UNPUBLISHED OPINION

158

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

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IN RE:	Bankruptcy No. 82A-01195
MOBILE MANUFACTURING COMPANY, dba Equal-i-zer Sales,	
Debtor.	

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MEMORANDUM OPINION

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APPEARANCES: Duane Gillman, of Boulden & Gillman, Salt Lake City, Utah, appeared as trustee and attorney for the trustee. Peter Stirba, Assistant U.S. Attorney, represented the Internal Revenue Service. Randall P. Feil of Fox, Edwards & Gardiner, Salt Lake City, Utah, appeared on behalf of Ed Hedgepeth Investment Company.

FACTUAL AND PROCEDURAL BACKGROUND

The debtor, Mobile Manufacturing Company, dba Equal-i-zer Sales, filed for relief under Chapter 11 of the Bankruptcy Code, on May 18, 1982. Upon the debtor's own motion, the Court converted the case to Chapter 7 on August 13, 1982, and appointed a trustee. On October 20, 1982, the clerk sent notice of the order for relief and the first meeting of creditors indicating that there were probably no assets from which to pay claims, that no filing of claims would be necessary at that time, and that if assets became available in the future the court would notify creditors to file claims.

Assets eventually became available, and on August 26, 1983, the Court issued an order and notice of a possible dividend which provided:

> It appearing from the reports of the Trustee appointed herein that a dividend to creditors is possible, it is ORDERED and notice is hereby given that creditors desiring to participate in a dividend must file a claim with the Court not later than October 26, 1983.

On November 3, 1983, the Internal Revenue Service ("IRS") filed a claim for a total of $41,263.65, including a secured claim for $25,112.65 and an estimated unsecured priority claim for $16,151.00. On January 24, 1984, at a hearing to approve the final report of the trustee and close the case, the trustee and Ed Hedgepeth Investment Company ("Hedgepeth"), the creditor with the largest claim, orally objected to the trustee's final report and payment of the IRS claim on the grounds that the claim was not filed before the October 26, 1983 deadline. Because of these objections, the Court continued the hearing to February 21, 1984.

On February 10, 1984, the IRS, Hedgepeth, and the trustee stipulated in writing that the secured portion of the IRS claim was $9,982.83, secured by proceeds held by the trustee. The debtor was not a party to the stipulation, nor was the stipulation submitted to the Court for approval.

On February 14, 1984, the debtor filed a claim on behalf of the IRS for a total of $40,178.95, including a secured claim for $9,983.83 and an unsecured priority claim for $30,195.12.

At the continued hearing held on February 21, 1984, the trustee and Hedgepeth argued that the Court's order of August 26, 1983, barred any claims filed after October 6, 1983, and that, therefore, both the proof of claim filed by the IRS and the proof of claim filed by the debtor on behalf of the IRS should be disallowed. Alternatively, they urged that the IRS claim be limited to a secured claim for $9,982.83, the agreed amount in the stipulation.

The IRS argued that the proof of claim filed by the debtor supplanted its earlier proof of claim and stipulation and that, therefore, the claim should consist of a secured claim for $9,983.83 and an unsecured priority claim for $30,195.12. In the alternative, the IRS maintained that it was entitled to the secured amount of its claim, limited by the stipulation, i.e., $9,982.83, regardless of whether it timely filed a proof of claim.

DISCUSSION

Timeliness of the IRS Proof of Claim

The first issue is whether the IRS timely filed its proof of claim on November 3, 1983, even though the Court had ordered that the deadline for filing claims was October 26, 1983.

Many debtors under Chapter 7 of the Code appear, at the time of filing their petitions, not to have sufficient assets to be able to pay a dividend to creditors. It is the practice of this Court to avoid needless paperwork in such cases by notifying creditors pursuant to Bankruptcy Rule 2002(e), that they need not file claims until further notice. The rule states:

> In a chapter 7 case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.

When, as the result of the trustee's gathering and liquidation of assets, a dividend subsequently appears possible, the Court sends notice in accordance with Bankruptcy Rule 3002(c)(5), which provides:

> If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

In this case, the Court issued notice of a possible dividend on August 26, 1983, and ordered that creditors should file claims not later than October 26, 1983. This bar date is 30 days short of the 90-day period prescribed in Rule 3002(c)(5).

The trustee and Hedgepeth argue that it was within the Court's discretion to shorten the time for filing claims. They cite Section 105(a) of the Bankruptcy Code in support of this proposition. That section states:

> The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Hedgepeth and the trustee suggest that orders setting deadlines for filing claims are "necessary or appropriate" to ensure that creditors have realistic expectations about when they will receive payments from distribution. They argue that since such orders are "necessary or appropriate," the Court has power to shorten the 90-day period mandated in the rule.

