

11 U.S.C. § 507(a) (7)  
31 U.S.C. § 3713  
Federal Insolvency Statute  
Priority

In re Daniel & Pauline Webb, Case No. 687-67841-R7

D. Ct. Civ. No. 91-6268-JO

12/24/91

Unpublished

District Court, Jones, J. remanding with instructions, prior oral ruling of AER

The Bankruptcy Court, Radcliffe, J., found that the government's claim for unpaid fuel excise taxes incurred by the Rice Hill Truck Stop during the debtor Daniel Webb's tenure as receiver thereof is entitled to priority under 31 U.S.C. § 3713(a) (the federal insolvency statute.) The bankruptcy court also found Mr. Webb personally liable to the government for those taxes under 31 U.S.C. § 3713(b). The debtors appealed.

On appeal the District Court, Jones, J., held that the bankruptcy court had not made specific findings of fact and conclusions of law as to whether, under section 3713(a) (1) (A), clause (i) had been satisfied or whether an act of bankruptcy under clause (iii) had been committed. Furthermore, the District Court held that the bankruptcy court had not made a specific finding under section 3713(a) as to the amount Mr. Webb paid toward other debts ahead of the government's claim.

The District Court remanded with specific instructions (1) to make specific findings regarding whether the prerequisites to priority status under section 3713(a) have been met; (2) pursuant to section 3713(b), to specifically determine the amounts paid by Mr. Webb toward other debts ahead of the government's claim; and (3) for reconsideration of the debtors' argument that the government's claim is not entitled to priority under 11 U.S.C. § 507(a) (7).

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U.S. DISTRICT COURT  
DISTRICT OF OREGON

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U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
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TERENCE J. DUNN, CLERK  
BY *[Signature]* DEPT.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In re )

DANIEL M. WEBB and PAULINE A. )  
WEBB, )

Debtors in Possession. )

Civil No. 91-6268-JO

DANIEL M. WEBB and PAULINE A. )  
WEBB, )

Appellants, )

v. )

OPINION AND ORDER

UNITED STATES OF AMERICA, )  
DEPARTMENT OF THE TREASURY, )  
INTERNAL REVENUE SERVICE, )

Appellee. )

JONES, Judge:

This matter comes before the court on appeal from the order of the bankruptcy court. Appellants are Daniel and Pauline Webb (the Webbs). Appellee is the United States of America by and through the Department of the Treasury and the Internal Revenue Service (the IRS) (collectively as the government).

Background

The Webbs are the former owners of the Rice Hill Truck

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91-16(12)

Stop (the truck stop). The Webbs sold the truck stop business to a partnership comprised of Stanley Becker, Thomas Bouchoux and Azmi Berkman (collectively as Becker) in 1983. The sale from the Webbs to Becker was by means of a land sale contract secured by a promissory note.

Those three individuals operated the truck stop business under the name Rice Hill Truck Plaza. In 1984, the truck stop was leased to Truc Op, Inc., a Nevada corporation owned by Becker and Bouchoux. In March 1984, the partnership dissolved and Becker succeeded to all the partnership property, including the truck stop.

Becker defaulted on the contract of sale and the Webbs brought a claim against Becker in the Circuit Court of the State of Oregon. See Daniel M. Webb and Pauline A. Webb v. Stanley M. Becker, et al., Civil No. E84-2659. In that action, the Webbs sought to foreclose their contract to sell the truck stop.

On January 25, 1985, the Circuit Court entered an order appointing Ollie Fosback (Fosback) as receiver of the truck stop during pendency of the foreclosure proceeding. Fosback operated the truck stop through September 25, 1985. On September 25, 1985, the Circuit Court substituted Mr. Webb for Fosback as receiver of the truck stop. Mr. Webb operated the truck stop as receiver through January, 1986. On February 14, 1986, the Douglas County Circuit Court entered an order terminating the receivership. The order also provided that Mr. Webb was to

that Mr. Webb was not discharged.

