UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20438
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAN E. WARDEN, ET AL.,

Defendants,

DAN E. WARDEN and MERIDON N. WARDEN, Etc.,

Defendants-Appellants.

Consolidated with/
No. 94-20641
Summary Calendar

IN THE MATTER OF: DAN E. WARDEN and MERIDON N. WARDEN,

Debtors.

DAN E. WARDEN and MERIDON N. WARDEN,

Appellants,

versus

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas

June 22, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Dan E. Warden and his wife, pro se appellants, appeal the grant of summary judgment in favor of the United States, determining that the taxpayers' conveyance of real property was fraudulent. (No.94-20438). The Wardens also appeal the district court's affirming the bankruptcy court's determination that debtors willfully attempted to evade their federal tax liabilities within 11 U.S.C. § 523(a)(1)(c) and thus should not be granted a discharge of those liabilities. (No.94-20641). Consolidating the cases and finding no error in either court's judgment, we affirm.

BACKGROUND

Mr. Warden became a self-appointed minister in 1979 and founded the Universal Life Church, Inc. and Life Foundation, Inc. Warden operated both organizations out of his home, and, pursuant to an application with the Internal Revenue Service, Life Foundation, Inc. was granted a provisional ruling of tax-exempt status valid until September 1984. The Wardens had complete control over the assets and disbursements of Life Foundation, Inc. and transferred part of their personal income to the Church and Foundation in order to receive tax benefits.

Despite the creation of these religious organizations, the majority of taxpayers' income from 1980 to 1985 was from Mr.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Warden's life insurance sales and Mrs. Warden's real estate sales. Also, on June 12, 1984, less than three months after appellants received notice of an Internal Revenue Service audit, the Wardens set up (and became trustees of) the Joy Trust. In order to create the trust, the taxpayers transferred all of their real and personal property--including two parcels of property located in Brazos County, Texas--to the trust in exchange for one dollar and 100 "trust certificate units."

After the transfer, the Wardens possessed no property and instead leased the trust property back to themselves. Under this arrangement, the trust never owed any taxes because expenses of upkeep of the trust property (mortgage payments, insurance, utilities, repairs, maid service, health insurance, and doctors' bills) totalled more than the lease payments the Wardens paid to live in the house. The trust was also able to claim depreciation on the Wardens' household furniture and monies advanced to the Wardens for personal living expenses.

In November of 1984, appellants received notice of deficiency concerning their 1980-1982 taxable years. The deficiency arose because the Internal Revenue Service found that Life Foundation, Inc. was not being operated as a religious organization but as a vehicle to avoid taxes on their personal income from the real estate and insurance sales. Subsequently, in December of 1988, a demand for payment of the deficiencies was made. The Wardens refused to pay the assessments and consequently

federal tax liens, for taxes as yet unpaid, arose on all of the taxpayers' property and rights to property.

Appellants filed for Chapter 7 bankruptcy on September 1, 1989. The Wardens were discharged of their debts in January, 1990, but the bankruptcy court refused to discharge the taxpayers' tax liabilities. The federal district court, finding a fraudulent conveyance, granted the United States' motion for summary judgment, reduced to judgment taxpayers' 1980-1982 assessed taxes (totalling $78,590.73 plus interest and statutory additions), and ordered foreclosure of the tax liens. Another district judge affirmed the bankruptcy court's determination that debtors willfully evaded their tax liabilities and should not be granted a discharge therefrom. Appellants appeal these judgements.

DISCUSSION

As the instant cases have been consolidated for appeal, this court will address all issues raised (and not raised) in appellants' one submitted brief. [1]

When a taxpayer disposes of property prior to the existence of federal tax liens, the United States is not without remedy because, in that instance, the United States may seek relief under the applicable fraudulent conveyance laws of the particular state in which the property and taxpayer are located. United

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[1] The district court's grant of summary judgment is reviewable de novo. Kansa Reinsurance v. Congressional Mortgage Corp., 20 F.3d 1362, 1371 (5th Cir. 1994). The district court's analysis is also reviewable de novo. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991). Additionally, the question whether a debtor willfully attempted to evade or defeat taxes is a question of fact, subject to the clearly erroneous standard of review. In re Midland Indus. Serv. Corp., 35 F.3d 164, 165 (5th Cir. 1994). Pro se briefs should be liberally construed. Abdul-Alim Amin v. Univ. Life Ins. Co. of Memphis, 706 F.2d 638, 640 (5th Cir. 1983).

States v. Chapman, 756 F.2d 1237 (5th Cir. 1985). Whether this transaction was fraudulent was therefore properly determined by the standards set forth in the Texas Fraudulent Transfers Act, Tex. Bus. & Com. Code Ann. §§ 24.02, 24.03 (West 1968). Chapman, 756 F.2d at 1240.[2]

In § 24.02 cases, since direct proof of fraud is often unavailable, the district court was also correct to rely upon circumstantial evidence to establish fraudulent intent. Roland v. United States, 838 F.2d 1400, 1403 (5th Cir. 1988). Such badges of fraud include (1) transfer of property for inadequate or no consideration;[3] (2) close personal relationship between the parties to the transaction; (3) retention of possession and other indicia of ownership of property transferred;[4] and, (4) transfer of all of the transferor's property, especially if to family members, leaving the transferrers unable to pay debts. Id. The trial court recognized that the presence of several of these indicia of fraud here compelled the conclusion that the Wardens' transfer of their assets to the Joy Trust should be set aside as fraudulent under § 24.02. Id. The timing of the creation of the trust supports an inference of questionable behavior. The Wardens refused to meet,

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[2] Because the transfer at issue in this case occurred on June 12, 1984, the district court's belief that Tex. Bus. & Com. Code Ann. § 24.005 (West 1987) was applicable to this case was erroneous as that statute does not apply to transfers made before September 1, 1987. Zahra Spiritual Trust v. United States, 910 F.2d 240, 246 (5th Cir. 1990).

[3] The Wardens created the Joy Trust in exchange for one hundred "trust certificate units" and one dollar. The value of the certificate units was uncertain at the time of the transfer.

[4] The Wardens were the transferrers, trustees, and certificate holders.

cooperate with, and provide information to the IRS. The transfer also left the Wardens insolvent and with no property. All these uncontested facts support the district court's conclusion that the Wardens' actions in creating the Joy Trust were undertaken to hinder, defraud, or delay creditors.

In § 24.03 cases, by contrast, proof of fraudulent intent is not necessary. The party that seeks to uphold the transfer, however, has the burden of proving that fair consideration was tendered and that the transferor had the capacity to pay his or her debts. Short v. United States, 395 F.Supp. 1151, 1154 (E.D. Tex. 1975). The Wardens have made no such showing. The transfer rendered the Wardens insolvent and yet the Warden family was the beneficiary of the trust. The record is filled with such uncontroverted evidence of the appellants' disregard of their obligations and refusal to comply with the law. Summary judgment was properly granted in this case.[5]

An individual debtor is not discharged for a tax debt, whether or not the creditor filed a claim, if the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax. 11 U.S.C. § 523(a)(1)(c). Analyzing this statute in relation to the Wardens again leads to the conclusion that the creation of the Joy Trust was a sham transaction with no economic effect other than to create income tax losses. A debtor's tax

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[5] On appeal, the Wardens make various assertions concerning their purposes in setting up the Joy Trust. The assertions do not overcome the propriety of summary judgment. The facts surrounding the creation and operation of the Trust, not appellants' self-serving declarations of motives, determine the tax consequences in this case.

liabilities are excepted from discharge if the debtor willfully, voluntarily, consciously, and intentionally attempts to evade or defeat the liability or collection of those taxes. Relying on the same facts earlier recited about the Joy Trust, the district court and bankruptcy court found the Wardens to have acted willfully in order to evade their tax liabilities, and these findings may not be disturbed on appeal unless they are clearly erroneous. Butler Aviation Int'l., Inc. v. Whyte, 6 F.3d 1119, 1127-28 (5th Cir. 1993).

This circuit has rejected a similar trust arrangement where taxpayers transferred all of their property in return for certificates of beneficial ownership such that taxpayers could claim the expenses for upkeep and operation of the property as deductible trust expenditures. United States v. Buttorff, 761 F.2d 1056 (5th Cir. 1985). The district court properly applied the rule in Buttorff in determining that the trust format used by the Wardens was not a legitimate business trust.[6]

Not surprisingly, appellants' arguments on appeal are all without merit. The Wardens seek relief from this court under Rule 60(b) of the Federal Rules of Civil Procedure. Application for relief under such rule is to be made, however, to the district court which rendered the judgment. Standard Oil Calif. v. United States, 429 U.S. 17 (1976). Appellants also contend, meritlessly,

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[6] The trust in Buttorff was essentially the same as the trust arrangement used by the Wardens. However, in Buttorff, the taxpayers did not take the Wardens' additional step of declaring bankruptcy because of their "pauper status" after the transfer to the trust.

that their trust was a contract and the United States Constitution's prohibition against states' passing laws impairing contractual obligations makes the district courts' actions against them and the Texas Fraudulent Transfer Act illegal. U.S. Const., Art. I, § 10, cl. 1. The Wardens also argue that the United States' cause of action against them is stale under Tex. Bus. & Com. Code Ann. § 24.010 (West 1987). This last claim is wrong on several counts. First, as has already been discussed, the 1987 version of this statute relied upon is not applicable to the Wardens' situation. Second, it is well-settled that state limitations provisions are inapplicable to fraudulent conveyance actions in which the United States is involved. United States v. Kellum, 523 F.2d 1284, 1285-86 (5th Cir. 1975). And third, because the assessments at issue in this case were made no earlier than December 14, 1988, the United States' complaint, which was filed on December 23, 1992, fell within the ten-year statute of limitations provided by 26 U.S.C. § 6502(a)(1). The Wardens also repeatedly wrongly argue that they should not be faulted for their desire to arrange their business affairs in a manner which would reduce or avoid taxation.

Therefore, the judgment of each district court is **AFFIRMED.**