BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
SAM KATZ)

Appearances:

For Appellant: Lester W. Roth and Peery Price, Attorneys

For Respondent: Frank M. Keesling, Franchise Tax Counsel; Clyde Bondeson, Senior Franchise Tax Auditor

O P I N I O N

This appeal is made pursuant to Section 19 of the Personal Income Tax Act of 1935 (Chapter 329, Statutes of 1935, as amends from the action of the Franchise Tax Commissioner in overruling the protest of Sam Katz to the Commissioner's proposed assessment of additional income tax in the amount of $605.27 for the year ended December 31, 1935.

The proposed additional tax arises from the disallowance by the Commissioner of the deduction claimed by the Appellant in his return of income for the year ended December 31, 1935, of the amount of $11,500 as a bad debt. The debt arose from the loan by Appellant on or about December 11, 1933, of the sum of $11,500 to one John Zanft, who gave Appellant his promissory note, payable on demand, in evidence of the obligation. In the early part of the year 1934, after advising Appellant of his intended action and of his intention nevertheless to pay the obligation in full, Zanft filed a voluntary petition in bankruptcy in the State of New York, listing among his liabilities the said obligation upon which nothing had been paid. Prior to receiving his discharge in bankruptcy in the latter part of the year 1934 and thereafter, Zanft on several occasion: made certain statements to Appellant respecting the payment of the amount of the obligation. It is. upon the basis of these statements and the fact that Zanft intended to enter the agency business in Los Angeles and did in fact enter that business with an excellent chance of success that the Appellant contends that the obligation did not become worthless in 1934 at the time of Zanft's discharge in bankruptcy and that Appellan acted reasonably in ascertaining that it became worthless and charging it off in 1935 when it appear that due to the failure of his agency business Zanft would not be able to meet the obligation.

To avoid the effect of the discharge in bankruptcy in 1934, the Appellant relies upon the principle that a promise to pay a debt listed by a bankrupt in his schedules is valid and enforceable if made after the filing of a petition in

bankruptcy and either before or after a discharge and that such promise requires no new consideration and need not be in writing Lambert v. Schmalz (1897) 118 Cal. 33, 50 Pac. 13; Mutual Reserve Fund Life Association v. Beatty (C.C.A. 9th, 1899) 93 Fed. 747; Remington on Bankruptcy (4th ed.) Sec. 3500, 3502, 3503, 3507. At the hearing of the appeal the Appellant directed our attention to his verified petition which was said to contain all the facts material to the issues presented herein. The statements made by Zanft after the filing of his petition in bankruptcy, as set forth in the Appellant's verified petition, and upon which the Appellant predicates a promise to pay the debt, are as follows:

> ". ..that if Appellant would remain patient that he (Zanft) would see that Appellant was paid the full amount of said obligation." (Page 5)
>
> ". ..said Zanft continually reassured Appellant of his desire and willingness to pay said obligation..." (Page 5)
>
> ". ..said Zanft reiterating at the time of making said payment of $500 that it was still his intention to pay the balance of said obligation whenever he was able to do so." (Page 6)

To constitute a waiver of the discharge *in* bankruptcy the new promise must be clear, distinct, certain and unequivocal. Lambert v. Schmalz, supra; Remington on Bankruptcy (4th ed.) Sec. 3505. The mere acknowledgement of the debt or the expression of a hope, desire, expectation, willingness or intention to pay is not, however, sufficient to revive it. Baker v. Hughes (1937) 56 Ohio App. 53, 10 N.E. (2d) 20; Roberts v. Stekoll (1934) 168 Okla. 229, 32 P. (2d) 713; Neblett v. Armstrong (Tex. Corn. App 1930) 26 S.W. (2d) 166, 75 A.L.R. 577; Vachon v. Ditz (1921) 114 Wash. 11, 194 Pac. 545; Calendonian Coal Co. v. Young (1917) 22 N.M. 675, 167 Pac. 274. The making of a partial payment on the debt is likewise not sufficient to revive the debt or to operate as a waiver of the discharge. Baker v. Hughes, supra; Alper v. Republic Inv. Co. (1936) F. (2d) 619; Roberts v. Stekoll, supra; Vachon v. Ditz, supra.

The evidence submitted by the Appellant as to the statement of Zanft respecting the payment of the obligation in question does not, in our opinion, establish a promise to pay that obligation within the meaning of the principle necessarily relied upon by the Appellant. The second and third statements of Zanft above quoted clearly indicate only an intention, desire or willingness to pay the obligation. The first statement while not phrased directly in terms of intention, desire or willingness to pay, as are the others, is not, we believe, properly to be considered as conveying a definite promise to pay the obligation.

We have concluded, accordingly, that the statements made by Zanft, constitute the expression of a desire or intention to

pay rather than a clear, distinct, certain and unequivocal promise to pay. Zanft's legal liability in the matter having been terminated by his discharge in bankruptcy in 1934 and there being no enforceable promise or obligation on his part to pay any amount to the Appellant after the date of the discharge, the Appellant could not reasonably ascertain that the indebtedness became worthless in 1935 and include the amou: thereof as a deduction in his return of income for that year. The action of the Commissioner should, therefore, be sustained.

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the action of Hon. Chas. J. McColgan, Franchise Tax Commissioner, in overruling the protest of Sam Katz to a proposed assessment of additional tax in the amount of $605.27 for the year ended December 31, 1935, pursuant to the Personal Income Tax Act (Chapter 329, Statutes of 1935, as amended) be and the same is hereby sustained.

Done at Sacramento, California, this 24th day of May, 1938, by the State Board of Equalization.

R, E. Collins, Chairman
Fred E. Stewart, Member
Wm. G. Bonelli, Member

ATTEST: Dixwell L. Pierce, Secretary