While the truck stop was in receivership it was insolvent to the extent that its liabilities exceeded its assets. In early 1987, the IRS began an administrative audit of the truck stop's liability for federal diesel fuel excise taxes incurred during the receivership period. That audit concluded when Webb, in his capacity as receiver for the truck stop, executed two treasury forms consenting to assessments of excise tax deficiencies against the receivership for the receivership period.

The federal diesel fuel excise tax liability incurred by the truck stop during the receivership period totalled \$296,473.00, and can be broken down as follows:

First Quarter 1985	\$55,303.68
Second Quarter 1985	\$87,961.60
Third Quarter 1985	\$75,692.82 <sup>1</sup>
Fourth Quarter 1985	\$77,514.90

The total payment by the truck stop to the IRS during the receivership period was \$234,116.78, and can be broken down as follows:

Paid by Fosback	\$170,351.40
Paid by Webb	\$ 63,765.38

Thus, the fuel tax liability incurred during the

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<sup>1</sup>. Fosback was receiver through September 24, 1985. The tax liability incurred during the second quarter while Fosback was receiver totalled \$71,292.85. The tax liability incurred during the second quarter while Webb was receiver totalled \$4,399.97.

receivership and left unpaid by the truck stop totalled \$62,356.22.<sup>2</sup>

The truck stop was eventually sold to Ellis Emory, who took possession of the truck stop in December 1987. The Webbs filed their bankruptcy petition under chapter 11 of the Bankruptcy Code on August 18, 1987. The IRS was listed as a disputed creditor on the schedule filed by the Webbs. The IRS filed a proof of claim in the amount of \$96,163.08 for the unpaid excise taxes, penalties and interest. The Webbs filed an objection to the IRS's proof of claim.

The bankruptcy court conducted a confirmation hearing where a plan of reorganization was tentatively adopted. At the confirmation hearing, the bankruptcy court heard evidence on the IRS's claim but did not decide the extent of the Webb's liability for that claim. The bankruptcy court held a second hearing specifically addressing the IRS's claim. After taking the matter under advisement, the bankruptcy court issued a written ruling in which the bankruptcy court determined that the IRS claim was entitled to priority status under 31 U.S.C. § 3713(a), and that

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<sup>2</sup>. There was also an overassessment followed by an administrative error. As a result, three refund checks were mailed to the truck stop and erroneously delivered to the subsequent owner of the truck stop who currently has the checks in his possession. The bankruptcy court determined that the amount of the misdelivered refund checks be offset against the truck stop's excise tax liability. The government does not appeal the bankruptcy court's ruling in this regard and the court does not disturb it.

Mr. Webb was personally liable to the IRS in the amount of \$70,101.06.<sup>3</sup>

The Webbs filed a motion to alter, amend or for a new trial which the bankruptcy court denied. The bankruptcy judge also issued a supplemental letter opinion wherein he ruled that the Webbs were barred by res judicata from denying that the government's claim was entitled to priority under section 507(a)(7) of the bankruptcy code.<sup>4</sup>

#### Issues on Appeal

Pursuant to Bankruptcy Rule 8006, the Webbs present two general issues on appeal. First, the Webbs submit that the bankruptcy court erred in allowing the IRS's proof of claim to the extent the claim exceeded the amount claimed for FUTA taxes (\$974.05). The Webbs also object to the amount of the claim allowed. Second, the Webbs submit that the bankruptcy court erred in determining that the IRS's claim is entitled to priority under the bankruptcy code.

#### Jurisdiction

Pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C § 505, this case was properly before the bankruptcy court. See also Local Rule 2101-1. The order appealed from was entered by

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<sup>3</sup>. The bankruptcy court arrived at this figure by adding \$974.05 in FUTA taxes and \$1049.61 in interest thereon, plus pre-petition penalties and interest totalling \$6,621.18 to the \$62,356.22 for unpaid excise taxes.

<sup>4</sup>. The government concedes that the doctrine of res judicata is not applicable to these facts. However, the government asserts that the issue is time barred.

the bankruptcy court on February 14, 1991. Notice of appeal was timely filed. See Bankruptcy Rule 8002(a), (b). This court has jurisdiction over the appeal under 28 U.S.C. § 158(a).

