United States Bankruptcy Court
District of New Mexico

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Description: Memorandum Opinion re: [87-1] Motion For Payment of Funds Held by Ch 13 Trustee to the IRS. Wherefore, the USA respectfully requests the Court enter an order directing the trustee to distribute the proceeds held to the IRS to be applied to dbtrs tax liability by Internal Revenue Service .

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
CRISTOBAL PINON and
RAQUEL PINON,
Debtors. No. 13-98-10568 SA

MEMORANDUM ON INTERNAL REVENUE SERVICE'S
REQUEST FOR PAYMENT OF FUNDS HELD BY THE CHAPTER 13 TRUSTEE

This matter is before the Court on the Request by the Internal Revenue Service ("Service") for Payment of Funds Held by the Chapter 13 Trustee. The debtors appeared through their attorney Ronald Grenko. The Internal Revenue Service appeared through the Assistant United States Attorney, Manuel Lucero. The Chapter 13 Trustee appeared pro se. Creditor Lorenzo Pinon appeared through his attorney John Caffrey. The Court conducted a hearing, and requested briefs on the legal issues. Having considered the briefs and the file, and being otherwise fully informed, the Court issues this memorandum opinion. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A),(B) and (K).

FACTS

Cristobal and Raquel Pinon were married in June 1979, and have lived in New Mexico continuously since 1982.

In October 1992, Lorenzo Pinon and Cristobal Pinon entered into a partnership under the name of Pinon Roofing. The partnership has been operated continuously since that time.

The debtors never executed an agreement in writing that the partnership interest would be held as the separate property of Cristobal Pinon.

On or about August 31, 1994, Cristobal Pinon and Lorenzo Pinon, each acting as married men dealing in their sole and separate property, purchased some real estate in Albuquerque, Bernalillo County, under a real estate contract (“the Parker property”).

Pinon Roofing fell behind in payment of withholding and payroll taxes and on January 27, 1997 the Service filed a tax lien for the years 1993, 1994, 1995 and 1996 with the Bernalillo County clerk. The Service used its standard lien document, on which it stated the name of the taxpayer as:

Lorenzo I Pinon, a Partnership
Cristobal Pinon

It listed an address as “6408 Palacio SW, Albuquerque, NM 87105". This is the address Pinon Roofing used on its federal partnership tax returns. The amount of the lien was $72,876.27.

The debtors filed their Chapter 13 petition on January 30, 1998. The Service filed a proof of claim, and then an amended proof of claim in the debtors’ case showing a secured claim in the amount of $72,929.67, an unsecured priority claim of $38,399.88, and a general unsecured claim in the amount of $12,042.80. The

claim is, at least in part, based on the taxes incurred by Pinon Roofing.

On December 1, 1998, the Court entered an order approving the sale free and clear of liens of certain real property located in Bernalillo County (the "Lot 3-A Raymac" property) owned by the debtors. This property was not the debtors' residence. The Chapter 13 Trustee holds approximately $66,000 of proceeds from this sale.

On March 29, 1999, the debtors filed a motion to dismiss their Chapter 13 case, and an order of dismissal was entered on May 7, 1999.[1] The Chapter 13 Trustee was faced with conflicting demands for the proceeds, and on November 24, 1999, the Court entered an Order Clarifying the May 7 Order of Dismissal, directing the Trustee to hold the funds pending further order of the court.[2] The Trustee continues to hold the funds pending an order from the Court directing disbursement.[3]

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[1]One of debtors' arguments is that because they dismissed their case, the Service's "[proof of claim] is unenforceable." While there is no longer a bankruptcy case in which to enforce the claim, any lien would still be in force. A dismissal revests property to the condition it was before the case was filed. See 11 U.S.C. §349(b)(3). This revestment would include the Service's liens against property of the debtors.

[2]The Court may retain jurisdiction to enforce its sale order. See e.g. Skaggs v. Fifth Third Bank of Northern Kentucky (In re Skaggs), 183 B.R. 129, 131 (Bankr. E.D. Ky. 1995).

[3]The Trustee has appeared and participated in the numerous matters which have occurred throughout this case, which was filed

On September 16, 1999, a state Court entered a Stipulated Judgment, Decree of Foreclosure, Order of Sale and Appointment of Special Master ("foreclosure") in a case regarding certain other real property located in Bernalillo County (the "Lot 3-B Raymac" property). The Service was named as a defendant. The State Court found that the Service's lien was inferior to the lien of the state-court plaintiff (a mortgage company unrelated to the issue currently before this Court), and ordered:

> That the Notice of Federal Tax Lien filed by DEPARTMENT OF THE TREASURY - INTERNAL REVENUE SERVICE against Defendant CRISTOBAL A. PINON be and hereby is confirmed and declared to be a valid and subsisting third lien upon the subject property and against Defendant CRISTOBAL A. PINON in the instant action.

Conclusions of Law

This opinion will first discuss the classification of the tax debt under New Mexico law, then the ramifications of that classification upon the debtors' property. Next, the opinion will discuss federal tax liens generally, examine the tax lien filed in this case, and then apply that examination to the debtors' debt. The Court concludes that the entire amount held by the Trustee is subject to the tax lien and should be paid to the Service.

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over two years ago, on January 30, 1998. She continues in this case to render service to the Court and the parties despite the fact that by statute she is receiving no compensation for all of her efforts. This is one of the sorts of cases that need to be remembered during the recurring discussions about Chapter 13 trustee compensation.

NEW MEXICO LAW

1. The Court must look to state law to determine what constitutes "community property". Swink v. Sunwest Bank (In re Fingado), 995 F.2d 175, 178 (10th Cir. 1993).

2. Cristobal Pinon is a partner in Pinon Roofing Partnership. The debtors own, as community property, a partnership interest in the Pinon Roofing partnership.[4] Community property is property acquired by either or both spouses during marriage which is not separate property. §40-3-8(B) NMSA 1978 (1999 Repl.). Separate property is property acquired before marriage or after divorce, acquired by gift, bequest, devise or descent, so declared by a court, or designated as separate property in a writing by the parties. §40-3-8(A) NMSA 1978 (1999 Repl.). The partnership interest was acquired during marriage and does not qualify as separate

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[4]Debtors claim that pursuant to §54-1-25(5) NMSA 1978 (repealed July 1, 1997) a partner's interest is not community property. Debtors misread the statute. This section provides that a partner's interest in specific partnership property is not community property. The statute has nothing to do with how the partnership interest itself is held. The same result would be obtained through reference to §54-1A-203 NMSA 1978 (1996 Repl.)("Property acquired by a partnership is property of the partnership and not of the partners individually.") See also Agri-Tech Services, Inc. v. Groff, 898 F.2d 1475, 1477 (10th Cir. 1990)("The rights of the partners in specific partnership property is as co-owners, holding as tenants in partnership.")

Actually, this finding that the partnership interest is community property is not necessary for the ultimate decision today. It does, however, help support the next finding that the debt is a community debt.

property, and is therefore presumed to be community property. See also Dotson v. Grice, 98 N.M. 207, 210, 647 P.2d 409, 412 (1982)(When community property is contributed to a partnership the community merely trades its interest in the specific assets for a community interest in the partnership.) Accord Harris v. Harris, 765 S.W.2d 798, 802 (Tx. Ct. Ap. 1989)(Partnership property is not separate or community; the partnership interest, i.e., the right to receive a share of profits and surplus, is separate or community in nature.); Marshall v. Marshall, 735 S.W.2d 587, 594 (Tx. Ct. Ap. 1987)(Same). In reaching this conclusion, the Court does not find it relevant that Cristobal Pinon and Lorenzo Pinon purchased the Parker property as their separate property, since the interest in the partnership was acquired during the marriage and because there was no evidence that the partnership interest was acquired in exchange for Cristobal Pinion's separate interest in the real property. (The real estate was not purchased until almost two years after the formation of the partnership.)

3. Cristobal Pinon is liable for the tax debt of Pinon Roofing. Each partner in a general partnership is liable for the debts of the partnership. §54-1A-306(a) NMSA 1978 (1999 Repl.). See United States v. Hays, 877 F.2d 843, 844 n.3 (10th Cir. 1989)(Court needs to refer to state law to determine the

(tax) liability of debtor partners). This liability includes the partnership's taxes. See Livingston v. U.S., 793 F.Supp. 251, 254 (D. Id. 1992)(IRS can pursue partners either through state law provisions making partners liable for partnership debts or through the "responsible party" provisions of §6672.) See also American Surety Company of New York v. Sundberg, 58 Wash.2d 337, 342-43, 363 P.2d 99, 103 (1961) cert. denied 368 U.S. 989 (1962)("There is no question but that general partners are individually liable for the taxes due the United States from the partnership.") Debtors' argument that the owner of a partnership should not be personally responsible for its federal unemployment taxes has no basis in the law.[5]

4. The liability for Pinon Roofing's tax debt is a community debt. A community debt is a debt incurred by either or both spouses during marriage which is not a separate debt. §40-3-9(B) NMSA 1978 (1999 Repl.). A separate debt is a debt incurred before marriage or after divorce, a debt designated as separate by a judgment or decree[6], a debt which is

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[5]Ndosi v. Minnesota, 116 B.R. 687 (Bankr. D. Mn. 1990), cited by debtors, is not to the contrary. In that case a debtor was found not liable for corporate unemployment taxes. Id. at 689.

[6]Debtors argue that the foreclosure judgment determined that the debt was Cristobal's separate debt because only he is named in that portion of the judgment regarding the Service's claim.

identified in writing as a separate debt to the creditor when it is incurred, separate torts, or debts declared unreasonable upon dissolution of marriage. §40-3-9(A) NMSA 1978 (1999 Repl.). Cristobal's liability for the tax debts of Pinon Roofing does not qualify as a separate debt, so is presumed to be a community debt. See Huntington National Bank v. Sproul, 116 N.M. 254, 258, 861 P.2d 935, 939 (1993)(Court presumes that a debt created during marriage is a community debt, and the party asserting otherwise must demonstrate that the debt is separate under one of the categories set forth in Sections 40-3-9(A)(1) through (6).) Furthermore, Courts in community property states routinely hold that taxes are community debts. See e.g. Hyde v. United States, 72 A.F.T.R.2d 93-6150, 93-2 USTC P50,605, 1993 WL 512059 at 2 (D. Az. 1993) aff'd 26 F.3d 130 (1994). (Holding that 100% of wife's pension fund, a community asset, was subject to IRS levy based on her husband's failure to remit withheld income and FICA tax for a company in which he was an

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It appears that this issue was not actually litigated in the state court. Furthermore, the fact that only Mr. Pinon is named does not mean the liability is not a community debt. "We believe, however, that the language of Section 40-3-9(A)(3) is clear. In order for a marital debt to constitute a separate debt under Section 40-3-9(A)(3), the judgment or decree rendered by a court having jurisdiction must contain an express statement designating the debt as the separate debt of one spouse." Huntington National Bank v. Sproul, 116 N.M. 254, 259, 861 P.2d 935, 940 (1993).

officer because the debt was a community debt); Baca v. Village of Belen, 30 N.M. 541, 240 P. 803, 805 (1925)(Real estate tax on community property is a community debt, subject to satisfaction out of community property.); Wine v. Wine, 14 Ariz.App. 103, 105, 480 P.2d 1020, 1022 (1971)(Noting that income taxes, penalties and interest are probably "per se" community debts); Vail v. Vail, 117 Idaho 520, 521, 789 P.2d 208, 209 (Ct. App. 1990)(Taxes are community debt); Hanson v. Hanson, 55 Wash.2d 884, 888, 350 P.2d 859, 861 (1960)(Income tax is community obligation which becomes a joint obligation after a divorce.)

5. Under state law, either spouse can incur a community debt for which the community is liable, "without the participation of the other spouse". Sproul, 116 N.M. at 258, 861 P.2d at 939 (Citing Beneficial Finance Co. v. Alarcon, 112 N.M. 420, 422, 816 P.2d 489, 491 (1982); Execu-Systems, Inc. v. Corlis, 95 N.M. 145, 147, 619 P.2d 821, 823 (1980); Fernandez v. Fernandez, 111 N.M. 442, 444, 806 P.2d 582, 584 (Ct. App. 1991).)

6. Under state law, community property is liable for the community's debts. §40-3-11(A) NMSA 1978 (1999 Repl.). Sproul, 116 N.M. at 258, 861 P.2d at 939.

7. Under state law, a creditor who has received a judgment against only one spouse, but on a community debt, may proceed

to foreclose its judgment lien on the real property of the community. Sproul, 116 N.M. at 264, 861 P.2d at 945. The Court based this finding on §40-3-9(B), which allows one spouse alone to incur a community debt, and §40-3-11(A), which subjects community property to the payment of community debts. Id. As a policy, the Court noted that a creditor, when loaning money to one spouse, could reasonably expect that the community real property would be liable to satisfy the community debt in the event of default. Id.

THE TAX LIEN

7. A federal tax lien is a general lien for unpaid taxes upon "all property and rights to property", both real and personal belonging to the delinquent taxpayer. 26 U.S.C. §6321. United States v. United States District Court (Matter of Carlson), 580 F.2d 1365, 1368 (10th Cir. 1978). The lien arises automatically whenever a tax delinquency occurs. Borque v. United States, 123 F.3d 705, 706 (2nd Cir. 1997). "[Section 6321], which defines broadly the property subject to attachment by the government for unpaid taxes, indicates 'that Congress meant to reach every interest in property that a taxpayer might have.'" Medaris v. United States, 884 F.2d 832, 833 (5th Cir. 1989).

8. The federal tax lien is perfected against the taxpayer without the necessity of filing a notice of tax lien. Id.;

United States v. Battley (In re Berg), 188 B.R. 615, 618 (9th Cir. B.A.P. 1995) aff'd 121 F.3d 535 (9th Cir. 1997); Stangel v. United States (In re Stangel), 222 B.R. 289, 294 (Bankr. N.D. Tx. 1998). A notice of tax lien must be filed, however, to be effective against third parties. Battley, 188 B.R. at 618.

9. In the case of a partnership, a demand on the partnership by the Service is a demand upon all the partners and is sufficient compliance with §6321 of the Internal Revenue Code for the purpose of making the taxes assessed a lien on the property of the individual partners. American Surety Company of New York v. Sundberg, 58 Wash.2d 337, 343, 363 P.2d 99, 103 (1961) cert. denied 368 U.S. 989 (1962); William D. Elliot, *Tax Liens and Levies Involving Partners*, 14 J. Partnership Tax'n 320, 321 and 324 (1998).

10. Although the federal tax lien is a creature of federal statute and is governed by federal law, state law controls what the "property and rights to property" are that are subject to attachment. Aquilino v. United States, 363 U.S. 509, 512-13 (1960); Medaris v. United States, 884 F.2d 832, 833 (5th Cir. 1989); Matter of Carlson, 580 F.2d at 1368. Therefore, the property subject to the Service's lien is determined through reference to New Mexico law.

11. The Service has, at least, the rights of a state law creditor. Medaris, 884 F.2d at 834-35.

12. Therefore, the federal tax lien, as a community debt, attached to the debtors' entire interest in the Lot 3-A Raymac property because a state law judgment creditor could foreclose a community claim against that property. The lien was perfected as to the debtors when demand was made on the Pinon Roofing partnership. No notice of tax lien was required.

13. Even if a notice of tax lien were required, the Service complied. For real property, a federal tax lien is perfected as to third parties by filing a notice of lien "in one office within the State .. as designated by the laws of such State, in which the property subject to the lien is situated." 26 U.S.C. §6323(f)(1)(A)(i). In New Mexico, a federal tax lien is perfected by filing as set forth in §48-1-1 NMSA 1978, the Uniform Federal Lien Registration Act. Subsection A provides:

> Notices of liens upon real property for taxes and other obligations payable to the United States and certificates and notices affecting the liens shall be recorded in the office of the county clerk of the county in which the real property subject to a federal lien is situated.

The Service filed its notice of tax lien with the clerk of Bernalillo County.

14. The form of notice for a federal tax lien is determined by federal regulation and is valid "notwithstanding any other provision of law regarding the form or content of a notice of lien." 26 U.S.C. §6323(f)(3). A state may not prescribe the form or content of the notice, nor can it require a property description on the notice. United States v. Union Central Life Insurance Company, 368 U.S. 291, 294 (1961). This ensures that all of a taxpayer's property and rights to property become subject to the federal tax lien. Id. Therefore, debtors' argument that the lien is defective because it failed to designate a specific property is without merit.

15. Debtors also argue that because there is no entity called "Lorenzo I Pinon, a Partnership, Cristobal Pinon" the tax lien is invalid; alternatively the lien cannot attach to property owned individually by Cristobal Pinon and/or Raquel Pinon. As to the name on the lien, the only requirement is that there be constructive notice of a federal tax lien. Tony Thornton Auction Service, Inc. v. United States, 791 F.2d 635, 638-39 (8th Cir. 1986)(Notice of lien filed against "Joe W. Davis and either Daviss Restaurant or Davis's Restaurant" was sufficient to create liens against Joe W. Davis and his wife Mary Ann Davis who was a joint venturer in the restaurant for the tax liabilities of the joint venture,

with the lien attaching to their entireties property); Sundberg, 58 Wash.2d at 343, 363 P.2d at 103 (Notice of lien using the name of the partnership "Oscar Sundberg and Sons" was notice not only to anyone dealing with Oscar Sundberg, but also to those dealing with Carl and Thor Sundberg (the sons) or their property); Hudgins v. Internal Revenue Service (In re Hudgins), 967 F.2d 973, 976 (4th Cir. 1992)("[T]he validity of a tax lien in bankruptcy must depend on the constructive notice that the lien would give a purchaser.") In this case the notice of tax lien specifically identifies Cristobal Pinon, and serves as constructive notice that his property was subject to a federal lien. Furthermore, the Notice of Lien served as actual notice, because the Service was named in the foreclosure suit regarding the Lot 3-B Raymac property.

16. Debtors also argue that the Service should be required to seek satisfaction from the partnership first because the tax is the partnership's debt. There is no statute or regulation that would limit the Service in this manner. Silverstein v. United States (In re Ackerman II), 424 F.2d 1148, 1150 (9th Cir. 1970)("We hold that a junior lienholder cannot invoke the marshaling doctrine to prevent the United States from enforcing its tax liens against any property for which enforcement is authorized by the applicable federal

statutes."); United States v. Valley National Bank (In re Decker), 199 B.R. 684, 688 (9th Cir. B.A.P. 1996)(Bankruptcy Court erred as a matter of law when it applied the doctrine of marshaling against the IRS.) The debtors' request for marshaling will therefore be denied.

For the reasons set forth above, the Motion by the Internal Revenue Service for Payment of Funds held by the Chapter 13 Trustee should be granted. A separate Order granting the motion will be entered.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties:

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