

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: : CIVIL ACTION
: :
LEONARD A. PELULLO :
: (Bankruptcy No. 95-22430)

LEONARD A. PELULLO : (Adversary No. 02-2512)
: :
v. :
: :
UNITED STATES OF AMERICA : NO. 04-01265-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

May 11, 2005

At issue in this bankruptcy appeal is whether the bankruptcy judge correctly determined that the claims of the Internal Revenue Service for income taxes owed by the debtor, Leonard A. Pelullo, were not dischargeable, and whether the bankruptcy judge abused his discretion in declining to determine the amounts of certain civil claims for penalties for non-payment of withholding taxes.

The bankruptcy judge determined that the IRS claims for the years 1981, 1982, and 1984 through 1986 were not dischargeable because the debtor had not filed returns for those years; and that, with respect to the year 1983, the debtor is not entitled to discharge because he attempted to evade and defeat his taxes for that year. The case was before the bankruptcy

judge on summary judgment; the Bankruptcy Court granted IRS's motion for summary judgment of non-dischargeability.

The record amply supports the bankruptcy judge's decision with respect to 1981, 1982, and 1984 through 1986. As to the first two years, although the debtor filed Forms 1040 for those years, the returns were not signed under penalties of perjury. The debtor crossed out that portion of the return, and attached a statement to the effect that he was unable to attest to the accuracy of the returns, since he was unable to confer with the accountant who had supplied the figures (the figures set forth in the purported return are, indeed, vague and sketchy in nature). The government argues, and the bankruptcy judge agreed, that, for purposes of determining dischargeability in bankruptcy, these cannot be regarded as properly filed returns. With respect to the years 1984 through 1986, it is clear that the debtor did not file tax returns at all. I conclude that dischargeability was properly denied with respect to the years 1981, 1982, and 1984 through 1986.

The situation is different with respect to the year 1983. The debtor did file a Form 1040 return for that year, with the appropriate verification. The issue is whether dischargeability is precluded by a finding that the debtor attempted to evade and defeat his tax liabilities for that year. In determining that the debtor did, indeed, attempt to evade and defeat his income tax liabilities for that year, the bankruptcy

judge relied upon (1) findings of fact made by my colleague, Judge Robert Kelly, in litigation in which debtor's wife attempted to establish an ownership interest in the Florida residence in which the parties had resided, and (2) testimony of an employee thoroughly familiar with debtor's financial activities, given in the course of his criminal trial. The debtor understandably argues that Judge Kelly's findings of fact do not bind the debtor, since he was not a party to that litigation, and that the testimony at the debtor's criminal trial is, for present purposes, rank hearsay. An argument can be made that, perhaps, the debtor should be regarded as having been in privity with his wife in the litigation before Judge Kelly, in which case considerations of collateral estoppel would come into play; and that the debtor may well have no valid defense to the assertion that he engaged in various tactics to conceal his assets from the claims of creditors, perhaps including the Internal Revenue Service. On the other hand, as the debtor points out, the IRS claim for the year 1983 is so small that it is unlikely that the alleged transfers of millions of dollars in assets were made for the purpose of evading the debtor's tax liability for the year 1983. I deem it unnecessary to resolve these issues, however, because I conclude that the record does not suffice to support a grant of summary judgment for the tax year 1983. The IRS had the burden of proof on the issue of evasion, and it cannot be said that the record demonstrates an

absence of legitimate factual dispute on that issue. In effect, the bankruptcy judge was making findings of fact, rather than ruling on an issue of law.

For these reasons, the judgment appealed from will be affirmed with respect to the dischargeability of the debtor's tax liability for the years 1981, 1982, and 1984 through 1986. Liabilities for those years were not discharged in bankruptcy.

With respect to the year 1983, the judgment appealed from will be reversed, and the matter remanded to the Bankruptcy Court for further proceedings (if the government intends to pursue the matter).

Finally, I conclude that the decision to abstain from addressing the civil penalties issue was a permissible exercise of the bankruptcy judge's discretion.

An Order follows.

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ORDER

AND NOW, this 11th day of May 2005,, IT IS ORDERED:

That the Judgment of the Bankruptcy Court entered on February 17, 2004 is AFFIRMED in part, insofar as it denied dischargeability for the debtor's tax liabilities for the years 1981, 1982, and 1984 through 1986, and decline to rule on civil penalties.

With respect to the tax year 1983, the Order appealed from is REVERSED, and the case REMANDED to the Bankruptcy Court for an evidentiary hearing, if requested.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.