

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

James and Stephanie Lewis,

Case No. 00-10469

Debtors.

**MEMORANDUM OPINION AND ORDER RE
UNITED STATES' MOTION FOR RELIEF FROM AUTOMATIC STAY**

The Court conducted a hearing on the United States' Motion for Relief from Automatic Stay on December 6, 2000. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The debtor in this case, James S. Lewis, is a cotton farmer. On February 4, 2000, James and his wife, Stephanie P. Lewis, filed a voluntary Chapter 11 bankruptcy petition in the Western District of Tennessee. At the time of the bankruptcy filing, the debtors were indebted to the Farm Services Agency, ("FSA"), in the amount of \$100,453.15. This debt was secured by Cotton Equities arising from the 1999 crop in the approximate amount of \$22,071.39.

Pursuant to a consent order entered with the Court on August 1, 2000, the debtors were allowed to use the \$22,071.39 cash collateral in return for granting a first priority lien to FSA on the 200 crops, 2000 crop insurance, and "any and all government program payments, including

but not limited to Agricultural Marketing Transition Act of 1996 ("AMTA") Program payments as well as disaster payments." This newly created security interest secured FSA to the extent of the \$22,071.39 cash collateral used by the debtor.

In 2000, James Lewis grew cotton in both Haywood and Madison Counties in Tennessee. On five of the farms Mr. Lewis grew cotton on in these counties, he participated, as a producer, in a Production Flexibility Contract for the 2000 crop year under AMTA. The landowners or their agents enrolled these five farms in the AMTA Program in 1996. Pursuant to these AMTA contracts, the landowner and/or the producer are entitled to receive seven (7) yearly payments from the government. FSA, through the Commodity Credit Corporation ("CCC") is currently holding approximately \$25,233.00 in funds to be disbursed on the five aforementioned farms. The 2000 designations made by the owners of the land on which Mr. Lewis grew cotton indicate that Mr. Lewis is to receive 100% of these funds. It is these funds which the government asserts may be setoff against the debtors' pre-petition debt to the government under 11 U.S.C. § 553.

II. CONCLUSIONS OF LAW

Section 553 of the Bankruptcy Code provides in relevant part as follows:

(a) Except as otherwise provided in this section . . . this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . .

11 U.S.C. § 553(a). "Setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'

Although no federal right of setoff is created by the Bankruptcy Code, . . . § 553(a) provides that,

with certain exceptions, whatever right of setoff otherwise exists is preserved in bankruptcy." *In re Buckner*, 218 B.R. 137, 145 (BAP 10th Cir. 1998), *citing Citizens Bank v. Strumpf*, 516 U.S. 16, 18-20, 116 S.Ct. 286, 289, 133 L.Ed.2d 258 (1995).

The Production Flexibility Contracts provide for the setoff of AMTA payments against any debt owed to the United States Government . Specifically, the second sentence of paragraph 5-F of the contract appendix (CCC-478) states: "Offsets for debts owed to agencies of the U.S. Government shall be made prior to making any payments to producers or their assignees." Therefore, pursuant to nonbankruptcy law, the U.S. Government has the right to setoff this debt.

To seek setoff under 11 U.S.C. § 553, the Government must meet the following three requirements:

- (1) the debt exists from creditor to debtor and that debt arose prior to commencement of bankruptcy case,
- (2) the creditor has claim against debtor which arose prior to commencement of bankruptcy case, and
- (3) the debt and claim are mutual obligations.

In re Sauer, 223 B.R. 715, 724 (Bankr. D.N.D. 1998). The parties in this case have stipulated that elements (2) and (3) have been met, thereby leaving element (1) as the only issue in question. The government asserts that the debt it owes to the debtor arose pre-petition. The debtors, on the other hand, assert that because they had to designate their shares on an annual basis, with the 2000 designation having been executed post-petition, the debt owed by the government to the debtor is a post-petition one and therefore not subject to setoff.

According to the testimony of Rick English, the AMTA contracts on each of the farms in question were executed in 1996. The AMTA contracts provide in the CCC-478 Appendix at

paragraph 3-A that these contracts became effective when signed by an authorized representative of CCC. At trial, Mr. English testified that each of the AMTA contracts were signed by an authorized representative of the CCC in 1996. As a result of these facts, the Court concludes that the governments' obligation to pay the producer/landowner arose at the time the contracts were executed in 1996, which makes the obligation a pre-petition one.

The mere requirement that the debtors had to designate the percentage of the AMTA payments the landowner and the producer were to receive for 2000 does not make the debt a post-petition one. "For purposes of setoff statute which requires that debt must have arisen pre-petition to be setoff against post-petition claim, debt is not prevented from arising pre-petition merely because of dependency on post-petition event; debt can be absolutely owing pre-petition even though the debt would never have come into existence except for post-petition events." *In re Gerth*, 991 F.2d 1428, 1443 (8th Cir. 1993) [also holding that contracts should be construed with preference for finding mutual promises rather than conditions, *Id.* at 1434, citing Restatement (Second) of Contracts § 227(2)]; *Sauer*, 223 B.R. at 725; *In re Alvsted*, 223 B.R. 733, 741 (Bankr. N.D.D. 1998). The character of a claim is not transformed from pre-petition to post-petition simply because it is contingent, unliquidated, or unmatured when the debtors' petition was filed. *In re Morristown Lincoln-Mercury, Inc.*, 42 B.R. 413, 418 (Bankr. E.D. Tenn. 1984); *In re Matthieson*, 63 B.R. 56 (D.Minn. 1986) (setoff right exists because CRP¹ debt is a

¹Conservation Reserve Program. A very similar government program to the AMTA program. Under CRP, the Secretary of Agriculture is charged with formulating and carrying out the "enrollment of lands in a conservation reserve program through the use of contracts to assist owners and operators of [eligible] lands . . . to conserve and improve the soil and water resources

pre-petition debt; obligation to pay CRP payments was absolutely owing and definite as to liability pre-petition, but not yet due or liquidated, because the contract requirements were contractual duties and promises rather than conditions precedent.)

Although not directly addressed at trial, the Court feels compelled to point out that relief from the automatic stay to allow setoff is not mandatory and is subject to the discretion of the Court. *In re Larbar Corp.*, 177 F.3d 439, 447 (6th Cir. 1999). The testimony of the Mr. Lewis at the December 6th trial was that he needed these AMTA monies to continue his farming operations; however, when questioned by the Assistant United States Attorney regarding some of his monthly expenses, it became evident that the debtor seeks the AMTA monies to continue a lavish and extravagant lifestyle, including numerous and unnecessary expenses for golf equipment and golf outings. Given this testimony, setoff is certainly equitable in the instant case.²

III. ORDER

of such lands." 16 U.S.C.A. § 3831(a). By entering the CRP program, eligible producers agree to convert eligible land to a conserving use for the duration of their contracts in return for annual rental payments and cost-share assistance from CCC. These contracts are generally for a 10 or 15 year period. *See, In re Sauer*, 223 B.R. 715 (Bankr. D.N.D. 1998).

²"In deciding whether or not to grant a creditor's request for a setoff, the presumption is in favor of setoff, unless such a setoff would prejudice other third-party creditors." *In re Larbar Corp.*, 177 F.3d at 447. In the case at bar, the government's Motion for Relief from the Automatic Stay was served on all creditors and interested parties per the Certificate of Service filed with the Bankruptcy Court on 5/19/00. Upon information and belief, no third party creditors filed objections to the requested relief.

"Memorandum Opinion and Order re United States' Motion for Relief from Automatic Stay"

It is therefore **ORDERED** that the United States' Motion for Relief from the Automatic Stay is **GRANTED**.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: December 27, 2000