

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

In re Carl E. Fenner and Pamela J. Fenner, Debtors
Bankruptcy Case No. MM7-89-00791

United States Bankruptcy Court
W.D. Wisconsin

May 15, 1990

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

The debtors, Carl E. Fenner and Pamela J. Fenner, are farmers. On or about February 28, 1986 the debtors filed their 1985 state income tax return; the return was not accompanied by any payment. Thereafter, on March 31, 1989, the debtors filed their petition under chapter 7 of the Bankruptcy Code. Their bankruptcy discharge was granted on August 10, 1989. The debtors and the State of Wisconsin, Department of Revenue (the "Department"), now seek determination of whether the debtors' 1985 state income tax liability has been discharged.

Pursuant to 11 USC § 523(a)(1)(A):

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed

11 USC § 507(a)(7)(A)(i) refers to:

(A) a tax on or measured by income or gross receipts--

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition.

The debtors contend that their 1985 state income tax return was "last due" on March 1, 1986, satisfying the three year requirement, and that their 1985 tax liability thus has been eliminated by virtue of their bankruptcy discharge. The Department contends that the debtors' 1985 state income tax return was "last due" on April 15, 1986, failing to satisfy the three year requirement, and that the debtors' bankruptcy discharge therefore did not discharge the debtors' liability for payment of their 1985 state income taxes.

Both the debtors and the Department rely on Wisconsin statutes in support of their respective contentions. Wis Stat § 71.10(2)(a)5.a. (1985) required debtors to file a 1985

state income tax return. Wis Stat § 71.10(2)(b) (1985) stated in relevant part that "Such reports shall be made on or before April 15 following the close of a year . . ." On the basis of Wis Stat § 71.10(2)(b) (1985) the Department contends that the debtors' 1985 state income tax return was last due on April 15, 1986.

The debtors argue that Wis Stat § 71.10(2)(b) (1985) does not determine when their tax was last due. Pursuant to Wis Stat § 71.21(1) (1985) the debtors were required to file a declaration of estimated tax, and Wis Stat § 71.21(3) (1985) specified that "[d]eclarations of estimated income tax required by sub. (1) from farmers or fishers may be filed at any time on or before the 15th day of the first month of the succeeding taxable year." However,

[i]f on or before the first day of the 3rd month of the succeeding taxable year a farmer or a fisher files a return for the taxable year, for which a declaration was required on or before the 15th day of the first month of the succeeding taxable year under sub. (3), and pays in full the amount computed on the return as payable, then such return shall be considered as such declaration, and, as such, shall be deemed timely filed.

Wis Stat § 71.21(8) (1985).

The debtors assert that "The statute [Wis Stat § 71.21(8) (1985)] says that the return is 'timely filed' if filed by March 1, implying that it is not timely filed if filed after that date." The debtors furthermore suggest that Wis Stat § 71.21(8) (1985) is ambiguous and contend that since "the Department of Revenue undoubtedly assisted in the drafting," "it would be reasonable to interpret the ambiguity against the department."

It is true that the debtors misinterpret Wis Stat § 71.21(8) (1985), but their misinterpretation cannot be blamed upon any ambiguity inherent in the statute. Nowhere does Wis Stat § 71.21(8) (1985) state that "the return is 'timely filed' if filed by March 1." Rather, it states that the return "shall be considered as such declaration, and, as such, [the declaration] shall be deemed timely filed."

Thus, pursuant to Wis Stat § 71.21(8) (1985), in the event that a return, accompanied by full payment, is received on or before March 1, a declaration will be deemed filed as of January 15, even though no actual declaration ever existed. By filing the return, accompanied by full payment, on or before March 1, one may avoid the penalties which would otherwise be assessed due to one's failure to file a declaration of estimated tax by the January 15 deadline. See Wis Stat § 71.21(19)(c) (1985). In exchange for the elimination of the penalty, one pays the entire return on or before March 1, when otherwise one could pay in installment payments, the last of which would not be due until as late as January 15 of the following year. See Wis Stat § 71.21(5) (1985).

Wis Stat § 71.21 (1985) is therefore concerned not with when a return is "last due," but rather with the filing of declarations of estimated tax and the making of the payments associated therewith. Wis Stat § 71.21(8) (1985) does not address returns at all, and does not provide debtors with an alternative date upon which a return may last be said to be due.

Wis Stat § 71.10(2)(b) (1985) required 1985 state income tax returns to be filed on or before April 15, 1986. The debtors filed their bankruptcy petition on March 31, 1989, and thus three years had not elapsed between the filing of the petition and April 15, 1986, when the 1985 state income tax return was "last due." The debtors' liability for payment of their 1985 state income taxes meets the requirements of 11 USC § 507(a)(7)(A)(i) as a debt "last due, including extensions, after three years before the date of the filing of the petition." Because this liability qualifies as a tax "of the kind and for the periods specified in section . . . 507(a)(7)," it is excepted from the debtors' discharge

pursuant to 11 USC § 523(a)(1).