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

IN RE:

Lawrence D. Smith,

Debtor(s).

In Proceedings
Under Chapter 7

Case No. 95-32570

Lawrence D. Smith

Plaintiff(s),

v.

U.S. Department of Treasury and
Internal Revenue Service and
Illinois Department of Revenue,

Defendant(s).

Adversary No. 96-3044

OPINION

This matter is before the Court on the plaintiff's Motion for Default Judgment. The plaintiff filed a Chapter 7 petition in bankruptcy on December 19, 1995, and received a discharge on March 19, 1996. Prior to his date of discharge, on February 6, 1996, the plaintiff filed an adversary complaint seeking to determine the dischargeability of federal and state income taxes and related penalties and interest owed to the defendants for tax years 1987, 1988, 1989, and 1990. Neither defendant filed an answer to the plaintiff's complaint.[1] Plaintiff moved for a default judgment against both defendants.

A default judgment was entered against the Illinois Department of Revenue on April 4, 1996. A hearing was held on the plaintiff's motion for default judgment against the United States. At that hearing, the Court directed the plaintiff to submit evidence satisfying Federal Rule of Civil Procedure 55 (e). The plaintiff complied by submitting a memorandum of law to the Court, to which he attached IRS documents

[1]Plaintiff's certificate of service established only that the Illinois Department of Revenue and the Internal Revenue Service were served. Accordingly, plaintiff was granted an additional ten days to secure service on the United States attorney and the Attorney General in accordance with Federal Rule of Civil Procedure 4 (i). The plaintiff subsequently filed proof of service establishing compliance with Rule 4 (i), and the United States was required to answer the complaint by July 10, 1996. The United States still failed to respond.

describing his tax liabilities for tax years 1987 through 1990.

Federal Rule of Civil Procedure 55(a) provides that when a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend, a default may be entered against that party. Rule 55(e) limits the availability of default judgments against the government and provides as follows:

> (e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Fed. R. Civ. Pro. 55(e). "The rationale underlying Rule 55(e) is that the government is sometimes slow to respond and that the public fisc should be protected from claims that are unfounded but would be granted solely because the government failed to make a timely response." Marziliano v. Heckler, 728 F.2d 151, 157-58 (2d Cir. 1984) (citing Giampaoli v. Califano, 628 F.2d 1190, 1193-94 (9th Cir. 1980)). Rule 55(e) does not prohibit the entry of default against the United States. However, it does require that the claimant provide evidence which satisfies the court that he or she is entitled to relief before any judgment may be entered upon that default against the United States. Gadoury v. United States of America, 187 B.R. 816, 822 (D. R.I. 1995).

There is a lack of case law defining what constitutes "evidence satisfactory to the court" under Rule 55(e) and what procedures a court should use to make such a determination. See id. The Second Circuit Court of Appeals has determined that Rule 55(e) does not "require an evidentiary hearing if one would ordinarily not have been held, nor [does the rule] require the court to demand more or different evidence than it would ordinarily receive in order to make its decision." Marziliano, 728 F.2d at 158. The First Circuit Court of Appeals has held that, "after entry of default against the government, the quantum and quality of evidence that might satisfy a court can be less than that normally required." Alameda v. Secretary Of Health, Education and Welfare et al., 622 F.2d 1044, 1048 (lst Cir. 1980). The question in the instant case, then, is whether the evidence presented by the plaintiff satisfies this Court that the plaintiff is entitled to the relief sought in the complaint--that is, whether the evidence supports a determination that the plaintiff's tax liabilities were discharged through his Chapter 7 bankruptcy proceeding.

The evidence submitted by the plaintiff illustrates that a return for the debtor's 1987 tax liabilities was received by the IRS on March 5, 1991, and the taxes were assessed on April 29, 1991. The debtor's 1988 tax return was received by the IRS on February 27, 1991, and those taxes were assessed on April 29, 1991. The IRS also received a return for the debtor's 1989 tax liabilities on February 27, 1991, but those taxes were not assessed until May 6, 1991. Finally, the debtor's 1990 tax return was filed before its April 15, 1991, due date, and those taxes were assessed on April 22, 1991. All of these tax liabilities have been accruing penalties and interest, and the debtor estimates his tax liability, as of the date of the filing of the bankruptcy petition, at $150,000.00, plus accruals.

Generally, a Chapter 7 debtor is granted a discharge from all debts that arose prior to the filing of the bankruptcy petition. Section 523 (a) (1) (A) of the Bankruptcy Code sets forth an exception from discharge for the types of tax debts described in Bankruptcy Code §507 (a) (8). 11 U.S.C. §523(a) (1) (A). Section 507 (a) (8), which describes tax debts that are entitled to priority of distribution in a bankruptcy case, provides a priority for taxes "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;
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> (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was ending, before the date of the filing of the petition; or
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> (iii) other than a tax of a kind specified in section 523 (a) (1) (B) or 523 (a) (1) (C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]

11 U.S.C. §507 (a) (8) (A) (i) (ii) (iii). Under §523 (a) (1) (A), then, Income and gross receipts taxes are priority, nondischargeable claims only to the extent that the tax return was due either after the petition date or within the three year period prior to the filing of the bankruptcy petition.

11 U.S.C. §§ 507 (a) (8) (A) (i); 523 (a) (1) (A). Section 523 (a) (1) (A) also grants priority, nondischargeable status to tax debts that are assessed within 240 days before the commencement of the

case, plus any extension of time.[2] 11 U.S.C. §§507 (a) (8) (A) (ii); 523 (a) (1) (A). Finally, under §523 (a) (1) (A) and §507 (a) (8) (A) (iii), to the extent tax debts were not assessed prior to bankruptcy but are still assessable after commencement of the case, they are nondischargeable priority claims.

Sections 523 (a) (1) (B) and (C) of the Bankruptcy Code also set forth exceptions from discharge for income tax debts. Under §523 (a) (1) (B) , taxes for which a return was never filed or was filed late within two years of bankruptcy are nondischargeable debts. 11 U.S.C. § 523 (a) (1) (B). In addition, under §523 (a) (1) (C), taxes for which the debtor made a fraudulent return or willfully attempted to evade such tax are nondischargeable. 11 U.S.C. §523 (a) (1) (C).

Based on the evidence submitted by the plaintiff, the tax liabilities in the instant case do not fall within §523 (a) (1) (A)'s definition of a nondischargeable debt. While these debts are for taxes "on or measured by income or gross receipts," returns for these tax liabilities were due more than three years prior to the filing of the debtor's Chapter 7 bankruptcy case[3] and, therefore, they are not of the kind described in §507 (a) (8) (A) (i). Nor are they of the kind described in §507 (a) (8) (A) (ii). Because the tax debts were assessed in April or May 1991 and the debtor filed this bankruptcy petition in December 1995, it is obvious that the debts were assessed prior to 240 days before the commencement of the bankruptcy case. Finally, these debts are not of the kind described in §507 (a) (9) (A) (iii) because it is clear that they have been assessed and that the assessments occurred prior to debtor's bankruptcy filing.

Moreover, the Court finds that the debtor's tax liabilities for years 1987 through 1990 do not fall within §523 (a) (1) (B) or (C) . Tax returns were filed for the debtor's tax liabilities for years 1987 through

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[2]If an offer in compromise has been made, any time in which the offer in compromise was pending, plus an additional 30 days, is added to the 240 day period. See §507 (a) (8) (A) (ii). The IRS documents submitted by the plaintiff show that no offer in compromise had been made.

[3]The Court is aware that the debtor has filed two previous Chapter 7 petitions in bankruptcy. One was filed on March 15, 1993, and closed on August 4, 1993. The other was filed on December 19, 1995, and closed on March 19, 1996. The three year "look back" period in which tax claims against the debtor would receive priority status under §507 (a) (8) (A) (i) is suspended during the debtor's earlier bankruptcy proceedings. See In re Taylor, 81 F. 3d 20 (3d Cir. 1996). Nevertheless, the three year period has been exceeded.

1990 in either February, March, or April 1991. Although all the returns were filed late except for the 1990 return, none are considered a nondischargeable claim under §523 (a) (1) (B) because all were filed more than two years prior to the filing of the debtor's bankruptcy proceeding. In addition, the Internal Revenue Service has not assessed any penalty related to fraud, nor has it objected to the debtor's discharge based upon allegations of fraud. Therefore, these taxes do not fall within §523 (a) (1) (C)'s requirements for a finding of nondischargeability.

The evidence submitted by the plaintiff satisfies this Court that the plaintiff is entitled to relief on its Complaint to Determine Dischargeability. Consequently, a default judgment shall be entered against the United States and in favor of the plaintiff on the Complaint to Determine Dischargeability.

SEE WRITTEN ORDER.

ENTERED: JULY 24, 1996

/s/ KENNETH J.MEYERS
UNITED STATES BANKRUPTCY JUDGE