11 USC §507(a)(7)(A)(ii)
11 USC §523(a)(1)(A)
11 USC §523(A)(1)(C)

Parks v. USA (IRS), Adv. No. 90-3323-S
In re Parks Case N0. 387-04709-S7
10/24/91 CEL unpublished

The debtors reopened their chapter 7 and sought a determination that their tax debt had been discharged. The taxes arose from a period for which the returns were due more than three years before the bankruptcy was filed, and would normally be "stale" and dischargeable. However, the returns were not timely filed, and were assessed within 240 days of the petition, so the taxes would be non dischargeable priority taxes under

§§ 507(a)(7)(A)(ii) and 523(a)(1)(A).

The debtors argued that the date of assessment should be considered to be the date they reached an agreement with the government because the debtors had conditioned their agreement upon a prompt assessment by the IRS. The attorney for the IRS had agreed to seek a prompt assessment, but the taxes were not actually assessed until two months after the stipulated tax court decision was entered. The debtor's attorney did not pursue confirmation of the assessment date.

Judge Luckey held that the taxes were not discharged. The attempt to discharge taxes was not an injury foreseeable by the government at the time the settlement was reached. The debtors could have mitigated their damages by verifying the date of assessment and waiting an appropriate time to file their bankruptcy.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	) Bankruptcy Case No. 387-04709-S7
WAYNE RANDLE PARKS and SALLY BACKUS PARKS,	) Adversary Proceeding No. 90-3323-S
Debtors,	) NARRATIVE MEMORANDUM
WAYNE and SALLY PARKS,	) OPINION, FINDINGS OF FACT AND CONCLUSIONS
Plaintiffs,	) OF LAW
v.	)
UNITED STATES OF AMERICA and its agency, INTERNAL REVENUE SERVICE,	)
Defendants.	)

Plaintiffs commenced this adversary proceeding to determine dischargeability of tax debts due the Internal Revenue Service pursuant to a discharge entered December 18, 1987. The United States answered alleging that when plaintiffs' bankruptcy petition was filed, priority income taxes and interest were owed and that those debts should be determined

nondischargeable.

A First Amended Complaint was filed to add an additional questioned year. The United States' answer was to the amended complaint. The Internal Revenue Service moved for Summary Judgment supported by its memorandum and affidavits.

The Plaintiffs filed a Motion for Summary Judgment with memorandum and supporting documents. the United States for the Internal Revenue Service filed its objection to the Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment with Memorandum and supporting documents.

The proceedings came before the Court on October 9, 1991. At the commencement of the hearing, counsel for both parties stated on the record that neither had any additional evidence to submit and the Court should enter a ruling from the record. Counsel for each party made oral arguments in support of their position and the matter was submitted.

The Court is now advised and renders its Narrative Opinion, Findings of Fact and Conclusions of Law as follows.

In 1986 the Plaintiffs were represented by Charles Gauger, P.C., an Attorney - Certified Public Accountant, in a pending United States Tax Court case.

The Internal Revenue Service was then represented by an attorney, Christine V. Olsen.

Settlement negotiations proceeded and Mr. Gauger contended in his affidavits that a proposed tax court settlement was conditioned upon a prompt assessment by the Internal Revenue Service after the settlement agreement was executed December 12, 1986 and hand

delivered that date with a cover letter reading:

> "Dear Christine:
>
> Enclosed please find a signed Decision and Stipulation for the above Tax Court Case. I would like to request you attempt to have the tax assessed as of today, December 12, 1986. Please provide me with confirmation, either in writing or with a photocopy of the assessment documents for my files.
>
> If you have any questions, please do not hesitate to give me a call.
>
> Very truly yours,
>
> Charles S. Gauger, P.C."

There is no indication in the record that any response was made to the letter's request, although final settlement was entered in the tax court December 31, 1986.

Mr. Gauger's affidavit recites that his willingness to sign the stipulated Tax Court Decision only upon "an immediate assessment" of the Plaintiffs' tax deficiency, which he allegedly orally communicated to Ms. Olsen on December 12, 1986, and was told by her "that she had found out how to get the taxes assessed immediately, by hand carrying the signed original Decision to another office where it would be logged in as assessed at that time."

Mr. Gauger's affidavit asserts that by "immediate assessment" it was contemplated that the act would be accomplished in a few days, but certainly not more than one or two weeks.

The file further reflects that in March 1990 the Plaintiffs received a Notice of Balance Due dated March 19, 1990.

Mr. Gauger then contacted Ms. Olsen who agreed to look into the matter and on

March 22, 1990 left a voice mail message for him in which she stated that manual assessments had been made on March 6, 1987, which those responsible for making assessments asserted had been a quick assessment, to which information her message had indicated a "You're kidding" response.

Ms. Olsen went on to say:

> "So that's the information I could gather for you. And I'm sure you're not going to be pleased. You, probably like me, thought it would be immediate, meaning the same week, at least the same two week period, but apparently, according to them, that's very immediate. That's the best information I have at this time. I know it's accurate. I don't know that their reasoning makes sense. Okay? Call me if there's anything I can do for you, okay. Thank you, bye-bye."

