

In the United States Bankruptcy Court

for the Northern District of Iowa

MARLIN R. NICHOLS
DIANE L. NICHOLS

Bankruptcy No. L88-00954W

Debtor(s).

Chapter 13

RULING ON IRS' OBJECTION TO THE TRUSTEE'S FINAL REPORT AND REQUEST FOR ACCOUNTING AND DISGORGEMENT OF SALE PROCEEDS

On August 17, 1994, the above-captioned matter came on for hearing pursuant to assignment. Carol F. Dunbar appeared as the Trustee. Ana Maria Martel appeared on behalf of the objector, the Internal Revenue Service (IRS). This matter is before the Court on the IRS' Objection to the Trustee's Final Report and Request for Accounting and Disgorgement of Sale Proceeds, and Trustee's Response thereto. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

STATEMENT OF THE CASE

The IRS seeks to recover \$5,831.04 in proceeds from the sale of Debtors' house. On May 11, 1994, the Chapter 13 Trustee, Carol Dunbar, received \$6,404.71 from the sale of the house. The Trustee distributed these funds and the IRS now contests three payments made from these funds: \$1,206.00 to Debtors' attorney, Don E. Gottschalk; \$2,191.77 to the Iowa Department of Revenue; and \$2,433.27 to the Trustee, for a total of \$5,831.04. The IRS filed liens against Debtors' property for Debtors' postpetition income taxes. This filing, the IRS asserts, entitles the IRS claims to priority over the above-contested payments. Consequently, the IRS alleges that the contested payments were improperly distributed. It seeks recovery of the contested payments and requests disbursement to the IRS in accordance with its recorded tax liens.

The bankruptcy petition was filed June 16, 1988, and the Chapter 13 Plan confirmed on March 29, 1989. Debtors allegedly failed to pay federal income taxes for the years 1989-1993. For each delinquent year, the IRS filed a Notice of Federal Tax Lien (NFTL) with the Black Hawk County Clerk of Court. Consequently, the IRS now claims that its postpetition tax claims are secured by liens against all Debtors' property, including the house, and that the IRS' secured claims should have been satisfied in full prior to any disbursements for administrative expenses or priority claims (the three contested payments).

Trustee asserts that she paid the creditors according to the Chapter 13 Plan. She states that the IRS was not entitled to full payment for the postpetition tax claims due to its failure to file an amended proof of claim, thereby foregoing recognition and disbursement under the Plan. In addition, Trustee claims that she is entitled to the full trustee fee as an administrative expense, regardless of whether the IRS had a secured tax lien. She asserts the same result for Mr. Gottschalk's fees, which were paid pursuant to a court order. Trustee maintains that she was given \$6404.71 to disburse according to the

Plan and the disbursements she made satisfied obligations recognized under the Plan. The Trustee asserts the IRS' claims were disregarded because the IRS failed to file an amended proof of claim asserting a deficiency for its postpetition tax claims, thereby requesting payment under the terms of the Plan.

A hearing on the objection filed by the IRS was held on August 17, 1994, with arguments heard from both parties. The Court took the matter under advisement.

CONCLUSIONS OF LAW

The first issue is whether the IRS' filing of liens for postpetition taxes is invalid as a violation of the automatic stay provisions of 11 U.S.C. § 362(a). Upon filing a petition for bankruptcy, a debtor is protected from further collection efforts by creditors. The automatic stay, created by 11 U.S.C. § 362, demands the cessation of all collection activity by providing that the filing of a bankruptcy petition "operates as a stay." 11 U.S.C. § 362. Section 362(a) states in part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of -

(4) any act to create, perfect, or

enforce any lien against property

of the estate; . . .

11 U.S.C. § 362(a). Section 362(a) includes prohibition against the creation of a lien for postpetition tax claims. In re Reserves Dev. Corp., 78 B.R. 951, 958 (Bankr. W.D. Mo. 1986); In re Bellman Farms, Inc., 86 B.R. 1016, 1020 (Bankr. D.S.D. 1988); United States v. McPeck, 910 F.2d 509, 511 (8th Cir. 1990).

