

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Everett Emmitt Autrey v. New Mexico Taxation and Revenue Departme
Case Number: 02-01266
Nature of Suit:
Judge Code: S
Reference Number: 02-01266 - S

| Document Information | | | |
|--|--|---|------------------------------|
| Number: | 11 | | |
| Description: | Memorandum Opinion re: [5-1] Motion For Partial Summary Judgment by New Mexico Taxation and Revenue Departme . | | |
| Size: | 8 pages (19k) | | |
| Date Received: | 03/14/2003 02:16:20 PM | Date Filed: | 03/14/2003 |
| | | Date Entered On Docket: 03/14/2003 | |
| Court Digital Signature | | | View History |
| 9a 39 c2 db 25 7c ed 43 3e 77 49 56 d3 95 f2 96 57 21 59 9b 34 3c fa c9 10 e5 32 2f 4f d1 20 1b 01 dc e0 5c f9 f1 75 ef 32 79 2b ab 9a 4a 3b df f1 2d 36 72 53 89 eb ab b2 38 1d c7 d7 59 ec 98 dd 02 e1 33 cd 51 92 e3 b3 b9 f8 f4 f6 5f 4b 23 39 93 20 0c 56 22 c6 91 57 a6 ee 9d 62 08 69 71 f1 30 3a 56 03 92 9b 0d b0 21 d0 b9 e8 f3 b9 d0 37 00 98 12 d1 fc bd e7 d2 56 aa ba c5 d7 c2 1c | | | |
| Filer Information | | | |
| Submitted By: | James E Burke | | |
| Comments: | Memorandum Opinion on New Mexico Taxation and Revenue Dept.'s Motion for Partial Summary Judgment | | |

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

EVERETT EMMITT AUTREY,
Debtor.

No. 11-01-15823 SA

EVERETT EMMIT AUTREY,
Plaintiff,

v.

Adv. No. 02-1266

NEW MEXICO TAXATION AND REVENUE DEPT.,
Defendant.

**MEMORANDUM OPINION ON NEW MEXICO
TAXATION AND REVENUE DEPT.'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on a Motion for Partial Summary Judgment (docs. 5 and 6) filed by New Mexico Taxation and Revenue Department ("NMTR") through Assistant Attorney General James C. Jacobson. Plaintiff is represented by Davis & Pierce, P.C. (William F. Davis) and filed a response (doc. 8). NMTR filed a reply (doc. 9). This is a core proceeding. 28 U.S.C. § 157(b)(2)(B), (I) and (K).

Plaintiff's complaint seeks to avoid NMTR's tax lien pursuant to 11 U.S.C. § 522 and § 506, and to determine the validity, extent and priority of NMTR's lien. In Count 1, Plaintiff asks the Court to determine the amount or legality of NMTR's tax claim pursuant to 11 U.S.C. § 505; Plaintiff claims that the amounts allegedly owed are more than three years old and pursuant to 11 U.S.C. § 507(a)(8) are not priority taxes and should be discharged. Count 2 seeks to

avoid NMTR's lien as a preference. Count 3, in the alternative, seeks a declaration that if NMTR's tax lien is valid, the debt should be the lesser of (a) the amount of the tax, or (b) the net equity of the Debtor's property at the petition date. Plaintiff also argues in Count 3 that the NMTR tax claim is incorrect and that NMTR failed to apply non-taxable transaction certificates correctly.

NMTR's Motion for Partial Summary Judgment lists 22 Material Facts. Local Bankruptcy Rule 7056-1 (governing motions for summary judgment) provides that all material facts set forth in a movant's statement of facts are deemed admitted unless specifically controverted. Based on this rule, the Court finds that Defendant's Material Facts 1 through 9 and 11 through 21 are deemed admitted. (Doc. 6) To the extent that some of the Material Facts are legal conclusions, the Court does not take them as true.

NMTR sets forth four arguments in support of its Motion for Summary Judgment: 1) whether the accuracy of the tax assessments can be relitigated under 11 U.S.C. § 505; 2) whether the assessments are for periods outside the priority period of 11 U.S.C. § 507(a)(8); 3) whether a tax lien is avoidable if it secures payment of taxes which are not

priority taxes; and 4) whether a tax lien filed within 90 days of a petition is avoidable as a preference.

1. 11 U.S.C. § 505

Section 505 provides in relevant part:

(a)(1) Except as provided in paragraph (2) ... the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine --

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title.

Debtor claims that "adjudication" did not occur because he withdrew his tax protest and no hearings were conducted to review the assessment.

The Court of Appeals for the Tenth Circuit discussed 11 U.S.C. § 505 in City Vending of Muskogee, Inc. v. Oklahoma Tax Commission, 898 F.2d 122 (10th Cir. 1990). The Court identified the two policies underlying § 505's grant of authority to determine state taxes: 1) it allows a prompt resolution of a debtor's tax liability, where that liability has not yet been determined prior to the bankruptcy, in the same forum addressing the debtor's overall financial condition, and 2) it protects creditors from a dissipation of

assets that could occur if the debtor were bound by a tax judgment which the debtor, due to his ailing financial condition, did not contest. Id. at 124-25.

A federal court, therefore, will have jurisdiction under § 505 to consider state tax issues where the debtor has failed to assert any challenge to the assessment prior to commencing bankruptcy proceedings, or where the debtor has challenged the assessment through state proceedings which are still pending at the time the bankruptcy petition is filed.

