

No. 11-217

In the Supreme Court of the United States

DONALD W. DAWES AND PHYLLIS C. DAWES,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 11 U.S.C. 1222(a)(2)(A) authorizes the bankruptcy court, in a case brought under Chapter 12 of the Bankruptcy Code, to treat as a dischargeable non-priority claim a federal tax debt arising out of the debtor's post-petition sale of a farm asset.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 652 F.3d 1236. The opinion of the district court (Pet. App. 21a-41a) is reported at 415 B.R. 815. The opinion of the bankruptcy court (Pet. App. 42a-71a) is reported at 382 B.R. 509.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2011. A petition for rehearing was denied on July 5, 2011 (Pet. App. 72a-73a). The petition for a writ of certiorari was filed on August 17, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Chapter 12 of the Bankruptcy Code (11 U.S.C.) addresses certain debts of family farmers and fishermen. A Chapter 12 plan binds each “creditor,” 11 U.S.C. 1227(a), which the Code defines as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor,” 11 U.S.C. 101(10)(A).¹ Section 1222 identifies the types of claims that may be included in the Chapter 12 plan. 11 U.S.C. 1222. Once a debtor completes payments pursuant to the plan, Section 1228(a) authorizes a discharge of all debts provided for by the plan (with certain exceptions). 11 U.S.C. 1228(a).

Section 1222(a)(2)(A), which was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23, permits family farmers to treat certain governmental claims resulting from the disposition of farm assets as unsecured claims, which are not entitled to priority status and are dischargeable after less than full payment under the Chapter 12 plan. That provision states:

§ 1222. Contents of Plan

(a) The plan shall—

* * * * *

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, ex-

¹ The commencement of a case, *i.e.*, the filing of the bankruptcy petition, constitutes the order for relief in a voluntary bankruptcy case. 11 U.S.C. 301.

change, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge.

11 U.S.C. 1222(a)(2)(A).

Section 507 of the Code accords priority status to enumerated categories of claims and expenses. In relevant part, Section 507(a) states that "[t]he following expenses and claims have priority in the following order: * * * (2) Second, administrative expenses allowed under section 503(b) of this title," 11 U.S.C. 507(a)(2), and "(8) Eighth, * * * [certain] tax[es] on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition," 11 U.S.C. 507(a)(8)(A). Section 503(b), in turn, includes in its enumeration of allowable administrative expenses the costs of "services rendered [to the estate] after the commencement of the case," 11 U.S.C. 503(b)(1)(A)(i), and "any tax * * * incurred by the estate," 11 U.S.C. 503(b)(1)(B)(i).

In Chapter 12 cases, Section 1226(b)(1) establishes a special procedure for the payment of allowable administrative expenses. Section 1226(b)(1) states that "[b]efore or at the time of each payment to creditors under the plan, there shall be paid * * * any unpaid claim of the kind specified in section 507(a)(2)," 11 U.S.C. 1226(b)(1), *i.e.*, administrative expenses allowed under Section 503(b).

b. Section 1399 of the Internal Revenue Code states that "[e]xcept in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under [the Bankruptcy Code]." 26

U.S.C. 1399. Section 1398 applies, with certain exceptions that are not relevant here, to “any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of [the Bankruptcy Code] in which the debtor is an individual.” 26 U.S.C. 1398(a).

2. a. After protracted civil and criminal litigation concerning petitioners’ failure to file income tax returns and to pay federal taxes, the IRS obtained a judgment against petitioners for \$1,541,604.08, plus interest accrued from May 3, 2004. Pet. App. 3a, 44a-45a. The IRS sought to execute the judgment by notifying petitioners that the government intended to take possession of various pieces of their property. *Id.* at 3a-4a. Petitioners then filed a bankruptcy petition. *Id.* at 4a.²

The bankruptcy court subsequently granted petitioners’ motion to sell several tracts of farm land for more than \$900,000, and the ensuing post-petition sale produced a capital gain that increased petitioners’ overall federal income tax liability. Pet. App. 4a, 46a. As set forth in their reorganization plan, petitioners proposed to treat that tax debt as a dischargeable unsecured liability. *Id.* at 4a, 45a.

The bankruptcy court granted summary judgment to petitioners as to the treatment of their post-petition tax liability, concluding that “capital gains taxes arising from postpetition sales of farm assets by a Chapter 12 debtor are governed by § 1222(a)(2)(A).” Pet. App. 46a-47a. The court noted that Section 1222(a)(2)(A) is limited to governmental claims that are entitled to priority under Section 507. *Id.* at 48a. In determining that petitioners’ tax debt gave rise to a priority claim, the court

² Although petitioners’ bankruptcy was initially filed under Chapter 7 of the Bankruptcy Code, it was subsequently converted to a bankruptcy under Chapter 12. Pet. App. 44a.

relied on Section 507(a)(2), which assigns priority to “administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.” *Id.* at 49a. Looking to Section 503(b), the court noted that Section 503(b)(1)(B)(i) describes administrative expenses as including “any tax * * * incurred by the estate.” *Id.* at 49a-50a.

The United States argued that the taxes at issue in this case were not “incurred by the estate” within the meaning of Section 503(b)(1)(B)(i) because “in a Chapter 12 case the filing of the petition does not create a new taxable entity so the taxes incurred postpetition are the liability of the debtor, not the estate.” Pet. App. 51a; see *id.* at 53a-71a. The bankruptcy court rejected that argument, concluding instead that the phrase “incurred by the estate” in Section 503(b)(1)(B)(i) refers to “when the tax liability was incurred, not to the entity having liability for the tax.” *Id.* at 56a.

c. The district court affirmed. Pet. App. 21a-41a. The court rejected the United States’ argument that Section 1222(a)(2)(A) applies only to pre-petition claims, concluding that “[t]he statute by its terms is not limited to ‘creditors,’ and it therefore cannot be read to apply only to pre-petition claims.” *Id.* at 33a; see *id.* at 32a-36a. The district court agreed with the bankruptcy court that post-petition income taxes constitute administrative expenses under Section 503(b)(1)(B)(i) and therefore are encompassed by Section 1222(a)(2)(A). *Id.* at 36a-40a.

3. The court of appeals reversed. Pet. App. 1a-20a. The court held that, because “post-petition income taxes incurred during Chapter 12 proceedings are liabilities of the individual debtor and *not* the bankruptcy estate

* * * , they are not within the purview of the bankruptcy proceedings or included in the reorganization plan.” *Id.* at 6a. Rather, the court concluded, “the taxes are due from the debtor personally, and the IRS’s recourse remains exclusively with the individual debtor, separate and apart from the Chapter 12 estate and unaffected by the bankruptcy discharge.” *Ibid.*

DISCUSSION

Petitioners contend (Pet. 18-30) that 11 U.S.C. 1222(a)(2)(A) authorizes the bankruptcy court in a Chapter 12 proceeding to treat as a dischargeable non-priority claim a federal tax debt arising out of the debtor’s post-petition sale of a farm asset. On June 13, 2011, this Court granted the petition for a writ of certiorari in *Hall v. United States*, No. 10-875 (to be argued Nov. 29, 2011). As petitioners explain (Pet. 7-8), *Hall* presents the same question as this case. The Court therefore should hold the petition in this case pending its resolution of *Hall* and then dispose of the petition as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Hall v. United States*, cert. granted, No. 10-875 (to be argued Nov. 29, 2011), and then disposed of as appropriate.

Respectfully submitted.

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