

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE:

KEVIN FROSCH,	(Bankruptcy No. 98-35948JKF
Debtor	(
	(Chapter 7
	(
KEVIN FROSCH,	(Adversary No. 99-0240
Plaintiff	(
	(
v.	(
UNITED STATES OF AMERICA	(On Motion for Reconsideration
Defendant	(

Appearances:

Thomas M. Rath, Special Assistant U.S. Attorney, for
the United States of America

John R. Crayton, Esquire, for the Debtor

MEMORANDUM OPINION¹

On April 10, 2001, we filed a Memorandum Opinion and entered an Order declaring that Debtor's federal income tax liabilities for the years 1989, 1990, 1991, and 1992 are dischargeable under 11 U.S.C. § 523(a)(1)(C). The United States of America on behalf of its agency, the Internal Revenue Service (IRS), has filed a Motion for Reconsideration of that Opinion and Order. In this motion, the IRS suggests that it has proven that Debtor's obligations for tax years 1989 through 1992, are nondischargeable based on his financial activities in later years, i.e., 1993-1998. We heard argument and have

¹The court's jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact and conclusions of law regarding the Motion for Reconsideration.

reviewed that Motion, the Supplemental Brief of the United States, and the Debtor's Response to Defendant's Motion for Reconsideration. Debtor was given the opportunity, until June 29, 2001, to file a response to IRS' Supplemental Brief which it has not done.

The issue we are asked to reconsider is: Has the IRS met its burden of proof, by a preponderance of evidence,² to show an exception to discharge under § 523(a)(1)(C) for a willful attempt in any manner to evade or defeat federal income taxes for any of the four tax years at issue? The IRS presents two arguments. The first is whether Debtor's actions to keep his child support obligation low by voluntarily depressing the income he earned in 1993 through 1996 for tax years after those in question, i.e., 1989 through 1992, translate into the willful attempt to evade federal income taxes. From 1989 through 1994 Debtor operated as a sole proprietor. In 1995, Debtor became an employee of a corporation. He remained an employee through the relevant time. The second is whether an inference of willfulness to evade or defeat a tax should be made from the following circumstances B Debtor and/or his current spouse filed an aggregate mortgage interest deduction of \$3569 or more for 1989, \$4166 for 1990, \$4072 for 1991, but only \$2442 for 1992, \$2219 for 1993, \$2483 for 1994, \$2804 for 1995, \$2570 for 1996, \$2196 for 1997, and \$2374 for 1998 for a

²Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

particular parcel of realty.³ The IRS established at trial that Debtor claimed one-half of the real estate taxes paid in 1991 and 1992 on his returns when he was not entitled to do so because his wife was the sole owner of the house. Debtor also claimed a deduction for business use of the home to which he was not entitled for the same reason. We address only the mortgage interest deduction because we find nothing of record which warrants reconsideration as to the real estate taxes or business use of the home deductions. We previously found that Debtor was not entitled to the deductions but, despite that fact, the IRS had not met its burden of proof concerning Debtor's willfulness in claiming them.

Regarding the Wages

The IRS contends that Debtor's tax obligations from 1989-1992 are nondischargeable in bankruptcy. We are asked to find that Debtor's effort to maintain a low child support obligation by taking a lower salary than otherwise could be demanded from his corporate employer from and after 1995 proves his willful attempt to evade payment of the federal income taxes he owed but failed to pay from 1989-1992. However, the language of §523(a)(1)(C) excepts from discharge a debt of an individual

³Debtor did not claim a mortgage interest deduction in 1989, 1993, 1994, or 1995. In 1990, 1991, and 1992, Debtor and his wife filed separate tax returns and each claimed one-half of the total deductions listed above. In 1993-1995, only Debtor's wife claimed a mortgage interest deduction in her separate returns. In 1996-1998, Debtor and his wife filed joint returns and the entire deduction was reflected on those returns.

"for a tax ... with respect to which the debtor...willfully attempted in any manner to evade or defeat such tax...." Here, as we previously found, Frosch's motive in accepting the salary he agreed to from his corporate employer was to keep a low child support payment. It was not to avoid paying taxes. The IRS emphasizes the phrase "in any manner" and points us to Dalton v. IRS, 77 F.3d 1297 (10th Cir. 1996). In Dalton, the court looked at "any conduct, the likely effect of which would be to mislead or to conceal." *Id.* at 1301. We look at the language in the full context of its analysis:

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation.... By way of illustration,... we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books,... and any conduct, the likely effect of which would be to mislead or to conceal....

Clearly, the contested language is to be expansively defined. Consequently, as the court in *Jones* observed, "the modifying phrase 'in any manner' is sufficiently broad to include willful attempts to evade taxes by concealing assets to protect them from execution or attachment." *Jones*, 116 B.R. at 814.... [A] contrary reading would effectively render the second exception of § 523(a)(1)(C) meaningless or superfluous. That is, unless the provision encompasses willful attempts to evade the payment or collection of taxes, then the only nondischargeable taxes under the section would be those resulting from fraudulent returns.... Finally, given Congress' express purpose of relieving only the "honest" debtor from the debt of stale taxes, any statutory interpretation of "evade or defeat" which relieves the dishonest debtor who conceals assets to avoid the payment or collection of taxes, but which penalizes the same dishonesty to avoid assessment, would be an absurd result.

Nonetheless, recognizing the general rule that exceptions to discharge are to be strictly construed in favor of the

debtor, we also agree with the narrow application of our colleagues in the Eleventh Circuit: "[A] debtor's failure to pay his taxes, alone, does not fall within the scope of section 523(a)(1)(C)." *Haas*, 48 F.3d at 1158.

Id. at 1301. [Footnote omitted.]

We have no evidence that Debtor concealed any assets. The IRS conceded that Debtor correctly reported the income he received. Nonetheless, the IRS contends that the Debtor could have earned more in years after those at issue in this case and, by agreeing to a reduced wage, hampered his ability to pay outstanding taxes.

We are faced with a debtor who has done more than simply not pay taxes but one who, as an employee of his wife's corporation, accepted from his employer a minimal income in an effort to avoid a higher child support obligation. The IRS alleges that the effect of Debtor's action not only caused his child support obligation to drop⁴ but also placed Debtor in the self-imposed position of being unable to pay prior years' outstanding tax obligations. Debtor testified that he was aware from 1989 to 1992 that he owed income taxes based upon the returns he filed.⁵ However, he was self-employed in those years. In 1993 he was employed by K & D Home Improvements, his

⁴The parties presented no evidence that, in fact, the child support obligation or payments required on arrears were lower than a state court would require if it had been presented with Debtor's testimony here.

⁵Transcript of Video Conference Trial of July 12 2000, pages 10-11, Adv. 99-0240. Hereafter all references to a transcript of video conference mean that of July 12, 2000.

sole proprietorship.⁶ In 1994 he was similarly employed.⁷ The IRS has shown no evidence that Debtor under-reported income from his sole proprietorship. Thus, in 1993 and in 1994, the evidence of record does not support the IRS' contention that Debtor could have earned more than he did from the sole proprietorship and he was not then employed by the corporation. In 1995 and 1996, Debtor was employed by Kevin Frosch Construction, Inc.⁸ He testified⁹ that the child support obligation was only one factor which determined how much he was paid by Kevin Frosch Construction, Inc., in years after the tax years at issue. He stated¹⁰ that other carpenters employed by Kevin Frosch Construction, Inc.,¹¹ were paid \$12 to \$15 per hour. The Form 1120S corporate income tax return for Kevin Frosch Construction, Inc.,¹² indicates that it was incorporated in September of 1994 and that it had a loss of \$1915 that year.

⁶Debtor's 1993 Income Tax Return, Government Exhibit G-9.

⁷Debtor's 1994 Income Tax Return, Government Exhibit G-10.

⁸Debtor's 1995 and 1996 Income Tax Returns, Government Exhibits G-11 and G-19.

⁹Transcript of Video Conference, page 26.

¹⁰Transcript of Video Conference, page 25.

¹¹ Debtor was an employee of Kevin Frosch Construction, Inc., and received wages through it from 1995 through 1998 Government Exhibits 11 and 19 through 21. Wages were reported by Debtor on his 1995 tax return and on the joint spousal returns for Debtor and Daryl Cohen for 1996 through 1998.

¹²Government Exhibit G-27, Schedule M-2.

The Form 1120S corporate income tax return for 1995¹³ shows a \$12,792 net income loss for that year. In 1995 the corporation claimed a \$130 charitable contribution deduction and a \$5,146 medical expenses deduction.¹⁴ Even if these deductions could somehow be proven to be inappropriate, an effort the IRS did not undertake in this case, there would still be a loss in that year. Thus, the evidence fails to support the IRS' contention that Debtor could have earned more in 1995.

The 1996 Form 1120S¹⁵ corporate income tax return shows corporate income (after all deductions) of \$7840. The 1997 Form 1120S corporate income tax return shows income (after all deductions) of \$34,068. Charitable contributions of \$760 were made in that year. Thus, the evidence concerning corporate earnings in 1996 and 1997 would show funds available to pay toward Debtor's salary. However, the IRS has not shown that Kevin Frosch was an officer or director of Kevin Frosch Construction, Inc., that he had any control over salaries to be paid, or that he was involved in managerial or financial decisions about the disposition of corporate earnings.¹⁶ The

¹³Government Exhibit G-28, Schedules M-1 and M-2.

¹⁴Government Exhibit G-28, Schedule K.

¹⁵Government Exhibit G-29.

¹⁶Although Debtor testified (Transcript of Video Conference, page 25) that he and Daryl Cohen hired the employees of Kevin Frosch Construction, Inc., Daryl Cohen testified (Transcript of Video Conference, page 42) that she held all the officer positions of the company. The IRS has not
(continued...)

Form 1120S corporate income tax returns for 1994 through 1998¹⁷ show that they were filed by corporate president Daryl Cohen. Thus, the IRS has not met its burden or advanced sufficient evidence to prove that Kevin Frosch willfully attempted to evade payment of his taxes by accepting his salary from Kevin Frosch Construction, Inc., which salary he reported as income to the IRS.

Regarding the Mortgage Interest and Other Deductions

The IRS contends that Debtor willfully attempted to evade or defeat a tax in 1989 through 1992 by claiming inappropriate deductions. The focus of the motion for reconsideration concerns mortgage interest deductions. The IRS questions the duplicate deductions claimed by Debtor and his nondebtor wife for mortgage interest expense on tax returns for years 1990, 1991, and 1992. There is no specific argument that an error was made for tax year 1989 based on this deduction because Debtor did not claim one. The IRS has not produced Debtor's tax return for 1989.¹⁸ Thus, we have no evidence upon which to change our finding that the tax liabilities for 1989 are dischargeable. Parenthetically, we note that Debtor paid two

¹⁶(...continued)
shown that Debtor had the authority to pay himself a different salary.

¹⁷Government Exhibits G-27 through G-31.

¹⁸The IRS has, however, produced, as Government Exhibit G-4, evidence that a 1989 return was filed in 1990.

estimated tax payments to the IRS totaling \$500 in 1989.¹⁹ The payment of estimated taxes in 1989 is inconsistent with a willful attempt to evade taxes in that year.

We turn to Debtor's alleged attempt to evade or defeat based upon the deductions claimed in 1990 through 1992. The IRS presents a table of figures on page 2 of its Supplemental Brief²⁰ that shows the amounts reported by Debtor and his non-debtor wife for mortgage interest deductions for tax years 1990 through 1998 for the property located at 9524A James Street in Philadelphia. Debtor and his wife filed separate returns from 1990 through 1995 and joint returns in 1996 through 1998. The IRS has calculated that Debtor and his wife, although filing separately, together claimed \$4166 in 1990 and \$4072 in 1991 in home mortgage interest deductions.²¹ The IRS further argues that comparing this amount to the home mortgage interest deductions for the two separately filed 1992 tax returns, i.e., a total of \$2442, compels the inference that Debtor knew that the amounts he was claiming as deductions for 1990 and 1991 were improper. From this inference, the IRS contends that Debtor willfully attempted to evade or defeat his tax obligation. The IRS argues that willful attempt to evade is

¹⁹Information produced in Government Exhibit G-4.

²⁰This chart is reproduced in the text of this opinion at pages 17 and 18.

²¹The IRS averages these numbers to be \$4119. Except to illustrate the IRS' argument, the "average" of deductions actually claimed is irrelevant.

shown because "based on these averages, it is far more likely than not that [Debtor] and his wife each claimed 100% of the mortgage interest deduction for the years 1990 and 1991." ²²

The argument goes further to say that if the latter were not true, Debtor would have produced evidence, specifically Forms 1098, of the actual mortgage interest amount paid in those years. The 1990 and the 1991 Forms 1098 are not in evidence and no one has produced evidence of the amount of mortgage interest reflected thereon. However, the credible testimony establishes that Daryl Cohen, the owner of the property, and not Debtor, received the Forms 1098. No one has produced documentation that would permit the court to calculate the mortgage interest. We have no evidence of the amount financed, the rate of interest, the date of the transaction, whether interest was higher in some years due to adjustable interest rates or the addition of "points," etc. The IRS asks us to accept, on faith, that the Forms 1098 would show certain amounts paid and that the tax returns do not claim the correct amounts. This we will not do. The court must rely on evidence and reasonable inferences based thereon. The IRS has simply failed to produce the evidence on which we could make the inferences or find the facts as the IRS requests.

Nonetheless, for purposes of argument, we will assume that, if produced, the Forms 1098 would show mortgage interest

²² Supplemental Brief of the United States, page 3.

actually paid of only one-half of the itemized totals of \$4166 and \$4072 in 1990 and 1991 respectively. On that assumption, Debtor's and his wife's returns in those two years would contain erroneous mortgage interest deductions, in amounts of double the correct amounts. The issue is whether or not the erroneous deductions by Debtor were a willful attempt to evade or defeat taxes rather than an inadvertent oversight. Our April 10, 2001 Memorandum Opinion and Order were based, in part, on our Debtor's testimony that he did not comprehend the information on his returns when he signed them, and that he was unaware of the erroneous deduction until after he filed bankruptcy in 1998. Thus, we found that Debtor did not realize the error in the 1990 and 1991 returns until 1998. The IRS asks us to decide a hypothetical, as to which we find no credible evidence of record, i.e., that if Debtor realized the mistake in 1992, a finding should be made that a willful attempt to evade occurred because Debtor did not amend his 1990 and 1991 returns. This hypothetical relies upon an assumption that the reason that the amount claimed on the two separately filed tax returns filed for 1992 was in excess of the actual mortgage interest paid was because Debtor himself realized the error. The accountants who testified about the 1990, 1991 and 1992 tax years stated that they could not specifically recall contacts or conversations with the Debtor.²³ CPA Frederick

²³CPA Etskovitz, Transcript of Video Conference, page 50:
(continued...)

Etskovitz, testified²⁴ about the 1990 tax returns of both Debtor and his wife and stated that "I recall being told that those were the amounts that should be deducted on each return." Daryl Cohen testified²⁵ that she gave Lutz Cowan (the accountants who prepared the 1991 and 1992 returns for her and for Debtor) copies of the Forms 1098 and made sure that she told them that all of the assets were owned by her. CPA Christopher DiGiacomo testified²⁶ regarding preparation of the 1991 and 1992 returns that he "would have to assume that that information was given to us by our client." The IRS argues that "[t]wo accounting firms did not make the same 'mistake' concerning the allocation of deductions on the returns."²⁷ However, Mr. DiGiacomo also testified²⁸ that it was customary to review a past year's tax return before preparing the current year's return. Mr. DiGiacomo said that he did not bring his files on the tax returns to the trial, did not know whether he had Forms 1098 for those years, and did not review them in

²³(...continued)

"It was either one or both." He could not recall specifically whether he spoke to Debtor or Debtor's wife. CPA DiGiacomo, Transcript of Video Conference, page 60: "I'm sure I spoke with Daryl Cohen, but I am not sure whether or not I ever spoke with Kevin Frosch."

²⁴Transcript of Video Conference, page 49.

²⁵Transcript of Video Conference, pages 40 and 41.

²⁶Transcript of Video Conference, pages 60-61.

²⁷United States' Motion for Reconsideration, page 2.

²⁸Transcript of Video Conference, pages 63-64.

preparation for his testimony if he had them. We are faced with evidence which does not clearly identify how the allegedly incorrect deductions were incorporated into the 1990 and 1991 tax returns. Based on the testimony and the court's duty to reconcile evidence, we find that the misinformation, if any, was communicated by Daryl Cohen to the accountants who prepared the returns and/or picked up by the accountants from their review of prior returns. We reaffirm our finding that Debtor did not appreciate or understand the significance of the mortgage interest deduction until at least 1998, after this case was filed, and that the preponderate evidence does not support a finding that Debtor willfully intended, by claiming the deductions in 1990 and 1991, to evade or defeat a tax. We find that the difference between the total amount of mortgage interest deducted in 1992 and the total amounts deducted in 1990 and in 1991²⁹ does not, by itself, show actual knowledge by Debtor. A showing of such knowledge by Debtor in one of these years is necessary for a showing of a "willful" attempt to evade or defeat a tax. In In the Matter of Birkenstock, 87 F.3d 947 (7th Cir. 1996), the Court of Appeals excepted from discharge the tax liability of a debtor-husband but discharged

²⁹In 1991, Debtor's use of itemized deductions resulted in a higher taxable income to him than he would have had by claiming the standard deduction. That year, the standard deduction was \$2850 whereas Debtor claimed \$2409 as itemized deductions. Under applicable tax law, Debtor was required to itemize when his separately filing spouse itemized deductions.

the tax liability of the debtor-wife finding that she did not have the required mental state for a finding of willful attempt to evade or defeat. Reversing the bankruptcy court, the Court of Appeals said:

The basis for the bankruptcy court's making this finding that Mrs. Birkenstock's debts were nondischargeable was that "[s]he signed the joint returns. She had to have knowledge of their failure to file returns and their failure to pay taxes." [Footnote omitted.]...

As a result, the only relevant evidence upon which the bankruptcy court rested its determination of Mrs. Birkenstock's willfulness was that she signed the joint returns. Signing returns, however, is evidence that she had a legal tax duty; it is not necessarily evidence that she knew of that duty, nor that she deliberately sought to evade it.... The government needed to put forth evidence that this evasion was *willful*, and it did not.

Birkenstock, 87 F.3d at 953 (emphasis in original).

Birkenstock noted that nondischargeability is reserved for "those whose efforts to evade tax liability are knowing and deliberate." Id. at 952. Further we look at all of Debtor's and Debtor's wife's income tax returns that were submitted as IRS Exhibits. They show significantly different mortgage interest deductions for the James Street property for different years³⁰ but no clear pattern³¹ as to Debtor. The IRS submits

³⁰The James Street property is listed as the residence of Debtor and his wife in years 1990 through 1994, Exhibits G-5 through G-10 (Debtor's returns) and G-13 through G-17 (Daryl Cohen's returns). It is shown as the residence only of Debtor's wife for 1989, Exhibit G-12. It is listed as income producing
(continued...)

the following chart³²:

<u>Year</u>	<u>Plaintiff</u>	<u>Plaintiff's Wife</u>	<u>Total</u>
1990	\$2,083.00	\$2,083.00	\$4,166.00
1991	\$2,036.00	\$2,036.00	\$4,072.00
1992	\$1,221.00	\$1,221.00	\$2,442.00
1993	0.00	\$2,219.00	\$2,219.00
1994	0.00	\$2,483.00	\$2,483.00
1995	0.00	\$2,804.00	\$2,804.00

We add the following for comparison purposes:

	<u>Joint</u>	<u>Total</u>
1996 ³³	\$2,570	\$2,570
1997	\$2,196	\$2,196
1998	\$2,374	\$2,374

Again, the IRS would have us attribute the decrease in mortgage interest deduction claimed by Debtor for the James Street property in 1992 to the Debtor's realization that the 1990 and 1991 returns were false. This argument is not a fair inference

³⁰(...continued)
property for tax years 1995 through 1998. Exhibits G-18 through G-21.

³¹Birkenstock, 87 F.3d at 951, also held that evidence of conduct for other tax years can be used to decide willful evasion for tax years in question. We have considered Debtor's conduct, in light of Birkenstock, earlier in this opinion.

³²This chart appears in the Supplemental Brief of the United States at page 2 (footnotes omitted). Standard deductions rather than itemized deductions were utilized by Debtor on his 1993 and 1994 returns, Exhibits G-9 and 10. Debtor filed Schedule A with his 1995 return but there was no deduction for home mortgage interest, Exhibit G-11.

³³Joint returns were filed for tax years 1996, 1997, and 1998. For these years, mortgage interest deduction for the James Street property is listed on Schedule E, income producing property Exhibits G-19, G-20, and G-21.

from the evidence. Even in 1992, Debtor and Daryl Cohen each claimed a mortgage interest deduction of \$1221. Had Debtor realized that he was not entitled to claim the deduction, there is no credible explanation advanced as to why he would have claimed one-half of the alleged total mortgage interest paid as his deduction in 1992. In 1993, 1994, and 1995, Debtor did not itemize deductions and did not claim this deduction. His wife claimed the full amount in those years.

We accept as credible Debtor's testimony that he did not know that these items were mistakenly claimed on his returns until 1998 or later³⁴ and Debtor's wife's testimony that she did not learn of the mistakes until 1999 or later.³⁵

The IRS has additionally commended to us for review In re Crawley, 244 B.R. 121 (Bankr. N.D. Ill. 2000), and Novitsky v. American Consulting Engineers, L.L.C., 196 F.3d 699, 702 (7th Cir. 1999). The IRS argues that these cases held that failure to read and review tax returns before signing them does not negate willfulness under § 523(a)(1)(C). Two important distinctions set the instant facts apart from those of the Crawley case: unlike the credible testimony in this case, (1) Mrs. Crawley testified that within hours after signing the returns both she and her husband were aware that there were errors on the returns; and (2) the Crawleys did not file

³⁴ Transcript of Video Conference, pages 12-13.

³⁵ Transcript of Video Conference, page 41.

returns for 10 years after having done so previously. 244 B.R. at 129. Novitsky gives a compelling rationale for holding signers responsible for the documents which they sign:

... people who sign tax returns omitting income or overstating deductions often blame their accountant or tax preparer.... People are free to sign legal documents without reading them, but the documents are binding whether read or not.

Novitsky, 196 F.3d at 702. However, as much as we agree with this sentiment, we must recognize that Novitsky was not a tax case and involved age and religious discrimination. As such, Novitsky did not interpret the willfulness requirement under §523(a)(1)(C) of the Bankruptcy Code.

We find that the IRS has not carried its burden by preponderate evidence. Debtor is discharged from these debts. An appropriate order will be entered, denying the motion for reconsideration.

/s/
Judith K. Fitzgerald
United States Bankruptcy Judge

DATE: December 13, 2001

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KEVIN FROSCH,	(Adversary No. 99-0240
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	(
v.	(On Motion for Reconsideration
	(
	(
UNITED STATES OF AMERICA,	(
	(
Defendant	(

ORDER

AND NOW, this 13th day of December, 2001, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED, and DECREED** that the Motion of the Defendant, United States of America, for Reconsideration is **DENIED**.

It is **FURTHER ORDERED** that the Clerk shall close this Adversary.

/s/
Judith K. Fitzgerald
United States Bankruptcy Judge

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