

Late-filed tax return issue results in split

Rulings cast uncertainty within bankruptcy bar

By: David E. Frank March 20, 2014



Lawyers say an appellate split created by two recent cases decided within 24 hours of each other has left them in the dark as to whether state taxes on late-filed returns are dischargeable under Section 727(a) of the U.S. Bankruptcy Code.

On March 6, the Bankruptcy Appellate Panel for the 1st Circuit affirmed U.S. Bankruptcy Court Judge Melvin S. Hoffman's decision in *Gonzalez v. Massachusetts Department of Revenue* that such taxes are dischargeable.

The next day, U.S. District Court Judge William G. Young found the opposite to be true in *Perkins v. Massachusetts Department of Revenue* when he reversed a ruling issued by Bankruptcy Court Judge Henry J. Boroff.

Young, who called the discharge question a "close call," heard *Perkins* and another consolidated case (*Fahey v. Massachusetts Department of Revenue*) after the debtors elected to appeal the matters to federal District Court.

"The idea that this same issue is out there at the same time and that on back-to-back days you have contrary rulings is just crazy," said Donald R. Lassman of Needham. "I've never seen anything like this, and I don't think you'll ever see it again because it's just so unusual."

Lassman, a former Department of Revenue attorney who is not involved in *Perkins* or *Gonzalez*, said the issue has never been addressed by the 1st U.S. Circuit Court of Appeals. Until the 1st Circuit resolves the controversy, he said, it will be "impossible" for lawyers to properly advise their clients.

"You simply can't operate when you have absolutely no idea what is going to happen," he said. "It creates immeasurable uncertainty for a client that has state taxes on late-filed returns. And that's not good for anyone."

Lassman said the BAP's decision in *Gonzalez* has binding precedential value on future cases. While Young's ruling is technically an appellate decision, some bankruptcy judges take the position that they are not obligated to follow a District Court determination, he said.

"You might go into court and argue that the District Court ruling should not be binding," Lassman said. "You could say that, but you'd be saying that at your peril because you have no way of knowing if you're right, which is not a position any lawyer wants to be in."

100 cases

Carl D. Aframe, who represents the debtor in *Perkins*, said Young denied his request last July to certify the case for direct appeal to the 1st Circuit.

Calling the issue "a nationwide problem" that has resulted in divergent opinions in courts across the country, Aframe said the only appellate court that has weighed in thus far is the 5th Circuit, which reached the same result as Young.

"This is an important issue for a lot of people," said Aframe, an attorney at Aframe & Barnhill in Worcester. "Everybody that is representing someone faced with this question at least should have some notion as to what the stakes are and where it's going to go."

With the local split now a major issue for the bankruptcy bar, Aframe said, lawyers on both sides in *Perkins* and *Gonzalez* plan to ask the 1st Circuit to consolidate them into one appeal.

"If the 1st Circuit ends up coming down our way, then what you're going to see at that point is a split between the 1st and 5th circuits," he said. "At that point, it's going to have to go up [to the U.S. Supreme Court.]"

Jeffrey S. Ogilvie of the DOR's litigation bureau said his office has already filed a notice of appeal in *Gonzalez*. He said there are five other cases in which the issue is due to be heard by the 1st Circuit and approximately 100 matters at the DOR that are likely to remain unresolved until a court of record settles the controversy.

"What the Department of Revenue is doing is putting all of those cases on hold until we get a definitive answer," he said. "To us, we take that to mean the 1st Circuit."

Ogilvie, who is arguing *Gonzalez* with his colleague Celine E. Jackson, said the DOR takes the position that for a return to be dischargeable, the Bankruptcy Code mandates that a debtor must meet all "applicable filing requirements."

Despite the debtor's arguments to the contrary, one of those requirements is for a filing to be made within the time limits established by state law, he said.

"In our view, if it makes sense to look at the plain meaning of the statute and apply it exactly as it's written, the usual rule is that it's not necessary to look at the legislative history or some guidance from Congress — apart from the statutory language — as to what they might have meant," Ogilvie said. "As with so much in the Bankruptcy Code, the language isn't as clear as it might be, but if you read it carefully in connection with the other sections the way Judge Young did, it just seems to us that there is a timing requirement."

Ogilvie noted that U.S. Bankruptcy Court Judge William C. Hillman recently looked at the question and ruled the same way Young did.

"The result is not really that far-fetched because what it really means is that, if a taxpayer doesn't abide by the rules of the state tax code and doesn't file his tax return on time, the tax is not going to be discharged," he said. "He can come in with it later, but he hasn't complied with the tax law."

Time limit

Marques C. Lipton of Boston, who represents the debtor in *Gonzalez*, said the DOR's argument places too much emphasis on timing and not enough on the definition of the word "return." That term is defined in the Code of Massachusetts Regulations and does not include a temporal requirement, he said.

Lipton, who practices at the Law Office of Timothy Mauser, noted that the DOR calls a filing a return regardless of whether it is submitted before or after April 15.

He added that G.L.c. 62C, §6(a), which addresses tax return filings, does not include any language on timing in its definition of return.

Young and the DOR have countered that G.L.c. 62C, §6(c) states that returns must be filed by April 15.

"Our response to that argument is that there is a filing requirement and there are consequences if you miss that deadline," Lipton said. "But if you file on April 17, the [DOR] will accept your return and will still call it a return."

The only effect of filing late is that a taxpayer incurs a penalty for doing so, he said.

"The bottom line is that if it looks like a return, and it serves the purpose of a return, and the Department of Revenue still calls it a return, the argument should end there," he said. "They are trying to add an additional requirement that it has to be filed on time to be discharged, but it seems to me that the statute would need to say that in order for it to be true."