

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT HAMMOND

IN RE: )  
MARY SCOTT )  
WILLIAM SCOTT ) BANKRUPTCY NO. 08-22858  
 )  
Debtors )

ORDER ON MOTION FOR SUMMARY JUDGMENT  
BY THE UNITED STATES OF AMERICA ON BEHALF  
OF THE INTERNAL REVENUE SERVICE

I

Statement of Proceedings

This Chapter 13 case is before the Court on the Motion for Summary Judgment filed on February 11, 2011 ("Motion") by the United States of America on behalf of the Internal Revenue service ("IRS") arising out of the following contested matter: Objection filed by the Chapter 13 Debtors on July 6, 2009 ("Objection") to the Amended Claim No. 22-2 filed by the IRS on April 16, 2009, and dated April 15, 2009 ("Amended Claim").

The Amended Claim is signed by one M. Mosley, Insolvency Advisor, Internal Revenue Service, Centralized Insolvency Operations, P. O. Box 21126, M/S N781, Philadelphia, PA 19114. The Amended Claim asserts that there is due and owing by the Debtors' Estate a Tax Debt by the Debtors to the IRS in the sum of \$177,071.07, comprised of an Unsecured Priority Claim in the sum of \$83,809.54 for unpaid Income Taxes for the tax years 2004 to and including 2007, and Unsecured General Claim in the sum of \$93,261.53 for unpaid Income Taxes for the tax years 2002 and 2003.

It is noted that the IRS Form 10 Attachment to the Amended Claim under the column "Date Tax Assessed" states "Exam". Thus, the Amended Claim does not indicate that, at least as of the date of the Amended Claim, or April 15, 2009, the IRS had formally assessed the Debtors for the taxes in question, although a Notice of Deficiency had been allegedly issued by the IRS according to its Motion.

Pursuant to an Order and Notice dated February 17, 2011 the Debtors were given 30 days to file their Response to the Motion of the IRS for Summary Judgment.

On March 23, 2011 the Court entered an Order on the Motion of the Debtors granting the Debtors to and including April 5, 2011 to file their response to the Motion of the IRS. No Response was ever filed by the Debtors.

The Motion by the IRS at Paragraph No. 1 sets out as “Facts” a statement that the IRS issued a Notice of Deficiency to the Debtors, setting forth deficiencies in the Debtor’s Income Taxes for the tax years ended December 31, 2002 through 2007, inclusive, attaching thereto an Exhibit No. 1, a Notice of Deficiency (“Notice”).<sup>1</sup>

The Notice to the Debtors is shown as being sent by Certified Mail, is dated April 7, 2009 on an IRS Form designated as Letter 1384 (Rev. 12, 2004), is comprised of five pages, and is signed by one Teresa M. Tramm, apparently for one Kevin Harris, Technical Services Territory Manager-Midwest, on behalf of Commissioner Douglas H. Shalman. The Notice itself is not Certified or under the Seal of the United States, nor does it contain a sworn affidavit or declaration by an officer or employee of the IRS that the Notice is authentic and genuine. The Notice states that included with the Notice are a “Statement, Copy of this Letter, Attachments to this Letter, Waiver, Notice 1214, Envelope.”

The Attachments to the Notice include a Form 4089, Notice of Deficiency-Waiver, a one page “Statement” as to Interest on deficiencies. This Statement refers to attached §6663(a) Worksheets for Civil Fraud Penalties for the years 2002 through 2007 inclusive. Also attached to the Notice are Form 5278, Statement-Income Tax Changes, for the Tax years 2002 through 2007 inclusive, setting out the adjustments made by the IRS to the Debtor’s Tax Return and Taxable Income as revised by the IRS.

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Exhibit No. 1, which comprised of 92 pages, is not tabbed, nor does it contain a table of contents, pagination, or an index, whereby the Court can easily discern those pages of the Exhibit that are relevant. In addition, the “Facts” and “Argument” as set out in the Motion do not specifically reference and discuss the various pages of the Exhibit. This has made it most difficult for the Court to sort through the 92 pages of Exhibit No. 1 in deciding the Motion of the IRS.

Next is found a Schedule 1-A, which sets out the IRS' Explanation of Adjustments for the tax years 2002 to and including 2007. Following the Schedule 1-A are Exhibits A-1 to and including A-54 Analysis of Bank Deposits for tax years 2002 to and including 2007; Exhibit B, Schedule C-Car and Truck Expenses for the tax years 2002 to and including 2007; Exhibits C-1 and C-2, Schedule C-Commissions and Fees for tax years 2002 to and including 2007; Exhibits D-1 and D-2, Schedule A-Medical and Dental Expenses for the tax years 2002 to and including 2007; Schedule A "Itemized Deductions Work Sheet Per Exam" for the tax years 2002 through 2007 inclusive; Schedule EIC-Computation of Earned Income Credit for the year 2007; Worksheet for Additional Child Tax Credit and Form 8812 Additional Child Tax Credit; and, Worksheet for Schedule SE Computation of Self-Employment tax for the tax years 2002 through 2007 inclusive.

None of the documents attached as Exhibit No. 1 to the Motion by the IRS are supported by an Affidavit, Declaration, or a Certification bearing the signature of an officer or an employee of the IRS in his or her official capacity that the Notice and the attachments thereto set out above are genuine and authentic and admissible in evidence. In addition, the "Argument" and "Facts" section of the IRS' Motion make no reference to specific sections in the Internal Revenue Code and Regulations, and relevant Case Law interpreting the same, that may directly apply to the various documents set out in Exhibit No. 1., and in turn, the Motion of the IRS.

## II

### Conclusions of Law and Discussion

Federal Rule of Civil Procedure 56, as amended effective December 1, 2010, and as made applicable by Fed. R. Bk. P. 7056 and Fed. R. bk. P. 9014 provides, in part, as follows:

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The Court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

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(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Federal Rule of Federal Procedure 56 is implemented by N. D. Ind. L.B.R. B-7056-1,

Motion for Summary Judgment. N. D. Ind. L.B.R. 7056-1 provides as follows:

In addition to complying with the requirements of N. D. Ind. L.B.R. B-707.1,<sup>2</sup> all motions for summary judgment shall be accompanied by a "Statement of Material Facts" which shall either be filed separately or as part of the movants initial brief. The "Statement of Material Facts" shall identify those facts as to which the moving party contends there is no genuine issue and shall be

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<sup>2</sup> N. D. Ind. L.B.R. 7007-1-(a), Motion Practice states as follow:

(a) Any motion filed within a contested matter or an adversary proceeding (e.g., motions filed pursuant to Fed. R. Bankr. P. 5011(b), 7012, 7037, and 7056) shall be accompanied by a separate supporting brief. Unless the court orders otherwise, the opposing party shall have thirty (30) days after service of the motion and initial brief within which to serve and file a response. the moving party shall have fourteen (14) days after service of any response within which to serve and file a reply. Time shall be computed as provided in Fed. R. Bankr. P. 9006. Extensions of time shall only be upon order of the court, for good cause shown. The failure to respond or reply within the time required will be deemed a waiver of the opportunity to do so and may subject the motion to a ruling without further submissions.

supported by appropriate citations to discovery responses, depositions, affidavits, and other admissible evidence. Any party opposing the motion shall, within thirty (30) days of the date the motion is served upon it, serve and file a “Statement of Genuine Issues” setting forth all material facts as to which it is contended there exists a genuine issue supported with appropriate citations to discovery responses, affidavits, depositions, or other admissible evidence, together with any affidavits or other documentary material controverting the movant’s position. The “Statement of Genuine Issues” may either be filed separately or as part of the responsive brief. In determining the motion for summary judgment the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts are controverted in the “Statement of Genuine Issues: filed in opposition to the motion, as supported by the depositions, discovery responses, affidavits, and other admissible evidence on file.

While the IRS included a section in its Motion denominated as “Argument” no supporting Brief was filed as required by N. D. Ind. L.B.R 7007-1(a). In addition, while the Motion of the IRS contains a section denominated as “Facts”, the IRS did not file a separate “Statement of Material Facts” or as a part of its Brief in Support of the Motion, identifying those facts as to which the IRS contends there is no genuine issue, supported by appropriate citations to discovery, responses, depositions, affidavits, and other admissible evidence.

The IRS in its Motion correctly asserts that under applicable non-bankruptcy law a Notice of Deficiency issued by the IRS carries a presumption of correctness, except as to Fraud Penalties, and the taxpayers is required to prove by preponderance of the evidence that the Notice is erroneous, citing, J.P. Morgan Chase & Co. v Comm’r., 530 F.2d 634, 638-39 (7th Cir. 2008); Pittman v. Comm’r., 100 F.3d 1308, 1313 (7th Cir. 1996). The IRS further cites the case of Moretti v. Comm’r., 77 F.3d 637, 643 (2nd Cir. 1996) (citing, Andrew Crispo Gallery, 16 F.3d 1336, 1341 (2nd Cir. 1994)).

It is true that though an assessment is a prerequisite to certain remedies that the IRS may seek, it is not a prerequisite to the IRS making a claim in Bankruptcy because the Bankruptcy Code gives priority to a claim that is “assessable” as well as one that is actually assessed pursuant to §507(A)(iii). United States v. Frontone, 383 F.3d 656, 658 (7thCir. 2004). However, the objection to a claim creates a contested matter pursuant to Fed. R. Bk. P. 9014. Federal Rule Bankruptcy Procedure 9017, Evidence, states that the Federal

Rules of Evidence and Rules 43,44, 44.1 F. R. Civ. P. apply in cases under the Code. Accordingly, the Federal Rules of Evidence are applicable to the Objection by the Debtors to the Amended Claim of the IRS and the Motion for Summary Judgment by the IRS.

Federal Rules of Civil Procedure 56 and N. D. Ind. L.B.R. B-7056-1, require that the Motion for Summary Judgment be based upon materials that could be admissible in evidence. Although not expressly set out in Fed. R. Civ. P. 56, a party may submit evidence other than listed in Rule 56 in support of its position on a Motion for Summary Judgment. However, when a party seeks to offer evidence through other exhibits, they must be identified by affidavit, or otherwise made admissible in evidence. Martz v. Union Labor Life Insur. Co., 757 F.2d 135, 138 (7th Cir. 1985). Rule 56 does not authorize the use of unsworn statements or unverified reports unless such other materials are either: (1) identified by affidavit as being authentic; or, (2) otherwise admissible. Id.

Inasmuch as the summary judgment procedure lacks the safeguards of cross-examination of the affiant, it must be shown that he is competent to testify as to the matters stated, and the facts to which he swears are admissible in evidence. American Securit Co. v Hamilton Glass Co., 254 F.2d 889, 893 (7th Cir. 1958); Midland Engineering Co. v John A. Hall Constr. Co., 398 F. Supp. 981, 989 (N.D. Ind. 1975).

Rule 56 requires that an affidavit: “(1) must be made on personal knowledge of the affiant: (2) set forth facts that would be admissible in evidence; and (3) show affirmatively that the affiant, is competent to testify to the matters stated therein.” Pfeil v. Rogers, 757 F.2d 850,860 (7th Cir. 1985), cert denied, 475 U. S. 1107, 106 S. Ct. 1513, 89 L. Ed. 2d 912 (1986). The Seventh Circuit has emphasized the personal knowledge requirement:

[W]itnesses who are not expert witnesses...are permitted to testify only from their personal knowledge. Testimony about matters outside their personal knowledge is not admissible, and if not admissible at trial neither is it admissible in an affidavit used to support or resist the grant of summary judgment ... It is true that “personal knowledge” includes inferences—all knowledge is inferential—and therefore opinions. But the inferences and opinions must be grounded in observation or other first-hand personal experience. They must not be flights of

fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience. Visser v. Packer Eng'g. Assocs., Inc., 924 F.2d 655, 659 (7th Cir. 1991)

(en banc) (citations omitted).

