

1 Dischargeability under § 523(a)(1)(A)
2 Workers Compensation Payments
3 Noncomplying Employer

3 Olsen v. Oregon 97-6183-fra
4 (In re Gary B. Olsen 696-64164-fra7)
5 2/12/98 FRA Unpublished

6 The Debtor had a business and employees, but failed to
7 obtain workers compensation insurance as required by state law.
8 One of the employees was injured on the job and filed a claim
9 with the Oregon Department of Consumer and Business Services, the
10 Defendant in this action. The Defendant referred the claim to
11 SAIF, which determined that the employee was covered by the
12 Workers Compensation Act and that the injury was compensable.
13 SAIF thereupon began making payments to the employee and billing
14 the Defendant for the amounts so paid. Oregon law makes the
15 noncomplying employer liable for the amounts paid by the
16 Defendant to SAIF. The Debtor filed bankruptcy, seeking
17 discharge of his liability to the Defendant. The parties agreed
18 to have the court issue a judgment on stipulated facts.

19 Both parties agreed that, based on prior case law, the
20 amounts owed to the Defendant qualify as excise taxes which are a
21 priority tax under § 507(a)(8)(E)(ii) if based on a transaction
22 occurring within three years of the petition date. Priority
23 taxes are nondischargeable under § 523(a)(1)(A). The issue to be
24 decided was the date the transaction occurred upon which the
25 excise tax was levied: the date of the injury as argued by the
26 Plaintiff, or a later date.

27 The court examined prior case law and determined that the
28 correct transaction date in these circumstances is the date that
29 the Defendant reimburses SAIF for the claims costs. It is that
30 payment which creates the liability incurred by the noncomplying
31 employer under state law. Based on that holding, the court ruled
32 that the part of the claim based on payments made by the
33 Defendant more than three years prior to the petition date was
34 discharged while the part of the claim based on reimbursements
35 occurring within three years of the petition date was a
36 nondischargeable priority tax. The part of the Defendant's claim
37 representing estimated future costs to be reimbursed represented
38 estimated post-petition claims; while not discharged in the
39 present case, it would be denied pursuant to the trustee's
40 objection to claim. Debtor will be liable for those future costs
41 as they accrue.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE)	
)	
GARY B. OLSEN,)	Case No. 696-64164-fra7
)	
_____ Debtor.)	
)	
GARY B. OLSEN,)	Adv. Proc. No. 97-6183-fra
)	
Plaintiff,)	
)	
v.)	
)	
STATE OF OREGON, acting by)	
and through the Department of)	
Consumer and Business Services,)	
)	MEMORANDUM OPINION
_____ Defendant.)	

The Plaintiff filed a complaint to determine the dischargeability of a debt owed to the Defendant; the parties have agreed to submit the case for judgment on stipulated facts.

Facts Stipulated To

1. Plaintiff's former employee, Tyra Ward, was permanently and totally disabled by an on the job injury which occurred April 11, 1988.

2. When Ms. Ward was injured, Plaintiff did not have

1 workers' compensation insurance, making the Plaintiff a non-
2 complying employer as defined by O.R.S. 656.005(18).

3 3. The State Accident Insurance Fund Corporation (SAIF)
4 determined that Ms. Ward was a "subject worker" as defined by the
5 workers' compensation laws and that the injury to Ms. Ward was
6 compensable; according to Defendant's claim, costs began accruing
7 on Ms. Ward's claim on June 30, 1988.

8 4. On September 20, 1995, the Workers' Compensation Board of
9 the State of Oregon issued a stipulated order signed by
10 Plaintiff's attorney and a representative of the Defendant. The
11 parties stipulated to imposition of \$9,487 in civil penalties
12 against the Plaintiff. No payment has been made on the penalty.

13 5. The Plaintiff filed a Chapter 7 petition in bankruptcy on
14 August 22, 1996, and received a discharge under Chapter 7 on
15 December 13, 1996.

16 6. The Defendant timely filed a proof of claim in the
17 Plaintiff's bankruptcy in the amount of \$240,064.02 general
18 unsecured and \$251,025.62 priority. Included in the Defendant's
19 general unsecured claim is the \$9,487 penalty which the parties
20 agree is nondischargeable under 11 U.S.C. § 523(a)(7). The
21 remaining general unsecured claim represents claims costs
22 incurred by the Defendant more than three years prior to the
23 petition date. The priority claim contains claims costs of
24 \$37,782.04 incurred within three years of the petition date and
25 \$213,243.58 in estimated future claims costs.

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1 Applicable Law

2 Every Oregon employer employing one or more "subject
3 workers" is required by O.R.S. 656.017 to carry workers'
4 compensation insurance. When an employer employs one or more
5 subject workers and fails to obtain this insurance, the employer
6 becomes a "noncomplying employer" per O.R.S. 656.005(18).

7 When an employee of a noncomplying employer suffers an on-
8 the-job injury, the employee files a claim with the Department of
9 Consumer and Business Services, the Defendant in this action.
10 The Defendant then refers the claim to a "claims agent"¹ which
11 processes the claim just as it would had the claim been made by
12 an employee of a covered employer. O.R.S. 656.054(1). If the
13 claims agent determines that the injury is compensable, it pays
14 the benefits for which the claimant is eligible. The claims
15 agent periodically bills the Defendant for the amounts paid to
16 the claimant and for other costs as defined by statute.
17 Reimbursable amounts paid by the Defendant from the Workers'
18 Benefit Fund to the claims agent become a liability of the
19 noncomplying employer. O.R.S. 656.054(3).

20 The claims costs paid by the Defendant to the claims agent
21 are excise taxes under 11 U.S.C. § 507(a)(8)(E) in any bankruptcy
22 filed by the noncomplying employer. In re Camilli, 94 F.3d 1330,
23 1333 (9th Cir. 1996), cert. denied 117 S.Ct. 953(1997); In re
24 Beaman, 9 B.R. 539 (Bankr. D. Or. 1980). Both parties agree that

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26 ¹ Which in the present case is SAIF, a quasi state agency providing
workers' compensation insurance.

1 these cases are controlling with regard to whether the liability
2 in question is an excise tax under bankruptcy law.

3 Excise taxes are entitled to priority under
4 §507(a) (8) (E) (ii) if they are on a transaction occurring during
5 the three years immediately preceeding the date of the filing of
6 the petition. A priority excise tax is not dischargeable in a
7 Chapter 7 bankruptcy pursuant to 11 U.S.C. § 523(a) (1) (A).

8 ISSUES PRESENTED

9 1. When does the transaction occur upon which an excise tax
10 is levied, where the excise tax represents the liability incurred
11 by a noncomplying employer for amounts paid by the Department of
12 Consumer and Business Services to a claims agent?

13 2. Given the transaction date, what part, if any, of the
14 Defendant's claim is nondischargeable under 11 U.S.C. §
15 523(a) (1) (A)?

16 DISCUSSION

17 Transaction Date

18 The Plaintiff argues that the transaction giving rise to the
19 Plaintiff's obligation was the injury of the employee, Ms. Ward.
20 That would put the transaction date in 1988, more than three
21 years prior to the petition date, making the entire debt, with
22 the exception of the civil penalty, subject to discharge. The
23 Defendant, on the other hand, argues that the transaction giving
24 rise to the excise tax in question is the payment of state funds
25 from the Workers' Benefit Fund to the designated claims agent.

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1 The Ninth Circuit Court of Appeals reviewed a situation
2 similar to the present one in the context of Arizona workers'
3 compensation law. Arizona has provisions similar to Oregon's
4 regarding noncomplying employers; the primary difference being
5 that in Arizona payments are made to an injured employee directly
6 by the state rather than by a third party as in Oregon. In that
7 case, the Court of Appeals stated that "[t]he source of [the
8 noncomplying employer's] obligation to repay the workers'
9 compensation benefits in this case was . . . the statutorily-
10 created obligation to reimburse the Special Fund once the Fund
11 paid benefits to an uninsured employee." Industrial Commission of
12 Arizona v. Camilli (In re Camilli), 94 F.3d 1330, 1333 (9th Cir.
13 1996).

14 In In re Beaman, 9 B.R. 539 (Bankr. D. Or. 1980), Judge
15 Sullivan stated that the "transaction which triggers liability
16 for this [excise] tax is the payment of benefits by the state
17 funds." In Beaman, the primary determination made by the court
18 concerned whether the liability incurred by the noncomplying
19 employer is an excise tax; the date of the transaction does not
20 appear to have been a necessary element in the court's
21 determination of dischargeability of the obligation.

22 Subsequent to Beaman, the question of the transaction date
23 was confronted in an unpublished opinion by Judge Hess in In re
24 McClure, No. 81-0274 (Bankr. D. Or. 5/2/82). In that opinion,
25 Judge Hess ruled that the transaction date giving rise to the
26 excise tax was each date that SAIF (the claims agent) made a

1 payment to the injured employee, rather than the date of the
2 accident. The rationale used was that it would be inappropriate
3 to hold that the transaction date was any earlier than the date
4 that claims costs were paid because the tax is determined by the
5 amount of money required to be expended by SAIF.

6 It is the payment by the Workers' Benefit Fund which legally
7 obligates the noncomplying employer, not the payment by the
8 claims agent or the injury to the subject worker.² O.R.S.
9 656.054(4) requires the Department of Consumer and Business
10 Services to periodically audit the files of assigned claims
11 agents to validate the amounts reimbursed and deny those amounts
12 found not to be reimburseable. Payment by the claims agent
13 therefore does not necessarily mean that it will be reimbursed by
14 the Workers' Benefit Fund or become an obligation of the
15 noncomplying employer. In any case, the noncomplying employer
16 does not have any liability with respect to claims costs until
17 payment is made to the claims agent from the Workers' Benefit
18 Fund.

19 I therefore hold that the transaction date giving rise to
20 the excise tax is the date that payments are made from the
21 Workers' Benefit Fund which become the liability of the
22 noncomplying employer pursuant to O.R.S. 656.054.

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24
25 ²O.R.S. 656.054(3) states: "In addition to, and not in lieu of, any
26 civil penalties assessed pursuant to ORS 656.735, all costs to the Workers'
Benefit Fund incurred under subsection (1) of this section shall be the
liability of the noncomplying employer."

1 Dischargeability of Defendant's Claim

2 1. General Unsecured Claim

3 The parties have stipulated that \$230,577.02 of the
4 Defendant's general unsecured claim of \$240,064.02 was incurred
5 more than three years prior to the petition date and was
6 therefore discharged. The remainder of the general unsecured
7 debt represents the civil penalty which the parties agree was not
8 discharged pursuant to 11 U.S.C. § 523(a) (7).

9 2. Priority Claim

10 \$37,782.04 of the Defendant's priority claim represents
11 claims costs incurred by the Defendant within the three years
12 immediately preceding the petition date. These costs represent
13 priority excise taxes for purposes of 11 U.S.C. §507(a) (8) (E) (ii)
14 since the transaction dates giving rise to these excise taxes
15 occurred within the three years immediately preceding the
16 petition date. As a priority excise tax under § 507(a) (8), the
17 \$37,782.04 is nondischargeable under 11 U.S.C. § 523(a) (1) (A).

18 The remainder of the Defendant's priority claim,
19 \$213,243.58, represents that amount which the Defendant estimates
20 it will be paying to SAIF in the future on Ms. Ward's claim.
21 Because the transaction dates giving rise to this estimated
22 amount have yet to occur, the \$213,243.58 represents an estimate
23 of excise taxes expected to accrue post-petition. As such, this
24 estimate of the post-petition claims of the Defendant was not
25 discharged in this bankruptcy case. This court cannot, moreover,
26 declare this amount to be nondischargeable in all instances under

1 § 523(a) (1) (A).³ These future costs are a liability which will
2 accrue as the Defendant makes payments to SAIF and for which the
3 Plaintiff/Debtor will be obligated according to state law.
4 Whether they may be discharged in some future case must be
5 determined at that time.

6 CONCLUSION

7 The amount of the Defendant's general unsecured claim
8 representing the civil penalty of \$9,487 is nondischargeable
9 under 11 U.S.C. § 523(a) (7). The remainder of the general
10 unsecured claim was discharged. \$37,782.04 of the Defendant's
11 priority unsecured claim represents priority excise taxes under
12 11 U.S.C. § 507(a) (8) (E) (ii) and, as such, is nondischargeable
13 under 11 U.S.C. § 523(a) (1) (A). The remainder of the Defendant's
14 priority unsecured claim, \$213,243.58, represents an estimate of
15 unliquidated post-petition excise taxes which is not a proper
16 claim in Plaintiff's bankruptcy and will be denied accordingly.
17 Counsel for the Defendant will provide a form of judgment
18 consistent with this Memorandum Opinion.

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21 FRANK R. ALLEY, III
22 Bankruptcy Judge

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24 ³ 11 U.S.C. § 523(a) (1) (A) makes a tax nondischargeable if it is "of the
25 kind and for the periods specified in . . . section 507(a) (8) of this title. .
26 . ." (emphasis added). Because a tax is only a priority excise tax under §
507(a) (8) if based on a transaction occurring in the three years immediately
prior to the petition date, the court could not declare an excise tax to be
nondischargeable if it were based on a transaction occurring post-petition.