

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
**Honorable A. Bruce Campbell**

In re:

MICHAEL C. STEINKE,	)	Case No. 10-36588 ABC
	)	Chapter 7
Debtor.	)	
	)	
	)	
	)	
MICHAEL C. STEINKE,	)	
	)	
Plaintiff,	)	
	)	Adv. Pro. No. 12-1721 ABC
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
INTERNAL REVENUE SERVICE,	)	
	)	
Defendant.	)	

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

Before the Court is the Motion to Dismiss ("Motion") filed by the Defendant United States of America ("United States") and the Objection thereto filed by Plaintiff/Debtor Michael C. Steinke ("Debtor"). The Court, having reviewed the Motion, the Objection and the file in this matter, and being otherwise advised in the premises, finds as follows.

**Background**

Debtor filed a Chapter 7 bankruptcy case on October 19, 2010. He received a discharge pursuant to 11 U.S.C. § 727(a) and (b) on February 16, 2011. Thereafter, on May 31, 2012, the Internal Revenue Service ("IRS") issued a notice to Debtor of its intent to levy on Debtor's 401K account to collect Debtor's obligations, in the approximate amount of \$270,000, for his 2004 and 2005 income taxes (the "Tax Obligations"). Debtor asserts, and the IRS acknowledged in its levy notice, that Debtor's personal liability for the Tax Obligations was discharged in his Chapter 7 bankruptcy. The levy notice states that the IRS merely intends to enforce a pre-petition lien against the 401K account. Debtor disputes that the IRS had a valid pre-petition lien. He brought this adversary proceeding seeking an order to enforce the discharge injunction of 11 U.S.C. § 524(a)(2) by enjoining the IRS from taking any action to collect the discharged Tax Obligations. In his Complaint, Debtor also seeks an order holding the IRS in contempt for violating the discharge injunction.

At the Rule 16(b) status conference in this matter, the Court directed the parties to file briefs regarding this Court's subject matter jurisdiction of the matters raised in Debtor's Complaint. The United States filed its brief in the form of a motion to dismiss this adversary proceeding, under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction.

### **Arguments of the Parties**

#### **A. United States' Motion to Dismiss**

The United States argues first that Debtor has not demonstrated a waiver of sovereign immunity which would allow Debtor to maintain this suit, noting that none of the jurisdictional statutes cited by Debtor in his Complaint contains an express waiver.

Next, the United States contends that Debtor's Complaint seeks to restrain the United States from collecting a tax, and is thus barred by 26 U.S.C. § 7421(a) (the "Anti-Injunction Act"). This statute provides that, with exceptions not relevant to this case, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

Finally, the United States asserts that Debtor's claims for damages are barred because he failed to exhaust his administrative remedies. The United States cites 26 U.S.C. § 7433 which provides that the exclusive remedy for the IRS's willful violation of the bankruptcy discharge injunction is a petition in bankruptcy court, but that no such petition may be maintained unless the plaintiff first complies with administrative regulations requiring the filing of a written claim with the IRS. The United States argues that Debtor's failure to file an administrative claim bars this Court from asserting jurisdiction over this adversary proceeding. If the failure to file an administrative claim is not a jurisdictional bar, the United States asserts that the exhaustion of administrative remedies is an element of any claim for damages against the IRS and that the failure of Debtor to allege he complied with administrative prerequisites subjects his Complaint to dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

#### **B. Debtor's Response**

Debtor contends that, in 11 U.S.C. § 106(a), the United States has specifically waived sovereign immunity for suits regarding the applicability of the discharge injunction. Debtor also contends that the case law is consistent in holding that the Anti-Injunction Act does not apply to actions pertaining to 11 U.S.C. § 105(a) and 524 which seek to enforce the discharge injunction. Finally, Debtor maintains that he is not seeking any damages against the IRS, so that 26 U.S.C. § 7433 does not apply, and his failure to exhaust administrative remedies does not bar this adversary proceeding.

### **Discussion**

Section 106 of the Bankruptcy Code provides that:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is

abrogated as to a governmental unit<sup>1</sup> to the extent set forth in this section with respect to the following:

- (1) Sections 105 [and] . . . 524 . . . .
- (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
- (3) The court may issue against a governmental unit an order, process, or judgment under such sections . . . including an order or judgment awarding a money recovery, but not including an award of punitive damages. . . .
- (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit. . . .
- (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

According to a leading bankruptcy treatise, the Supreme Court's decision in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), interpreted the pre-1994 version of section 106 as a waiver of sovereign immunity with respect to declaratory and injunctive relief. 2 Collier on Bankruptcy, ¶ 106-04 at 106-19 (16th ed. rev. 2012). Collier further states that by amending the statute to its current form in the Bankruptcy Reform Act of 1994, "Congress made clear its intent to provide for an abrogation of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief." *Id.* The current section 106(a) is, therefore, an express, albeit limited, waiver of sovereign immunity by the United States, as to suits concerning the application of the discharge injunction to its actions and those of its agencies. *United States v. Rivera Torres (In re Rivera Torres)*, 432 F.3d 20, 24 (1st Cir. 2005)(there is no doubt that section 106 is an express waiver of sovereign immunity).

The more specific and more recently enacted language in section 106(a) prevails over the more general language in the Anti-Injunction Act. In light of the express provision in section 106(a)(2) of the Bankruptcy Code that permits the bankruptcy court to "hear and determine any issue arising with respect to the application of [section 524] to [the United States]," the Anti-Injunction Act should not be interpreted to bar bankruptcy courts from determining whether an asserted tax lien is invalid and therefore whether the discharge injunction of 11 U.S.C. § 524(a)(2) applies to prevent collection activities by the IRS. See, *Kuhl v. United States*, 467 F.3d 145, 147 (2nd Cir. 2006)(assuming bankruptcy court's ability to determine whether tax liability was included in

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<sup>1</sup> The United States and its agencies are included in the definition of a "governmental unit" under 11 U.S.C. § 101(27).

discharge). Further, in such a situation, the bankruptcy court is not issuing an injunction against the IRS, only determining the scope of the statutory injunction already in place as a result of section 524(a)(2) of the Bankruptcy Code. Despite the phrasing of Debtor's Complaint, the Court does not interpret the Debtor's First Claim for Relief as requesting an unnecessary and duplicative injunction to prevent the violation of an already existing injunction. Rather, Debtor's First Claim for Relief is more accurately viewed as a request for declaratory relief concerning the scope of his discharge injunction under section 524(a)(2) – specifically whether Debtor's discharge injunction prevents the IRS from levying on Debtor's 401K. This claim is not barred by sovereign immunity or by the Anti-Injunction Act.

Whether the Debtor is entitled to anything beyond such declaratory relief is a more complicated question. Debtor's Second Claim for Relief requests an "order holding the IRS in contempt for violating the discharge injunction." Both the applicability of the discharge injunction of section 524 of the Bankruptcy Code and the exercise of the bankruptcy court's contempt powers under section 105 of the Bankruptcy Code are within the enumerated sections for which sovereign immunity is waived under Bankruptcy Code section 106. But, as noted above, the waiver of sovereign immunity is limited by the terms of section 106 itself. Thus, for example, a bankruptcy court may issue an order awarding compensatory but not punitive damages against a governmental unit because of the limitations set forth in section 106(a)(3).

In addition to the limitations specifically contained in section 106(a), an award of damages against the IRS for violation of the discharge injunction is also subject to the requirements of 26 U.S.C. § 7433(e). Section 7433(e) of the Tax Code was amended in 1998, after the 1994 amendments to section 106 of the Bankruptcy Code. It provides that, "notwithstanding section 105 of such Title 11, a petition to the bankruptcy court shall be the *exclusive remedy* for recovering damages" for the IRS's willful violation of the bankruptcy discharge injunction. (emphasis added). Thus, while Congress, in Bankruptcy Code section 106, waived sovereign immunity to allow bankruptcy courts to exercise certain of their contempt powers under Bankruptcy Code section 105 against the United States in order to effectuate the discharge injunction of Bankruptcy Code section 524(a)(2), Congress later chose to prescribe, in section 7433 of the Tax Code, the exclusive form and required procedures for seeking such relief.

Section 7433(d) of the Tax Code provides that a judgment for damages shall not be awarded on a petition to the bankruptcy court under section 7433(e), "unless the court determines that the plaintiff has exhausted [his] administrative remedies."<sup>2</sup> A failure to exhaust administrative remedies bars a plaintiff from recovering *any* damages, including attorneys fees or costs, for the IRS's willful violation of the discharge injunction. *Kovacs v. United States*, 614 F.3d 666 (7th Cir. 2010); *Kuhl v. United States*, 467 F.3d 145, 148 (2nd Cir. 2006).

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<sup>2</sup> In order to exhaust his administrative remedies prior to filing a section 7433(e) petition, a taxpayer must first file an administrative claim for damages and/or attorneys fees with the Chief of the Local Insolvency Unit for the judicial district in which his bankruptcy petition was filed. 26 C.F.R. § 301.7430-1(e), C.F.R. § 301.7433-2(e).

The Debtor's Complaint fails to allege that he has exhausted his administrative remedies. Indeed, in his Response he tacitly concedes that he has not, stating that he "understands the limitation" of Tax Code section 7433, but that that statute is not a bar to his Complaint because "he is not seeking monetary damages against the IRS." In his Response, Debtor does not explain what type of non-monetary relief he seeks in his Second Cause of Action for contempt. Because of Debtor's failure to exhaust his administrative remedies, section 7433 of the Tax Code prohibits the Court from exercising its contempt powers under section 105 of the Bankruptcy Code to award him compensatory monetary sanctions. *Kovacs*, 614 F.3d at 672-73. As a general matter, the Court has the ability under section 105 of the Bankruptcy Code to issue sanctions to coerce compliance with its orders, but an award of punitive damages is specifically excluded from Bankruptcy Code section 106(a)'s waiver of sovereign immunity. Accordingly, the Court concludes that it is without power to grant Debtor any relief on his Second Claim for Relief for contempt other than the declaratory relief already encompassed in Debtor's First Claim for Relief. Debtor's Second Claim for Relief will be dismissed, without prejudice to Debtor's right to assert this claim at a future date when and if his administrative remedies have been exhausted.<sup>3</sup>

### Conclusion

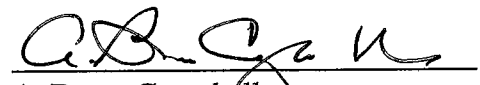
For the foregoing reasons, it is

ORDERED that the United States' Motion to Dismiss is denied as to Debtor's First Claim for Relief, and it is

FURTHER ORDERED that the United States' Motion to Dismiss is granted, without prejudice, as to Debtor's Second Claim for Relief.

DATED: June 12, 2013

BY THE COURT:

  
A. Bruce Campbell,  
United States Bankruptcy Judge

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<sup>3</sup> The Court agrees with the Sixth Circuit's decision in *Hoogerheide v. Internal Revenue Service*, 637 F.3d 634 (6th Cir. 2011), that Debtor's failure to exhaust his administrative remedies is not a jurisdictional bar to his Second Claim for Relief. Nevertheless, the failure to exhaust administrative remedies is an affirmative defense which requires dismissal of this claim under Fed. R. Civ. P. 12(b)(6). *Id.* at 638.