

On Individual Repayment in Personal Bankruptcy

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Abstract: *The repayment of debts is the obligation of the debtor, but the repayment of individual debts before bankruptcy may be deemed to be revocable. Its purpose is to protect the debtor from malicious transfer of property in bankruptcy, and avoid the creditor's right to equal compensation due to the debtor's biased liquidation behavior. At the same time, however, some seemingly revocable acts and repayment acts in the danger period can be exempted from revocation. If the debt is repaid, the debtor's property will benefit and the debtor's life will be necessary. The situation that conforms to the basic principles and requirements of the personal bankruptcy legislation system is a supplement to the personal bankruptcy cancellation system, so as to achieve the balance of interests between individual creditors and other creditors who have not yet been repaid, and ensure that all creditors can pay their debts fairly.*

Keywords: *Individual settlement; Bankruptcy danger period; Equal compensation; Property benefit*

1. Introduction

On November 8, 2021, Shenzhen Intermediate People's Court of Guangdong Province concluded the first personal bankruptcy liquidation case in the mainland of China and declared the debtor bankrupt. After the debtor is declared bankrupt, it will enter a 3-year bankruptcy exemption inspection period. After the expiration of the exemption inspection period, the remaining debts can be released after the court passes the trial. Based on this background, the theoretical focus is no longer on whether the personal bankruptcy exemption system should be built, but on how to reasonably limit the application of personal bankruptcy exemption. Although the academic community has set up an overall framework for the personal bankruptcy exemption system, the balance concept of the bankruptcy exemption system is still vague, and the extent of the limitation of personal bankruptcy exemption is still controversial^[1]. Therefore, this paper attempts to further sort out the balance concept of the personal bankruptcy exemption system on the basis of the existing research and in combination with the evolution process of the personal bankruptcy exemption system in various countries in the world, and appropriately design the norms of personal bankruptcy exemption for reference of China's personal bankruptcy legislation.

2. Principle of personal economic withdrawal

2.1. Personal Bankruptcy Principle

The personal bankruptcy system has not been fully established in China, and the relevant legislation is also lacking, but the bankruptcy situation is indeed common. In 2019, the Reform Plan for Accelerating the Improvement of the Exit System of Market Subjects clearly put forward China's proposal on establishing an individual bankruptcy system^[2]. In China's cultural tradition of repaying debts, personal bankruptcy is often difficult to understand. It can still be understood that the bankruptcy creditor's right of the company is extinguished, and its legal person right is extinguished, which is naturally non recourse. However, after personal bankruptcy, the creditor cannot recover the remaining debt after partial repayment, which is really difficult for the public to accept immediately. Therefore, the Personal Bankruptcy Regulations of Shenzhen Special Economic Zone has been given priority in the Shenzhen Special Economic Zone. As for why we give priority to the trial in Shenzhen, I think it has something to do with the huge size of individual businesses in Shenzhen. The bankruptcy risk of individual businesses, partnerships and sole proprietorships is weaker than the anti risk ability of enterprises.

Prior to the implementation of the Personal Bankruptcy Regulations of Shenzhen Special Economic

Zone, there were no clear provisions on the procedure, conditions and content of personal bankruptcy in the legal provisions of China, which were just mixed in the legal interpretations. However, personal bankruptcy happens from time to time. Whenever an individual becomes insolvent in business or consumption, or even becomes insolvent and unable to repay. The traditional theory of "repaying debts is natural" is deeply rooted. As a result, even though the debtor has been unable to repay the debt, it is still being charged[3]. There may even be outsourcing companies that collect debts violently, which seriously affects the basic survival and personal safety of debtors. Many debtors are unable to repay, and because of the lack of exit mechanism, they are unable to get rid of the plight of high debts, and finally lose the hope of life. Finally, the family was ruined. It is precisely because of this that many ordinary people do not dare to participate in the market to start their own businesses, fearing that the final failure will lead to no turning back. As a result, the Trial Personal Bankruptcy Regulations will have a place of use and provide experience for the subsequent personal bankruptcy system.

2.2. Protection of creditor's rights

In essence, personal bankruptcy is to liquidate, reorganize or reconcile the creditor's rights and debts of creditors, debtors and other interested parties with existing or future available assets under the intervention of law. To achieve that all parties can reduce the loss to the minimum, and can guarantee the minimum living security of the debtor. The corresponding legal systems such as debt exemption encourage the debtor who fails to start a business temporarily to reintegrate into the society. The main feature of individual bankruptcy liquidation is different from the general debt liquidation procedure, which is that the debtor pays off the legitimate claims of all creditors simultaneously and fairly through collective procedures when paying off the claims.

Personal property shall be distributed according to other properties or distribution plans except the property guaranteed by the minimum living standard (free property). A "exemption period of investigation" similar to the income repayment of creditor's rights within a few years after the bankruptcy of the United States emerged[4]. However, in China, after the expiration of the exemption period, the debtor will be exempted from other debts and will not have to repay them. It can avoid the value destruction in the property disposal, and also reduce the possibility of the individual debtor being unable to repay the debt and falling into a desperate situation, thus committing a crime. At the same time, it can also promote individuals to obtain economic regeneration through the bankruptcy exemption system, and it can help social and economic recovery after re entering the society.

2.3. Avoid biased liquidation

To exclude the bankrupt debtor from transferring, hiding or dispersing personal property before bankruptcy, and to safeguard the legitimate rights and interests of other creditors. The debtor shall be prohibited from paying off individual creditors separately before declaring bankruptcy, resulting in unequal payment of creditor's rights. Or the debtor colludes with others to transfer property, so as to realize fair distribution of the same creditor's rights while personal bankruptcy liquidation. At this time, there will be a situation of "biased liquidation", which means that before the commencement of the individual withdrawal procedure, the debtor's behavior makes the status of individual claims superior to the same claims of other creditors, resulting in that creditors who enjoy equal claims cannot receive fair compensation. Therefore, the debtor's "biased liquidation" must be prohibited when checking the debtor's property. In order to maintain the equality of all creditors, it is necessary to avoid the debtor from paying off the claims of some creditors before bankruptcy. Because such behavior of paying off part of the creditor's rights before bankruptcy is a violation of the equal creditor's rights of other equal creditors. Therefore, we should pay attention to distinguish the situation of such individual settlement when legislating. In order to protect the legitimate claims of all creditors.

3. The Boundary of Personal Bankruptcy Determination

The issue of the bankruptcy boundary of personal bankruptcy can also be said to be the premise for the debtor to file a bankruptcy application and start bankruptcy proceedings. It should include all kinds of realistic situations that the assets are insufficient due to production, operation and living consumption, and the due debts cannot be paid off in a timely manner or are determined to be unable to pay off all debts. In case of the above circumstances, the debtor may apply to the court for bankruptcy. A more straightforward provision is the Bankruptcy Regulations on a trial basis in Shenzhen, which stipulates that the reasons for applying for bankruptcy can be production, operation and living

consumption. In Shenzhen Special Zone, there are many self-employed businesses and small and micro enterprises, which is undoubtedly a good signal for entrepreneurs who actively participate in the market and are brave in innovation. Life consumption is another reason for determining bankruptcy, but should the restriction on life consumption bankruptcy be in a serious state at this time[5]. We might as well imagine that a debtor who is dishonest and unkind and leads to excessive consumption and debt in order to pursue a luxurious life can also apply for personal bankruptcy through a seemingly fair legal process, so as to cancel a large number of personal debts after a period of time, which obviously does not conform to the original intention of the personal bankruptcy system. It should be carefully identified in practice.

3.1. Bankruptcy caused by production and operation

In the study of individual bankruptcy applications in the United States and Hong Kong, we can find that a debtor is actively engaged in market innovation and has the courage to start a new business. However, due to the wrong direction of entrepreneurship, the entrepreneur lacks experience and execution ability. In the process of entrepreneurship, the capital chain was broken, and policy changes in market laws and regulations led to the inability of entrepreneurs to maintain their normal production and operation. Finally, all the assets of the entrepreneur cannot pay off all the debts. At the same time, we should also recognize that the operational risks of sole proprietorship enterprises and individual businesses are unavoidable, and even weaker than those of large enterprises. Therefore, when the enterprise is in debt default, it is more likely to be unable to repay the expected debt. The debt of an unincorporated enterprise essentially becomes the personal debt of an entrepreneur[6]. The credit of small and medium-sized enterprises is unstable, and it is common for shareholders or actual controllers to provide personal joint guarantee for enterprise loans. The debt caused by entrepreneurial failure has become a huge burden for entrepreneurs and their families. It may even live under its shadow for a lifetime. Therefore, it is in line with its legislative basis to include the debts caused by production and operation into the content of personal bankruptcy.

At this time, a new problem arises. According to the principle of personal bankruptcy legislation, the personal bankruptcy system is formulated to protect good and honest entrepreneurs to actively participate in entrepreneurship, encourage them to go out of failure and invest in society, and continue to create greater wealth[7]. However, if some entrepreneurs use personal bankruptcy as an excuse to escape debts, they will lend freely and squander their enterprise property in the process of entrepreneurship. Since the managers of the enterprise are reckless and the enterprise is on the verge of bankruptcy due to extravagance and waste, should the entrepreneurs at this time be included in the "production and operation" difficulties that cause the property to be difficult to maintain the development of the enterprise, and the debt is too much to repay the debts? And pay off the debts of individuals after the cause of bankruptcy arises. I believe that personal bankruptcy should not be the reason and excuse for avoiding debts, but the opportunity for an honest and kind entrepreneur to start a new life. Then, what should be prohibited for the personal behaviors of the enterprise managers and responsible persons and the behaviors implemented on behalf of the enterprise in the production and operation process. In the subsequent identification after the bankruptcy application, it is still necessary to accumulate experience in practice whether the malicious debt is exempted or not.

3.2. Personal consumption leads to bankruptcy

In recent years, the situation of consumer credit exists in a large number of young and middle-aged people, and the total debt of credit debt groups is also increasing. The total amount of credit overdue for half a year was 89.22 billion yuan, an increase of 6.39% month on month, accounting for 1.12% of the credit balance payable by credit cards. In particular, the consumption culture of the young generation in China tends to be obvious. According to the data, young and middle-aged people are more inclined to credit consumption[8]. At the same time, there is a considerable volume of consumption ahead. The relationship between credit and debt is obvious: the rapid expansion of credit means the rapid growth of debt. The use of credit card consumption not only promotes our national economy, but also brings excessive debt to consumers. If the debtor pays off individual debts in order to avoid other debts, at this time, due to the huge debt of the consumer himself, he will pay part of the debt by colluding with some debtors or close relatives, and after bankruptcy, the debtor or close relatives will return part of the debt, making him still have a large amount of property for consumption. At this time, bankruptcy can not be said to be set up for the good and honest consumers to invest in a new life again. As a result, the settlement of such individual debts will undoubtedly cause damage to

the legitimate claims of other debtors.

In addition, we can also find another problem, that is, for the consumption of goods purchased by living consumption, we can recognize that it belongs to the debt of personal bankruptcy category, so should the expenditure that is somewhat vague whether it belongs to consumer restriction be in the same liquidation status as the ordinary consumption expenditure? For example, the education expenditure of students is not a consumption behavior in the Consumer Protection Law in essence. Naturally, the relationship between students and schools should not be a consumer relationship to buy or sell or provide services. In addition, whether the medical expenditure, as another major item of national expenditure, should be classified as consumption expenditure, and whether it should be in the same position as ordinary creditor's rights. The creditor's rights and debts of patients and hospitals involve personal relations, so it is impossible to simply equate them with ordinary creditor's rights and debts that do not involve personal relations[9]. Then this kind of creditor's right should have the priority to be repaid. At this time, even if it is paid six months before bankruptcy, it should not be deemed as individual settlement

3.3. Time limit of individual settlement

The act of individual repayment is a legally revocable act, at which time the public power is expanded. However, the mine managers of public power are bound to be limited, because any expansion of public power is a violation of private rights. In judicial practice, on the one hand, we need to use public power to restrict private rights, and on the other hand, we need to lock public power into the prison of the system. Otherwise, public power will only become a weapon against private rights rather than a tool to protect them. The time limit for cancellation of individual settlement shall be determined by the people's court. For example, in Article 41 of the Personal Bankruptcy Regulations, the six month limit for ordinary creditors and the two-year limit for close relatives to pay off debts are stipulated. Its purpose is to limit the actions of individuals in certain periods of time before bankruptcy to damage the common interests of creditors, to achieve the fair payment of creditor's rights, and to reflect the principle of equal rights and equal protection. At the present stage, the bankruptcy legislation in China is similar to that in most foreign countries,

During the danger period of bankruptcy, the debtor determines that the repayment of individual creditors is revocable, and gives the administrator the right to apply to the court for its revocation. It establishes the general rule that the individual liquidation behavior in the critical period of bankruptcy should be canceled. As a result, the law makers, on the basis of distinguishing whether the debtor's repayment behavior has treated the same creditor's rights differently, have stipulated different revocable periods for repaying ordinary creditors' debts or close relatives' debts for two years within six months from the acceptance of the bankruptcy application. In terms of personal bankruptcy, according to the Personal Bankruptcy Ordinance temporarily implemented in Shenzhen, the risk period of bankruptcy is not much different from that of enterprise bankruptcy. It only proposed that the debtor should pay off individual debts to relatives and interested parties within two years before bankruptcy. The administrator has the right to revoke it to the court. However, the exception shall be where the individual repayment benefits the debtor's property or is necessary for the debtor's normal life. Except for the above proviso, the liquidation within the danger period of bankruptcy or within the time limit of six months or two years can be revoked. Its purpose is to prevent the debtor's property interests from decreasing due to the debtor's individual liquidation behavior, which leads to unfair liquidation treatment for the legal claims of other creditors when distributing the bankruptcy property.

Therefore, in order to protect the legitimate rights and interests of all creditors, we believe that this act of repaying creditor's rights violates equality and fairness, and it may be the above-mentioned act of repaying creditor's rights for the purpose of transferring property. Therefore, the law restricts the above-mentioned acts considered to be revocable. The repayment of debts other than the above time limit shall not be deemed as individual repayment of debts. Because the debt repayment beyond the above time can only be recognized as normal production and operation or living consumption, it should not be within the scope of cancellation. On the one hand, limiting the revocable right of individual repayment within this time limit is a strict restriction on public rights, on the other hand, it can reasonably protect the legitimate claims of all creditors.

4. Determination of Irrevocable Circumstances

4.1. Benefit from debtor's property

The purpose of the administrator's application for cancellation of the liquidation behavior in the danger period is to protect the debtor's personal property from loss, so as to achieve fair and comprehensive liquidation among creditors. If the debtor's repayment will not reduce his personal property, it will not threaten the creditor's fair repayment, and it should not be a revocable act. From the perspective of common people's rational thinking, repaying the creditor's rights of individual debtors in the dangerous period near bankruptcy will reduce the total amount of property owned by the debtor, thus causing damage to the joint creditor's rights of creditors. But the facts are far more complicated than the legal provisions. Because life is extremely complicated. From a certain point of view, when individual repayment occurs, the debtor's property will not naturally decrease to a certain extent. For example, it is the debt of purchasing raw materials to maintain the debtor's production and operation, or the debt of paying for water and electricity in the production process, or the labor remuneration paid in the production process. In principle, such debt repayment is to protect the debtor's property or increase the debtor's property^[10]. It should be recognized that it is implemented in order to protect the common interests of all creditors from greater losses.

4.2. Avoid damage to the debtor's property

Therefore, in order to avoid greater losses, the debt repayment behavior is implemented. Even if it is implemented six months before the application for bankruptcy or the debt is paid to its close relatives after the reason for bankruptcy appears, it should not be considered as the loss of the debtor's property. It is a way to safeguard the common interests of all creditors and achieve higher economic benefits in order to obtain greater benefits. Thus, when the debt repayment for a single creditor within the time limit of individual repayment is beneficial to the possession or increase of the debtor's property, it is certainly conducive to protecting the legitimate claims of all creditors. At this time, the individual settlement cannot be revoked.

4.3. Living necessities of the debtor

Individual bankruptcy is different from enterprise bankruptcy. Once an enterprise legal person goes bankrupt, it will be clean from birth to extinction without leaving a trace. While natural person, as a "person", lives in this world and naturally needs to meet various conditions of his personal life. Once the basic survival of human beings is difficult to sustain, it is difficult to identify the significance of the existence of human beings as "people"^[11]. Therefore, even when the debtor is faced with the situation of bankruptcy, the property expended by his individual or family to maintain a basic life should not belong to a revocable act. Because the occurrence of its behavior is a normal survival demand behavior implemented by a person as a person. It is the requirement of the basic right of existence of human beings as human beings. It can be seen that when the debtor goes bankrupt, it provides necessary conditions and support for the basic material life and spiritual world development of the debtor and his family members.

5. Conclusion

The basic material life guarantee made by the debtor when raising children or supporting the elderly, as well as the children's education problems, the elderly's medical problems and other expenditures, certainly do not involve the revocation of the act. Because the debtor's right to retain human dignity should not be deprived. This is in line with human nature and the conscience of the public. It is also the embodiment of the promotion of human spirit and legislative connotation in the personal bankruptcy system.

In addition, if the debtor repays the creditor's rights of individual creditors, and the repayment is made within the risk period of bankruptcy. According to the relevant provisions of the Personal Bankruptcy Regulations, the individual liquidation six months before bankruptcy and the debt liquidation for close relatives within two years before bankruptcy should be revocable. Then there is the proviso except for the debtor's normal life necessity. On the surface, it has nothing to do with whether it is necessary for the creditor to pay off the creditor's rights. It should also be within the scope that the administrator can apply for and the court finds revocable. But in fact, this is not the case. The

original intention of the bankruptcy law is to enable the honest debtor to maintain a basic life after insolvency and have the right to continue to develop. However, if the property that belongs to the creditor and is needed for basic life is recovered, it will undoubtedly be a devastating blow to the creditor who was originally repaid. This obviously goes against the original intention of personal bankruptcy legislation. But at the same time, we need to pay attention to the situation that the creditor and debtor push the boat along the river or even collude with each other to transfer property maliciously. Life is more complex, so when judicial practice is recognized, the judiciary still needs to pay more attention.

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