The IRS filed a Notice of Federal Tax Lien (NFTL) with the Black Hawk County Clerk of Court for each year Debtors' failed to pay postpetition federal income taxes. The IRS did not file a Motion to Lift Stay pursuant to § 362 prior to filing the NFTL's. A federal tax lien is automatically created once the IRS makes a demand for payment and the taxpayer fails to pay. 6 Collier Bankruptcy Practice Guide, ¶ 93.03[2][a] (Asa S. Herzog et al. eds., 1994). This lien attaches to all property of the taxpayer. Id. A federal tax lien is perfected by filing a public notice of lien as required by 26 U.S.C. § 6323(f). 2 David G. Epstein et al., Bankruptcy, § 6-62, at 139, n. 31 (1992). The Bankruptcy Code is clear that upon filing NFTLs, the IRS violated the automatic stay by perfecting liens against property of the Chapter 13 estate. In re Shields, 24 B.R. 219 (Bankr. S.D. Ohio 1982); U.S. v. Sayres, 43 B.R. 437, 439 (D.D.C. 1984). The automatic stay is violated even if no further affirmative action is required to perfect the lien. In re Parr Meadows Racing Ass'n, 880 F.2d 1540, 1545 (2d Cir. 1990); In re Ballantine Bros., Inc., 86 B.R. 198, 200-01 (Bankr. D. Neb. 1988).

The fact that the IRS is a governmental entity does not render the automatic stay inapplicable. In re Eisenberg, 7 B.R. 683, 687 (Bankr. E.D.N.Y. 1980). Congress used broad language, prohibiting "all entities," including "governmental unit[s]," from taking action against property of the estate during the pendency of the bankruptcy proceedings. 11 U.S.C. §§ 101(15), 362(a). See also Alliance R.R. Community Credit Union v. County of Box Butte, 503 N.W.2d 191, 199 (Neb. 1993); United States v. McPeck, 910 F.2d 509 (8th Cir. 1990).

The automatic stay of § 362(a) prohibits collection efforts against property of the estate. Sections 541 and 1306 of the Bankruptcy Code determine what constitutes property of the estate in a Chapter 13 case. Section 541 states that property of the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). After confirmation, the "estate consists of all property and wages necessary for the execution of the Chapter 13 Plan." Security Bank v. Neiman, 1 F.3d 687, 690 (8th Cir. 1993). The First Amendment to Chapter 13 Debtor's Plan provides that "the Debtor shall within the five years under the Plan, list and sell his residence . . . and shall apply such amounts as necessary to fully satisfy all priority claims, the allowed secured claims and 10% of the allowed unsecured claims." (First Amendment to Chapter 13 Debtor's Plan ¶ 3). As the Debtors' residence is "property . . . necessary for the execution of the Chapter 13 Plan," the residence is property of the Chapter 13 estate. Security Bank, 1 F.3d at 690; see also In re Truelove, No. 93-11170KC, slip op. at 2 (Bankr. N.D. Iowa May 26, 1994). The residence was property of the estate at the time the IRS filed the tax liens.

The distinction between property of the estate and property of the debtor is significant because the IRS is allowed to collect post-petition debts from Chapter 13 debtors by attaching or levying against property of the debtor, whereas the IRS is not allowed to collect against property of the estate. In re Markowicz, 150 B.R. 461, 462 (Bankr. D. Nev. 1993); In re Thompson, 142 B.R. 961, 964 (Bankr. D. Colo. 1992). Because the proceeds from the sale of the residence were to be used to fulfill obligations under the Chapter 13 Plan, the residence qualifies as property of the estate, and the filing of the tax liens by the IRS against the Debtors' residence violated the automatic stay.

Courts, in addressing consequences for violations of the automatic stay, have held, as a minimum, that postpetition tax liens may be declared null and the tax claims deemed unsecured. In re Pad Enters., Inc., 139 B.R. 516, 519 (Bankr. D. Or. 1992). "It is well-established that any action taken in violation of the automatic stay is void and without effect," Ellis v. Consolidated Diesel Elec. Corp., 894 F.2d 371, 372 (10th Cir. 1990). Here, the IRS liens are invalid as a violation of the automatic stay.

Although the IRS liens are invalid, the issue remains whether the filing of the tax liens might qualify as a proof of claim, thereby requiring the Chapter 13 Trustee to address the tax obligations under the Plan. The filing and allowance of postpetition claims are addressed by 11 U.S.C. § 1305 which states in part:

- (a) A proof of claim may be filed by any entity that holds a claim against the debtor -
 - (1) for taxes that become payable to a governmental unit while the case is pending; or . . .
- (b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. § 1305.

