UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11140

IN THE MATTER OF:
SOUTHWESTERN STATES MARKETING CORP.,

Debtor,

WALTER C. KELLOGG, Trustee,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-0549-H)

March 4, 1996

Before JONES, STEWART, AND PARKER Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Southwestern States Marketing Corporation (SWSM) appeals the judgment of the district and bankruptcy courts, which granted summary judgment against SWSM's claim to receive a federal income tax refund. For the reasons that follow, we AFFIRM.

I. FACTS AND PROCEEDINGS BELOW

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Appellant SWSM, an accrual-basis taxpayer, was in the business of reselling crude oil from 1978 through 1981. By 1982, SWSM was placed into an involuntary Chapter 11 bankruptcy proceeding. In 1985, the Chapter 11 proceeding was converted to a Chapter 7 liquidation proceeding; Walter Kellogg was appointed trustee.

During the pendency of the Chapter 11 proceeding, the Department of Energy (DOE) filed a proof of claim against SWSM alleging that SWSM violated DOE price regulations and overcharged for crude oil during most of its existence. In 1991 SWSM and the DOE executed a settlement agreement whereby SWSM admitted overcharging and withdrew its objections to the DOE's general unsecured claim against SWSM consisting of over $30 million in principal overcharges, and $20 million in pre-petition interest. Needless to say, by the time SWSM executed the settlement agreement, SWSM was unable to pay even a portion of the DOE's claim, and it was clear that SWSM would never be able to pay the claim in full.

In December 1991, SWSM filed a corporate income tax return for the tax year ending November 30, 1991. With this return, SWSM filed a Form 1139 (Request for Tentative Refund) claiming a refund of over $11 million arising from the accrual of the DOE debt. The refund was attributable to a deduction of over $41 million in the fiscal year ending November 30, 1978 for payments required by the settlement agreement that corresponded with crude oil overcharges made in that year. The reduction of

1978 income created a net operating loss for that year which was carried forward to later years, thereby eliminating SWSM's taxable income for the tax years 1979 through 1984, and creating the claimed overpayment. Additionally, SWSM filed a request with the Internal Revenue Service (IRS) for a prompt determination of tax liability pursuant to section 505(b) of the Bankruptcy Code.

Following receipt of the various tax forms and other requests from SWSM, the IRS notified SWSM by mail that its tax return had been accepted as filed. Shortly thereafter, however, the IRS informed SWSM that its refund request was being sent to the Examination Division. Subsequently, the IRS failed to comply with certain timing requirements relating to the claimed refund.

In May 1992, SWSM commenced this adversary proceeding in the bankruptcy court seeking to compel the Government to turn over the tentative refund. Both parties moved for summary judgment. The bankruptcy court granted the Government's motion, holding that the trustee had failed to establish a right to the claimed deduction. Alternatively, the bankruptcy court found that the IRS was justified in disallowing the deduction pursuant to I.R.C. § 446(b), which allows the IRS to disallow a deduction when the taxpayer's accounting treatment does not accurately reflect income. The bankruptcy court held also that the IRS was not time-barred from refusing to issue the refund. Based on these conclusions, SWSM was not entitled to deduct its liability to the DOE, and the IRS could refuse to issue the refund. The district court affirmed the decision of the bankruptcy court.

II. DISCUSSION

Appellant SWSM contends that the bankruptcy court erred in granting the Government's motion for summary judgment and in denying its motion for summary judgment. SWSM argues that the deduction was proper under I.R.C. § 461 and that the deduction did not distort SWSM's income. Additionally, SWSM contends that the IRS's failure to comply with certain timing requirements relating to the claimed refund requires the Government to issue the tentative refund.

We review the bankruptcy court's grant or denial of summary judgment *de novo*. *See Szabo v. Errisson*, 68 F.3d 940, 942 (5th cir. 1995); *Omni Vision, Inc. v. Holder*, 60 F.3d 230, 231 (5th Cir. 1995). Summary judgment is appropriate when the record establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Appellant SWSM's contention that the IRS is required to issue the tentative refund because of the IRS's failure to comply with certain timing requirements is essentially a claim of estoppel. The doctrine of estoppel cannot be used to require the Government to pay money from the Treasury. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428, 110 S. Ct. 2465, 2473 (1990). The bankruptcy court, therefore, properly denied SWSM's motion for summary judgment as to this issue.

The bankruptcy court also properly concluded that SWSM was not entitled to deduct the DOE liability. Under the accrual method of accounting, a liability is incurred and generally is taken into account for tax purposes in the calendar year in which "all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability." Treas. Reg. § 1.461-1(a)(2). Although absolute certainty of payment is not a prerequisite to accrual and deduction of a liability, *Fahs v. Martin*, 224 F.2d 387, 393-94 (5th Cir. 1955), this general principle gives way in "extreme circumstances." *Tampa & Gulf Coast R.R. Co. v. Commissioner of Internal Revenue*, 469 F.2d 263, 264 (5th Cir. 1972)(interest obligation not deductible when taxpayer owed interest to parent corporation and was "hopelessly insolvent"); *see Gounares Bros. & Co. v. United States*, 292 F.2d 79, 84-85 (5th Cir. 1961)(interest obligation not deductible when record demonstrated an incapacity to pay until actual earnings were generated).

As in *Tampa & Gulf Coast R.R. Co. v. Commissioner of Internal Revenue Service*, 469 F.2d 263 (5th Cir. 1972), this is a case of "extreme circumstances." SWSM admitted to over $30,000,000.00 of overcharges in the sale of crude oil during a three year period. Subsequently, SWSM has been involved in bankruptcy proceedings for the past fourteen years, eleven of those years being liquidation proceedings. DOE's overcharge claim was held at bay for most of that period. At the time SWSM finally

admitted to overcharging, it was financially unable to pay even a fraction of the DOE claim. Despite its lack of financial resources, SWSM now claims an $11,079,182.00 tax refund attributable to deductions resulting from the DOE overcharge claim and associated interest. Under these circumstances, SWSM's deduction of the DOE claim cannot be said to accurately reflect the income of SWSM. *See Thor Power Tool Co. v. Commissioner of Internal Revenue*, 439 U.S. 522, 532, 99 S. Ct. 773, 781 (1979)(Commissioner has wide discretion in determining whether taxpayer's accounting method clearly reflects income); *Mooney Aircraft, Inc. v. United States*, 420 F.2d 400, 409-10 (5th Cir. 1969)(accounting fiction cannot obscure reality). The bankruptcy court, therefore, properly granted the Government's motion for summary judgment.

CONCLUSION

For the foregoing reasons, we **AFFIRM**.