Non-hearsay evidence must be used at summary judgment. Randle v. LaSalle Tele-Communications, Inc., 876 F.2d 563, 570 (7th Cir. 1989). Hearsay is inadmissible in summary judgment proceedings to the same extent it is inadmissible at trial. Eisenstadt v. Centel Corp., 113 F.3d 738, 742 (7th Cir. 1997) (collecting cases). However, affidavits and depositions which are not generally admissible at trial, are admissible in summary judgment proceedings to establish the truth of what is attested or deposed. Id. In ruling on a motion for summary judgment the Court can properly disregard an affidavit that contains only inadmissible hearsay. Leonard v. Dixie Wll Service & Suppl, Inc., 828 F. 2d 291, 295 (5th Cir. 1987); Rossi v. Trans World Airlines, Inc. 507 F. 2d 404, 406 (9th Cir. 1974); Turoff v. May Co., 531 F.2d 1357, 1362 (6th Cir. 1976). An affidavit not based on personal knowledge is insufficient to support a motion for summary judgment. Hummel v. Wells Petroleum Co., 111 F.2d 885, 886 (7th Cir. 1940).

Mere conclusory statements do not satisfy the standards of Rule 56. Davis v. City of Chicago, 841 F.2d 186, 189 (7th Cir. 1988); Toro Co. v. Krouse, Kern, & Co., Inc., 827 F.2d 155, 163 (7th Cir. 1987); Ashwell & Co. v. Transamerica Ins. Co., 407 F.2d 762, 766 (7th Cir. 1969); Wilson Jones Co. v. Gilbert & Bennett Mfg. Co., 332 F.2d 216, 219 (7th Cir. 1964).

None of the documents attached to the Motion for Summary Judgment by the IRS as Exhibit No. 1 satisfy the requirement that they would be admissible in evidence at an evidentiary hearing on the merits of this contested matter, as they are not supported by an Affidavit, Declaration, or a Certification under Seal of the Director of the IRS by an officer or employee of the IRS that based on personal knowledge that the documents are authentic and genuine, nor are they self-authenticating.

It is observed that Fed. R. Bk. P. 9017 provides that the Federal Rules of Evidence and Rules 43, 44, and 44.1 Fed. R. Civ. P. apply in cases under the Code. Accordingly, the Federal Rules of Evidence

apply to this contested matter.

Federal Rule of Evidence 902, Self-Authentication, provides, in part, as follows:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

**(1) Domestic public documents under seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

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**(4) Certified copies of public records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

The Court would observe that opposed to a Notice of Deficiency, a Certificate of Assessments and Payments under Seal of the Director of the IRS is self authenticating under Fed. R. Evid. 902(1) and no extrinsic evidence is necessary to provide a foundation as to the authenticity and genuineness of the Certificate and thus its admissibility into evidence. A Certificate of Assessments and Payments is presumed correct and establishes a Prima Facie case of liability for the payment of the tax assessment . In re Associated Bicycle Service, Inc., 128 B.R. 436, 444 (Bankr. N. D. Ind. 1990). In re Barber, 236 B.R. 655, 661-662 (Bankr. N. D. Ind. 1998). See, Russell, Bankruptcy Evidence Manual, 2010-2011 Edition Vo. 2 §902.1, pp. 990-91 (collecting cases); Id., §301.13, pp. 202-204 and p. 206. See e.g. Matter of Rosemiller, 188 B.R. 129, 137-138 (Bank. D. N. J. 1995).