Id. at 125 (Citations omitted.) In City Vending the debtor "vigorously challenged" the state tax assessment but did so unsuccessfully because he failed to invoke the proper state remedies in a timely fashion. Id. The assessment therefore became final prior to his bankruptcy. Id.

Mr. Autrey was assessed taxes, interest, and penalties and timely filed a protest on May 9, 1997. He was represented by counsel for this proceeding. He withdrew his protest on or about November 15, 1999. Plaintiff has not argued that he was unable to continue the protest for lack of finances. See City Vending, 898 F.2d at 125. The Court finds that Plaintiff's participation in the protest process was an adjudication by an administrative tribunal¹ such that 11 U.S.C. § 505(a)(2)(A)

¹Section 7-1-24 NMSA (1978) sets out the administrative hearing procedures that include, for example, notice, representation by counsel or an accountant, right to present evidence and written materials, a record of the proceeding,

prevents relitigation of the tax at this time. See Id.
(Failure to pursue available state remedies results in a final adjudication of the merits and prevents Bankruptcy Court review.) See also Texas Comptroller of Public Accounts v. Trans State Outdoor Advertising Co., Inc. (In re Trans State Outdoor Advertising Co., Inc.) 220 B.R. 339, 344 (Bankr. S.D. Tx. 1997)(when taxpayer has full and fair opportunity to contest the tax assessment before a tribunal of competent jurisdiction the decision becomes final under state law and section 505(a)(2)(A) is satisfied, citing City Vending); El Tropicano, Inc. v. Garza (In re El Tropicano, Inc.), 128 B.R. 153, 160 (Bankr. W.D. Tx. 1991)(once debtor has a full and fair opportunity to argue its version of the facts in an administrative forum and to seek court review there is an "adjudication within the meaning of Section 505(a)(2)" regardless of whether the debtor exhausted its remedies).

In summary, the Court finds that Plaintiff had a full and fair opportunity to challenge the assessments in an administrative and a judicial tribunal. Therefore, 11 U.S.C. § 505(a)(2)(A) prevents relitigation of the tax issues in the bankruptcy court.

and rights to appeal. See also Section 7-1-25 NMSA (1978) for appeals procedures.

2. Priority

The Court finds insufficient evidence in the record to determine whether the taxes are priority claims.

3. Avoidability of Tax Lien

The complaint refers to 11 U.S.C. §§ 506 and 522 to avoid the tax liens. NMTR's motion focuses on §§ 547 and 545.

The tax lien is a statutory lien. See 11 U.S.C. § 101(53). The lien cannot be avoided under § 522 because that section pertains only to judicial liens and non-possessory non-purchase money security interests. See 11 U.S.C. § 522.

Debtor's reference to § 506 is unclear and not argued in his response brief. It is true, however, that under § 506 a claim is secured to the extent of the value of such creditor's interest in the estate's interest in such property and unsecured for the balance. NMTR concedes that the "value of the property to which the Department's lien attaches, and hence the extent of the Department's lien, remains to be determined." Taxation and Revenue Department's Reply to Plaintiff's Response to Motion for Partial Summary Judgment (doc 9), at 5.

Under 11 U.S.C. § 545(2) the trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien is not perfected or enforceable at the time of

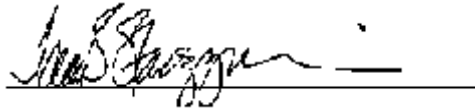
the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists. In other words, if a tax lien is properly recorded it is not avoidable. Filipovits v. Internal Revenue Service (In re Filipovits), 1995 WL 724520, *1 (Bankr. D. Md. 1995); Reitmeyer v. Internal Revenue Service (In re Totten), 82 B.R. 402, 403 (Bankr. W.D. Pa. 1988). The tax lien in this case was filed before the bankruptcy case. The lien is therefore unavoidable under § 545.

4. Whether Tax Lien is Preference

Statutory liens unavoidable under § 545 are not avoidable as preferences. See 11 U.S.C. § 547(c)(6). Filipovits, 1995 WL 724520 at *1; Reitmeyer, 82 B.R. at 403 ("[I]f notice of the tax lien has been filed before the taxpayer's bankruptcy, even shortly before, the lien is not avoidable under section 545.") See also Jodi S. Brodsky, Tax Payments: Are They Voidable Preferences in Low-Asset Bankruptcies?, 10 Cardozo L.Rev. 341, 347 (1988)("If the IRS properly perfects the lien before the debtor files his petition for bankruptcy, then the fixing of the lien will never be a voidable preference.") Therefore, the tax lien in this case is not avoidable as a preference.

Conclusion

NMTR's Motion for Partial Summary Judgment will be granted in part. Plaintiff cannot relitigate Assessment 2107111 in the Bankruptcy Court. Plaintiff cannot avoid NMTR's tax lien under section 545. Plaintiff cannot avoid NMTR's statutory lien as either impairing an exemption or as a preferential transfer. A partial judgment consistent with this opinion will issue.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 14, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

William F Davis
PO Box 6
Albuquerque, NM 87103-0006

James C Jacobsen
111 Lomas NW Ste 300
Albuquerque, NM 87102-2368

