

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DANIEL GIGLIOBIANCO	:	DETERMINATION
	:	DTA NO. 816247
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1990.	:	

Petitioner, Daniel Gigliobianco, 449 West 56th Street, New York, New York 10019, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1990.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on October 19, 1998 at 10:15 A.M., with all briefs to be submitted by February 5, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Bradley B. Davis, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to consider whether petitioner's 1990 New York personal income tax liability was discharged pursuant to a Discharge of Debtor order dated February 27, 1996 and issued by the United States Bankruptcy Court.

II. If so, whether the Division of Taxation's assertion that petitioner's tax debt was not discharged in bankruptcy is properly dismissed as untimely under bankruptcy court rules.

III. If the Division of Tax Appeals does have jurisdiction, whether petitioner has the burden of proof on the issue of dischargeability.

IV. If so, whether petitioner has shown that he filed his 1990 New York personal income tax return more than two years before he filed his petition in bankruptcy thereby rendering petitioner's 1990 New York tax debt dischargeable pursuant to the Discharge of Debtor order dated February 27, 1996.

FINDINGS OF FACT

1. Petitioner, Daniel Gigliobianco, and his wife, Audrey Gigliobianco, filed a joint Federal income tax return for the year 1990 on or before November 1, 1991. The record does not establish whether or not this return was timely filed.

2. The Internal Revenue Service issued an assessment against petitioner and Audrey Gigliobianco with respect to their 1990 Federal income tax return. This assessment resulted from a large capital gain realized by petitioner during 1990 and reported on petitioner's 1990 Federal return. Petitioner failed to pay the tax reported due on the return.

3. Petitioner and Audrey Gigliobianco filed an Application for Additional Extension of Time to File for Individuals and Gift Tax Return Filers (Form IT-372) with the Division of Taxation ("Division") on or about August 1, 1991. By this form petitioner and Audrey Gigliobianco requested an extension of time to file their 1990 Resident Income Tax Return (Form IT-201) until October 15, 1991. The Division granted this request on or about August 28, 1991.

4. The Division subsequently received information from the Internal Revenue Service that petitioner and Audrey Gigliobianco had filed a joint Federal return for 1990 which listed a New York address. The Division had no record of petitioner and his wife's 1990 New York resident return. Accordingly, the Division sent petitioner and Audrey Gigliobianco a letter dated September 25, 1993 requesting information regarding their 1990 New York return. Neither petitioner nor Audrey Gigliobianco responded to this request and the Division sent the two a second letter dated December 12, 1993 requesting information regarding their 1990 New York return. This letter stated, in part:

WE HAVE NOT RECEIVED A REPLY TO OUR LETTER DATED 09/25/93 REQUESTING INFORMATION ABOUT YOUR 1990 NEW YORK STATE INCOME TAX RETURN. . . . You filed a 1990 federal income tax return using a New York State address. However, we have been unable to locate your 1990 New York return.

5. In response, by letter dated January 6, 1994, petitioner's accountants requested that the Division provide a transcript of petitioner and Audrey Gigliobianco's account for the years 1990 through 1992. By letter dated November 7, 1994, petitioner's accountants made a second request for a transcript of the accounts of petitioner and his wife for the years 1990 through 1992.

6. In response to these requests, the Division provided a summary of petitioner and his wife's tax liability for the years 1990 through 1992 by letter dated May 8, 1995. With respect to 1990 the letter stated:

Information furnished by the Internal Revenue Service . . . indicates that you filed a federal tax return using a New York State address.

We do not have a New York State personal income tax return filed under your name(s) or social security number(s).

Enclosed are the necessary forms and instructions for tax year 1990. . . . Please fill out the forms and return them to me along with any wage and tax statements.

If you previously filed a New York State return for tax year 1990, please forward a copy including any wage and tax statements.

7. The Division received no response to its May 8, 1995 letter and therefore sent a follow-up letter dated June 22, 1995 again requesting information with respect to 1990. The June 22, 1995 letter also failed to elicit a response.

8. On August 4, 1995 the Division issued to petitioner and Audrey Gigliobianco a Statement of Proposed Audit Changes for the year 1990. This statement again explained that the Division had no record of a 1990 New York State income tax return on file for petitioner and Audrey Gigliobianco. The statement also advised that tax due for 1990 had been computed using information as reported on the joint 1990 Federal return of petitioner and Audrey Gigliobianco. Based on such information, the Division calculated additional 1990 New York State and New York City income tax due from petitioner and Audrey Gigliobianco of \$14,591.92. The statement also advised of the imposition of penalties pursuant to Tax Law § 685(a)(1); (b)(1) and (2), plus interest.

9. On September 28, 1995 the Division issued to petitioner and Audrey Gigliobianco a Notice of Deficiency which asserted \$14,591.92 in additional New York State and New York City income tax due, \$7,484.82 in penalties pursuant to Tax Law § 685(a)(1); (b)(1) and (2), and \$5,572.94 in interest for the year 1990.

10. Subsequent to the issuance of the Notice of Deficiency the Division cancelled the penalties asserted against petitioner therein (*see*, Division's brief, p. 10, fn. 3).

11. During 1991 or 1992 petitioner had telephone conversations with employees of the Division regarding the collection of petitioner's 1990 income tax liability.

12. Audrey Gigliobianco submitted a copy of a signed joint 1990 New York State resident return on February 5, 1996. This return contains the signature of petitioner and Audrey Gigliobianco. These signatures are undated. The return was prepared by petitioner's accountants and the preparer's signature is dated October 5, 1991.

13. The 1990 New York return of petitioner and Audrey Gigliobianco reports a capital gain of \$124,222.00 and tax due of \$14,592.00.

14. The Division has no record of receiving petitioner's 1990 New York return before February 5, 1996.

15. The 1990 New York return was prepared by the accounting firm of Wurdemann & Englert. Petitioner has hired this firm to prepare his New York and Federal income tax returns for approximately 15 years. Once the returns had been prepared and forwarded by the accountants, petitioner and his wife were responsible for signing and mailing their returns.

16. Petitioner testified that it was the practice of he and his wife to mail their returns on the day they signed them. Petitioner testified that this practice was followed with respect to the 1990 New York return. Petitioner could not recall whether he mailed the 1990 return by himself or with his wife. Petitioner testified that the return would have been mailed using regular mail because petitioner never used certified mail. Petitioner did not testify as to the date on which the return was purportedly mailed.

17. Petitioner did not produce any documentary evidence corroborating his claim that the 1990 New York return was filed with the Division before February 5, 1996.

18. Petitioner filed a Chapter 7 bankruptcy petition in United States Bankruptcy Court, Southern District of New York, on September 18, 1995.

19. Petitioner's bankruptcy petition lists the Division of Taxation as a creditor holding an unsecured nonpriority claim with respect to an income tax liability for the 1990 tax year of approximately \$20,000.00.

20. The bankruptcy court issued a Discharge of Debtor order dated February 27, 1996 with respect to petitioner's bankruptcy petition. This order provides, in part:

IT IS ORDERED THAT:

1. The above-named debtor [petitioner] is released from all dischargeable debts.
2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:
 - (a) debts dischargeable under 11 U.S.C. § 523;
 - (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6) and (15) of 11 U.S.C. § 523(a);
 - (c) debts determined by this court to be discharged.
3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void in paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

21. Audrey Gigliobianco is not a party to this proceeding.

22. The Division submitted proposed findings of fact numbered "1" through "29". Such proposed findings of fact are accepted in substance and have been incorporated into the record herein.

