

FILED

at ___ O'clock & ___ min. ___ M

APR 25 2006

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

C/A No. 05-01449-JW

Michael Gene Donithan,

Chapter 13

Debtor.

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Internal Revenue Service's ("IRS") Motion for Relief from the Automatic Stay is granted for purposes of allowing the IRS to setoff Debtor's 2004 pre-petition tax refund of \$4,517.50 with Debtor's pre-petition tax liability.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 25, 2006

ENTERED

APR 25 2006

L. G. R.

IN THE UNITED STATES BANKRUPTCY COURT

APR 25 2006

FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

C/A No. 05-01449-JW

Michael Gene Donithan,

Chapter 13

Debtor.

ORDER

This matter comes before the Court upon Motion for Relief from the Automatic Stay ("Motion") filed by the Internal Revenue Service ("IRS"). The IRS seeks relief from the automatic stay in order to setoff Debtor's 2004 pre-petition tax refund of \$4,517.50 with Debtor's pre-petition tax liability of \$12,907.82. For the reasons set forth below, the Motion is granted.

The Court has previously recognized that, pursuant to 26 U.S.C. § 6402(a), the IRS may seek relief from stay to setoff a pre-petition tax refund with a pre-petition debt owed to the IRS. In re Dozier, C/A No. 02-02000-W, slip op. (Bankr. D.S.C. Aug. 21, 2002). 11 U.S.C. § 553 generally provides that "any right of setoff that a creditor possessed prior to the debtor's filing for bankruptcy is not affected by the Bankruptcy Code." Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S.Ct. 286, 289, 133 L.Ed.2d 258 (1995). Despite this general ability to setoff, the Court has noted that relief from stay may not be appropriate if the confirmed plan clearly and accurately treats the claim of the IRS or if the IRS is otherwise adequately protected. Id. at 4-6; U.S. v. Reynolds, 764 F.2d 1004, 1007-1008 (4th Cir. 1985); In re Deutchman, 192 F.3d 457, 460-61 (4th Cir. 1999).

The IRS's proof of claim, as amended, indicates that the IRS is secured by Debtor's pre-petition tax refund. Debtor has not objected to this claim and it is *prima facie* evidence as to the validity and the amount of the claim. Fed. R. Bankr. P. 3001(f). Debtor's plan in this case was confirmed May 19, 2005. The confirmed plan provides for a one hundred (100%) percent

dividend to unsecured creditors; however, the plan does not accurately treat the IRS as a secured creditor or extinguish the right of the IRS to seek setoff; therefore the IRS retains its setoff right with regard to Debtor's pre-petition tax refund and it may obtain relief from the automatic stay in order to exercise this right. See Deutchman, 192 F.3d at 461; Dozier, slip op. at 5.

The IRS is also not adequately protected. Despite the fact that the IRS is receiving a stream of payments under the confirmed plan, the refund owed to Debtor appears to be less than the amount of the IRS's claim; and thus, there is no equity cushion to protect the IRS. See In re Koenig, C/A No. 00-11188-W, slip op. at 3 (Bankr. D.S.C. Dec. 7, 2001) (granting relief from stay for lack of adequate protection when there is no equity cushion in the subject collateral). The plan also fails to protect the IRS because it does not provide payment to the IRS as a secured creditor. In re Kolb, C/A No. 02-05079-W, slip op. at 4 (Bankr. D.S.C. Aug. 26, 2002) (holding that debtors' offer of adequate protection was insufficient where plan did not properly treat the IRS as a creditor partially secured by its right of setoff). Finally, Debtor has not demonstrated an overriding need to receive the refund and therefore it appears that relief from stay is appropriate so that the IRS may exercise its right to setoff under § 553.

Therefore, in light of the foregoing, the Court grants the Motion.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 25, 2006


UNITED STATES BANKRUPTCY JUDGE

ENTERED

APR 25 2006

L. G. R.

IN THE UNITED STATES BANKRUPTCY COURT

APR 25 2006

FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (26)

IN RE:

C/A No. 05-01449-JW

Michael Gene Donithan,

Chapter 13

Debtor.

ORDER

This matter comes before the Court upon Motion for Relief from the Automatic Stay ("Motion") filed by the Internal Revenue Service ("IRS"). The IRS seeks relief from the automatic stay in order to setoff Debtor's 2004 pre-petition tax refund of \$4,517.50 with Debtor's pre-petition tax liability of \$12,907.82. For the reasons set forth below, the Motion is granted.

The Court has previously recognized that, pursuant to 26 U.S.C. § 6402(a), the IRS may seek relief from stay to setoff a pre-petition tax refund with a pre-petition debt owed to the IRS. In re Dozier, C/A No. 02-02000-W, slip op. (Bankr. D.S.C. Aug. 21, 2002). 11 U.S.C. § 553 generally provides that "any right of setoff that a creditor possessed prior to the debtor's filing for bankruptcy is not affected by the Bankruptcy Code." Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S.Ct. 286, 289, 133 L.Ed.2d 258 (1995). Despite this general ability to setoff, the Court has noted that relief from stay may not be appropriate if the confirmed plan clearly and accurately treats the claim of the IRS or if the IRS is otherwise adequately protected. Id. at 4-6; U.S. v. Reynolds, 764 F.2d 1004, 1007-1008 (4th Cir. 1985); In re Deutchman, 192 F.3d 457, 460-61 (4th Cir. 1999).

The IRS's proof of claim, as amended, indicates that the IRS is secured by Debtor's pre-petition tax refund. Debtor has not objected to this claim and it is *prima facie* evidence as to the validity and the amount of the claim. Fed. R. Bankr. P. 3001(f). Debtor's plan in this case was confirmed May 19, 2005. The confirmed plan provides for a one hundred (100%) percent

dividend to unsecured creditors; however, the plan does not accurately treat the IRS as a secured creditor or extinguish the right of the IRS to seek setoff; therefore the IRS retains its setoff right with regard to Debtor's pre-petition tax refund and it may obtain relief from the automatic stay in order to exercise this right. See Deutchman, 192 F.3d at 461; Dozier, slip op. at 5.

The IRS is also not adequately protected. Despite the fact that the IRS is receiving a stream of payments under the confirmed plan, the refund owed to Debtor appears to be less than the amount of the IRS's claim; and thus, there is no equity cushion to protect the IRS. See In re Koenig, C/A No. 00-11188-W, slip op. at 3 (Bankr. D.S.C. Dec. 7, 2001) (granting relief from stay for lack of adequate protection when there is no equity cushion in the subject collateral). The plan also fails to protect the IRS because it does not provide payment to the IRS as a secured creditor. In re Kolb, C/A No. 02-05079-W, slip op. at 4 (Bankr. D.S.C. Aug. 26, 2002) (holding that debtors' offer of adequate protection was insufficient where plan did not properly treat the IRS as a creditor partially secured by its right of setoff). Finally, Debtor has not demonstrated an overriding need to receive the refund and therefore it appears that relief from stay is appropriate so that the IRS may exercise its right to setoff under § 553.

Therefore, in light of the foregoing, the Court grants the Motion.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 25, 2006


UNITED STATES BANKRUPTCY JUDGE

ENTERED

APR 25 2006

L. G. R.