Certainly, orders limiting the time in which creditors can file claims are "necessary or appropriate" to the administration of a case. It does not follow, however, that Section 105 puts the Court at liberty to ignore the mandates of the Bankruptcy Rules. The Court

had no discretion to shorten the 90 days allowed in Rule 3002(c)(5). Rule 9006(c)(2) specifically states: "The court may not reduce the time for taking action under Rule . . . 3002(c) . . . ." Therefore, the Court erred in sending 60 days notice to creditors rather than the mandatory 90 days.[1]

In a similar case, In re Roco, 32 B.R. 552, 10 B.C.D. 1431 (Bkrtcy. D.R.I. 1983), the Rhode Island Bankruptcy Court, in its notice of a possible dividend, had given creditors just 30 days within which to file claims instead of the minimum 60 days allowed under Bankruptcy Rule 302(e)(4), the predecessor of Rule 3002(c)(5). The debtor objected to the timelines of one of the claims because it was filed on the day after the 30-day deadline. The court realized that it had acted contrary to the rules, allowed the late-filed claim, ordered that new notice be sent to all creditors, giving 90 days within which to file claims. (The court applied a 90-day period instead of 60 days, because Rule 3002(c)(5) had become effective during the interim between the original notice and the court's decision to require new notice.)

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This error is probably attributable to the fact that Rule 3002 became effective on August 1, 1983, only a short time before the Court sent notice to creditors informing them of the possible dividend. Due to a clerical oversight, the Court sent an outdated notice form that allowed only 60 days for filing claims, the same period that was in use under Rule 302 of the former rules.

Like the court in _Roco_, this Court recognizes its error in reducing the mandatory filing period and concludes that the IRS claim was timely since it was filed prior to the expiration of the 90 days. The Court directs that any and all other claims so filed shall be considered timely.

This Court does not follow the court in _Roco_, however, in requiring that new notice be given to creditors. As will be explained later, the Court cannot now determine the exact amount of the IRS claim. However, it is quite possible, perhaps probable, that when that amount is ascertained, it will be in an amount sufficient to consume substantially all of the funds held by the trustee. If such is the case, new notice will not result in any additional dividend to creditors. Thus, an order requiring new notice is premature at present.

If and when the Court orders new notice, such notice shall afford creditors only 30 additional days to file proofs of claim, because creditors have already had 60 days within which to decide to file claims under the Court's previous notice of dividend.

Amount of the IRS Claim

At the February 21, 1984 hearing, the parties addressed most of their arguments to the amount of the claim in the event that the IRS proof of claim proved to be untimely. Other than some oblique references to the amount stated in the stipulation, namely, $9,982.83 as a secured claim, at no time did the parties address what the amount should be if the proof of claim turned out to be timely. Yet that is the exact status of the claim.

Under normal circumstances, the amount of a properly filed proof of claim is governed by Bankruptcy Rules 3001(f), which provides:

> A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

Because of the facts presented here, however, the Court is reluctant simply to allow the IRS claim in the amount listed on its proof of claim. Four areas of concern lead to the conclusion that the IRS proof of claim does not establish a prima facie case as to the amount of the claim.

1. The unsecured portion of the claim is for an estimated amount.

The IRS proof of claim was for a total of $41,263.65. This amount included a secured claim for $25,112.65 and an estimated unsecured priority claim for $16,151.00. The unsecured portion of the claim covers periods for which the debtor did not file tax returns. The IRS was unable to do more than estimate the amount of the debtor's tax liability for those periods. The IRS did not assess a tax for this estimated liability.

Estimated tax claims present a practical problem to the closing of cases and distribution of dividends. An estimated tax is not often for the same amount as the actual, enforceable tax. If a trustee were to make a distribution that included an estimated tax claim, he might face the impracticable task of having to collect excess dividends from dismayed creditors in order to make a new distribution. The Advisory Committee Note to Rule 3007, which governs objections to claims, describes this procedure:

> By virtue of the automatic allowance of a claim not objected to, a dividend may be paid on a claim which may thereafter be disallowed on objection made pursuant to this rule. The amount of the dividend paid before the disallowance in such event would be recoverable by the trustee in an adversary proceeding.

Because of the possibility that payment of estimated tax claims will result in the trustee's bringing numerous adversary proceedings with attendant delay and expense for all concerned, this Court has had the policy that estimated tax claims should not be allowed except in amounts that can be substantiated.

As a partial remedy to the problem of estimated claims, the Court recently promulgated Standing Order #33, dated December 8, 1984. The order reads:

> IT IS HEREBY ORDERED that the Internal Revenue Service be and is authorized to:
>
> 1) assess tax liabilities reflected on voluntarily filed tax returns and returns prepared under authority of 26 U.S.C. 6020(b) and
>
> (2) make refunds in the ordinary course of business to debtors who have cases filed in this district without regard to the due date or the actual filing date of the return.
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> IT IS FURTHER ORDERED that the stay afforded by 11 U.S.C. 362 be and is modified as provided herein in any case filed in this district, unless otherwise ordered.

Now that the IRS is free to assess taxes without violating the automatic stay, it will be able to submit proofs of claim based on taxes actually assessed. Although the assessed amount might be no more than an estimate itself and could be the subject of an objection, a claim based on an assessed tax is more likely to be allowable, because it is one step closer to being an enforceable claim against the debtor.[2]

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2 Outside the realm of Bankruptcy law, an unassessed tax has very little legal effect. Tax liability arises independent of an assessment, but a formal assessment is an absolute prerequisite to the imposition of a tax lien under 26 U.S.C. §6321-22. For cases commenting on these sections of the Tax Code, _see In re R & T Roofing Structures & Commercial Framing, Inc._, 42 B.R. 908 (Bkrtcy. D. Nev. 1984); _In re Mills_, 37 B.R. 832 (Bkrtcy E.D. Tenn. 1984); _In re Gary & Connie Jones Drugs, Inc._, 35 B.R. 608

In this case, the estimated portion of the IRS claim remains unassessed. The Court will not conjecture as to its validity or amount at this time, but will allow the IRS an opportunity to assess a tax and amend its claim in conformity with the order set forth following this opinion.

2. The secured portion of the IRS proof of claim is not accompanied by evidence that the security interest has been perfected.

A point not raised by any of the parties is that according to Bankruptcy Rule 3001(d):

> If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

After searching the files, the Court cannot find any evidence of a security interest accompanying the IRS proof of claim. The IRS may well have a perfected a lien on the proceeds held by the trustee, but it has not offered evidence to that effect. Absent such evidence, the Court cannot allow a secured claim. No decision is made as to

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(Bkrtcy. D. Kan. 1983); In re Seminole Backhoe Services, Inc., 33 B.R. 914 (Bkrtcy. N.D. Tex. 1983); In re Dunne Trucking Co., 32 B.R. 182 (Bkrtcy. N.D. Iowa 1983); In re Riverfront Food and Beverage Corp., 29 B.R. 846 (Bkrtcy E.D. Mo. 1983); In re Busman, 5 B.R. 332 (Bkrtcy. E.D. N.Y. 1980).

whether failure to comply with Rule 3001(d) amounts to a waiver of the secured status of the claim. This lack of evidence further controverts the already uncertain nature and amount of the IRS claim.

3. The Court has not approved the stipulation.

The third concern is that the stipulation entered into by the IRS, Hedgepeth, and the trustee was never approved by the Court. The portion of the stipulation relevant to the amount of the IRS claim states:

> 1. The Internal Revenue Service is seeking to be paid from the funds currently being held by the Trustee, only $9,982.83, the amount which it maintained as its secured claim.

In a bankruptcy proceeding, stipulations are more than just contractual obligations shared by the parties to the agreement. A stipulation is likely to affect the bankruptcy estate. Since all parties in interest conceivably have an interest in the bankruptcy estate, the Supreme Court has seen fit to adopt strict notice and hearing requirements. Bankruptcy Rule 9019(a) provides:

> On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

Rule 2002(a)(3) requires 20 days notice to all parties in interest, specifically including the debtor, of "the hearing on approval of a compromise or settlement of a controversy, unless the Court for cause shown directs that notice not be sent."

This Court has supplemented these provisions with Local Rule 7 which provides:

> No understanding or arrangement between parties or attorneys affecting the course or conduct of trial shall be enforceable for any purpose unless the same is in writing or made a part of the record by oral representation. No stipulation shall have the effect of relieving the parties from a prior order of the court, including a scheduling order, unless such stipulation is approved by the court in writing.

These provisions, when read together, indicate that a private compromise between parties is unenforceable for purposes of a bankruptcy proceeding unless approved, and that approval is available only on notice to parties in interest. See In re Lloyd, Carr and Co., 617 F.2d 882, 885 (1st Cir. 1980) and In re Bramham, 38 B.R. 459, 465 (Bkrtcy. D. Nev. 1984).

