

Chapter 13 Confirmation
§ 109(e) Threshold
26 USC §6672 Penalty Tax

Robert and Anne Brown, Case No. 603-62645-fra13

8/13/03 FRA

Unpublished

Debtors filed for Chapter 13 with a number of creditors and the trustee objecting to confirmation on grounds, among others, that the debtors' unsecured noncontingent and liquidated debts exceeded the threshold limitation of Code § 109(e).

Debtor Robert Brown was the owner and president of a business also in bankruptcy which failed to remit to the IRS the withholding taxes taken from its employees' pay. The corporate business was held liable by the IRS for the unpaid taxes. The Debtor was also assessed a penalty tax under 26 USC § 6672 equal to 100% of the unremitted withholding taxes. The amount of that penalty, when combined with the Debtors' other unsecured debts, put the debtors' total unsecured debts above the threshold limit.

In response to Debtors' arguments, the court held that the penalty was not contingent merely because the provisions of the corporate debtor's proposed plan provided for repayment of the taxes. The Debtor was liable for the penalty tax at the petition date and the fact that he may be relieved of that liability by some later occurrence (i.e. payment by the corporation) does not reduce the liability as of the petition date. The debt was liquidated because the amount of the unremitted taxes had already been acknowledged by the Debtor and could have been easily ascertained in any case.

The court denied confirmation and gave the Debtors 14 days to convert or dismiss the case.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	603-62645-fra13
BROWN, ROBERT W.	)	
BROWN, ANNE M.	)	MEMORANDUM OPINION
	)	
_____ Debtors.	)	

Debtors filed their petition for relief under Chapter 13 of the Bankruptcy Code on April 7, 2003. MorEquity Inc., a creditor, the United States, on behalf of the Internal Revenue Service, and the Trustee object to confirmation on various grounds, including feasibility and eligibility. Because the court finds that the Debtors are ineligible under Chapter 13, confirmation of the Debtors' proposed plan will be denied, and the case dismissed unless the Debtors elect to convert the case to one under either Chapter 7 or 11 of the Bankruptcy Code.

FACTS

Debtor Robert W. Brown is the owner and president of Brown Masonry, Inc., an Oregon corporation. Brown Masonry, Inc. is

presently a debtor-in-possession in a Chapter 11 case before this court.

During the course of its business operations, Brown Masonry withheld from its employees taxes owed by the employees to the United States. Instead of remitting the withheld funds to the Treasury, the corporation, under Robert Brown's direction, expended the funds for other purposes. It is not disputed that, at the time in question, the money was withheld, that Mr Brown was acting as president of the company, and that the amounts withheld were identified and reported to the Treasury. All these events occurred prior to the Debtors' petition for relief in this case.

The government now contends that Robert Brown is subject to a penalty equal to 100% of the monies withheld by the corporation from its employees. If this is so, then the unsecured debt owed by the Debtors exceeds the jurisdictional limits for Chapter 13 cases.

Debtors, on the other hand, argue that the debt is not owed or, alternatively, that it is unliquidated and contingent, because the expected final reorganization of the corporation will provide for payment of the government's claim.

DISCUSSION

The Bankruptcy Code, at 11 USC section 109(e) provides that:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated unsecured debts of less than \$290,525.00... may be a debtor under Chapter 13 of this title.

1 The limits created by § 109 are jurisdictional. In
2 determining the amounts, a bankruptcy court may look past the
3 schedules to other evidence submitted, including proofs of claim
4 filed in the case, when an objection to the debtor's eligibility
5 under § 109(e) is raised. In re Soderlund, 236 B.R. 271, 273 (BAP
6 9th Cir. 1999)(internal citations omitted).

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8 The Internal Revenue Code, at 26 USC § 6672, provides:

9 (a) General rule- Any person required to collect, truthfully
10 account for, and pay over any tax imposed by this title who
11 willfully fails to collect such tax, or truthfully account
12 for and pay over such tax, or willfully attempts in any
13 matter to evade or defeat any such tax or the payment
thereof, shall, in addition to other penalties provided by
law, be liable to a penalty equal to the total amount of the
tax evaded, or not collected, or not accounted for and paid
over....

14 (b)Preliminary notice requirement-

15 (1) In general: No penalty shall be imposed under subsection
16 (a) unless the secretary notifies the taxpayer in writing by
17 mail... or in person that the taxpayer shall be subject to an
assessment of such penalty.

18 (2) Timing of notice-The mailing of the notice described in
19 paragraph (1) (or, in the case of such a notice delivered in
person, such delivery) shall precede any notice and demand of
any penalty under subsection (a) by at least 60 days.

