

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
RENEA AQUANETTE MAXFIELD)
) BANKRUPTCY NO. 04-60355
)
Debtor)

FINDINGS OF FACT
CONCLUSIONS OF LAW AND DECISION

I

Statement of Proceedings

This Chapter 13 case is before the Court on a Motion filed on March 24, 2008 by the United States of America (“USA”) on behalf of the Internal Revenue Service (“IRS”) to Dismiss this case “for cause” pursuant to 11 U.S.C. §1307(c) based on a failure of the Debtor to pay her postpetition Federal Income Tax debts for the years 2004, 2005, 2006. (“Motion”).

A Hearing was held on said Motion on June 18, 2008.

The parties orally stipulated in open Court that the Debtor has failed to pay her 2004, 2005, and 2006 postpetition Federal Income Tax debts, in a sum totaling \$15,256.00. (Docket Entry No. 70). Thus, the 2004 taxes were due April 15, 2005; the 2005 taxes were due April 15, 2006; and, the 2006 taxes were due April 15, 2007. The Stipulation did not state whether or not the Debtor had filed her Income Tax Returns for those years.

The parties further stipulated in open Court that no testimony or documents need to be submitted, and that the sole legal issue to be decided is whether the failure to pay said postpetition Income Taxes by the Debtor was per se “cause” to dismiss this case.

The USA elected to stand on its list of citations filed in support of the Motion to Dismiss filed in the case of In re Cotton, Case No. 04-63911 on January 11, 2008. The Debtor was granted to and

including July 8, 2008 to file her Memo in opposition to the Motion of the USA. No Memo was filed by the Debtor.

II

Jurisdiction and Core Proceeding

No objection was made by counsel to the subject matter jurisdiction of this Court as to this matter. The Court finds subject matter jurisdiction to be present, pursuant to 28 U.S.C. §1334(b), and this contested matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).

III

Findings of Fact Based on Judicial Notice

The Court hereby takes judicial notice of the following as set out in the Debtor's Main Case No. 04-60355.¹

1. That the Debtor filed her Chapter 13 Petition on January 29, 2004. Docket Entry

¹

Federal rule of Bankruptcy Procedure 9017 provides that the Federal Rules of Evidence apply in cases under the Code. See also, Fed. R. Evid. 1101(a) and (b). Federal Rule of Evidence 201 provides that the Court, whether or not requested, may take judicial notice of adjudicative facts at any stage of the proceedings, Federal Rule of Evidence 201 is the only evidentiary rule on the subject of judicial notice.

This Court has held in In re Snider Farms, Inc., 83 B.R. 977, 986 (Bankr. N.D. Ind. 1988), citing, In re Woodmar Realty, 294 F.2d 785, 788 (7th Cir 1961). Cert. Den. 369 U.S. 803, 82 S. Ct. 643, 7 L.Ed.2d 5550 (1962), that a bankruptcy court is duty bound to take judicial notice of its records and files. See also, Friedrich v. Mottaz, 294 F.3d 864, 870 (7th Cir. 2002) (bankruptcy judge did not err by taking judicial notice of schedules filed by debtor in main case in §548(a)(1) adversary proceeding); State of Florida Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975) (not error for a bankruptcy court to take judicial notice of related proceeding and records in cases before a court); In re E. R. Fegert, 887 F.2d 955, 957-58 (9th Cir. 1989) (the Court takes judicial notice of the file and record in the underlying case). See also, Green v. Warden, U. S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983) (a Court may take judicial notice of its own court documents and records).

No. 1.² The USA filed its Motion to Dismiss on March 24, 2008, or approximately three years and two months after the Petition was filed. Docket Entry No. 56.

2. That the Debtor filed her Chapter 13 Plan on January 29, 2004 (Docket Entry No. 2.). The Plan at Paragraph 5.B provides that all priority claims are to be paid 100% Pro Rata.³

3. That the Debtor's Plan at Paragraph 7 provided that on Confirmation the property of the Debtor shall vest in the Debtor. See §1327(b), which provides that except or otherwise provided in the plan or in the Order confirming the plan, the confirmation of a Plan vests all property of the estate in the debtor.

4. That the Debtor's Plan made no provision for the payment of postpetition taxes. See §1322(b)(6), which provides a plan may provide for the payment of all or any part of any claim allowed under §1305. Section 1322(b)(6) is thus discretionary with the debtor rather than mandatory.

5. The Debtor's Plan as filed was Confirmed by Order of Court on July 7, 2004. Docket Entry No. 27. Thus, at the time the Plan was confirmed the unpaid post Petition taxes for the year 2004 were not due until after confirmation or until April 15, 2005. The USA's Motion to Dismiss was filed on March 28, 2007, or almost two years after the 2004 taxes were due on April 15, 2005.

6. The Order Confirming provided at Paragraph 6 that the Debtor shall not incur any additional debts during the term of the Plan without the prior, written approval of the Trustee, except for emergency or routine medical, dental, optical, hospital, auto or home repair expenses. However, the Confirmation Order does not provide for dismissal of the case if the Debtor violates this provision. The Confirmation Order does not require for Debtor to file postpetition tax returns or pay postpetition taxes.

² In that the Debtor filed her Chapter 13 Petition on June 29, 2004, her case is not governed by the Bankruptcy Abuse Prevention and Consumer Prevention Act of 2005, Pub. L. 109-8, 119 Stat. 23 (April 20, 2005) ("BAPCPA"), which generally became applicable to all bankruptcy cases filed on or after October 17, 2005, and generally is only applicable prospectively. See In re Sidebottom, 430 F.3d 893, 897 n. 1 (7th Cir. 2005). Thus, §522(j)(1), as added by BAPCPA, which provides that if a debtor fails to file a tax return that becomes due after the commencement of the case, or to properly obtain an extension of the due date for filing such a return, the taxing authority may request an order converting or dismissing the case, is not applicable in this case. In addition, the Motion by the USA is to Dismiss this case for failure to pay postpetition taxes, not for failing to file postpetition returns.

³ Former Section 507(a)(1) (now § 507(a)(8)) includes all unsecured prepetition priority tax claims. Section 1322(b)(2) provides that all §507 unsecured priority tax claims shall be paid in full over the life of the debtors' plan.

7. The IRS filed its Amended Claim No. 24 versus the Debtor's estate on April 28, 2004, wherein the IRS asserts an unsecured, prepetition, priority Claim by in the sum of \$5,545.70, and a general unsecured Claim of \$1,511.64. This Claim was based on the prepetition tax periods ending 2000, 2001, and 2002, based on Income Tax Returns actually filed by the Debtor.

8. The IRS did not file a postpetition tax Claim versus the Debtor or the Debtor's estate pursuant to §1305(a)(1), which provides that a proof of claim may be filed by any entity that holds a claim against the debtor for taxes that become payable to a governmental unit while the case is pending. Thus, the IRS has the option to either file a claim for postpetition taxes or decline to do so.

9. The Debtor is a wage earner and is not operating a business. Thus, N. D. Ind. L.B.R. B-2015-2(1), which provides that every trustee or debtor who operates a business under any Chapter shall file and pay all Federal, State, or local taxes on account of the operation of the estate as and when due, is not applicable.

10. The Court had no Local Rule or Standing Order requiring a Chapter 13 debtor who is not engaged in business to file all postpetition tax returns and pay all postpetition taxes when due.

IV

Legal Authorities Cited by the IRS

The legal authorities cited by the IRS in support of its Motion to Dismiss are as follows:

1. In re Wigley, 333 B.R. 768 (Bankr. N. D. Tex 2005).
2. In re Bennett, 200 B.R. 252 (Bankr. M. D. Fla 1996).
3. In re Roberts, 279 B.R. 396 (1st Cir. BAP 2000), Aff'd, 279 F.3d 91 (1st Cir. 2002).
4. In re Gonzales, 2005 WL 1819948 (Bankr. N. D. Tex 2005).
5. In re Koval, 205 B.R. 72 (Bankr. N. D. Tex 1996).
6. In re King, 217 B.R. 623 (Bankr. S. D. Cal. 1998)
7. In re Robertson, 2000 WL 33716977 (Bankr. D. Ore. 2000).
8. Matter of Berryhill, 189 B.R. 463 (D.C. N.D. 1995).

V

Conclusions of Law and Discussion

Section 1307(c) of Title 11 governs the dismissal of a Chapter 13 case on the Motion of a creditor, the trustee, or the U.S. Trustee.⁴ As. Recognized by the Seventh Circuit:

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Section 1307(c), as constituted before the enactment of BAPCPA, provided as follows:

(c) Except as provided in subsection (e) of this section, on a request of a party in interest or the United States Trustee, and after notice and a hearing, the Court may convert a case under this chapter to a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including -

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan.

(9) only on request of the United States Trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (2) of section 521; or

(10) only on request of the United States Trustee, failure to timely file the information required by paragraph (2) of section 521. (Emphasis supplied).

Chapter 13 does not explicitly contain a good faith requirement for the filing of a petition. Nevertheless, Section 1307(c) of the Bankruptcy Code does state that Chapter 13 petitions may be dismissed "for cause." 11 U.S.C. §1307(c). This Court has indicated that lack of good faith is sufficient cause for dismissal under Chapter 13.

Matter of Love, 957 F.2d 1350, 1354 (7th cir. 1992), (citing, In re Smith, 848 F.2d 813, 816, n. 3 (7th Cir. 1988)).

The burden of proof is on the movant in the context of a motion to dismiss for lack of good faith. Id., 957 F.2d at 1355.

The relevant factors vary from case to case. In re Earl, 140 B.R. 728, 735, (Bankr. N. D. Ind. 1992), (citing, In re Jones, 119 B.R. 996, 1002-03 (Bankr. N. D. Ind. 1990)). "No list, however exhaustive, can be complete. The Variety of factors which might be worthy of consideration is potentially infinite." In re Jones, 119 B.R. at 1003.

As accurately summarized by one bankruptcy court:

The Bankruptcy Code does not define "good faith." There is no illuminating legislative history. More than 300 reported "good faith" decisions form a maze of rules and exceptions swallowing rules. Nearly identical fact patters have produced inconsistent results within judicial districts and across the circuits. The reported decisions demonstrate that "good faith" is an illusive statutory description of the limits of Chapter 13 relief.

In re Easley, 72 B.R. 948, 950 (Bankr. M.D. Tenn. 1987) (collecting cases).

Most of the reported cases arising out of Motions to Dismiss "for cause" involve a fact-intensive analysis of whether the petition was not filed in good faith, or whether the debtor's plan was not proposed in good faith. See, e.g. In re Love, 957 F.2d at 1354. (Petition) and Matter of Smith, 848 F.2d 813, 819-21 (7th Cir. 1988) (Plan).

In the case before the Court, the IRS does not allege that the Debtor's Petition was not filed in good faith or that the Debtor's Plan was not proposed in good faith. The IRS asserts that the failure to pay postpetition taxes is per se sufficient grounds to dismiss a case "for cause".

Many of the cases cited by the USA in support of its Motion can be distinguished as the facts.

In In re Wigley, 333 B.R. 768, the Court granted a motion to dismiss the case by the IRS for "cause" based upon lack of good faith for the failure of the debtors as a "responsible person" to pay postpetition, trust fund taxes, as opposed to income taxes. The Debtors had filed a "late" prepetition tax Claim on behalf of the IRS. The IRS and the Debtors had entered an Agreed Order whereby the Debtors agreed to pay postpetition trust fund taxes through their plan.

In In re Bennett, 200 B.R. 252, the Court granted a motion to dismiss the case by the USA for failure to pay postconfirmation tax liabilities. The Confirmation Order provided that the debtor shall not incur any indebtedness without prior approval of the Court or the Trustee. In addition, the Court in Bennett had entered a "Duties Order", that the debtor remain current on all Federal and State taxes coming due after the commencement of the case. The IRS had filed a claim pursuant to §1305 for postpetition tax liabilities.

In In re Roberts, 279 B.R. 396, the Bankruptcy Appellate Panel affirmed the decision of the Bankruptcy Court denying the debtor's Motion for a hardship discharge, where the debtor's confirmed plan expressly provided that the debtors would pay all postpetition priority claims allowed under §1305.. The IRS had filed a claim for postpetition trust fund taxes pursuant to §1305(a). The debtors did not file a motion to modify their plan postconfirmation pursuant to §1329, to address the postpetition claim of the IRS.

In In re Gonzales, 2005 WL 1819948, the Court granted the Motion to Dismiss the case by the IRS for failure to pay postpetition Income Taxes. The dismissal was based on the Court's Standing General Order that debtor shall timely file and pay all postpetition Federal Tax Returns and pay all taxes due pursuant to said Returns, which was cause for dismissal.

In In re Koval, 205 B.R. 72, the Court granted the Motion to Dismiss the case by the IRS where

the debtor had failed to file all postpetition Federal Income Tax Returns or pay taxes due under those Returns. The Court had a General Standing Order that the required all debtors to timely file all postpetition Federal Tax Returns and pay all taxes due pursuant to said Returns which was cause for dismissal.

In In re King, 217 B.R. 623, the Court dismissed the case sua sponte for a material default in Plan payments. The IRS had filed postpetition tax claim pursuant to §1305. The confirmed Plan of the debtor provided that all §1305(a)(1) claims would be paid in full.

In In re Robertson, 2000 WL 33716977, the Court denied a Motion to Dismiss case by the State of Oregon for failure to pay postpetition Income Taxes. The Plan of the debtor provided that the debtor shall incur no credit obligations during the life of the Plan. The Court acknowledged that while the failure to pay postpetition taxes gives rise to authority to dismiss a case, the Court is not required to do so under the permissive language of §1307.

In Matter of Berryhill, 187 B.R. 463, the District Court granted a motion by the IRS to dismiss the debtors' Chapter 11 case pursuant to §1112(b) for nonpayment of postpetition Federal Income Taxes based on Local Rule B-215.2 (now N. D. Ind. L.B.R. 2015-2(1)), that required a debtor to file and pay all Federal, State, and local taxes on account of the operation of the estate when done. Section 1112(b)(4)(I) provides that failure to timely pay taxes after the Order for Relief or failure to file tax returns after the Order of Relief is "cause" for dismissal or conversion of a Chapter 11 case. No such provision is found in Chapter 13.

It is thus observed that in all of the above cases, with the exception of Robertson, the cases were dismissed because either the IRS had filed a §1305 postpetition tax claim which had not been paid, the Court had a Standing General Order providing for the dismissal of a case for failure to pay a postpetition tax claim, the plan of the debtor expressly provided for the payment of postpetition tax

claims which were not paid, or a combination of the above factors.

In the case before the Court, the IRS did not file a §1305 postpetition tax claim. The Plan of the Debtor has no provision for the payment of postpetition taxes pursuant to §1322(b)(6), which is discretionary with the Debtor. The Court's Local Rule L.B.R. B-2015-2(1) is not applicable to the Debtor as she is not operating a business. The Court has no Local Rule or Standing Order providing that a Chapter 13 case may be dismissed if the debtor does not pay postpetition tax debts. Paragraph 6 of the Order Confirming the Plan provided generally that the Debtor not incur any additional debts during the term of the Plan, with certain exceptions not applicable here. However, if a postpetition debt was incurred the Confirmation Order did not provide for the dismissal of the Case.

The Court's own research has unearthed several decisions not cited by the USA, while distinguishable on the facts, put the treatment of unpaid, postpetition taxes in a clearer perspective.

In the case of In re Jagours, 236 B.R. 616 (Bankr. E. D. Texas), the trustee moved to dismiss a case as infeasible. The confirmed plan provided for payment of the priority claim of the IRS. After confirmation, and the plan was substantially consummated, the IRS filed what it erroneously denominated an amended claim which included postpetition taxes. There was no objection to the amended claim and the plan was not modified by the debtor.

The Jagours Court held that the claim for postpetition taxes filed under §1305 was not a priority claim that fell within the scope of §507(a)(8), and that §1322(b)(6), which states that a Chapter 13 plan may provide for the payment of all or any part of a claim filed under §1305 is permissive. A debtor is thus not required by the Code to treat such claims. The postpetition claims are not given priority status but the rights of the creditor are not impaired by the plan. Id. 236 B.R. at 619-20. The Court cited 8 Collier on Bankruptcy Par. 1322.10 (1998), which states, "If the plan does not provide for postpetition claims, no such claims may be paid under the plan even if a postpetition creditor files a claim. Although

the debtor may choose to amend the plan to accommodate the postpetition claim, the debtor is not required to do so." Thus, the Court denied the trustee's motion.

In the case of In re Parffrey, 264 B.R. 409 (Bankr. S. D. Texas 2001), the IRS moved to dismiss the debtor's Chapter 13 case for failing to file postpetition tax returns. The debtor did not dispute that he did not file his postpetition tax returns timely and that his postpetition tax liability exceeded several thousand dollars. The debtor's plan was confirmed and all payments required by the plan had been made. The plan provided that the debtor shall incur no additional debt during the terms of the plan, except upon written approval of the trustee, and failure to obtain such approval may cause the claim for such debt to be unallowable and nondischargeable. The IRS did not file a §1305(a)(1) claim.

The Parffrey Court held that the mere fact that postpetition debt, without more, would not seem to be grounds for dismissal. The Court did observe that many Courts have issued orders that required the filing of postpetition tax returns and that failure to comply with those orders is generally found to be cause for dismissal. (Citing, Lundin, Chapter 13 Bankruptcy, 3rd Ed. §334.1.n.5 (now N.7)). Id. 264 B.R. at 413. The Parffrey Court had no such order in place at the time that case was filed, but if it had entered such an order it would have dismissed the case for willful violation of the Title 26 of the Internal Revenue Code which requires individuals to file Federal Income Tax Returns and because the debtor was not performing his obligations as a Chapter 13 debtor in good faith. Id. 265 B.R. at 414.

The Parffrey Court also observed that a tax on postpetition income of the debtor is not a liability of the Chapter 13 estate, it is a liability of the debtor alone by virtue of §346. Id. The Parffrey Court also noted that the IRS for strategic reasons may not elect to file a §1305 claim and thus, may be in a better position to demand postpetition interest. Id. (Citing, Lundin, Chapter 13 Practice 3rd Ed. §292.1). See also, In re Whall, 391 B.R. 14 (Bankr. D. Mass. 2008), where the Court correctly held that Section 1398 of the Internal Revenue Code (26 U.S.C. §1398) contains specific provisions only with respect to

cases commenced under Chapter 7 and Chapter 11 of the Bankruptcy Code in which the debtor is an individual. However, 28 U.S.C. §1398 states that "[e]xcept in any case to which Section 1398 applies, no separate taxable entity shall result from the commencement of a case under Title 11 of the United States Code. Thus, a Chapter 13 estate is not a taxable entity under the Internal Revenue Code." Id. 391 B.R. at 4. Accordingly, the Whall Court sustained the objection by the State Revenue Department to the debtor's amended postconfirmation plan, which purported to pay postconfirmation income taxes as an administrative expense of the estate pursuant to §503(b)(1)(B)(i), in that they are not incurred by the Chapter 13 estate. Id. 391 B.R. at 6.

In the case of In re Pagan et al, 279 B.R. 43 (D. Puerto Rico 2002), the Bankruptcy Court entered Orders in several unrelated Chapter 13 cases denying motions by the Puerto Rico Department of Treasury to compel the debtors to file postpetition income tax returns pursuant to §105(a), and as an alternate ground for relief to dismiss the cases pursuant to §1307(b)(1) for lack of good faith and for unreasonable delay prejudicial to creditors. The plans had been confirmed in all cases and the motions were all filed after confirmation. On appeal the District Court affirmed the Orders of the Bankruptcy Court. The District Court held that the Bankruptcy Court did not abuse its discretion in refusing to dismiss the cases and agreed that with the Bankruptcy Court that the debtors did not commit any egregious behavior which would warrant a finding of bad faith. Id. 279 B.R. at 48.

Finally, in the recent case of In re Corbo, 394 B.R. 617 (Bankr. D. Minn. 2008), the IRS moved to dismiss the case based on the debtor's default in falling to pay postpetition taxes. The Court reviewed all of the cases cited by the IRS and concluded as follows:

There is no certainty in concluding that all events of failure to satisfy post petition tax responsibilities constitute bad faith or per se cause for dismissal, and no legal basis from which to find default under the plan in any event, short of a specific provision or order requiring with particularity timely post petition tax compliance.

* * * *

There is no controlling local rule or standing order in this jurisdiction requiring Chapter

13 debtors to file all post petition tax returns when due and to make all post petition tax payments when due. There is also no such provisions in the controlling Chapter 13 plan in this case, the plan confirmed March 10, 2005, and therefore the plan is not in default. Were there such a provision applicable, the controversy here would require no discussion and would simply require enforcement by dismissal unless a feasible modified plan were proposed and confirmable, or there existed some other prevailing circumstances. Accordingly, the IRS motion to dismiss, based on Corbo's failure to satisfy post petition tax obligations during the pendency of his March 10, 2005, plan may be denied.

This Court agrees that "[d]ebtors should not be able to afford themselves of the special and equitable benefits afforded by the Bankruptcy Code while ignoring the duties and responsibilities imposed by the Tax Code," and that ... "[i]t is not good faith for Debtors to file Chapter 13 bankruptcy and then continue to earn income but not pay the postpetition taxes on that income." Gonzalez, 2005 WL1819948, quoting Koval, 205 B.R. at 76. However, there is nothing in the provisions of Chapter 13 that mandates dismissal for a debtor's failure to stay current with postpetition tax obligations, any more than a debtor's failure to stay current with any other legal obligations. Without a controlling provision in the confirmed plan or a controlling order or local rule, postpetition tax delinquency is not per se cause for dismissal.

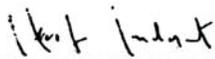
Id. 391 B.R. at 621-22 (footnote omitted).

The foregoing analysis by the Corbo Court is fully applicable to the Motion to Dismiss by the USA on behalf of the IRS. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Motion of the United States of America should be and is hereby **DENIED**.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

February 19, 2009



JUDGE, U. S. BANKRUPTCY COURT

Distribution:
Debtor
Attorney Dabertin
Attorney Morlock
Trustee
U. S. Trustee