

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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TONYA A. BRASS  
Debtors.

Bankruptcy No. 92-61959LW  
Chapter 7

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### ORDER RE DEBTOR'S APPLICATION TO DETERMINE INCOME TAX REFUND STATUS

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On March 22, 1995, the above-captioned matter came on for hearing in Waterloo pursuant to assignment. Debtor appeared by Attorney Don Gottschalk. Habbo Fokkena, the Chapter 7 Trustee, was also present. The matter before the Court is Debtor's Application to Determine Income Tax Refund Status. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

Debtor originally filed a Chapter 13 Petition on October 22, 1992. The Chapter 13 Plan was confirmed by Judge Edmonds in a hearing held February 1, 1993. On January 25, 1994, the Chapter 13 Trustee, Carol Dunbar, filed a Motion to Dismiss or Convert. By that time, Debtor was to have paid \$2,025 through the Plan. The Trustee asserted that she had received \$540 and there was a delinquency of \$1,485. At hearing on February 22, 1994, Debtor requested, in lieu of dismissal, that she be allowed to convert to a Chapter 7. This was allowed and on March 7, 1994, Debtor filed her election to convert to Chapter 7.

A § 341 meeting was held by the Chapter 7 Trustee, Habbo Fokkena, on April 25, 1994. At that time, the Trustee inquired about the possibility of a tax refund from the Internal Revenue Service. Ultimately, he requested that any amounts in excess of the exempt amount of \$1,000 be turned over to him. Beginning with May 10, 1994, the Trustee wrote a series of letters to counsel for Debtor requesting the excess tax refund money. Almost monthly letters were written and no response was received by the Trustee. The final letter was written to counsel for Debtor on November 21, 1994. In the interim, Debtor received a general discharge on June 30, 1994.

When no response was received to his inquiry, the Chapter 7 Trustee filed a complaint to revoke discharge on December 30, 1994. The basis for the complaint was 11 U.S.C. § 727(d)(2) which states that the Court shall revoke a discharge if Debtor acquires property that belongs to the Estate and fails to deliver or surrender such property to the Trustee. The Trustee asserted that the excess income tax refund was property of the estate. He argued that since Debtor had failed to turn over this property, the discharge granted in June, 1994 should be revoked.

The adversary complaint was properly served upon Debtor and Debtor's attorney pursuant to the Federal Rules of Bankruptcy Procedure. No response was made by Debtor or her attorney and an Application for Entry of a Default was made on February 10, 1995 by the Chapter 7 Trustee pursuant to Rule 7055.

The Court entered a default judgment on February 15, 1995 based upon Debtor's failure to appear or file a timely pleading in the adversary proceeding. This default judgment granted the relief sought by

the Trustee which was a revocation of the Debtor's general discharge previously entered on June 30, 1994. Thereafter, the Clerk of Court sent a notice of this revocation to all creditors on the creditor matrix.

On March 10, 1995, Debtor filed an Application to Determine Income Tax Refund Status in the Bankruptcy case. Debtor asserts that she received the income tax refund for calendar year 1993 after the filing of the Chapter 13 Petition but prior to the filing of the Chapter 7 conversion. Counsel for Debtor represented at the time of hearing that the Federal return was signed February 1, 1994 and requested a refund in the amount of \$1,639; the Iowa return was executed February 1, 1994 and sought a refund of \$91. No evidentiary record was presented by counsel for Debtor and Debtor was not personally present. However, counsel for Debtor represents that these refunds were received prior to the conversion to Chapter 7 which occurred on March 7, 1994. Debtor claims, therefore, that these funds received preconversion are not property of the estate. She argues that she thus has no obligation to turn over any of these funds to the Trustee.

The Trustee argues, first of all, that the default judgment in the adversary proceeding is preclusive on the issue of whether the tax refund constitutes property of Debtor's Chapter 7 estate. The Trustee also asserts that Debtor has failed to meet her burden to prove that she received the tax refund prior to conversion to Chapter 7. At the time of hearing, Debtor was not present and no evidence was presented. Debtor's attorney says the refund was received prior to the date of conversion. The conversion occurred on March 7, 1994. The tax returns were signed on February 1. That is a little more than a month from the time of filing the tax returns until the time of conversion. Debtor's schedules filed March 23, 1994 list the 1993 tax refund as exempt in an "unknown amount". The Trustee's notes from the § 341 meeting held on April 25, 1994 state that Debtor "has excess Tax Refund -- HOLD".

The Court finds the Trustee's arguments persuasive. Debtor has failed to prove that she is entitled to retain the nonexempt portion of the tax refund. She has ignored her opportunity to present evidence both by failing to respond to the Trustee's adversary complaint requesting revocation of discharge and by failing to appear or present evidence at the hearing herein. Default judgments may operate as res judicata and are conclusive of whatever is essential to support the judgment. Kapp v. Naturelle, Inc., 611 F.2d 703, 707 (8th Cir. 1979); In re Davis, 168 B.R. 189, 191 (Bankr. W.D. Ark. 1994). The default judgment entered on the Trustee's adversary complaint revokes Debtor's discharge for her failure to turn over the tax return which constitutes property of the estate.

Furthermore, Debtor has failed to present sufficient evidence or argument to enable the Court to determine that she is entitled to retain the tax refund. The relevant tax returns are not in evidence. No evidence was presented regarding the dates of filing of the return or receiving the refund other than representations by Debtor's attorney.

Debtor's last active involvement in this case was her appearance at the § 341 meeting in April of 1994. Since that time, she has ignored correspondence by the Trustee. She has not resisted the adversary complaint to revoke her discharge in December of 1994 and only belatedly filed an Application to Determine Income Tax Refund Status a month after her discharge was revoked. Even then, Debtor did not appear at hearing scheduled on this matter to present an evidentiary record. Even if Debtor would be entitled to retain part or all of her income tax returns under the assertions of her application and applicable law, the burden of proof is upon her to establish the requisite foundational facts upon which to make such a determination. Absent an evidentiary record, the Court is asked to merely speculate about these foundational facts and to formulate a ruling which is nothing more than hypothetical as there exists no foundational facts upon which to base a factually supported ruling.

Debtor has failed to appear and has failed to present competent evidence to support the relief sought. The Court cannot speculate as to what facts may or may not have been established by an evidentiary record. As the burden of proof is upon Debtor to present facts supporting her application, Debtor's application must be denied for lack of evidentiary support.

**WHEREFORE**, Debtor's Application to Determine Income Tax Refund Status is DENIED.

**SO ORDERED** this 30th day of March, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge