

IN RE: Patrick HUNTER, Debtor.
Patrick HUNTER, Plaintiff,
v.
INTERNAL REVENUE SERVICE, Defendant.

No. 96-0825.

United States Bankruptcy Court, W.D. Tennessee.

April 1, 1997.

MEMORANDUM OPINION AND ORDER RE DEBTOR'S COMPLAINT FOR INJUNCTIVE
RELIEF; AND,
DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

On February 18, 1997, this Court held a hearing to resolve this dispute pursuant to Federal Rule of Bankruptcy Procedure 9014. This is a core proceeding. 28 U.S.C. § 157(b). This memorandum constitutes findings of fact and conclusions of law. Bankruptcy Rule 7052.

FINDINGS OF FACT

On March 6, 1995, the IRS sent the plaintiff's 1994 tax refund of \$1,691.00 to the Alaska Child Support Agency pursuant to 26 U.S.C. § 6402(c). On May 9, 1995, the plaintiff filed for Chapter 13 Bankruptcy, triggering the automatic stay. 11 U.S.C. § 362. Forty-five days later, the automatic stay terminated as to the IRS's actions under 11 U.S.C. § 6402 by virtue of this Court's **STANDING ORDER GRANTING RELIEF FROM AUTOMATIC STAY IN CHAPTER 7 AND 13 PROCEEDINGS** of March 6, 1990 ("Standing Order"). On April 29, 1996, the IRS sent the plaintiff's 1995 tax refund of \$1,213.00 to the state of Alaska under the authority of the Standing Order.

On July 30, 1996, the plaintiff filed a **COMPLAINT FOR INJUNCTIVE RELIEF** ("complaint") against the IRS. In the complaint, the plaintiff seeks to recover the 1994 and 1995 tax return refunds sent to the state of Alaska and to enjoin the IRS from offsetting his income tax return

refunds in the future. Specifically, the debtor alleges that his income tax return refunds should not be turned over to the state of Alaska on the ground that he needs the funds in order to effectuate a reorganization. Additionally, he alleges that the IRS's interception of the funds is in violation of 11 U.S.C. § 362 and the Taxpayer Bill of Rights, and he alleges that such interception would cause irreparable harm.

On January 2, 1997, the IRS filed a MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ("motion to dismiss"). The IRS alleges that this Court lacks subject matter jurisdiction to hear the complaint pursuant to 26 U.S.C. § 6402(e). In the alternative, the IRS argues that even if this Court has subject matter jurisdiction, the debtor has failed to state a claim upon which relief can be granted in light of the current Standing Order.

On January 28, 1997, the debtor responded to the IRS's motion to dismiss with a RESPONSE TO INTERNAL REVENUE SERVICE'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ("response"). Additionally, on February 13, 1997, he filed an AMENDED RESPONSE TO INTERNAL REVENUE SERVICE'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ("amended response"). In these documents the debtor alleges in pertinent part that this Court has subject matter jurisdiction pursuant to 11 U.S.C. § 105. Furthermore, the debtor alleges that the Standing Order does not ban his request that it be waived.

CONCLUSIONS OF LAW

Both parties have raised issues concerning this Court's jurisdiction to hear the debtor's COMPLAINT FOR INJUNCTIVE RELIEF. However, the dispositive issue in this case is whether the debtor has stated a claim for which relief can be granted in light of the current Standing Order. For the following reasons, this Court finds that the debtor's claim is denied.

11 U.S.C. § 105(a) authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Pursuant to this section, this

Court issued a Standing Order on March 5, 1990 granting relief to the IRS from the automatic stay in Chapter 7 and Chapter 13 cases under limited circumstances. The Standing Order provides:

The automatic stay provided by 11 U.S.C. 362 shall be terminated in Chapter 7 and Chapter 13 proceedings as to the matters set forth below 45 days after the filing of the debtor's original petition, if neither the debtor nor any other party in interest files an objection and requests a hearing within said 45 day period:

1. IRS assessment of amount due,
2. IRS issuance of notices and demands under Title 26 of the United States Code, and
3. IRS offset or credit of any amounts due in accordance with 26 U.S.C. 6402.

The effect of the Standing Order is to lift the automatic stay 45 days after a debtor files an original Chapter 7 or Chapter 13 bankruptcy petition. During this period, a debtor has ample opportunity to file an objection and request a hearing on the termination of the automatic stay. The relevant purpose of the Standing Order is to allow the IRS to offset or credit amounts owed by debtors in accordance with 26 U.S.C. § 6402. Otherwise, a debtor wishing to circumvent IRS setoffs could simply implicate the automatic stay. 11 U.S.C. § 362.

On March 6, 1995, the IRS offset the debtor's 1994 tax return refund. This was done over two months before the debtor filed his Chapter 13 petition on May 9, 1995. Because the petition had not been filed at the time of the setoff, the automatic stay was not in effect at that time pursuant to 11 U.S.C. § 362. Therefore there was no violation of the automatic stay in regard to the 1994 tax return refund.

On April 29, 1996, the IRS offset the debtor's 1995 tax return refund. This was done more than 45 days (the time allowed by the Standing Order) after the debtor filed his petition on May 9, 1995. Furthermore, the debtor did not file an objection and a request for a hearing within this period. As a result of this inaction, the automatic stay terminated after the 45 day period. Therefore, there was no violation of the automatic stay in regard to the 1995 tax return.

This Court finds that the debtors COMPLAINT FOR INJUNCTIVE RELIEF seeking to

recover the 1994 and 1995 tax return refunds and to enjoin the IRS from sending future tax return refunds is without merit in that the debtor did not comply with the terms of the Standing Order. Specifically, the debtor did not file an objection or request a hearing within the 45 day period allowed.

ORDER

It is therefore ORDERED that the debtor's COMPLAINT FOR INJUNCTIVE RELIEF is DENIED and that the IRS's MOTION TO DISMISS OR FOR SUMMARY JUDGMENT is GRANTED.

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: April 1, 1997

****This is a published decision**