

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

IN RE:)
)
TPS ENTERPRISES, INC.,) Bankruptcy Case No. 02-60736
)
Debtor-in-Possession.)

OPINION

This matter having come before the Court on Debtor in Possession's Motion for Rehearing and to Reconsider Order Denying Objection to Claim; the Court, having heard sworn testimony and arguments of counsel, and having reviewed the written memoranda filed by the parties, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Findings of Fact

The material facts in this matter are not in serious dispute and are, in pertinent part, as follows:

1. The Debtor filed for relief under Chapter 11 of the Bankruptcy Code on August 1, 2002.
2. The Debtor listed the Internal Revenue Service as the holder of an unliquidated claim.
3. On August 19, 2002, the Court entered an Order establishing January 27, 2003, as the deadline for filing claims in Debtor's Chapter 11 bankruptcy proceeding.
4. The Internal Revenue Service filed a proof of claim on March 4, 2003, some 36 days after the deadline for filing claims.

5. The Internal Revenue Service did not file a motion for the allowance of its late-filed claim, nor did the Internal Revenue Service request an extension of time within which to file its proof of claim.

6. On April 25, 2003, the Debtor filed its Disclosure Statement and an Amended Plan of Reorganization. Pursuant to the Debtor's Amended Plan of Reorganization, the Internal Revenue Service was to be treated in accordance with Rule 3003 of the Federal Rules of Bankruptcy Procedure.

7. The Internal Revenue Service did not object to the Debtor's Disclosure Statement, and, on June 19, 2003, the Court approved the Disclosure Statement and entered an Order regarding the solicitation of ballots and established a deadline to object to the Amended Plan of Reorganization. The Internal Revenue Service did not submit a ballot as to Debtor's Amended Plan of Reorganization, nor did the Internal Revenue Service file an objection to confirmation of Debtor's Amended Plan of Reorganization.

8. On August 22, 2003, the Court held a hearing on confirmation of the Debtor's Amended Plan of Reorganization at which time the Internal Revenue Service failed to appear, contrary to the assertion of representatives of the Office of the United States Attorney.

9. An Order was entered confirming the Debtor's Amended Plan of Reorganization on September 9, 2003.

Conclusions of Law

Pursuant to Rule 3003(c)(2) of the Federal Rules of Bankruptcy Procedure, any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by the Court. Rule

3003(c)(2) further states that any creditor who fails to file a claim as required shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution under a Chapter 11 reorganization. In this case, it is clear that the claim of the Internal Revenue Service was unliquidated at the time of the filing of the Debtor's Chapter 11 bankruptcy petition. As such, pursuant to Rule 3003(c)(2), the Internal Revenue Service was required to file a claim in order to vote on the Debtor's Amended Plan of Reorganization and to receive any distribution under that Plan. It is the Debtor's position that the Internal Revenue Service failed to file a timely claim, and, as such, the Internal Revenue Service should receive no distribution on its claim, which was eventually filed on March 4, 2003. The Internal Revenue Service maintains that the late filing of its claim should be allowed based upon excusable neglect.

In considering the defense of excusable neglect, the United States Supreme Court, in the case of Pioneer Investment Services v. Brunswick Associates, 507 U.S. 380 (1993), stated that the Court must consider four factors to determine whether excusable neglect exists in the late filing of a claim:

1. The danger of prejudice to the debtor;
2. The length of the delay and its potential impact on the judicial proceedings;
3. The reason for the delay, including whether it was in the reasonable control of the party asserting excusable neglect; and,
4. Whether the party asserting excusable neglect acted in good faith.

The Supreme Court further stated that the Court should balance the doctrine of excusable neglect against the underlying principle that the purpose of the bar date is to create finality and assist in the expeditious administration of the bankruptcy estate. If the Court is to allow excusable neglect as the norm, rather than the exception, then the bar date has no meaning in bankruptcy. Id. at 385.

In examining the required factors in order to apply excusable neglect, this Court finds that the Internal Revenue Service has failed to establish that its actions in filing its claim late resulted from excusable neglect. First, this Court finds that allowing the Internal Revenue Service claim at this point in time would clearly prejudice the Debtor, especially in light of the fact that the Internal Revenue Service had no participation in the Debtor's bankruptcy proceeding prior to the late filing of its claim. Second, the Court notes that the reason for the delay in filing of the Internal Revenue Service's claim was well within the control of the Internal Revenue Service, and the Court has heard no credible argument to excuse the Internal Revenue Service from the bar date clearly established by Order of this Court on August 19, 2002. The undisputed facts indicate that the Internal Revenue Service had ample notice of all deadlines in the Debtor's Chapter 11 bankruptcy proceeding yet chose not to participate in any way. Further, the Court finds that the Internal Revenue Service has failed to establish that it acted in good faith in its failure to file a timely claim or to participate in the Debtor's Chapter 11 bankruptcy proceeding.

In addition to its argument that its late-filed claim should be allowed based upon excusable neglect, the Internal Revenue Service argues that the Order of Confirmation entered on September 9, 2003, is contrary to the provisions of Debtor's Amended Plan of Reorganization, and that the Order of Confirmation provides for treatment of the Internal Revenue Service's claim in a manner that is significantly different than in the Amended Plan of Reorganization. This Court has reviewed the Debtor's Amended Plan of Reorganization and the Order of Confirmation and finds that it disagrees with the assertion of the Internal Revenue Service. Debtor's Amended Plan of Reorganization shows clearly that the Internal Revenue Service claim would be treated pursuant to Rule 3003 of the Federal Rules of Bankruptcy Procedure, and the Order of Confirmation does not

alter that treatment. The Internal Revenue Service chose not to object to the Debtor's Amended Plan of Reorganization, nor to appear at hearing on the confirmation on that plan; and, thus, cannot now complain of the treatment afforded to it. The facts in this matter clearly establish that the Internal Revenue Service failed to act within any deadline established in Debtor's Chapter 11 case, and, as such, the Court must conclude that the Debtor in Possession's Motion for Rehearing and to Reconsider Order Denying Objection to Claim should be allowed, the Debtor's Objection to Claim should also be allowed, and any distribution to the Internal Revenue Service under the Debtor's confirmed Amended Plan of Reorganization should be denied.

ENTERED: August 31, 2004.

/s/Gerald D. Fines
GERALD D. FINES
United States Bankruptcy Judge