20 The Debtors contend that they are not subject to the penalty
21 described in IRC § 6672, and that, even if they are, the claim is
22 contingent and unliquidated, and should not be included in
23 determining their eligibility under Bankruptcy Code § 109. The court
24 disagrees on all counts.

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1 1. Applicability of penalty tax.

2 The Debtor's corporation withheld payroll and income taxes
3 from its employees. When the time came to remit these withheld
4 taxes to the government, Debtor instead filed the appropriate forms
5 acknowledging the amount withheld, but did not pay the money over.
6 Debtors now argue that acknowledgment that the withholding took
7 place satisfies § 6672's requirement that the employer "account for
8 and pay over" the withheld tax.

9 It is clear from the purpose and structure of IRC § 6672 that
10 the penalty will apply if the money is not actually paid over. The
11 section imposes the penalty on an employer who has "not accounted
12 for *and* paid over" the tax: this is far different from the Debtors'
13 interpretation, which essentially rewrites the Code to say "not
14 accounted for *or* paid over." To interpret this section to allow the
15 management of a company to escape liability merely by admitting that
16 it appropriated the funds without paying them over would render the
17 statute useless.

18 2. Preliminary notice.

19 Debtors argue that the second of two preliminary notices is
20 invalid since it was delivered after this bankruptcy case was
21 commenced, and therefore in violation of the automatic stay. 11 USC
22 § 362. Code § 362(b)(9), which excludes certain acts from the
23 operation of the automatic stay, includes "the issuance to the
24 debtor by a governmental unit of a notice of tax deficiency,"
25 (Section 362 (b)(9)(B)) and "the making of an assessment for any tax
26 and issuance of a notice and demand for payment for such an

1 assessment...." (§ 362 (b)(9)(D)). The court therefore finds that
2 the notice required by the Internal Revenue Code falls within the
3 scope of Bankruptcy Code § 362(b)(9), and that the notices are not
4 prohibited by the automatic stay.

5 3. Contingent.

6 Debtors believe the tax penalty claim is contingent because
7 the company, which is primarily liable for the tax claimed, intends
8 to pay the debt through its Chapter 11 case. A debt is noncontingent
9 if all events giving rise to liability occurred prior to the filing
10 of the bankruptcy petition. In re Nicholes, 184 B.R. 82,88 (BAP 9th
11 Cir. 1995)(citing In re Fostvedt, 823 F.2d 305,306 (9th Cir. 1987)).
12 Viewing the circumstances as of the date of the petition, the
13 precursor to liability, namely withholding by a corporation
14 controlled by the Debtor without remission to the government, had
15 already occurred. The fact that a third party might relieve the
16 Debtors of liability by paying the tax at some future date does not
17 reduce or limit their liability as of the date of the petition. See
18 In re Nicholes 184 B.R. at 88 ("liability on contract [the type of
19 debt at issue in Nicholes] is 'noncontingent' once contract is made,
20 *even if liability is subject to being avoided by some later*
21 *occurrence.*") (citing In re Albano, 55 B.R. 363, 366-67 (N.D. Ill.
22 1985)(italics added)).

23 4. Unliquidated.

24 A debt is liquidated if it is capable of easy calculation
25 without the need for an extensive hearing. In re Slack, 187 F.3d
26 1070 (9th Cir. 1999). The amount of the debt in this case is not

1 subject to any serious dispute: The Debtors and Smith Masonry have
2 already acknowledged the amount withheld from the paychecks. Even if
3 they were to dispute this, the amount withheld would be easily
4 ascertained by referring to the corporation's payroll records. The
5 claim is liquidated.

6
7 CONCLUSION

8 The Internal Revenue Service has a liquidated and non-
9 contingent claim against Debtor Robert Brown in the sum of
10 \$201,945.79. When combined with other debts disclosed by schedules
11 and the proofs of claim, the total of the noncontingent liquidated
12 unsecured debts owed by the Debtors exceeds \$290,525.00.

13 Confirmation of Debtors' proposed plan of reorganization will
14 be denied, and the Debtors given 14 days from the date of the order
15 to elect to convert the case to one under Chapter 7 or Chapter 11.
16 In the absence of such election, the case will be dismissed without
17 further notice.

18 The foregoing constitutes the court's findings of fact and
19 conclusions of law, which will not be separately stated.

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23 Frank R. Alley, III
24 Bankruptcy Judge

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26 cc: Judson Carousone; Kelley Blaine; Fred Long