

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
<b>GAIL D. FELDMAN,</b>	)	<b>CASE NO. 14-54705 - MHM</b>
	)	
Debtor.	)	
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	)	
R. PETER FISHMAN,	)	
	)	
Movant,	)	
v.	)	<b>CONTESTED MATTER</b>
	)	
GAIL D. FELDMAN,	)	
	)	
Respondent.	)	

**ORDER ON MOTION TO DISMISS FOR ABUSE**

Movant filed a *Motion to Dismiss or Convert Case to Chapter 13 or Chapter 11* July 11, 2014, asserting Debtor's case is an abuse under 11 U.S.C. § 707(b)(2) (Doc. No. 42) (the "Motion"). Hearings were held August 19, 2014, September 30, 2014, and November 19, 2014. At the August 19, 2014 hearing, Debtor was directed to produce certain documents and to file a response to the Motion by September 16, 2014; however, Debtor failed to file a response. At the September 30, 2014 hearing, Debtor was directed to produce additional documents, to amend Debtor's Schedules by November 12, 2014, and to file a statement of caregiver expenses for Debtor's adult, disabled son. Debtor amended her Schedules after the stated deadline, and did not file a statement of caregiver

expenses.<sup>1</sup> At the November 19, 2014 hearing, the parties narrowed the disposition to the outcome of one question – whether Debtor’s tax obligations for 2009 are priority debts. The parties were directed to file briefs on the priority issue on or before November 26, 2014. Neither party filed a timely brief. Movant filed a supplemental brief December 1, 2014 (Doc. No. 77). Debtor has not filed a post-hearing brief.

Under 11 U.S.C. § 707(b), the court “may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts ... if it finds that the granting of relief would be an abuse of the provisions of this chapter.” The Means Test embodied in 11 U.S.C. § 707(b)(2) provides

- (i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the less of –
  - (I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$7,475, whichever is greater; or
  - (II) \$12,475.

Subsection (ii) provides that Debtor’s current monthly income should be reduced by expenses as specified under the National Standards and Local Standards and for “Other Necessary Expenses” as defined by the Internal Revenue Service. Subsection (iii) provides that Debtor’s current monthly income may be reduced by the amount of secured

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<sup>1</sup> Debtor’s amended Schedule J lists an \$810 per month expense for “payments [Debtor makes] to support others who do not live with [Debtor],” but does not provide an itemization or basis for this expense.

debts contractually due, and provides procedures for calculating that amount. Subsection (iv) provides that Debtor's current monthly income may be reduced by the total amount of Debtor's priority debts, divided by 60. The IRS has not filed a claim in this case; however, Debtor argues that the IRS has a priority claim for Debtor's 2009 tax obligations. Movant argues that tax debt should be treated as a general unsecured debt.

A tax debt is a priority claim under 11 U.S.C. § 507(a)(8) to the extent it is for

- (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition-
  - (i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
  - (ii) assessed within 240 days before the date of the filing of the petition, exclusive of
    - (I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and
    - (II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or
  - (iii) other than a tax of a kind specified in 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]

Debtor's 2009 tax liability is "a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition." Movant asserts, and Debtor does not seriously contest, that the tax return was last due more than three years before the date Debtor filed her petition. Debtor has presented no evidence of an

offer of compromise or stay of proceedings during the applicable time period. The pertinent question is when the tax was *assessed*.

Debtor failed to file a tax return for the 2009 tax year until April 10, 2014. The IRS prepared a “substitute return” August 30, 2011, and “assessed” \$29,904 in taxes owed for the 2009 tax year May 14, 2012. Movant argues that the plain language of the statute, along with the tax transcript showing the tax was “assessed” May 14, 2012, leads to the conclusion that the IRS tax debt cannot be a priority debt. Debtor argues that the statute does not clearly state whether the tax return must be prepared by the Debtor for the assessment period to run, and points out that, for the purposes of dischargeability under 11 U.S.C. § 523, the time period for tax debts runs from the date the *debtor* files a return.

That statute reads


- (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt –
  - 1) For a tax or a customs duty—
    - (A) Of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed; [or]
    - (B) With respect to which a return, or equivalent report or notice, if required –
      - (i) Was not filed or given; or
      - (ii) Was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition[.]

Debtor argues that, under applicable case law, the applicable time period described in § 523(a)(1)(B)(ii) does not run until after the debtor files a tax return, notwithstanding any substitute return filed by the taxing authority. Debtor correctly points out that § 507(a)(8) is silent on the issue of *who* must file a tax return, and suggests that the time period in that section should be similarly tolled. Debtor is incorrect. The statute's silence as to the filing of a tax return must be interpreted to mean the statute's effect is not contingent on the filing of a tax return – the plain language of the § 507(a)(8)(ii) provides that taxes “assessed within 240 days of the date of the petition” are entitled to priority treatment, so the relevant date is when the tax was *assessed*. Because the 2009 tax liability appears to have been assessed more than 240 days prior to the petition date, the claim is not entitled to priority status. Because Debtor cannot deduct the 2009 tax debt divided by 60 from Debtor's monthly income for the purposes of the Means Test, a presumption of abuse arises under 11 U.S.C. § 707(b). Accordingly, it is hereby

ORDERED that this case is *dismissed*.

The Clerk is directed to serve a copy of this Order upon Debtor, counsel for Debtor, counsel for Movant, the Chapter 7 Trustee, and all creditors and parties in interest, including the Internal Revenue Service according to the service list, attached.

IT IS SO ORDERED, this the 7<sup>th</sup> day of January, 2015.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE

United States Attorney's Office  
United States Courthouse (and Richard B. Russell Federal Building)  
75 Spring Street, S.W., Suite 600  
Atlanta, Georgia 30303-3309

Special Assistant United States Attorney  
401 W. Peachtree Street, NW  
Stop 1000-D  
Suite 1400  
Atlanta, GA 30308

Internal Revenue Service  
Centralized Insolvency Operation  
P.O. Box 7346  
Philadelphia, PA 19101-7346

Internal Revenue Service  
Insolvency Unit  
401 W. Peachtree Street, N.W.  
Stop 334-D  
Atlanta, GA 30308

Department of Justice, Tax Division.  
Civil Trial Section, Southern Region  
P. O. Box 14198  
Ben Franklin Station  
Washington, D. C. 20044