Once the IRS presents an assessment of liability, the taxpayer bears the burden of production and persuasion. In re Walters, 176 B.R. 835, 869 (Bankr. N. D. Ind. 1994) (citing, Ruth v. United States v United States, 823 F.3d 1091, 1093 (7th Cir. 1987)); United States v. Schroeder, 900 F.2d 1144, 1147-48 (7th Cir. 1990); Sawyer v. United States, 831 F.2d 755, 758 (7th Cir. 1987).)

As noted above, the Amended Claim of the IRS states that no Certificate of Assessments and Payments had been issued by the IRS as of April 15, 2010. The Internal Revenue Service is forbidden, with immaterial exceptions, to assess a deficiency until it has issued a notice of deficiency. United States v. Frontone, 383 F.3d 656, 658 (7th Cir. 2004). A notice of deficiency that follows, rather than precedes an assessment is invalid. Id.

In addition, Federal Rule of Evidence 803, Hearsay Exceptions: Availability of Declarant Immaterial, states, in part, as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there has a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Thus, once a Certificate of Assessments and Payments by the IRS has been properly identified and self-authenticated, the Records, Reports, Statements or Data Compilations of the IRS supporting the Certificate may be admissible in evidence under the exception to the hearsay found at Fed. R. Evid. 803(3)(8). This would include those documents as set out in Exhibit No. 1 to the IRS' Motion. See, e.g. in re Garm, 114 B.R. 414, 416-417 (Bankr. M. D. Pa. 1990); In re Heritage Village Church and Missionary Fellowship, Inc., 92 B.R. 1000, 1016 (Bankr. D. S. C. 1988) Aff'd, 907 F.2d 901 (4<sup>th</sup> Cir. 1991). As Noted by the Seventh Circuit Court of Appeals in the case of Cole v. C.I.R., 637 F. 3d 767 (7<sup>th</sup> Cir. 2011):

Internal Revenue Code section 6001 requires taxpayers to "keep such records, render such statements, make such returns, and comply with such rules and regulations" as required by the Commissioner. When a taxpayer fails to regularly use an accounting method, "or if the method used does not clearly reflect income," I.R.C. §446(b) allows the Commissioner to determine taxable income via a method that in its discretion "does clearly reflect income." See Webb v. Comm'r, 394 F.2d 366, 371-72 (5<sup>th</sup> Cir. 1968) (holding that because a taxpayer's "records did not

clearly reflect his income the Commissioner was authorized to use such methods as in his opinion clearly reflected that income" (citing 26 U.S.C. §446(b)); Factor v. Comm'r, 281 F.2d 100, 117 (9th Cir. 1960) (holding that an "undisputed rule is that, because of the failure of the taxpayer to keep books clearly reflecting his income, the Commissioner had the right to compute the income" using a method the Commissioner believes accurately reflects income (citations omitted)). Courts have long approved of the "bank deposits" and the "specific items" methods. See United States v. Merrick, 446 F.2d 1087, 1092 (10<sup>th</sup> Cir. 1972) (affirming a tax evasion conviction—challenged on sufficiency of the evidence—that was established by the specific items method); United States v Stein, 437 F.2d 775, 779-81 (7<sup>th</sup> Cir. 1971) (holding that a tax evasion conviction could be proved on a "a bank deposits analysis" (citations omitted)). The reconstruction of a taxpayer's income need only be reasonable in consideration of the case's circumstances and facts. See Bradford v. Comm'r, 796 F.2d 303, 306 (9<sup>th</sup> Cir. 1986).

Id. 637 F.3d at 774-775.

For the reasons stated above, it is hereby **ORDERED** that the Motion for Summary Judgment by the IRS is **DENIED** without prejudice. Pursuant to Fed. R. Civ. P. 56(e), the IRS is hereby granted to and including August 31, 2011 to file an Amended Motion for Summary Judgment consistent with matters covered by this Decision and Order.

Dated: July 22, 2011

  

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**JUDGE, U. S. BANKRUPTCY COURT**

Distribution:  
Debtor  
Attorney Peters  
Attorney Holesinger  
Attorney Beri  
Trustee, UST