UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT
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June 12, 2001

TO: All Recipients of the Captioned Order and Judgment
RE: BAP No. KS-00-074, In re Tuttle
Filed April 5, 2001; Hon. Richard L. Bohanon, authoring

Please be advised of the following correction to the captioned decision:

Page 3, second paragraph, fourth sentence: the sentence is amended to add a citation to the bankruptcy court's published decision. The amended sentence is as follows:

In so doing, the bankruptcy court made clear in a thought-provoking memorandum decision, published as In re Tuttle, 259 B.R. 735 (Bankr. D. Kan. 2000), that although it was bound by Tenth Circuit law to hold the gap interest to be nondischargeable, it believed the existing law to be incorrect, and such interest should be discharged.

If you received a hard copy of the decision, please make this correction to your copy.

Very truly yours,

Barbara A. Schermerhorn
Clerk

By:
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JOHN MARSHALL TUTTLE and LEONA JULIA TUTTLE, Debtor.	BAP No. KS-00-074
LEONA JULIA TUTTLE, Appellant, v. UNITED STATES OF AMERICA, Appellee.	Bankr. No. 93-40549 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before McFEELEY, Chief Judge, CLARK, and BOHANON, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

The debtor-Appellant appeals the bankruptcy court's decision holding her personally liable for interest that accrued on a tax claim post-petition and prior to

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

the confirmation of her Chapter 11 plan, or "gap interest." For reasons explained below, we affirm.

JURISDICTION

This Court has jurisdiction to hear timely appeals of "final judgments, orders, and decrees" of bankruptcy courts in the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), (c)(1); Fed. R. Bankr. P. 8002. Because neither party has opted to have this appeal heard by the District Court for the District of Kansas, the parties have consented to jurisdiction of this Court. See 10th Cir. BAP L.R. 8001-1(a). The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's order, judgment, or decree, or remand with instructions for further proceedings.

STANDARD OF REVIEW

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988); see Fed. R. Bankr. P. 8013; Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1370 (10th Cir. 1996).

The bankruptcy court's determination that a chapter 11 debtor remains personally liable for gap interest following discharge is an issue of law that we review *de novo*.

BACKGROUND

The facts in this appeal are not in dispute. The Appellant and her now deceased husband filed a Chapter 11 bankruptcy petition in April 1993; however, a Chapter 11 reorganization plan was not confirmed until December 1999.

The Appellee, the Internal Revenue Service ("IRS"), filed an amended claim for $53,997.35. Of this total, $40,519.17 was for a priority claim, and

$13,478.18 represented a general unsecured claim. There is no dispute over the priority tax claim, but there is a dispute over the interest that accrued on it from the filing of the petition to the confirmation of the plan. This "gap interest" totals approximately $30,000. The amount here is substantial because six years passed between the filing of the petition and confirmation of the plan. It is undisputed that the underlying debt has been paid in full as provided in Appellant's reorganization plan.

PROCEDURAL POSTURE

When the IRS sought to collect the gap interest, the Appellant filed her motion to enforce the confirmation order, and the IRS objected. The bankruptcy court conducted a hearing on the Appellant's motion, and both sides submitted briefs. The bankruptcy court entered its ruling in October 2000, holding that the accrued gap interest was not discharged. In so doing, the bankruptcy court made clear in a thought-provoking memorandum decision, published as In re Tuttle , 259 B.R. 735 (Bankr. D. Kan. 2000), that although it was bound by Tenth Circuit law to hold the gap interest to be nondischargeable, it believed the existing law to be incorrect, and such interest should be discharged. The Appellant then timely filed her notice of appeal.

DISCUSSION

The issue before this Court is whether the bankruptcy court erred in holding that the $30,000 gap interest, that is the interest that had accrued from the filing of the petition to the confirmation of the plan, was not discharged and remains the Appellant's personal obligation.

The Appellant sets forth three arguments for why the gap interest should be discharged. First, drawing from the non-binding arguments made in the bankruptcy court's memorandum decision, she contends that the Bankruptcy Code cases relying on Bruning v. United States , a Bankruptcy Act liquidation case, for

the proposition that post-petition interest on a nondischargeable prepetition tax debt survives bankruptcy as a personal liability of a debtor, are distinguishable from the case at bar. See generally Bruning v. United States, 376 U.S. 358 (1964). Next, she argues that the confirmed reorganization plan provided for repayment of all amounts owed to the IRS, the plan is res judicata, and the IRS is entitled to nothing else. Finally, the Appellant argues that equity demands that the gap interest be discharged. On the other hand, the Appellee points out that the Tenth Circuit has addressed the question presented in this case and that precedent dictates that the gap interest is the personal liability of the Appellant and cannot be discharged. Similar to the bankruptcy court, we are compelled by binding precedent to agree with the IRS.

It is well-established that a creditor may not seek payment from a bankruptcy estate for gap interest, *i.e.*, interest that accrues on a prepetition debt during the post-petition period. See 11 U.S.C. § 502(b)(2); Bruning, 376 U.S. at 362-63; In re Fullmer, 962 F.2d 1463, 1467-68 (10th Cir. 1992), abrogated on other grounds by Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000). [1] The policy here is to assure administrative convenience and fairness to all creditors. See In re Hanna, 872 F.2d 829, 830 (8th Cir. 1989) ("The rule makes it possible to calculate the amount of claims easily and assures that creditors at the bottom rungs of the priority ladder are not prejudiced by the delays inherent in liquidation and distribution of the estate.").

Although the estate is not liable for gap interest, such interest that accrues on a nondischargeable prepetition tax debt survives bankruptcy as the personal liability of the debtor. Section 1141(d)(2) specifies that: "The confirmation of a plan does not discharge an individual debtor from any debt excepted from

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[1] A reorganization plan may include post-confirmation interest that begins to accrue on the effective date of the plan. See 11 U.S.C. §§ 507(a), 1129(a)(9)(C).

discharge under section 523 of this title." 11 U.S.C. § 1141(d)(2). In turn, § 523(a)(1)(A) provides that a tax defined in § 507(a)(8) is not dischargeable. [2] Section 507(a)(8) describes unsecured claims held by the government for income taxes. See 11 U.S.C. § 507(a)(8). A tax described in § 507(a)(8) therefore remains the personal liability of the debtor, and this liability includes gap interest, which is considered to be an integral part of the nondischargeable tax claim. See Bruning, 376 U.S. at 360-61. See also United States v. Victor, 121 F.3d 1383, 1387 (10th Cir. 1997) ("Admittedly, interest that accrues on a nondischargeable tax debt is an integral part of an underlying tax claim" and is nondischargeable if the IRS holds an unsecured debt); Grynberg v. United States (In re Grynberg), 986 F.2d 367, 370 (10th Cir. 1993) ("However, like any other holder of a nondischargeable debt, the IRS is also free to pursue the debtor outside bankruptcy."); Fullmer, 962 F.2d at 1468 ("Interest that accrues postpetition on a nondischargeable prepetition tax debt survives bankruptcy as a personal liability."). Such is the case here. [3]

Given the binding precedent provided by the Tenth Circuit, this Court must hold that the gap interest owed to the IRS is not dischargeable, but rather the Appellant remains personally liable for the gap interest.

The Appellant also argues that the terms of her plan of reorganization provide that she has satisfied all her obligations to the IRS, including the gap interest. In particular, she asserts that she relied on the payoff status report provided by the IRS. The payoff report contains two sections pertaining to

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[2] The Appellant does not dispute that the gap interest in question is a nondischargeable tax debt as described in 11 U.S.C. § 507(a)(8).

[3] The Appellant argues that the Court should not apply Bruning because it involved Chapter 7, not Chapter 11. She likewise attempts to distinguish Fullmer, Grynberg, and Victor by asserting that language that purports to apply here is nothing more than non-binding dicta. This argument is not persuasive given the factual similarity of this case to those that the Appellant attempts to distinguish.

interest, one called "pre-petition interest" and one called "accrued interest." She argues that any gap interest that she owed should have been included in the "accrued interest" section.

The Appellant's position is that IRS is entitled only to those payments outlined in the reorganization plan because it consented to the confirmation of the plan and even suggested governing language in the confirmation order.

A similar argument was made by the debtor in Depaolo v. United States (In re Depaolo) , 45 F.3d 373, 375 (10th Cir. 1995). In that case, the debtors' plan for reorganization was confirmed, providing for a set amount of tax debt to be paid to the IRS. The IRS did not object to confirmation, but it subsequently conducted an audit of the debtors' taxes, which showed that the debtors owed still more taxes.

The debtors argued that res judicata prevented the IRS from claiming the debtors owed more taxes than the amount provided in the reorganization plan. The Tenth Circuit disagreed and concluded that the IRS could pursue collection of the additional taxes because the additional taxes were not dischargeable under § 523. Therefore, the IRS could enforce its right to collect the additional taxes outside of the bankruptcy plan. Id.; accord Grynberg , 986 F.2d at 371.

Similarly, the plain language of the Bankruptcy Code discussed above makes it clear that the gap interest owed to the IRS is nondischargeable. The IRS can exercise its rights to collect that debt despite its consent and active participation in the confirmation of the plan of reorganization.

The Appellant further argues that the Court should use its powers of equity under 11 U.S.C. § 105 to prevent the IRS from collecting the gap interest. She points out that she has paid the underlying debt in full. She also notes that the gap interest could have been included, and thus discharged, in a plan under Chapter 13. See 11 U.S.C. § 1328(a). Likewise, under § 1141(d)(2), the gap interest owed by an individual debtor is nondischargeable, whereas gap interest

owed by a corporate debtor would be dischargeable. See 11 U.S.C. § 1141(d)(2).

Although we recognize the debtor's arguments, like the bankruptcy court, we too are bound by existing Tenth Circuit precedent. Hence, this Court is bound to conclude that the Appellant remains personally liable for the gap interest.

CONCLUSION

Accordingly, this Court holds that the bankruptcy court did not err, and the IRS is entitled to collect the gap interest from the Appellant. The bankruptcy court's decision is AFFIRMED.