In the United States Bankruptcy Court

for the Northern District of Iowa

JERRY LEE KLEINMEYER *Debtor(s).*	Bankruptcy No. L92-01089C Chapter 7

ORDER RE: OBJECTION TO EXEMPTIONS

The matter before the court is an objection by the trustee to Debtor's claim of exemption in his 401(k) plan. The matter came on for hearing on September 17, 1992 in Cedar Rapids, Iowa. After the hearing, the parties jointly submitted a copy of the plan document for consideration in addition to the exhibits admitted at the hearing. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FINDINGS OF FACT

Debtor is employed by Hawkeye International, Inc. in Cedar Rapids, Iowa (HAWKEYE). Hawkeye participates in the National Automobile Dealers and Associates Retirement Trust Salary Deferral 401(k) Master Plan and Trust Agreement (PLAN and TRUST AGREEMENT). Hawkeye provides each employee an employee handbook describing the terms of the Plan (Exhibit A). The handbook is supplemented by an insert titled "Special Provisions of Your Plan", which provides particular details of the Plan as offered by Hawkeye.

Contributions to the Plan are classified as either "Employer Contributions" or "Employee Contributions." Plan secs. 1.19, 1.21; handbook pp. 6-7. Hawkeye offers its employees three Employer Contribution accounts: (1) deferred cash contributions, (2) discretionary company contributions and (3) matching company contributions. Hawkeye also allows employees to make "voluntary contributions" to an Employee Contribution account. Special Provisions pp.1-2.

Deferred cash contributions are Employer Contributions that are required if an employee elects to participate in the salary deferral Plan. Plan secs. 1.13, 4.2. Matching company contributions are additional Employer Contributions made after an employee elects to make deferred cash contributions. Plan secs. 1.35, 4.1. Hawkeye requires employees to contribute two per cent of their salaries to participate in the Plan. Hawkeye contributes 50 per cent of the deferred cash contribution as a matching company contribution. Hawkeye also contributes discretionary company contributions, which are a type of profit sharing contribution. Special Provisions pp. 1, 2.

Voluntary contributions are Employee Contributions. Plan secs. 1.19, 1.58. Voluntary contributions are non-deductible contributions made with after-tax dollars. Plan sec. 4.6; Special Provisions p. 1.

Hawkeye provides its employees with a statement of accounts under the Plan. Trustee submitted at the hearing a copy of an employee statement showing the value of Debtor's accounts as of December 30, 1991 (Exhibit 1). The employee statement uses one- or two-word descriptions of the accounts rather than the more lengthy titles used in the Plan and employee handbook. The court finds that the descriptions used in the employee statement correspond with the account titles in the Plan and handbook as follows:

Statement Term	Plan Term
Employer:	Employer contribution accounts
Profit Shar.	Discretionary company contributions
401(k) Employer	Matching company contributions

401(k) Employee	Deferred cash contributions
Employee:	Employee contribution accounts
Required	Mandatory contribution
Voluntary	Voluntary contributions

The employee statement indicates that all amounts in Debtor's accounts are attributable to Employer Contributions and earnings thereon. Debtor has made no voluntary contributions.

An employee may make withdrawals of voluntary contributions at any time upon written request. Plan sec. 9.6. An employee ordinarily may receive distributions from Employer Contributions only upon retirement or death; however, the Plan also allows such distributions upon attainment of age 59 or for financial hardship. Plan secs. 9.1, 9.8.

Employers intend the Plan to operate only if the Plan is determined :o be a qualified employee pension benefit plan under ERISA and Internal Revenue Code § 401(a). Plan secs. 12.8, 12.10; trust agreement sec. 2.1. As of June 16, 1990, the Internal Revenue Service had approved the form of the Plan under § 401 of the Internal Revenue Code and had determined that the trust under the Plan was exempt from income tax under Internal Revenue Code § 501(a). Plan p. 24. The plan contains anti-alienation language as required by ERISA and Internal Revenue Code § 401(a). Plan sec. 12.2.

DISCUSSION

Debtor argues that the plan is a qualified 401(k) plan covered by ERISA, and therefore not property of the estate because of the recent U. S. Supreme Court decision in Patterson v. Shumate, 112 S.Ct. 2242 (1992). The trustee responds that the Plan is possibly not "ERISA-qualified" in its entirety and to that extent is property of the estate. He also argues that Debtor should not be allowed to claim his interest in the 401(k) plan as exempt because the plan appears in part not to be a true "pension plan" and allows withdrawal of voluntary contributions at any time. The trustee bears the initial burden of proving that Debtor has an interest in the Plan. Debtor then has the burden of proving by a preponderance of the evidence that the Plan comes within an exception to the definition of property of the estate. Finally, the trustee must prove the property is not exempt. Fed.R.Bankr.P. 4003(c)

Bankruptcy Code § 541 defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(c)(2) provides an exception to this otherwise broad definition:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

The Court in Patterson held that "applicable nonbankruptcy law" in § 541(c)(2) refers to "any relevant nonbankruptcy law," and that the ERISA anti-alienation language in the plan at issue was an enforceable transfer restriction preventing the plan from becoming property of the estate. Patterson, 112 S.Ct. at 2247-48.

The parties agree that Debtor has an interest in the Plan; Debtor listed the property on his bankruptcy schedules. However, Debtor has shown by a preponderance of the evidence that the Plan is within the exception of § 541(c) (2). A 401(k) plan is covered by ERISA and is eligible to qualify for favorable tax treatment as a qualified employer plan. In re Jones, 142 B.R. 950 (Bankr. W.D). Wash. 1992); 29 U.S.C. § 1003(a); 26 U.S.C. 401(k)(1). The anti-alienation language in the Plan is required both by ERISA and the Internal Revenue Code for tax-qualified plans, making the transfer restriction enforceable under applicable nonbankruptcy law. 29 U.S.C. § 1056(d); 26 U.S.C. § 401(a)(13). The Internal Revenue Service has approved the form of the Plan under Internal Revenue Code § 401(a). The Plan trust is tax-exempt under Internal Revenue Code § 501 (a), a characteristic of qualified employer plans. 26 U.S.C. § 72(p)(4) .

The trustee argues that the voluntary contributions portion of the Plan may not be a tax-qualified ERISA plan and that the transfer restriction as to -voluntary contributions is not enforceable. Caselaw suggests that plans involving after-tax contributions as part of a salary deferral plan are also qualified plans subject to ERISA. See In re Jones, 142 B.R. 950 (Bankr. W.D. Wash. 1992) (finding plan allowing both pre-tax and post-tax contributions not property of the estate); In re Brown, 130 B.R. 304 (Bankr. E.D. Mo. 1991) (pre-Patterson case, salary deferral plan also allowed voluntary after-tax contributions). However, even assuming for argument that the voluntary contributions portion of the Plan is not a qualified plan, the trustee has offered no evidence or authority that combining a non-qualified plan with a qualified plan destroys the tax qualification and ERISA status of the entire master plan.

The court finds it unnecessary to determine the precise nature and tax status of voluntary contributions under the Plan. "Voluntary contributions" is a defined term that does not refer to the election to participate in the salary deferral Plan. Debtor has made no voluntary contributions. All contributions to his accounts have been Employer Contributions. The $700.00 at issue here is the value of Debtor's deferred cash contribution account. This amount is the required two per cent salary deferral that makes up the basic component of a 401(k) plan.

Debtor has shown by a preponderance of the evidence that his interest in Hawkeye's Plan is part of a tax-qualified 401(k) plan covered by ERISA, excepted from property of the estate by 11 U.S.C. § 541(c)(2). The anti-alienation language in the Plan is enforceable under ERISA and the Internal Revenue Code. Debtor's interest in the Plan is not property of the estate. It is unnecessary to consider whether the property is exempt.

ORDER

IT IS ORDERED that the trustee's objection to exemptions is overruled.

SO ORDERED ON THIS 30th DAY OF OCTOBER, 1992.

William L. Edmonds
Chief Bankruptcy Judge