The record does not reflect any reason, stated or unstated, for Mr. Gauger's proposed conditioning the settlement on a prompt assessment. Many can be conjured.

The record shows that the plaintiffs filed their Chapter 7 bankruptcy petition on September 9, 1987, which was within 240 days of the assessment.

If the filing is less than 240 days after the assessment, the taxes are priority, nondischargeable taxes. (11 U.S.C. § 507[a][7][A][ii]); 11 U.S.C. § 523(a)(1)(A).

If the assessment had been made within the time contemplated by Ms. Olsen and Mr. Gauger, the 240 days would have elapsed before the bankruptcy filing and the obligations discharged.

The agreement concerning the settlement of the tax court case arguably created a contract between the parties. (See Robert F. Haiduk, ¶90, 506 PH Memo TCM [CCH] 864 [1990]). But, compare, Klein v Comm. 899 F.2d 1149 (11th Cir. 1990). However, the agreement failed under all the circumstances to amount to more than a request for "immediate"

or prompt assessment.

This proceeding is not one challenging the settlement agreed to, but rather one arising from the consequences of the failure to perform one aspect of the agreement.

Mr. Gauger knew that the action of persons other than Ms. Olsen would be required to make the assessment. In his letter of December 12, 1986, to reiterate, he says: "I would like to request you attempt to have the tax assessed as of today, December 12, 1986. Please provide me with confirmation, either in writing or with a photocopy of the assessment documents for my files."

Under the circumstances, it is incumbent upon the Court to apply the law not only of the duty of the defaulting party, but also that of the nondefaulting party.

As stated in the Restatement of the Law, Contracts, 2d Edition, § 351(1):

> "Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."

and 22 Am.Jur. 2d, Damages, §455:

> "Observation: The principle that the damages which are recoverable in contract actions must be such as were in the contem-plation of the parties, although often spoken of as originated in Hadley v. Baxendale, is in reality an embodiment of civil-law principles and is substantially a paraphrasing of the rule on the subject as it had been stated at an earlier date in the Code Napoleon by Pothier and by Chancellor Kent. This statement has generally been accepted as an accurate statement of the law of the subject.
>
> There have been many statements on the principle of foreseeability. However, the statement most often made by the courts is the one stated above, that in an action for breach of contract, the damages to be recovered are such, and only such, as may reasonably be sup-posed to have been within the contemplation of both parties at the time the contract was made, as the probable result of the breach."

To say that the result of aiding a taxpayer's discharge was within the contemplation of the representative of the I.R.S. in her agreement to facilitate an early assessment date would be bizarre and probably contrary to her official duty, if known to her.

Consideration must be given also to the Restatement, supra, 15 § 350:

> "(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
>
> (2) The injured party is not precluded from recovery by the rule that he has made reasonable but unsuccessful efforts to avoid loss."

In this case, Plaintiffs were represented by a lawyer-C.P.A. who asked for proof of the date of prompt assessment, which he knew had to be made by other parties in a complex Internal Revenue Service, not the person he was negotiating with, and obviously he did not receive such proof. He could have taken steps consistent with avoiding the claimed loss had he required such proof, had it been then contemplated by the parties.

By ascertaining the actual date of the assessment, there is no showing by the Plaintiffs that the alleged nondischargeable damage could not have been avoided. It is hornbook law that a party has a duty to mitigate damages.

It is unfortunate that the representative of the government, in obtaining the tax court settlement, failed to accomplish what she had apparently agreed to do. That, however, did not absolve the Plaintiffs of all responsibility to make efforts to avoid the loss, at least by ascertaining the existence of the date of the assessment before reliance upon an unstated date unknown to them at the time of filing their petition in bankruptcy. In this regard, although the decision rests on other theories, for the consequences of reliance on a believed assessment date, see In re Brian F. Howell and Kimberly A. Howell, 120 BR 137 (9th Cir BAP 1990).

This has not been shown to have been a loss in contemplation of the parties at the time of the asserted contract to settle the tax court case.

Two hundred forty days is too great a time to forestall a bankruptcy emergency and if the only purpose of Plaintiffs' seeking the early assessment date was to project an avoidance of taxes 240 days in the future, the conduct would almost seem contrary to the spirit of 11 U.S.C. § 523(a)(1)(C).

This Court has no basis for retroactively fixing a fictitious assessment date, on this record. "Specific performance" of the unspecific agreement is not an option.

The prayer of the Plaintiffs for determination that the debts enumerated in the complaint are dischargeable must be denied, and Summary Judgment for the Defendant allowed.

This Memorandum Opinion contains the Court's Findings of Fact and Conclusions of Law and, pursuant to Bankr. R. 7052, they will not be separately stated. Separate judgment consistent herewith will be entered that Summary Judgment is awarded to the Defendant and Summary Judgment for the Plaintiffs is denied.

DATED this _____ day of October, 1991.

_____
C. E. LUCKEY
Bankruptcy Judge

cc: Howard M. Levine
Catherine J. Caballero