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JUDGE: M. A. Mahoney

PARTIES: Gregory L. Cummings, Giselle G. Cummings, State of Alabama, Department of Revenue

CHAPTER: 7

ATTORNEYS: T. O. Bear, D. R. Crow

DATE: 5/13/98

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

GREGORY L. CUMMINGS
GISELLE G. CUMMINGS

Case No. 97-12061-MAM-7

Debtors.

GREGORY L. CUMMINGS
GISELLE G. CUMMINGS

Plaintiffs

v.

Adv. No. 97-1269

STATE OF ALABAMA
DEPARTMENT OF REVENUE

Defendant

**ORDER AND JUDGMENT DECLARING STATE OF ALABAMA
INCOME TAX DEBTS FOR YEARS 1987 AND 1988 DISCHARGEABLE**

Thomas O. Bear, Foley, AL, Attorney for Plaintiff/Debtor
Duncan R. Crow, Mobile, AL, Attorney for State of Alabama, Department of Revenue

This matter is before the Court for the trial of issues as to the dischargeability of income taxes owed to the State of Alabama for the years 1987, 1988, 1990, 1991, 1992 and 1993.

Appearances were as noted in the record. This Court has jurisdiction pursuant to 28 U.S.C.

§§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding.

The parties agree that the income taxes for the years 1987 and 1988 are dischargeable. For the reasons indicated below, the taxes for 1990-1992 are not dischargeable.

FACTS

The debtors, Gregory L. and Giselle G. Cummings, filed a Chapter 7 case on June 9, 1997. They owed income taxes to the State of Alabama for tax years 1987-1988 and 1990-1992 at filing. There was no evidence presented as to whether or when tax returns were ever filed by the debtors for 1990-1992, or if the returns were filed late. The State of Alabama issued preliminary assessments as to the following taxes on March 14, 1997:

1990 - \$722.73
1991 - 377.95

A preliminary assessment as to 1992 taxes was issued on April 16, 1997.

The State of Alabama issued final assessments on June 25, 1997 as to the same taxes:

1990 - \$735.89
1991 - 384.81
1992 - 586.16

March 14, 1997, April 16, 1997 and June 25, 1997 are all dates which are less than 240 days before June 9, 1997, the date the debtors filed this bankruptcy case.

LAW

The debtors seek to have this Court declare the debtors' income taxes owed to Alabama for tax years 1990-1992 declared nondischargeable pursuant to 11 U.S.C. § 523(a)(1). The debtor bears the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

Section 523(a)(1) provides that income taxes owed pursuant to 11 U.S.C. § 507(a)(8) are not dischargeable if the taxes were "assessed within 240 days . . . before the date of the filing of the petition." Regardless of whether the preliminary assessment or final assessment is used as

the date for calculation, the assessment was within the 240-day period. Therefore, the taxes are not dischargeable.

The debtors, in their post-trial brief, assert that they filed tax returns in 1990-1992 and that the taxes claimed to be due in this case are the result of later assessments. The debtors also allege that the State of Alabama had given the debtors a statement of their taxes due for 1989-1992 on November 5, 1993. These facts are not in evidence, having been submitted after the trial without consent of opposing counsel. Therefore, the facts must be disregarded. As far as the Court knows, no returns were filed, or they were filed late.¹ ALA. CODE 40-2A-7(b)(2) (1975) states that preliminary assessments shall be entered “within three years from the due date of the return, or three years from the date the return is filed with the department . . . or . . . at any time if no return is filed as required.” Final assessments are filed when no petition for review of the preliminary assessment is filed within 30 days or after the petition for review is determined in the Revenue Department. ALA. CODE 40-2A-7(b)(3) (1975). Since the evidence of the debtor does not establish that the preliminary assessment was entered late, or that the final assessments were untimely or improper, the assessments stand as valid. Both are within 240 days of the debtors’ bankruptcy filing.

THEREFORE, IT IS ORDERED and ADJUDGED that the debts of Gregory L. and Giselle G. Cummings for income taxes owed to the State of Alabama for tax years 1987 and 1988 are DISCHARGEABLE debts pursuant to 11 U.S.C. § 523(a)(1).

¹It is likely that the returns were filed at some point in time. The assessment forms state that the taxes being assessed are “additional tax due.” However, the Court does not know the date of the filings.

IT IS FURTHER ORDERED and ADJUDGED that the debts of Gregory L. and Giselle G. Cummings for income taxes owed to the State of Alabama for tax years 1990, 1991 and 1992 are NONDISCHARGEABLE debts pursuant to 11 U.S.C. § 523(a)(1).

Dated: May 13, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE