U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
ABDUL W. MOOMAND and ZOHRA MOOMAND,	§	CASE NO. 04-45310-DML-13
	§	
	§	
DEBTORS.	§	CHAPTER 13

MEMORANDUM OPINION AND ORDER

Before the court is the Texas Comptroller's Motion to Dismiss Case (the "Motion") filed on September 3, 2004. Abdul W. Moomand and Zohra Moomand ("Debtors") filed their Response to Texas Comptroller's Motion to Dismiss opposing dismissal of their bankruptcy case on September 23, 2004. The court held a hearing on the Motion on October 21, 2004. At the conclusion of the October 21, 2004 hearing, the court took this matter under advisement and instructed the parties to submit briefs to the court. Both parties have submitted briefs and the court has reviewed the same.

This matter is subject to the court's core jurisdiction. 28 U.S.C. §§ 1334(a) and 157(b)(2)(A). This memorandum opinion and order comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

I. Background

In June, 1999 Debtors purchased the Lucky M Food Store ("Lucky M") located in Arlington, Texas. Lucky M is an active corporation and has been operated by Debtors from their purchase of the store to the present. Debtors filed for relief under chapter 13 of the United States Bankruptcy Code[1] (the "Code") on May 27, 2004.

[1] 11 U.S.C. §§ 101-1330.

Debtors' schedules indicate that Debtors are the sole owners of Lucky M and that Debtors owe unsecured debts totaling $379,807.25. Of this unsecured debt, Debtors scheduled two separate debts to the Texas Comptroller ("Comptroller"). One debt is listed in the amount of $248,678.20 for the period beginning October 1, 1999 and ending September 30, 2002. The other debt is listed as unknown in amount and no date or range of dates is specified to indicate when the debt arose. Both debts are listed as disputed, but none of the unsecured debts scheduled by Debtors, including both debts to the Comptroller, are denominated as contingent or unliquidated.

On August 6, 2004, the Comptroller filed a proof of claim asserting an unsecured priority claim against Debtors in the amount of $451,938.76 on account of sales and use taxes, penalties and interest owed by Lucky M. The Comptroller's claim encompasses amounts found by the Comptroller to be owed by Lucky M pursuant to two separate audit assessments. Both audit assessments were fully completed prior to Debtors' bankruptcy filing. The first audit assessment covers the period beginning April 1, 1992 and ending April, 1999 and the total amount of taxes, penalties and interest allegedly due for such period is $186,035.96 (the "First Audit").[2] The second audit assessment covers a period beginning in the fourth quarter of 1999 and ending September 30, 2002 and the total amount of taxes, penalties and interest allegedly due for such period is $265,902.80 (the "Second Audit").[3]

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[2] The Comptroller seeks recovery from Debtors of taxes, penalties and interest not paid by Lucky M during this time period on the basis that Debtors, as current owners, have successor liability for the taxes, penalties and interest Lucky M failed to pay prior to Debtors' acquisition of the business.

[3] Debtors owned and operated Lucky M during the period covered by the Second Audit. Thus, the Comptroller's claims against Debtors pursuant to the Second Audit are not based on successor liability. Rather, Debtors' liability is premised on "responsible individual" liability under section 111.016(b) of the Texas Tax Code, which provides:

On September 3, 2004 the Comptroller filed the Motion seeking dismissal of Debtors' bankruptcy case on the basis that Debtors' are ineligible under section 109(e) of the Code to be chapter 13 debtors because the amount of their unsecured debt exceeds the statutory cap provided by section 109(e).

II. Discussion

The issue before the court is whether the debts to the Comptroller must be counted in determining Debtors' eligibility as chapter 13 debtors under 11 U.S.C. § 109(e). Section 109(e) states in relevant part:

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $307,675 . . . or an individual with regular income and such individual's spouse . . . that owe, on the date of the filing of the petition, noncontingent, liquidated unsecured debts that aggregate less than $307,675 . . . may be a debtor under chapter 13 of this title.

11 U.S.C. § 109(e). The Comptroller argues that the court need look no further than Debtors' schedules to conclude that Debtors are ineligible for chapter 13 relief since Debtors' scheduled unsecured debt exceeds $307,675.00 and the debts to the Comptroller are not designated as contingent or unliquidated. This court has previously stated, however, that while "a faithful reading of section 109(e) calls for a 'snapshot' of indebtedness at the time a debtor files his petition, the Court will [sic] cannot go so far as to find that the image captured on the debtor's schedules is always in perfect focus." *In re Hatzenbuehler*, 282 B.R. 828, 833 (Bankr. N.D. Tex. 2002). This court has instead

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> With respect to tax or other money subject to the provisions of Subsection (a), an individual who controls or supervises the collection of tax or money from another person, or an individual who controls or supervises the accounting for and paying over of the tax or money, and who willfully fails to pay or cause to be paid the tax or money is liable as a responsible individual for an amount equal to the tax or money not paid or caused to be paid.

Tex. Tax Code Ann. § 111.016(b) (LEXIS 2004).

"recogniz[ed] that a debtor's schedules are a potentially imperfect measure of the debtor's debts . . . [and] a more appropriate approach is to use the debtor's schedules as a starting point in the section 109(e) inquiry . . . ." *Id.* Thus, the court will give due weight to Debtors' schedules in determining their eligibility under section 109(e), but further analysis of the nature of Debtors' debts to the Comptroller is warranted.

A. Disputed Debts are Generally Included in the Section 109(e) Analysis

The Comptroller asserts that debts which are noncontingent and liquidated, although disputed, must be included in the determination of whether a debtor exceeds the unsecured debt limit of section 109(e). The Comptroller's position is a correct statement of the general rule. *See Mazzeo v. U.S.* (*In re Mazzeo*), 131 F.3d 295, 305 (2d Cir. 1997); *U.S. v. Verdunn*, 89 F.3d 799, 802 n.9 (11th Cir. 1996); *In re Pulliam*, 90 B.R. 241, 244 (Bankr. N.D. Tex. 1988). However, this court previously declined to adopt a *per se* rule that debts which are merely disputed must be included in the section 109(e) analysis, stating:

> It seems sensible that, unless the equities of the case require a different result, a debt denominated as "disputed" should be included in the section 109(e) eligibility analysis if, on its face, it is a legally enforceable debt on the petition date. . . . Conversely, where the "dispute" requires a creditor to establish the debtor's liability, the debt should not count for section 109(e) purposes.

Hatzenbuehler, 282 B.R. at 832 (citations omitted).

Debtors dispute their personal liability for the amounts due under both audit assessments.[4] The court cannot find, on the evidence before it, that any dispute as to

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[4] The court need not consider the issue of whether Debtors' dispute regarding their successor liability for amounts due pursuant to the First Audit requires exclusion of that portion of the Comptroller's claim from the section 109(e) analysis. For the reasons discussed herein, the court finds that the amount of the Comptroller's claim based on the Second Audit must be considered in

Debtors' liability for the taxes, penalties and interest assessed pursuant to the Second Audit justifies exclusion of those amounts from the section 109(e) analysis. As discussed in footnote 3 above, the Comptroller bases Debtors' personal liability for the amounts under the Second Audit on section 111.016(b) of the Texas Tax Code. Section 111.016(b) makes personally liable for taxes owed by a corporation any individual responsible for controlling or supervising the accounting for and paying of taxes collected by the corporation when such individual willfully fails to pay or cause to be paid the taxes collected. Debtors' schedules reflect that Debtors are co-owners of Lucky M, and individuals holding similar positions within corporations have been held liable for unpaid taxes as "responsible individuals" under section 111.016 of the Texas Tax Code. *Ghashim v. State*, 104 S.W.3d 184 (Tex. App.—Austin 2003, no pet.) (holding individual who was president and 50% owner of corporation liable as responsible individual); *see also State v. Mink*, 990 S.W.2d 779 (Tex. App.—Austin 1999, pet. denied) (holding president of corporation liable for unpaid taxes of corporation prior to enactment of section 111.016(b)).

Debtors do not dispute that Lucky M failed to pay sales and use taxes during the period covered by the Second Audit. Debtors have also presented no evidence to indicate that any persons other than themselves hold positions of control at Lucky M, or that any persons other than themselves have a duty to ensure that the taxes collected by Lucky M are remitted to the appropriate taxing authorities. Neither in their pleadings nor at the

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determining Debtors' eligibility under section 109(e). And, because either figure attributable to the Second Audit (the amount reflected in the Comptroller's proof of claim, or the amount listed on Debtors' schedules), when added to the unsecured nonpriority claims scheduled by Debtors, results in Debtors' unsecured debt exceeding the statutory cap, determination of whether the debts stemming from the Second Audit must be included in the section 109(e) analysis is sufficient to dispose of this matter.

October 21, 2004 hearing did Debtors address section 111.016(b) of the Texas Tax Code and argue that Debtors do not qualify as responsible individuals. Rather, Debtors' primary arguments are that (1) the Comptroller did not perform an audit of the Debtors individually, (2) Debtors had no notice of past due taxes when they purchased Lucky M and thus should not be subject to successor liability for the amounts associated with the First Audit[5] and (3) the audits are inaccurate in terms of amount because they are mere estimates which fail to take into account significant occurrences in the business of Lucky M[6].

That the Comptroller has not audited Debtors individually is irrelevant because the plain language of section 111.016(b) of the Texas Tax Code does not require an audit of a responsible individual before such person can be held liable for taxes owed by a corporation. The evidence indicates that if any persons are liable as responsible individuals for the taxes, penalties and interest owed by Lucky M under the Second Audit, those individuals must be Debtors. The court emphasizes that it does not pass judgment on whether or not Debtors do in fact meet the statutory definition as responsible individuals and are therefore liable as such. Rather, the court concludes that, on the evidence before it, any dispute as to Debtors' personal liability as responsible individuals for the amounts associated with the Second Audit does not rise to the level justifying departure from the general rule that disputed debts are included in the section 109(e) analysis.

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[5] As previously noted, the court need not consider the issue of Debtors' liability for the amounts claimed by the Comptroller pursuant to the First Audit in order to resolve this matter.

[6] Debtors' arguments concerning the accuracy of the audits will be discussed in greater detail in the court's consideration of whether the debts at issue are liquidated.

B. The Debts to the Comptroller are not Contingent

Although Debtors list the debts to the Comptroller in their schedules only as disputed, Debtors argued in their pleadings and at the October 21, 2004 hearing that the debts are in fact contingent. Debts which are contingent are not included in the analysis of a debtor's eligibility as a chapter 13 debtor. 11 U.S.C. § 109(e). Because the court is not confined to consideration of Debtors' schedules alone in determining Debtors' eligibility, analysis of whether the debts to the Comptroller are truly noncontingent is appropriate.

In *Mazzeo*, the Court of Appeals for the Second Circuit addressed the issue of whether a debt for taxes of a corporation owed by a debtor as a responsible individual constituted a contingent debt. The Court of Appeals stated:

> It is generally agreed that a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy.
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> ....
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> ... Nor by a future "event," do we refer to a judicial determination as to liability and relief, for a claim may be noncontingent even though it has not been reduced to judgment. . . . Although the creditor's ability to collect the sum due him may depend on adjudication, that does not make the debt itself contingent.
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> ....
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> ... The existence of a dispute, and the prerequisite that the claimant establish its claim by a given quantum of proof, mean only that the claim is disputed, not that it is "contingent" in the sense of depending on the occurrence of an extrinsic event.

> In the present case, Mazzeo's debt to the State was plainly noncontingent. Westfield withheld the requisite taxes from its employees' wages; Mazzeo, in signing the company's returns, certified that there were no payments or credits towards the indebtedness; and it is undisputed that the taxes were not paid. A responsible person's liability for unpaid withholding taxes is imposed by statute. Mazzeo, Westfield's president, either was a responsible person or he was not; but his status did not depend on any event that had not occurred prior to the time he filed his Chapter 13 petition. We conclude that his debt to the State, though disputed, was not contingent.

Mazzeo, 131 F.3d at 303-04 (citations omitted); *See also Pulliam*, 90 B.R. at 243 ("A debt is contingent if the debtor's liability depends upon an extrinsic event."). Although *Mazzeo* does not constitute binding precedent on the court, the issue presented in *Mazzeo* is virtually identical[7] to the case at bar and the court finds the reasoning of the Court of Appeals for the Second Circuit generally persuasive.[8]

The claims associated with the Second Audit relate to taxes for the period beginning in the fourth quarter of 1999 and ending September 30, 2002. Lucky M's liability for such taxes is not dependent on the occurrence of any future event. Thus, the debts to the Comptroller associated with the Second Audit became obligations well in

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[7] Though liability here is imposed by Texas law, as opposed to New York law, the key statutory formulations are virtually identical.

[8] The Court of Appeals for the Second Circuit expressed concern that to exclude from the section 109(e) analysis debts which a debtor disputes as to underlying liability or amount would "allow a debtor, simply by characterizing certain claims as disputed, to ensure his eligibility to proceed under Chapter 13 . . . ." *Mazzeo*, 131 F.3d at 305. The court does not share this concern, and notes that a *per se* rule requiring all disputed claims to be considered in the section 109(e) analysis would allow creditors, by the assertion of a claim in a large enough amount, to effectively deny debtors relief under chapter 13 even when the claim is without merit. A *per se* rule would also frustrate the Code policy, as evidenced by section 707(b), favoring a debtor's use of chapter 13, rather than liquidation under chapter 7, when the debtor is capable of making meaningful payments to creditors through a plan. Thus, the court believes the rule it established in *Hatzenbuehler* – that disputed debts, though generally included in the section 109(e) analysis, may be excluded when the dispute is such that the claimant must first establish a debtor's underlying liability to validate the claim – sufficiently protects against debtors scheduling and creditors asserting claims in a manner which abuses section 109(e) and furthers the Code policy of encouraging debtors with the ability to repay creditors to do so.

advance of Debtors' bankruptcy filing. As for Debtors' individual liability for payment of the debts, the evidence does not indicate that any judicial determination has been made regarding Debtors' status as responsible individuals under section 111.016(b) of the Texas Tax Code. But, the court agrees with *Mazzeo* that such a determination is irrelevant for purposes of determining whether the debts are contingent or noncontingent. *See also Pulliam*, 90 B.R. at 244 ("A claim is not contingent even if it is subject to a bona fide dispute."). As was the case in *Mazzeo*, Debtors either are responsible individuals or they are not. The answer to that question, however, is not dependent on any event that had not already occurred prior to Debtors' filing for bankruptcy, nor is there a dispute over the existence of the debts or the liability of responsible individuals to pay the debts. Thus, the court concludes that the debts for taxes, penalties and interest associated with the Second Audit are not contingent.

C. The Debts to the Comptroller are not Unliquidated

As with contingent debts, debts which are unliquidated are not included in the analysis of a debtor's eligibility as a chapter 13 debtor. 11 U.S.C. § 109(e). The Comptroller alleges that the debts at issue are liquidated. Debtors' schedules do not denominate the debts as unliquidated, but Debtors argued in their pleadings and at the October 21, 2004 hearing that, despite the description of the debts found in the schedules, the debts to the Comptroller are in fact unliquidated.

The status of a debt as liquidated or unliquidated relates to the amount of liability on a claim as opposed to the existence of liability, and a debt qualifies as liquidated if the amount due is fixed by operation of law or ascertainable by reference to an agreement or simple mathematical formula. *Mazzeo*, 131 F.3d at 304; *Verdunn*, 89 F.3d at 802;

Pulliam, 90 B.R. at 244; *In re Berenato*, 226 B.R. 819, 822 (Bankr. E.D. Pa. 1998). The Comptroller argues that the debts connected with the Second Audit are liquidated because the Second Audit was performed pursuant to the procedures set forth in Chapter 111 of the Texas Tax Code and was fully completed prior to Debtors' bankruptcy filing. Debtors, on the other hand, characterize the Second Audit as an inaccurate *estimate* and gross overstatement of the amounts due. Debtors cite authority for the proposition that tax claims based on mere estimates constitute unliquidated debts. *See In re Elrod*, 175 B.R. 5 (Bankr. N.D. Okla. 1995); *In re Belt*, 106 B.R. 553 (Bankr. N.D. Ind. 19889). The court need not consider whether claims for estimated taxes do or do not constitute unliquidated debts because the court cannot conclude, on the evidence before it, that the Comptroller's claims related to the Second Audit are estimates.

The Comptroller asserts that the Second Audit was conducted utilizing the available corporate books and records of Lucky M. Debtors do not dispute that the Comptroller reviewed Lucky M's books and records in conducting the Second Audit, nor do they claim that the Comptroller's review of such materials was incomplete. Debtors urge, however, that the Second Audit is an inaccurate estimate of taxes due because it fails to take into account loss of inventory and business due to significant occurrences, including numerous robberies and the closing of the store for repairs due to a fire. Debtors have presented no testimony or other evidence as to the dates and number of robberies or the amount of money and/or inventory lost as a result. Debtors have likewise presented no evidence regarding when the alleged fire occurred, how much inventory and business was lost as a result and how long the store remained closed for repairs. Furthermore, properly maintained corporate books and records would reflect the

occurrence of such events and their attendant economic impact. If the Comptroller should have but did not consider these events in conducting the Second Audit, the court cannot conclude that the blame for such failure is properly placed on the Comptroller as opposed to Debtors. Debtors rather assert defenses to the Comptroller's claim. As the court observed in *Hatzenbuehler*, where, as here, a debtor argues he or she can show a basis for reduction of the debt, the debt must nevertheless be counted at its face amount in determining eligibility under section 109(e). *Hatzenbuehler*, 282 B.R. at 832. Therefore, the court holds that the debts associated with the Second Audit are liquidated. *See Verdunn*, 89 F.3d at 803 (finding tax debt liquidated because amount of debtor's liability was easily ascertainable in that it was computed by the IRS using fixed legal standards established by the tax code); *In re Hounsom*, 294 B.R. 399, 401 (Bankr. M.D. Fla. 2003) (finding IRS tax debt liquidated where it was computed using fixed legal standards established in the tax code).

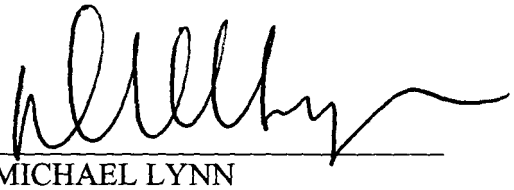
III. Conclusion

The unsecured priority debts associated with the Second Audit, though disputed as to liability and amount, are neither contingent nor unliquidated and must be included in the determination of Debtors' eligibility as chapter 13 debtors under section 109(e) of the Code. The court has been provided with two figures for the amount of debt associated with the Second Audit: Debtors' schedules list the amount at $248,678.20 and the Comptroller's proof of claim lists the amount at $265,902.80. Regardless of which figure is utilized, the total amount of Debtors' unsecured debt exceeds $307,675.00 when either figure is added to the total amount of unsecured nonpriority debts scheduled by

Debtors.[9] Debtors are thus ineligible to be debtors in a case under chapter 13 of the Code.

IT IS THEREFORE ORDERED that Debtors shall have ten days from the date of entry of this memorandum opinion and order to convert their bankruptcy case to another chapter of the Code. If Debtors do not convert their bankruptcy case within such time, the Comptroller's Motion shall be GRANTED and Debtor's bankruptcy case DISMISSED.

Signed this the 29 day of November, 2004.



DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

[9] Debtors allege that the amount of unsecured nonpriority debt scheduled is overstated due to the lack of certainty regarding the universe of claims against Debtors at the time the schedules were prepared. In support of this contention, Debtors point to the fact that the claims register in their case reflects a total of only $81,759.12 in unsecured nonpriority claims filed against Debtors. The court sees no basis, however, to utilize a figure for unsecured nonpriority debts other than that reflected in Debtors' schedules and notes that even if the court were to look to the claims register, Debtors' total amount of unsecured debt would still exceed the section 109(e) cap.