#### Standards for Review

The court reviews the findings and determinations of the bankruptcy court under two standards. The bankruptcy court's findings of fact will not be disturbed unless those findings are clearly erroneous. In re Contractors Equipment Supply Co., 861 F.2d 241, 243 (9th Cir. 1988). "A finding of fact is clearly erroneous when, after reviewing the evidence, [the court is] left with the definite and firm conviction that a mistake has been committed." Id. (internal quotations omitted, citations omitted); see also Bankruptcy Rule 8013. The bankruptcy court's conclusions of law are reviewed de novo. In re Contractors Equipment Supply Co., 861 F.2d at 243.

#### Burden of Proof

As a preliminary matter, the Webbs submit that the government bears the burden of proving the validity and amount of its claim by a preponderance of the evidence. See Matter of Fidelity Holding Co., 837 F.2d 696, 698 (5th Cir. 1988) (under the bankruptcy code once debtor puts forth evidence rebutting claimant's prima facie claim, then claimant bears the burden of proving its claim); but see United States v. Cole, 733 F.2d 651, 654 (9th Cir. 1984) (the party who argues that the government's priority under 31 U.S.C. § 3713 does not apply bears the burden of showing that they are not within the provisions of section

3713).

However, the question of who bears the burden of proof is not relevant to this appeal. Nothing in the record suggests that the appropriate standard of proof was at issue at trial. The Webbs do not argue that the bankruptcy court applied the wrong standard. Nor do the Webbs argue that the bankruptcy court erred in its application of that standard to these facts. The issue on appeal is whether the bankruptcy court made clearly erroneous factual findings, or otherwise misapplied the law.

#### Discussion

The bankruptcy court found that the government's claim for unpaid fuel excise taxes incurred by Rice Hill after the appointment of the first receiver, Ollie Fosback, and during Mr. Webb's tenure as receiver is entitled to priority under 31 U.S.C. § 3713(a). The bankruptcy court also found Mr. Webb personally liable to the government in the amount of \$70,101.06 under 31 U.S.C. § 3713(b).

The Webbs contend that the conditions triggering priority status under 31 U.S.C. § 3713(a) have not been satisfied, and, therefore, Mr. Webb is not liable for any receivership fuel excise taxes regardless of when those taxes were incurred. Further, the Webbs contest the amount of liability determined under 31 U.S.C. § 3713(b). It is the government's position that there is sufficient evidence in the record to support the bankruptcy court's finding that the government's claim is entitled to priority and that Mr. Webb is

personally liable under 31 U.S.C. § 3713(b) for the receivership's fuel excise taxes.

Title 31, section 3713, otherwise known as the federal insolvency statute, provides as follows:

(a) (1) A claim of the United States Government shall be paid first when --

(A) a person indebted to the Government is insolvent and --

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached;

(iii) an act of bankruptcy is committed;  
or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

31 U.S.C. § 3713.

Under section 3713(a), a claim of the United States government is given first priority of payment when a debtor is insolvent and makes a voluntary assignment of property or commits an act of bankruptcy. Further, once priority status under section 3713(a) is triggered, "[s]ection 3713(b) establishes personal liability for a representative of the debtor who pays

other claimants before paying the claims of the federal government. United States v. Cole, 733 F.2d 651, 654 (9th Cir. 1984). The statute's priority provisions are given liberal interpretation in order to effectuate its purpose of securing adequate revenue to satisfy burdens on the federal treasury. Id.

In order to trigger the priority provisions of section 3713(a), the following conditions must be met: (1) a person is indebted to the government; (2) that person is insolvent; and (3) that person's insolvency is manifested in one of the three ways set forth in the statute. Nolte v. Hudson Nav. Co., 8 F.2d 859, 866 (2d Cir. 1925) (applying the predecessor of section 3713(a)). "It must appear . . . that an insolvent debtor has made a voluntary assignment . . . or . . . that an act of bankruptcy has been committed." Id.; accord SEC v. Levine, 881 F.2d 1165, 1177-78 (2d Cir. 1989) (applying section 3713(a) and citing Nolte with approval).