In this case, none of the parties to the stipulation has given the required notice to other parties in interest or offered the stipulation to the Court for approval. Moreover, this stipulation presents a situation of the type that the requirements of notice and hearing were meant to guard against.

The debtor has an interest in paying as much of its tax liability as possible prior to discharge, because its remaining tax liability is nondischargeable as an unsecured priority claim under Section 523(a)(1).[3]

By entering into the stipulation, the IRS agreed that it would seek only $9,982.83 in the distribution despite the fact that it had previously estimated its claim to be $41,263.65. If the first estimate was at all accurate, the trustee probably holds sufficient funds to pay the entire IRS claim. Almost nothing would be left for other creditors, however. The situation creates an impression that the IRS is trying to collect a reduced amount through the distribution so that nonpriority creditors can also participate, and then pursue the remainder of its claim against the principals of the debtor after discharge. Whether this course of action is prudent on the part of the IRS, the debtor has not had an opportunity to object

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The Advisory Committee Note to Rule 3004, which governs the procedure that debtors follow when filing claims on behalf of creditors, describes the debtor's interest in paying its non-dischargeable tax liability prior to discharge:

> It is the policy of the Code that debtors' estates should be administered for the benefit of creditors without regard to the dischargeability of their claims. After their estates have been closed, however, discharged debtors may find themselves saddled with liabilities, particularly for taxes, which remain unpaid because of the failure of creditors holding nondischargeable claims to file proofs of claim and receive distributions thereon. The result is that the debtor is deprived of an important benefit of the Code without any fault or omission on the debtor's part and without any objective of the Code being served thereby.

or agree to it. Until a party in interest presents the stipulation for approval in a manner that will protect the debtor's interest, the Court will not approve the stipulation.

The rules cited above do not specifically state that an unapproved stipulation is unenforceable for all purposes. The stipulation in this case may have some binding effect on the parties to it. The Court will not try to sort out that problem here. For purposes of this opinion, it is only important to note that the unapproved stipulation does not answer the question of the amount of the IRS claim.

4. <u>The debtor's filing of a claim on behalf of the IRS is not dispositive of the amount of the IRS claim.</u>

Subsequent to the stipulation, the debtor filed a claim on behalf of the IRS for a total of $40,178.95, including a secured claim for $9,983.83 and an unsecured priority claim for $30,195.12. The debtor filed this claim pursuant to Section 501(c) which provides:

> If a creditor does not timely file a proof of claim, the debtor or the trustee may file a proof of such claim.

As the language of this subsection indicates, the debtor normally would file a claim only after the creditor has failed to timely file. But here, the IRS has timely filed. At least two courts have held that the creditor's failure to file is a necessary

precondition to the debtor's authority to file. In re Teichman, 29 B.R. 323 (Bkrtcy. E.D. N.Y. 1983); In re Popular Fruit & Produce, Inc., 21 B.R. 185 (Bkrtcy. S.D. N.Y. 1982).

The Court does not reach the issue of whether the debtor had authority to file a claim for the IRS, however. If the debtor's filing was unauthorized, the Court needs to look only to the IRS proof of claim which, as explained above, does not adequately establish the amount of the claim. If, on the other hand, the debtor's filing was authorized, the Court is faced with two authorized claims for differing amounts. Either way, the Court is unable to determine the amount of the claim on the present evidence.

CONCLUSION

The IRS proof of claim filed on November 3, 1983, is deemed timely even though it was filed several days after the filing bar date of October 26, 1983, because the Court was without authority to shorten the 90-day mandatory filing period for filing claims under Rule 3002(c)(5).

The Court is unable to decide what the amount of the IRS claim should be because of unanswered questions raised by the following facts: (1) the unsecured portion of the IRS claim is for an estimated unassessed amount, (2) the secured portion of the claim is

not accompanied by evidence of a perfected security interest, (3) the Court has not approved the stipulation as to the amount of the claim and will not do so at the present time, and (4) the filing by the debtor, even if authorized, is not dispositive of the amount of the claim.

Therefore, IT IS ORDERED that the IRS be allowed to amend its claim within 20 days of the entry of this order, that such amended claim should reflect a tax that is actually assessed, and that any secured portion of the claim be accompanied by evidence of a perfection.

IT IS FURTHER ORDERED that if the IRS amends its claim in compliance with this order, its shall give notice of the amendment to the trustee and Hedgepeth, and the amended claim will be allowed unless a party in interest objects within 10 days of the filing of such claim.

DATED this 8 day of May, 1985.

JOHN H. ALLEN
UNITED STATES BANKRUPTCY JUDGE