SUMMARY OF THE PARTIES' POSITIONS

23. Petitioner contends that the Division of Tax Appeals lacks jurisdiction to determine whether the 1990 income tax assessment was discharged in the bankruptcy proceeding. Even if the Division of Tax Appeals does have jurisdiction, petitioner asserts that the Division's objection to the dischargeability of the income tax debt is untimely under bankruptcy court rules. Petitioner also asserts, again assuming that the Division of Tax Appeals has jurisdiction and again applying bankruptcy court principles, that the Division has the burden of proving that the debt was not discharged. Finally, notwithstanding the foregoing, petitioner asserts that he has proven that the 1990 return was filed and that therefore the 1990 liability was discharged pursuant to the bankruptcy court's order.

24. The Division contends that the Division of Tax Appeals does have jurisdiction in this matter and that petitioner has the burden to show that the income tax debt has been discharged. The Division contends that petitioner has failed to prove that he filed his 1990 New York income tax return before February 5, 1996. Accordingly, the Division asserts that petitioner's 1990 income tax debt was not discharged in the bankruptcy proceeding and the debt remains outstanding.

CONCLUSIONS OF LAW

A. Petitioner's contention that the Division of Tax Appeals lacks jurisdiction to address the issue of dischargeability is rejected. The Division of Tax Appeals is an adjudicative body of limited and statutorily created jurisdiction (*see, Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *annulled on other grounds sub nom New York State Dept. of Taxation and Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140). The purpose of the Division of Tax Appeals is to provide the public with a just system of resolving controversies between taxpayers and the Division of Taxation (*see*, Tax Law § 2000). To fulfill that purpose the

Division of Tax Appeals has been granted jurisdiction to provide hearings to taxpayers pursuant to its rules and regulations (*see*, Tax Law 2006[4]). A hearing before the Division of Tax Appeals is the only evidentiary hearing available to taxpayers following the issuance of a Notice of Deficiency of personal income tax under Article 22 (*see*, Tax Law § 689[b]). In the course of such a hearing, issues of dischargeability in bankruptcy may arise and, unless barred by Federal law, such issues must be addressed in order for the Division of Tax Appeals to meet its statutorily-imposed obligations.

A review of the relevant Federal statutes reveals no jurisdictional bar to the consideration of the dischargeability of a tax debt by the Division of Tax Appeals. Specifically, Title 28 of the United States Code, Section 1334(b) (28 USC § 1334[b]) establishes the general proposition that State and Federal courts have concurrent jurisdiction over civil proceedings that arise under, arise in or are related to a bankruptcy case. Section 523(c) of the Bankruptcy Code (11 USC § 523[c]) creates certain exceptions to this general rule. The discharge of a tax debt does not fall within any of these exceptions. Therefore, the dischargeability of a tax debt is within the subject matter jurisdiction of State courts and is not within the exclusive jurisdiction of the Federal courts (*see*, ***State v. Perkins***, 112 AD2d 485, 490 NYS2d 900 [State court had the jurisdiction to determine the dischargeability of student loans because such debt did not arise in “the context of fraud or false pretenses, fiduciary fraud or willful and malicious injury to property.”]; *see also*, ***N.Y. Higher Educ. Services Corp. v. Quell***, 104 AD2d 11, 482 NYS2d 373). In the present context, the Division of Tax Appeals, in lieu of the State court, has jurisdiction to address the dischargeability of a tax debt where such issue arises in the context of a petition and hearing (*see*, ***Matter of Levin***, Tax Appeals Tribunal, April 16, 1998 [although the question of jurisdiction was not raised, the Tribunal addressed the dischargeability of a tax debt]).

B. Petitioner also contends that the Division's objection to the dischargeability of the tax debt is untimely under bankruptcy court rules. This contention is without merit. Since the question of dischargeability has been raised in a hearing before the Division of Tax Appeals, timeliness rules of the bankruptcy court are not relevant.

C. Petitioner's contention that the Division of Taxation had the burden of proof on the issue of dischargeability is also rejected. This contention is premised on the general rule in bankruptcy which places the burden of proof upon the creditor in challenging dischargeability under 11 USC § 523 (*see, In re Esposito*, 44 Bankr 817). Tax Law § 689(e) provides, however, that in any case before the Division of Tax Appeals, the burden of proof shall be upon the petitioner, except with respect to certain issues not relevant herein. Moreover, in *N.Y Higher Education Services Corp. v. Quell* (*supra*), a former student was sued in State court for repayment of a student loan. The defendant raised the affirmative defense of dischargeability. The court held that the student "failed to demonstrate that his student loan debt qualified under either of the statutory conditions under which it could escape the general rule of nondischargeability" (*id.*, 482 NYS2d at 377). In other words, the defendant had the burden of proof and failed to carry that burden. Similarly, the question in this case is whether petitioner has proven that his 1990 New York income tax debt was discharged pursuant to the Order of Discharge dated February 27, 1996.

D. Turning to the merits, under 11 USC § 523(a)(1)(B), a discharge under Chapter 7 does not discharge an individual debtor from a tax debt with respect to which a required return was either not filed, or was late-filed less than two years before the filing of the bankruptcy petition. Accordingly, petitioner must show that his 1990 return was filed before September 18, 1993, i.e.,

more than two years before the filing of the bankruptcy petition, in order to prove that his 1990 New York income tax debt was discharged in bankruptcy.

Petitioner has failed to make such a showing. There is no evidence that petitioner's 1990 return was received by the Division before February 6, 1996 (*see*, Findings of Fact "12" and "14") and there is direct documentary evidence in the record to show that the Division had not received such return prior to that date (*see*, Findings of Fact "4", "6", and "8"). The evidence submitted to prove mailing of the return consists solely of petitioner's testimony that the return was mailed by ordinary mail. Such testimony is insufficient to establish that petitioner's 1990 New York return was filed more than two years prior to the filing of the bankruptcy petition (*see, Matter of Levin, supra; Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

The determination that petitioner's tax debt was not discharged is consistent with the Bankruptcy Court's order which discharges "debts dischargeable under 11 U.S.C. § 523" (*see*, Finding of Fact "20"). As previously discussed, a tax debt is dischargeable only if the return was filed more than two years before the bankruptcy petition. Petitioner has not shown that he filed his return by that time. Accordingly, the tax debt was not dischargeable under section 523 and was not discharged by the bankruptcy court. Additionally, the order discharged debts alleged to have been excepted from discharge pursuant to section 523 (a)(2), (4), (6) or (15). The exception relevant in this matter is 11 USC § 523(a)(1) and is therefore not covered by this part of the bankruptcy court's order.¹

In support of his contention that he filed his 1990 New York return more than two years before he filed for bankruptcy, petitioner asserted that it would not have been logical for him to

¹ If petitioner believes that this determination violates the order of discharge of the bankruptcy court, his remedy is to apply to the bankruptcy court for relief.

have filed his 1990 Federal income tax return and not his 1990 New York return. As discussed above, the evidence in this matter shows nonreceipt of the return in question by the Division and is insufficient to prove mailing by petitioner. Thus, while it may not have been logical, it appears that petitioner did not file his New York return at the time he filed his Federal return.

Accordingly, that petitioner filed his Federal return in 1991 does not support an inference that he filed his New York return at the same time.

Furthermore, and contrary to petitioner's assertion, his telephone conversations in 1991 or 1992 with Division employees regarding the collection of his 1990 income tax liability does not support petitioner's contention that he filed his New York return (*see*, Finding of Fact "11").

There is no evidence that any Division employee advised petitioner that his return had been filed or made any statements inconsistent with the various correspondence sent by the Division to petitioner in this matter.

E. The petition of Daniel Gigliobianco is denied and the Notice of Deficiency dated September 28, 1995, as modified in accordance with Finding of Fact "10", is sustained.

DATED: Troy, New York
July 8, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE