

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

IN RE: SAMMIE WILSON

CASE NO. 9700531JEE

SAMMIE WILSON

PLAINTIFF

VS.

ADVERSARY NO. 9700066JEE

MISSISSIPPI STATE TAX COMMISSION

DEFENDANT

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United States Trustee

MEMORANDUM OPINION

This adversary proceeding is before the Court on the *Motion for Summary Judgment* of the Mississippi State Tax Commission ("MSTC"). MSTC contends that this Court lacks jurisdiction because it has not waived its sovereign immunity. After considering the motion, MSTC's brief in support of the motion, and the response of Sammie Wilson ("Debtor"), along with the pleadings filed in this adversary proceeding, the Court holds that it lacks jurisdiction over the MSTC and that this adversary proceeding should be dismissed. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 31, 1997. The MSTC never filed a claim in this bankruptcy proceeding. On March 20, 1997, the Debtor commenced this adversary proceeding, seeking a judgment that state tax liens which have existed for more than three years be deemed dischargeable by this Court.¹

On April 16, 1997, the MSTC filed its *Motion for Summary Judgment* contending that this Court did not have jurisdiction over the MSTC because it failed to waive its sovereign immunity. Thereafter, this Court entered an Order of Certification pursuant to 28 U.S.C. § 2403(a) and Federal Rule of Bankruptcy Procedure 7024(c) allowing the United States to intervene because the constitutionality of an act of Congress affecting the public interest was placed in issue by the MSTC in its *Motion for Summary Judgment*, but the United States did not intervene.

CONCLUSIONS OF LAW

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).

Motions contesting the jurisdiction of a court are more appropriately treated as motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b) rather than motions for summary judgment. See Southeast Bank, N.A. v. Gold Coast Graphics Group Partners, 149 F.R.D. 681 (S.D. Fla. 1993)(recognizing that motion to dismiss rather than motion for summary judgment is the more appropriate vehicle for contesting jurisdiction); Meskers v. Birdsall Engineering, Inc., 1994 WL 288107 (E.D. Pa. 1994)(treating motion for summary judgment based on lack of jurisdiction as

¹ The dischargeability of taxes is governed by 11 U.S.C. §523(a)(1) although the Debtor did not cite this provision in his *Complaint*.

motion to dismiss); Demarest v. U.S., 718 F.2d 964 (9th Cir. 1983); Anderson v. Beneficial Mortgage Corporation, 699 F. Supp. 1075 (D. Del. 1988); Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757 (2d Cir. 1983). Accordingly, this Court will treat the MSTC's motion as a motion to dismiss.

In its *Motion and Memorandum Brief*, the MSTC contends that this Court does not have jurisdiction over it in this adversary proceeding because it failed to waive its sovereign immunity.

11 U.S.C. § 106(a) of the Bankruptcy Code² provides, in part, as follows:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

11 U.S.C. § 106(a).

The United States Court of Appeals for the Fifth Circuit recently addressed the constitutionality of § 106(a). In Department of Transportation and Development v. PNL Assert Management Company LLC (In re Fernandez), 123 F.3d 241 (5th Cir. 1997), the jurisdiction of a bankruptcy court over a state agency was challenged on the basis that § 106(a) was unconstitutional. Applying a two-part test of abrogation announced by the United States Supreme Court in Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the Fifth Circuit stated:

² Hereafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

...Section 106(a) of the Bankruptcy Code is unconstitutional. Congress cannot locate the authority claimed here to abrogate sovereign immunity in either the Bankruptcy Clause or in Section 5 of the Fourteenth Amendment.

Fernandez, 123 F.2d at 246. Similarly, other courts have found that the Bankruptcy Clause of the United States Constitution does not authorize Congress to abrogate state sovereign immunity under § 106(a) and have declared § 106(a) unconstitutional. See In re Creative Goldsmiths of Washington, D.C., Inc., 119 F.3d 1140 (4th Cir. 1997); In re Sacred Heart Hosp. of Norristown, 204 B.R. 132 (E.D. Pa. 1997); In re NVR L.P., 206 B.R. 831 (Bankr. E.D. Va. 1997); In re York-Hannover Devs., Inc., 201 B.R. 137 (Bankr. E.D.N.C. 1996); In re Martinez, 196 B.R. 225 (D. Puerto Rico 1996).

Based on the foregoing and finding no waiver of sovereign immunity by the MSTC, this Court holds that it does not have jurisdiction over the MSTC and that this adversary proceeding should be dismissed. A separate final judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 19th day of December, 1997.


UNITED STATES BANKRUPTCY JUDGE

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IN RE: SAMMIE WILSON

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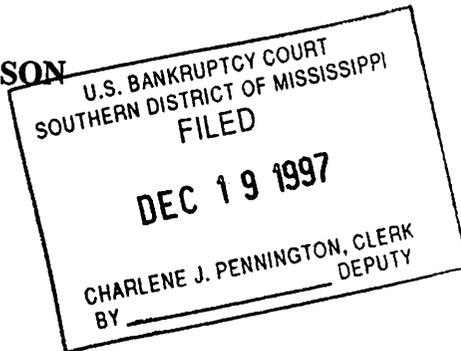
PLAINTIFF

VS.

ADVERSARY NO. 9700066JEE

MISSISSIPPI STATE TAX COMMISSION

DEFENDANT



ORDER

Before the Court for its consideration is the *Motion for Summary Judgment* of the Mississippi State Tax Commission. In accordance with the Court's opinion dated contemporaneously herewith, the *Motion for Summary Judgment* should be treated as a motion to dismiss for lack of jurisdiction and the Court finds that the motion is well taken and should be granted.

IT IS HEREBY ORDERED AND ADJUDGED that this adversary proceeding is dismissed.

SO ORDERED, this the 19TH day of December, 1997.


UNITED STATES BANKRUPTCY JUDGE