

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
 ) Under Chapter 11  
GEORGE R. ROSENTHAL and )  
BONNIE S. ROSENTHAL, ) No. BK 89-30272  
 )  
Debtor(s), )

MEMORANDUM AND ORDER

This matter is before the Court on debtors' objection to claim #40 of the Internal Revenue Service (I.R.S.). The claim was filed as unsecured priority in the amount of \$46,700.02, and is a penalty for unpaid trust fund taxes under section 6672 of the Internal Revenue Code.<sup>1</sup>

The debtors objected to the claim on the basis that it is a penalty, not a tax, and therefore is not subject to priority under 11 U.S.C. §507(a)(7). Thus, the issue for resolution is whether a section 6672 penalty is entitled to priority status under the Bankruptcy Code.

Section 507(a) sets forth the expenses and claims that are allowed priority status. The seventh priority is for taxes and provides:

(7) Seventh, allowed unsecured claims of

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<sup>1</sup>(a) General Rule - Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

governmental units, only to the extent that such claims are for -

(A)...

(B)...

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D)...

(E)...

(F)...

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

11 U.S.C. §507(a)(7)(C), (G).

Thus, to be entitled to priority status the penalty must (1) relate to a claim of a kind specified in the tax priority paragraph, and (2) be in compensation for actual pecuniary loss. As previously stated, the section 6672 penalty is for unpaid trust fund taxes and therefore relates to a 507(a)(7)(C) type tax.

The section 6672 penalty or 100% penalty is assessed against the responsible corporate official who is required to collect and pay over to the government the trust fund type taxes. Although denoted a penalty in the Internal Revenue Code the liability imposed by section 6672 is not penal in nature. Monday v. United States, 421 F.2d 1210, 1216 (7th Cir.) cert. denied, 400 U.S. 821 (1970). "The primary purpose of the section is the protection of government revenue." United States v. Huckabee Auto Co., 783 F.2d 1546, 1548 (11th Cir. 1986). In fact, the Internal Revenue Service collects the delinquent taxes only once, and there is an abatement of the tax assessment against the corporation to the extent that the related 6672 penalty assessment is paid. Id. (citing the Internal Revenue manual). Thus,

it is clear that the section 6672 penalty is to ensure that the trust fund tax is paid, and is in compensation for actual pecuniary loss.

The Court finds that the section 6672 penalty relates to a §507(a)(7)(C) type tax and is in compensation for actual pecuniary loss. Therefore, the penalty is entitled to priority pursuant to §507(a)(7)(G).

IT IS ORDERED that debtors' objection to claim #40 of the Internal Revenue Service is DENIED.

/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: March 22, 1990