Appeal History:

aff'd in part, rev'd in part, 213 B.R. 558, (8th Circuit BAP, 1997), appeal pending

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

R. EUGENE JANSSEN and EUNICE JANSSEN Debtors.	Bankruptcy No. 93-51776XS Chapter 11
R. EUGENE JANSSEN and EUNICE JANSSEN Plaintiffs vs. UNITED STATES OF AMERICA, Internal Revenue Service Defendant.	Adversary No. 95-5072XS

PARTIAL SUMMARY ADJUDICATION

On April 14, 1995, Plaintiffs R. Eugene Janssen and Eunice Janssen (Janssens or Debtors) filed a Complaint Objecting to Claim of the Internal Revenue Service. The IRS claim is for income taxes, penalties and interest owed for tax years 1980 and 1981. The Janssens requested the court to determine the validity, amount and secured status of the IRS claim. They also asked that the court avoid the fixing of the lien pursuant to 11 U.S.C. 545(2). These matters are core proceedings pursuant to 28 U.S.C. 157(b)(2)(B) and (K).

On March 29, 1996, Janssens filed a motion for partial summary judgment. The IRS resisted the Janssens' motion and filed its own motion for summary judgment. Hearing on the motions was held May 21, 1996 in Sioux City, Iowa. The court now issues its ruling on the motions based on undisputed facts in the pleadings, affidavits, the joint pretrial statement and statements of fact accompanying the motions for summary judgment.

FACTS

Janssens timely filed federal income tax returns for tax years 1980 and 1981. On December 27, 1985 they amended the returns to show previously unreported income, resulting in additional tax liability of $96,984 for 1980 and $55,857 for 1981. IRS Motion, Doc. No. 16, Exhibits 1 and 2. IRS assessed the Janssens' tax liability on February 10, 1986. Id., Exhibit 3; Plaintiff's Statement of Material Facts,

Doc. 15, Exhibit G. IRS filed a notice of federal tax lien with the Register of Deeds for Woodbury County on February 3, 1987, and renewed the lien on February 16, 1992. Id.; Complaint, 5; Answer.

On or about December 27, 1983, Janssens formed REJ Farm Enterprises, Inc. as an Iowa corporation. IRS Motion, Exhibit 4 (Articles of Incorporation); Plaintiff's Exhibit H. REJ has remained a corporation in good standing with the Iowa Secretary of State. On January 2, 1984, the directors of REJ held an organizational meeting. R. Eugene Janssen was elected president and treasurer of REJ, Eunice A. Janssen was elected secretary, and Darloe E. Janssen, the Debtors' son, was elected vice president. IRS Exhibit 5 (minutes); Plaintiff's Exhibit I. Prior to the formation of the corporation, Janssens held warranty deeds to nine parcels of real property consisting of farmland and their homestead. By quit claim deeds dated January 2, 1984, Janssens transferred all nine parcels to REJ. Joint Pretrial Statement at 7-8. They also transferred their farm machinery and livestock to REJ. Id. at 8. Janssens retained no interest in any of the transferred property. After the transfer the Janssens continued to live in their personal residence. Id. R. Eugene Janssen owns 49,500 shares of REJ, and Eunice Janssen owns 47,500 shares, for a total of 97 percent of REJ's stock. Three percent was gifted to Darloe Janssen. Id.

In 1992, the IRS filed a complaint in the United States District Court for the Northern District of Iowa against the Janssens, their son Darloe Janssen, and REJ, to establish that REJ is the alter ego of the Janssens and to foreclose the federal tax liens on farmland titled in the name of REJ. On October 28, 1993, the Janssens filed a Chapter 11 bankruptcy petition. The only non-exempt assets the Janssens owned at the time of filing their petition were money and REJ stock. Complaint, 9; Answer.

On November 15, 1993, the IRS filed a claim in Janssens' case for tax, penalties and interest in the amount of $592,371.50 as of the petition date. Plaintiff's Exhibit C. At the time of hearing on the motions, the claim with penalties and interest was approximately $600,000. IRS claims it is fully secured. Complaint, 7; Answer.

DISCUSSION

The complaint and answer raise three claims, all of which are involved in the summary judgment motions of the Janssens and the IRS. Janssens claim that they are entitled to set off losses against their tax liability, and that the IRS claim is subject to further reduction under the doctrine of estoppel. Janssens also seek to avoid the lien of the IRS pursuant to 11 U.S.C. 545(2) and 26 U.S.C. 6323(b)(1). The answer of IRS denies that the Janssens are entitled to judgment on either claim. The answer includes a claim, styled an affirmative defense, that the corporation REJ is the alter ego of the Janssens. IRS has not brought REJ in as a third party.

Both the Janssens and the IRS have moved for summary judgment on the claim for lien avoidance. Plaintiff's Motion, Doc. No. 13; IRS Brief, Doc. No. 17. Janssens also request judgment that the IRS, as a matter of law, is unable to prevail on its alter ego theory. The IRS motion seeks judgment that Janssens may not assert an estoppel claim against the government.

Summary judgment is governed by Fed.R.Civ.P. 56, made applicable in bankruptcy adversary proceedings by Fed.R.Bankr.P. 7056. A party may move with or without supporting affidavits for a summary judgment in the party's favor. Fed.R.Civ.P. 56(a). A party is entitled to summary judgment if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c). The court concludes that there are no issues of material fact and that the motions are ripe for summary judgment.

Estoppel

Janssens claim that they are entitled to a reduction of the amount claimed by the IRS under the doctrine of estoppel. The theory of this claim is that the IRS failed to respond to their settlement proposals or to negotiate in good faith, thus allowing interest and penalties to accumulate over the years. Joint Pretrial Statement, page 2. The IRS denies that the Janssens may assert a claim of estoppel in this situation because they are seeking a monetary recovery, citing Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S.Ct. 2465 (1990). Alternatively, the IRS argues that the Janssens have not shown "affirmative misconduct" by the government, an element necessary to establish an estoppel claim.

A court may apply the doctrine of equitable estoppel in a particular case in order to prevent injustice. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59, 104 S.Ct. 2218, 2223 (1984). Under Iowa law, the elements of equitable estoppel are:

(1) misrepresentation or concealment of material facts by the

other party,

(2) lack of knowledge of the true facts by the party to whom

the misrepresentation is made,

(3) an intent to cause reliance on the misrepresentation, and

(4) actual reliance on the misrepresentation to the detriment

of the party to whom the representation was made.

International Harvester Credit Corp. v. Leaders, 818 F.2d 655, 659 (8th Cir. 1987) (citing Grandon v. Ellingson, 259 Iowa 514, 144 N.W.2d 898 (1966)); Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 578-79 (Iowa 1990). The party asserting estoppel must prove each of the elements by clear and convincing evidence. International Harvester, 818 F.2d at 658.

The United States Supreme Court has left open the question whether estoppel is ever available against the United States. Heckler v. Community Health, 467 U.S. at 60, 104 S.Ct. at 2224. The doctrine is a potential threat to the government's ability to protect the public's interests.

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.

Id. Courts that recognize equitable estoppel as a claim that can be asserted against the government construe the doctrine very narrowly. Miller v. United States, 907 F.2d 80, 82-83 (8th Cir. 1990) (citing Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp., 884 F.2d 80 (3d Cir. 1989) and United States v. Browning, 630 F.2d 694 (10th Cir. 1980)). The Eighth Circuit has ruled that, to establish a claim of equitable estoppel against the United States, "a party must at least show 'affirmative misconduct' by the government in addition to establishing the traditional elements of estoppel." Miller v. United States, 907 F.2d at 82-83; accord United States v. Lair, 854 F.2d 233, 237-38 (7th Cir. 1988); United States v. Asmar, 827 F.2d 907, 912 (3d Cir. 1987); Mukherjee v. Immigration & Naturalization Service, 793 F.2d 1006, 1009 (9th Cir. 1986). Moreover, courts have found that, assuming affirmative misconduct would estop the government, inaction or delay does not constitute such misconduct. See, e.g., Immigration& Naturalization Service v. Miranda, 459 U.S. 14, 19, 103 S.Ct. 281, 284 (1982) (inaction for 18 months on application for permanent resident alien status insufficient to estop enforcement of immigration laws); Green v. United States Department of Labor, 775 F.2d 964, 970 (8th Cir. 1985) (government delay was likely prejudicial and may have been negligent, but did not constitute affirmative misconduct); Precious Metals Associates, Inc. v. Commodity Futures Trading Commission, 620 F.2d 900, 909 (1st Cir. 1980) (failure of CFTC to respond to inquiries regarding legality of transactions did not estop agency prosecution).

Janssens have not identified a factual issue as to any aspect of their estoppel claim. Cf. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552 (1986) (summary judgment may enter against nonmoving party who fails to make showing sufficient to establish existence of essential element of case). IRS is entitled to judgment as a matter of law on the issue of equitable estoppel. Because estoppel is but one of two theories under which the Janssens seek to reduce their tax liability, partial summary judgment on this issue does not dispose of their claim to determine the amount of the debt. The claim on the setoff theory will be set for trial.

REJ as Alter Ego of Janssens

The IRS, in answer to the complaint, stated as an "affirmative defense," that:

R.E.J. Farm Enterprises, Inc., an Iowa corporation, and owner of real and personal property formally [sic] titled in the name of the debtors, is the alter-ego/nominee of the debtors R. Eugene Janssen and Eunice Janssen.

The alter ego doctrine is an equitable doctrine that allows a court to disregard the corporate form in certain circumstances. The separate legal existence of a corporation may be set aside "if there is such unity of interest and ownership that the individuality of the corporation and its owners have ceased and the facts demonstrate observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice." Benson v. Richardson, 537 N.W.2d 748, 761 (Iowa 1995). Under Iowa law, the doctrine may be applied in two situations: either to hold individuals liable for actions taken in the name of a corporation or to allow a creditor to reach corporate assets to satisfy an individual's debt. Id.

A corporation holds property as a separate legal entity. Corporate property does not belong to its stockholders. Regal Ins. Co. v. Summit Guaranty Corp., 324 N.W.2d 697, 703 (Iowa 1982). However, if a creditor proves that a corporation is the alter ego of an individual debtor, the court can fashion remedies that allow the creditor to satisfy the individual's debt from corporate property. See, e.g., Benson v. Richardson, 537 N.W.2d at 762 (judgment entered against corporation in full amount of federal judgment against individual).

The IRS claims it should be allowed to reach assets nominally held by REJ to satisfy the individual tax liabilities of the debtors. Assuming for argument that the IRS could prove REJ is the alter ego of the Janssens, a judgment by this court on the alter ego theory would not bind REJ because it has not been named as a party and has not been served. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110-11, 89 S.Ct. 1562, 1569-70 (1969). In Zenith, judgment against parent corporation Hazeltine was vacated. The trial court had based jurisdiction over Hazeltine on a stipulation between the subsidiary HRI and defendant Zenith that HRI and Hazeltine were "one and the same company" for purposes of the litigation. The Supreme Court stated:

It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.... The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

Id., 395 U.S. at 110, 89 S.Ct. at 1569; accord Tokheim v. Geiger (In re Van Dyke), No. C95-4127-MWB, slip op. at 9-10 (N.D. Iowa July 3, 1996). A court cannot obtain jurisdiction over an unnamed corporation by virtue of claimed alter ego status with a named individual. Id. at 11 n. 8; see also Monchick v. Davis (In re Davis), 16 B.R. 553, 554 (Bankr. S.D. Fla. 1981) (creditor must challenge corporation directly to attribute ownership of corporate property to individual).

An affirmative defense is one which allows the defendant to prevail despite the defendant's admission of the allegations of the complaint. See Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82, 86 (Iowa 1992). An affirmative defense is "matter asserted by a defendant which, assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary (6th ed. 1996). The alter ego doctrine is not an affirmative defense to the Janssens' complaint to reduce the IRS claim or to avoid the tax lien. The IRS appears to admit as much in the pretrial statement. Doc. No. 25 at 5 n. 1. The IRS seeks to satisfy its secured claim against property in the name of REJ. The alter ego claim is a separate claim against the corporation.

The IRS argues that the Janssens are not entitled to summary judgment because there is a genuine issue of fact as to whether the tax claim is secured by liens on the farmland titled in the name of REJ. Doc. No. 20 at 4. While the determination of an alter ego claim is a fact-intensive inquiry, see Adam v. Mt. Pleasant Bank & Trust Co., 355 N.W.2d 868, 872 (Iowa 1984) (listing factors which may determine whether to hold individual liable for actions of corporation); Central National Bank & Trust Co. of Des Moines v. Wagener, 183 N.W.2d 678, 681-82 (Iowa 1971) (discussing facts supporting decision to subject nominally corporate property to execution to satisfy debt of individual), and while there may be facts in dispute, the issues of fact are not material. As a matter of law, the alter ego claim is not a defense to the claims raised by the Janssens. It is a direct claim against the corporation. Moreover, the IRS cannot obtain an enforceable judgment against REJ in this adversary proceeding because REJ is not a party. Therefore, the Janssens' motion for summary judgment should be granted, and the defense stricken as insufficient. Fed.R.Bankr.P. 7012(b).

Avoidance of Tax Lien

The Janssens also move for summary judgment on their claim that they are entitled to avoid the IRS lien on money and REJ stock owned at the time of their petition. The lien arose on February 10, 1986 when the IRS assessed the Janssens' tax liability. 26 U.S.C. 6321, 6322. The lien attached to all of the Janssens' property. 26 U.S.C. 6321. The lien became effective as to purchasers, holders of security interests, mechanic's lienors and judgment lien creditors on February 3, 1987, when the IRS filed its notice of tax lien. 26 U.S.C. 6323(a).

Notwithstanding the filing of a notice of lien, a tax lien is not enforceable against purchasers of the particular types of property, including securities, listed in 26 U.S.C. 6323(b). "Even though notice of a lien imposed by section 6321 has been filed, such lien shall not be valid ... as against a purchaser of [a] security who at the time of purchase did not have actual notice or knowledge of the existence of such lien...." 26 U.S.C. 6323(b)(1)(A). The term "security" is defined very broadly as:

any bond, debenture, note, or certificate or other evidence of indebtedness, issued by a corporation or a government or political subdivision thereof, with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

26 U.S.C. 6323(h)(4). The court finds that the Janssens' money and shares of REJ stock are securities within the meaning of

6323.

The Janssens, as Chapter 11 debtors-in-possession, have all the avoidance powers of a trustee. 11 U.S.C. 1107(a); United States v. Hunter (In re Walter), 45 F.3d 1023, 1027 (6th Cir. 1995). Under 11 U.S.C. 545, a bankruptcy trustee has the power to avoid statutory liens as a hypothetical bona fide purchaser. Section 545 provides in relevant part:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien--

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property, whether or not such a purchaser exists.

11 U.S.C. 545(2). A federal tax lien is a statutory lien subject to avoidance. Walter, 45 F.3d at 1027.

The Janssens claim the tax lien which attached to the REJ stock is avoidable because it would not be enforceable against hypothetical bona fide purchasers of the stock. The IRS argues that the lien is not avoidable because the bankruptcy trustee's status as a bona fide purchaser under 11 U.S.C. 545(2) is not equivalent to status as a "purchaser" under 26 U.S.C. 6323. Section 6323(h)(6) defines a purchaser as:

a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice.

26 U.S.C. 6323(h)(6).

Although the cases did not directly discuss the issue raised here by the IRS, several courts have treated the trustee as a "purchaser" under the Tax Code. These courts have held that the bankruptcy trustee's power under 11 U.S.C. 545(2) enables the trustee to avoid tax liens, notwithstanding a filed notice of tax lien, on the types of property listed in 26 U.S.C. 6323. See O'Neil v. United States (In re O'Neil), 177 B.R. 809, 813-14 (Bankr. S.D.N.Y. 1995) (Chapter 11 debtor-in-possession may avoid lien on non-exempt property within the definition of securities); United States v. Branch, 170 B.R. 577, 579 (E.D. N.C. 1994) (Chapter 13 trustee had power to avoid tax lien on household goods under 6323(b)(4)); Cameron v. Orix Credit Alliance, Inc. (In re Larson, 1993 WL 367106, *8 (Bankr. D. N.D. 1993) (Chapter 7 trustee allowed to avoid tax lien on corporate stock); United States v. Sierer,

139 B.R. 752, 755-56 (N.D. Fla. 1991) (Chapter 11 debtor-in-possession permitted to avoid lien on various property including stocks). In Christison v. United States (Matter of Hearing of Illinois, Inc.), 960 F.2d 613 (7th Cir. 1992), the Chapter 7 trustee filed a complaint to avoid an IRS levy on a contract right of the debtor as a preference. The IRS asserted the defense under 11 U.S.C. 547(c)(6). The issue was whether the tax lien was avoidable. The IRS had abandoned its argument that the trustee was not a "purchaser" under the Tax Code. Id., 960 F.2d at 614 n.3. The court concluded that "an IRS lien is not valid with respect to bona fide purchasers of 'securities.'" Id. at 615. However, the court held that the debtor's right to receive payments under a lease was not within the meaning of securities. Id. at 617. See also 4 Collier on Bankruptcy 545.04[2], [3] (15th ed. 1996)(bona fide purchaser test; avoidability of federal tax liens).

Two recent cases, Askanase v. United States (In re Guyana Development Corp.), 189 B.R. 393 (Bankr. S.D. Tex. 1995), and United States v. Hunter (In re Walter), 45 F.3d 1023 (6th Cir. 1995), have directly addressed the issue whether the bankruptcy trustee's bona fide purchaser status is equivalent to status as a purchaser under the Tax Code. The IRS relies on Walter in which the court refused to permit a Chapter 7 trustee to avoid a federal tax lien on the proceeds of a motor vehicle. The crux of the court's argument in Walter is that a bona fide purchaser, as one who purchases property for value without notice of title defects, is not necessarily a purchaser for "adequate and full consideration." Without defining "value," the court concluded that:

"value" is a much lower standard than "adequate and full consideration in money or money's worth." Because a bona fide purchaser is not necessarily a purchaser for purposes of Internal Revenue Code 6323(b)(2), it follows that a trustee standing in the shoes of a hypothetical bona fide purchaser does not fall within the protection of this statute.

Walter, 45 F.3d at 1030 (footnotes omitted).

This court declines to follow the reasoning of Walter and is persuaded, instead, by Guyana Development. In the latter case, the Chapter 11 trustee sought to avoid the lien of the IRS on various assets of the estate. Judge Brown found that the "trustee is deemed to have paid full and adequate consideration in his capacity as a bona fide purchaser." Guyana Development, 189 B.R. at 397. As a hypothetical purchaser of a security, the trustee was able to avoid the lien on shares of stock held by the estate. The court found additional support for this conclusion in the legislative history of 545. Id.

Section 545 is applicable to unenforceable statutory liens arising under every body of statutes, state or federal law. By giving the trustee the power of a hypothetical "bona fide purchaser," Congress did not limit application of the power to liens arising under statutes referencing a "bona fide purchaser." For example, a mechanic's lien under Iowa law, unenforceable against "purchasers ... who acquire interests in good faith and for a valuable consideration, and without notice" may be avoided by a bankruptcy trustee. Iowa Code 572.18; In re Rench, No.

92-52020XS, slip op. at 12 (Bankr. N.D. Iowa Feb. 1, 1994).

The court must first look to the statute creating the lien to determine whether the lien would be unenforceable against a purchaser. See Walter, 45 F.3d at 1029-30 (state law governs whether lien arising under state law is avoidable by a bona fide purchaser; federal law determinative as to a statutory lien created by federal law). If so, the court should then compare that purchaser's status with the bankruptcy trustee's status as a "bona fide purchaser." As the court in Walter noted, "bona fide purchaser" is not a defined term in the Bankruptcy Code. See 11 U.S.C. 101 (definitions applicable generally in title 11). As a term in a federal statute, its definition should be a matter of federal law.

Iowa's Uniform Commercial Code provides a definition of a bona fide purchaser of securities which is appropriate here. See United States v. Landmark Park & Associates, 795 F.2d 683, 686 (8th Cir. 1986) (state law derived from uniform statute may provide content of federal law). A bona fide purchaser is "a purchaser for value in good faith and without notice of any adverse claim...." Iowa Code 554.8302; see also Dietsch v. Long, 72 Ohio App. 349, 366, 43 N.E.2d 906, 915 (1942) (elements of a bona fide purchase are "absence of notice, a valuable consideration, and the presence of good faith") (cited in Walter, 45 F.3d at 1030).

Value is a relatively fluid concept in the Bankruptcy Code, having different meanings depending on context. See 11 U.S.C. 506(a) (value of collateral is determined in light of purpose of valuation); 11 U.S.C. 547(a)(2) ("new value" defined for purpose of preference statute); 11 U.S.C. 548(d)(2)(A) ("value" defined for purpose of fraudulent transfer statute). The trustee acquires the highest status as a bona fide purchaser that there may be under the law. In re Rench, slip op. at 14. I see no reason to treat trustees as having given nominal or inadequate consideration in their capacity as bona fide purchasers solely because minimal consideration is sufficient, in some circumstances, to meet a definition of "value." The court is also persuaded by the Janssens' argument that the good faith element of bona fide purchaser status implies adequate consideration. The relation of the price paid to fair market value is evidence of the existence of good faith. See Production Credit Association of the Midlands v. Shirley, 485 N.W.2d 469, 474 (Iowa 1992) (purchase of corporate stock for half of fair market value one factor in finding buyers were not bona fide purchasers). I conclude that a trustee's status as a bona fide purchaser, and thereby the Janssens' status as debtors-in-possession with all the powers of a trustee, is sufficient to avoid the lien on the REJ stock.

The IRS cites Drewes v. Carter (In re Woods Farmers Co-operative Elevator Co.), 946 F.2d 1411 (8th Cir. 1991), for the proposition that the Eighth Circuit has adopted reasoning similar to that in Walter. In Woods Farmers Co-op., the Chapter 7 trustee sought to avoid farmers' liens on the proceeds of grain stored at the debtor-elevator pursuant to 11 U.S.C. 545(2). The North Dakota statute under which the liens arose provided that the liens were "discharged as to grain sold by the warehouseman to a buyer in the ordinary course of business." The court held that the trustee was unable to avoid the liens. The Woods Farmers Co-op. case is distinguishable. Under North Dakota law, "bona fide purchaser" and "buyer in the ordinary course" are separately defined terms. A buyer in the ordinary course is a bona fide purchaser with the additional requirement of being a buyer "in the ordinary course from a person in the business of selling goods of that kind." Id., 946 F.2d at 1414. In this case, the elements of a bona fide purchaser satisfy all the elements of a purchaser as defined in 6323. The Janssens should be allowed to avoid the lien on the REJ stock.

ORDER

IT IS ORDERED that the Janssens' motion for summary judgment is granted. The Internal Revenue Service motion for summary judgment is granted in part and denied in part.

IT IS FURTHER ORDERED that the lien of the IRS on money and stock in REJ Farm Enterprises, Inc. owned by the Janssens at the time of filing their Chapter 11 petition will be avoided pursuant to 11 U.S.C. 545(2), upon the entry of judgment on all issues.

IT IS FURTHER ORDERED that the IRS defense that REJ is the alter ego of the Janssens is stricken.

IT IS FURTHER ORDERED that the Janssens are not entitled to reduce the amount of their federal income tax liability on the basis of estoppel against the United States. The Janssens' claim for reduction on the basis of setoff will be set for trial.

SO ORDERED THIS 21st DAY OF AUGUST 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U.S. mail to: Steven Jensen, U.S. Attorney, U.S. Trustee.