

170.1262

Memorandum

To: William D. Dunn
Assistant Principal Tax Auditor (MIC:49)

Date: July 31, 1995

From: Thomas J. Cooke
Staff Counsel

Subject: REDACTED TEXT

Gary Jugum has requested that I respond to your memorandum to him dated June 7, 1995 concerning the above taxpayer.

In your memorandum, you state that the taxpayer's attorney has written to the Board contending that the liability against his client has been discharged in a bankruptcy action. You state that the taxpayer as a corporate officer is held liable during the corporate suspension of REDACTED TEXT for the period of April 1, 1984 through June 15, 1987. The taxpayer's attorney argues that the liability in question is an excise tax and that pursuant to 11 U.S.C. §507(a)(7)(E) his client is discharged of any liability for the period April 1, 1984 through June 30, 1986, since returns were filed by the corporation during that period and the liability arose more than three years prior to the filing of the bankruptcy petition. You ask whether all or any portion of this liability is discharged.

We have examined the taxpayer's letter and have concluded that no portion of the liability has been discharged by the taxpayer's bankruptcy. The taxpayer's attorney admits that "the proposed assessment by the Board was not listed in that [the taxpayer's bankruptcy] Petition." 11 U.S.C. §523(a) provides that a bankruptcy discharge "does not discharge an individual debtor from any debt --

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --"

a claim to be filed. A liability which arose in 1992 when the Board issued a Notice of Determination to the taxpayer cannot be discharged in a Chapter 7 bankruptcy that the taxpayer filed in 1989. We have examined the case cited by the taxpayer's attorney for his contention that a "sales tax claim . . . not listed in the prior Chapter 7 is . . . irrelevant," *In re Beezley*, 944 F.2d 1433 (9th Cir. 1992). In that case, the court affirmed a decision not to reopen a bankruptcy case. The debtor sought to reopen the bankruptcy case to add an omitted debt to his schedules. The court stated that in a no-asset Chapter 7 case, reopening the case would have been a pointless

exercise. The court held that if the omitted debt “is of a type covered by 11 U.S.C. §523(a)(3)(A), it has already been discharged pursuant to 11 U.S.C. §727. If the debt is of a type covered by 11 U.S.C. §523(a)(3)(B), it has not been discharged, and is non-dischargeable.” 11 U.S.C. §523(a)(3)(B) excepts from discharge a claim not listed or scheduled in time to permit a timely filing of a claim and a timely request for a determination of dischargeability. The case cited by the taxpayer’s attorney has no relevance to the taxpayer’s situation.

The taxpayer’s attorney states in his letter that, in the case of In re George, 95 B.R. 718 (1989), the “Appellate Panel held that the sales tax is an excise tax under (former) Section 507(a)(7)(E)” and the “Appellate Panel upheld the Trial Court, that the sales taxes proposed against a responsible officer of the corporation are characterized as excise taxes, under Section 507(a)(7)(E).” These statements are not true. The court in George stated:

“There may be a question as to whether the bankruptcy court correctly determined that the ‘sales tax’ in this case should be considered an ‘excise tax’ under §507(a)(7)(E) rather than a “trust fund tax” under §507(a)(7)(C) or a tax on or measured by gross receipts under §507(a)(7)(A) This distinction, however, is not crucial to the instant case since the obligation arose within three years of the petition filing and thus the ‘statement’ exception to nondischargeability under §523(a)(1)(A) and §507(a)(7)(E) is not at issue.”

The court declined to rule on whether California sales taxes are “excise taxes” within the meaning of 11 U.S.C. §507(a)(7)(E).

The case of In re Raiman, 172 B.R. 933 (1994) held that California sales taxes are taxes “on or measured by gross receipts” within the meaning of 11 U.S.C. §507(a)(7)(A).

It is our opinion that the taxpayer’s bankruptcy filed in 1989 did not discharge any portion of the taxes determined in 1992.

TJC/cmm