After considering the evidence offered at two hearings, including extensive briefing from both parties, the bankruptcy court determined that the government's claim against the truck stop for unpaid diesel fuel excise taxes was entitled to priority under section 3713(a). ER 439-446. In its ruling, the bankruptcy court stated:

The government's case, of course, supporting its proof of claim is based on 31 U.S.C. Section 3713 which is the federal priority statute. I won't read the statute into the record. In substance, subsection (a) of the statute provides that any claim of the United States government shall be paid first when a person who's indebted to the government is insolvent

and they've done certain other things. One of those other things is that a voluntary assignment has been made.

Subsection (b) of the statute, which I believe is the pertinent section that we're dealing with here today, provides that a personal representative, such as a receiver, is liable to the government when the receivership is insolvent and they have preferred claims of the government over others.

ER 441.

The bankruptcy court referred only indirectly to the requirements of section 3713(a)(1)(A). The court did not expressly find that clause (i) had been satisfied, or that an act of bankruptcy under clause (iii) had been committed. Although it is implicit in the bankruptcy court's ruling that the bankruptcy court was satisfied that one of those two conditions had been met, this court cannot properly determine the validity of that ruling absent specific findings of fact and conclusions of law.

The government contends that the record supports the bankruptcy court's finding that either or both conditions were met. After carefully reviewing the 546 pages contained in the Webbs' excerpt of the record and the parties' briefs, the court does not agree.

Neither the record, nor the bankruptcy court's findings in regard to section 3713(a), are sufficient to allow meaningful review. Because the bankruptcy court did not make specific factual findings, and the record is not sufficient to inform the court, the court finds that remand is appropriate. See Bankruptcy Rule 8013.

In regard to section 3713(b), the bankruptcy court made specific findings as to Mr. Webb's knowledge of the excise tax claims. However, neither the bankruptcy court's findings nor the record provide sufficient information as to the amount Mr. Webb paid toward other debts ahead of the government's claim. As the government notes:

the Bankruptcy Judge determined that it was not necessary to dwell upon any specific reduction in the amount of secured debt owed by the business due to the 'amount of payment that were made by Mr. Webb as the receiver in this case.' The court tacitly found that Webb paid sufficient creditors to cause him to be liable for the full amount of the excise taxes incurred by the receivership.

Appellee's Brief, p. 15 (citation to Webb's excerpt of the record omitted).

Unfortunately, the bankruptcy court's tacit findings are not sufficient. Assuming, without deciding, that priority under section 3713(a) is triggered, the plain language of section 3713(b) requires the court to determine specifically how much money was paid by the debtor's representative on other debts ahead of the government.<sup>5</sup> Accordingly, the court finds that remand is appropriate.

The court remands this matter to the bankruptcy court with the following instructions:

(1) to make specific findings in regard to whether the

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<sup>5</sup>. The statute provides as follows:

A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

31 U.S.C. 3713(b) (emphasis added).

prerequisites to priority status under section 3713(a) have been met;

(2) pursuant to section 3713(b), to specifically determine the amounts paid by Mr. Webb toward other debts ahead of the government's claim; and

(3) in light of the court's decision to remand this matter and in the interest of judicial economy, the court finds that reconsideration of the Webbs' argument under 11 U.S.C. § 507(a)(7) is appropriate.

To the extent they are contingent on the outcome of the proceeding on remand, the court does not address the Webbs' other assertions of error.

Conclusion

This matter is REMANDED to the bankruptcy court for further disposition consistent with this order.

DATED this 19<sup>th</sup> day of December, 1991.

  
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ROBERT E. JONES  
United States District Judge

Certified to be a true and correct  
copy of original filed in my office.  
Dated DEC 24 1991  
By Donald M. Cinnamon Clerk  
Deputy