The filing of an amended proof of claim for postpetition taxes is necessary to receive recognition under the Chapter 13 Plan. See In re Wright, 66 B.R. 125, 127 (Bankr. D. Kan. 1984). In addition, Bankruptcy Rule 3001(d) states that "[i]f a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the proof of claim has been perfected." Fed.R.Bankr.P. 3001(d). A proof of claim is necessary to proclaim a secured interest, and the filing of an NFTL alone does not satisfy the proof of claim requirement.

An entity with a tax claim may elect to forego filing a proof of claim and wait until the Chapter 13 case is closed to collect from the debtor. In re Woodall, 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987); In re Hester, 63 B.R. 607, 610 (Bankr. E.D. Tenn. 1993); In re Busone, 71 B.R. 201, 206-06 (Bankr. E.D.N.Y. 1987); In re Pad Enters., Inc., 139 B.R. 516, 519 (Bankr. D. Or. 1992); In re Bisch, 159 B.R. 546, 549 (Bankr. 9th Cir. 1993); In re Matravers, 149 B.R. 204, 206 (Bankr. D. Utah 1993). Because the IRS failed to file an amended proof of claim, it must wait to satisfy its claim after the close of the Chapter 13 case.

Because of the NFTLs, the IRS received payments from the proceeds of the sale of house on approximately \$17,578.93 of its postpetition tax claims. The IRS' violation of the automatic stay could mandate disgorgement of these funds. Although the NFTLs filed by the IRS violate the automatic stay and fail to satisfy the proof of claim requirement, under 11 U.S.C. § 105, "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Although the IRS' liens are invalid as a violation of the automatic stay and it failed to file the required amended proof of claim, tax claims survive bankruptcy, and the IRS is entitled to eventual satisfaction of its claim for postpetition taxes.

This Court concludes, pursuant to the bankruptcy court's equitable powers under 11 U.S.C. § 105(a), that the most reasonable conclusion is to allow the IRS to retain the amounts it received for Debtors' postpetition tax deficiencies. In re Hester, 63 B.R. 607, 612 (Bankr. E.D. Tenn. 1986) (stating that "postpetition taxes generally must be paid in full . . . [and] can be discharged only by payment in full . . ."). In addition, any remaining deficiency of the IRS' claim for postpetition taxes will be preserved and the IRS may collect on this deficiency after the Chapter 13 case is closed. In re Matravers, 149 B.R. 204, 206 (Bankr. D. Utah 1993) (stating that, because the IRS failed to file a proof of claim for postpetition taxes, it must wait until the case is closed to collect on debtors' tax liabilities).

Moreover, the Iowa Department of Revenue (IDOR) has not objected to the IRS' retention of the proceeds. The IDOR also received payment on its equal-priority claim, and failed to object to the payment the IRS received. As a result, no injustice is done, and the parties will maintain their current positions. The Trustee and the Debtors' attorney may also retain the amounts received from the proceeds of the sale of the residence, as these expenses qualify as administrative expenses and are entitled to priority treatment over the tax claims of the IRS and the IDOR. In re Gyulafia, 65 B.R. 913, 917 (Bankr. D. Kan. 1986) (stating that administrative expense claims have priority over postpetition tax claims).

WHEREFORE, the Internal Revenue Service's Objection to the Trustee's Final Report and Request for Accounting and Disgorgement of the Sale Proceeds filed in the above-captioned matter are DENIED.

FURTHER, the IRS violated the automatic stay provisions of 11 U.S.C. § 362(a) by filing the postpetition tax liens against property of the estate.

FURTHER, the filing of a Notice of Federal Tax Lien does not qualify as a proof of claim for recognition and distribution under the Chapter 13 Plan.

FURTHER, judgment shall enter in favor of Defendant Chapter 13 Trustee, Carol Dunbar, and the \$6,404.71 in proceeds from the sale of Debtor's residence shall remain with the parties as disbursed by the Trustee.

FURTHER, the IRS is entitled to retain the amounts in received in recognition of its invalid tax lien, and may collect the remainder of Debtors' tax liabilities after the close of the Chapter 13 case.

SO ORDERED this 28th day of September, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge