

ENTERED ON DOCKET
5/25/11

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	
	:	CASE NO. G10-23982-REB
JESS J. CHILDRESS	:	
and LORI B. CHILDRESS,	:	
	:	
Debtors.	:	
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JESS J. CHILDRESS,	:	ADVERSARY PROCEEDING
	:	NO. 10-2187
Plaintiff,	:	
	:	
v.	:	
	:	CHAPTER 7
GEORGIA DEPARTMENT OF REVENUE,	:	
	:	
Defendant.	:	JUDGE BRIZENDINE
	:	

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANT

Before the Court is the motion of Defendant Georgia Department of Revenue filed on April 19, 2011 for summary judgment on the complaint of Plaintiff-Debtor Jess J. Childress.¹ Said Debtor commenced this adversary proceeding through the filing of a complaint on December 3, 2010 to determine the dischargeability of certain indebtedness under 11 U.S.C. § 523(a)(1) for unpaid state excise and sales taxes in the total sum of \$175,987.00 plus any penalties and interest for the tax years 2004-2007. Debtor seeks a ruling herein that he is not personally liable for such

¹ Previously, Defendant filed a motion to dismiss on February 10, 2011, and based on a telephone conference conducted by the Court between the parties, the Court deems that motion to be abandoned and replaced by the motion for summary judgment. In addition, the Court notes that although Plaintiff-Debtor Jess J. Childress commenced this adversary proceeding through the filing of a complaint, in its motion Defendant named both Debtors yet seeks judgment only against Jess J. Childress herein.

outstanding tax liabilities to the extent same are excise taxes, and that any claim of Defendant with respect to same should be limited to enforcement of its lien against Debtor's prepetition property as listed in his bankruptcy schedules.

In its motion for summary judgment, which Debtor has not contested, Defendant states via affidavit that it assessed Jess Childress as a corporate officer with Childress Investments, Inc. for certain sales and use taxes and that his obligation in connection with same now totals \$186,319.64. Defendant further states that it has assessed no excise taxes against this Debtor. As argued in its memorandum of law and based on cited authority therein, Defendant contends that retail businesses in Georgia are required to collect sales and use taxes as owed by client/customers and remit same to the proper state taxing authority as provided by law. *See* O.C.G.A. § 48-8-30, *et seq.* Such taxes are considered to be trust fund taxes entitled to priority treatment in bankruptcy under 11 U.S.C. § 507(a)(8)(C) and excepted from discharge herein under 11 U.S.C. § 523(a)(1)(A). Defendant contends that all liabilities asserted herein are sales and use taxes.

As mentioned above, Debtor contends that the proper characterization of any tax liability as owed to Defendant herein must also include excise taxes, which he is entitled to discharge evidently as a tax over three years old. *See* 11 U.S.C. § 507(a)(8)(E).² Defendant argues, however, that based upon various state law authority including certain statutes, regulations, and an opinion of the Attorney General as cited in its memorandum of law, in Georgia, local sales taxes for education, local option taxes, special option county taxes, and taxes for MARTA are collected by Defendant "as part of the State's sales and use tax" (Memorandum at 5). Moreover, the Court observes that while there may be some overlap in the bankruptcy statute between sales and use

² Debtor has cited no legal authority in support of his position.

taxes or trust fund taxes as described in Section 507(a)(8)(C), and excise taxes as referenced in Section 507(a)(8)(E), the latter of which may be discharged if sufficiently stale, the Eleventh United States Circuit Court of Appeals has held that a trust fund tax collected by a retailer on sales on behalf of a purchaser/customer is not dischargeable. See *In re Waite*, 698 F.2d 1177 (11th Cir. 1983); as cited and discussed in *Peiffer v. Alabama Dep't of Revenue (In re Peiffer)*, 126 B.R. 364, 367-69 (Bankr. N.D.Ala. 1991). In the present case, the Court further notes that Debtors' Schedule E lists the obligation in question as a sales tax debt. In sum, it appears that as contemplated under Georgia law, the subject tax liabilities constitute a trust fund tax obligation that the seller is responsible to collect from a buyer and remit to the appropriate state taxing authority.

Given the undisputed facts of record, and based upon on a review of Defendant's argument and authority, the Court concludes that Defendant's motion for summary judgment under Federal Rule of Civil Procedure 56, applicable herein by and through Federal Rule of Bankruptcy Procedure 7056, should be granted. The Court concludes that the tax obligations in question are entitled to priority under Section 507(a)(8)(C) and same are excepted from discharge herein consistent with Section 523(a)(1)(A) as constituting sales and use taxes and, therefore, trust fund taxes. Plaintiff-Debtor Jess J. Childress is not entitled to a declaration on his complaint that he is not personally liable for said debt as an excise tax, or restricting Defendant's collection thereof to pre-petition property of this bankruptcy estate to the extent that Defendant holds a valid lien.

Accordingly, for the above reasons, it is

ORDERED that the motion of Defendant Georgia Department of Revenue for summary judgment be, and the same hereby is, **granted**, and the tax liability in issue as assessed against Plaintiff-Debtor Jess J. Childress for the tax years 2004 through 2007, same being found to


constitute state trust fund taxes pursuant to applicable legal authority, are **nondischargeable** herein under 11 U.S.C. § 523(a)(1)(A). It is

FURTHER ORDERED that judgment will be granted contemporaneously herewith in favor of said Defendant and against said Plaintiff-Debtor on the complaint.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff-Debtors, counsel for Defendant the Georgia Revenue Department, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 25th day of May, 2011.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE