dischargeable in bankruptcy is deemed non-dischargeable if, inter alia, the debtor failed to file a return for the tax year from which the debt arises.

Section 659 of the New York Tax Law provides in relevant part that:

> If the amount of a taxpayer's federal taxable income for any taxable year . . . is changed or corrected by the United States internal revenue service . . . the taxpayer . . . shall report such change or correction in federal taxable income . . . within ninety days after the final determination of such change, correction, . . . and shall concede the accuracy of such determination or state where it is erroneous.
>
> . . .
>
> Any taxpayer filing an amended federal income tax return . . . shall also file within ninety days thereafter an amended return under this article, and shall give such information as the commissioner may require.

N.Y. Tax Law § 658 (McKinney 1997-98 Interim Supp.). This provision mandates taxpayers whose incomes were adjusted as a result of a federal audit to report to the State any changes or corrections in their income. Moreover, it requires taxpayers to file an amended state return if they are required to file an amended federal return. In the instant case, the appellees were not required to file amended federal returns.

The Department contends that appellees' tax debts are not dischargeable because they failed to file a report with the Department detailing the results of their federal audits, and thus failed to file a "return" as required under 11 U.S.C. § 523. In support of this position, appellee cites In re Blutter, 177 B.R. 209 (Bankr. S.D.N.Y. 1995), in which that court held that a failure to file a report under New York Tax Law § 659 constituted a failure to file a return under 11 U.S.C. § 523, and accordingly, the debtor's tax debts could not be discharged in bankruptcy. Id. at 210.

I decline to follow the Blutter case because the prevailing law supports the conclusion reached by Bankruptcy Judge Ninfo in this case. The failure to file a report pursuant to state law will not trigger the exclusionary provisions of § 523 where the debtor-taxpayer has filed an original state tax return, and where state law does not require the taxpayer to file an amended return to report a change in income. See In re Jerauld, 208 B.R. 183, 187-189 (B.A.P. 9th Circ. 1997) (failure to file report is not the same as a failure to file a return and does not result in nondischargeability of tax debt where amended return was not required); In re Blackwell, 115 B.R. 86, 89 (Bankr. W.D.Va. 1990)(state statutory requirement to file a report regarding

federal tax change was not the same as a requirement to file an amended return).

As the Ninth Circuit Bankruptcy Appellate Panel stated in Jerauld, the exception to dischargeability created by § 523(a)(1)(B)(i), is a narrow one, and like all exceptions to dischargeability, should be construed strictly. Jerauld, 208 B.R. at 189. The Jerauld court determined that it would violate the rules of strict construction to equate a "report" with a "return," and thus create an exception to dischargeability not specifically authorized by Congress. As the Supreme Court has stated, "In view of the well-known purposes of the bankrupt law, exceptions to the operation of a discharge thereunder should be confined to those plainly expressed . . . ." Gleason v. Thaw, 236 U.S. 558, 562 (1915). Because Congress has not expressed an intention to make the debts in question here nondischargeable, I decline to read such an exception to dischargeability into 11 U.S.C. § 523(a)(1)(B)(i). Accordingly, I hereby AFFIRM the decision of the Bankruptcy Court.

ALL OF THE ABOVE IS SO ORDERED.

Michael A. Telesca

MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
March 16, 1998