

Not intended for publication

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

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IN RE

BRENDA GOWER,

Debtor.

CASE NO. 97-10662

Chapter 13

BRENDA GOWER,

Plaintiff,

v.

Adv. Pro. No. 97-5180

ECMC,

Defendant.

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MEMORANDUM OPINION AND ORDER RE  
PLAINTIFF'S COMPLAINT TO COMPEL TURNOVER  
OF CERTAIN MONIES FROM DEFENDANT

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On September 25, 1997, this Court conducted a trial to resolve this dispute pursuant to FED. R. BANKR. P. 7001. This is a core proceeding. 28 U.S.C. § 157(b). This memorandum shall constitute the Court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

**I. FINDINGS OF FACT**

On October 6, 1997, the parties to this proceeding submitted a "Joint Stipulation of Undisputed Facts" to assist the Court in deciding this case. This stipulation reads as follows:

1. ECMC and the Internal Revenue Service are both entities acting as agencies of the United States federal government.
2. The Debtor was entitled to a refund on her 1996 income taxes in the amount of \$2,484.00.
3. The Debtor has scheduled in her bankruptcy petition filed in this case a debt to ECMC for government insured student loans in excess of \$14,000.00.
4. On February 24, 1997, the Internal Revenue Service seized the Debtor's income tax return in the amount of \$2,484.00.
5. The Debtor's petition for relief was filed on February 25, 1997.

6. Neither ECMC nor the Internal Revenue Service has filed a Motion to Obtain Relief from the automatic stay.

7. On March 28, 1997, the Internal Revenue Service deposited the seized income tax refund into the account of the U.S. Department of Education.

8. The Debtor's bankruptcy case was dismissed by Order of the Court dated May 8, 1997, but said dismissal was set aside and the case reinstated by Order of the Court dated July 2, 1997.

9. ECMC has filed a general unsecured claim for the subject debt.

10. If the turnover is granted, the Debtor would use the property for moving expenses and other living expenses.

In addition to the stipulated facts submitted by the parties, the Court additionally finds that the current Complaint to Compel Turnover was filed on June 30, 1997.

## **II. CONCLUSIONS OF LAW**

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, the 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.

In the case at bar, the IRS seized the debtor's income tax return in the amount of \$2484.00 on February 24, 1997. Because the petition had not been filed at the time of the seizure, the automatic stay

was not in effect at that time pursuant to 11 U.S.C. § 362. As a result, no violation of the § 362 automatic stay occurred when the IRS seized Gower's tax refund.

On March 28, 1997, the IRS deposited Gower's seized tax refund with the U.S. Department of Education. In turn, the Department set-off this refund amount against the outstanding balance of the Debtor's federally guaranteed student loan. This set-off occurred thirty-two (32) days after Gower's bankruptcy petition was filed. The Standing Order issued by this Court on March 5, 1990, does not lift the automatic stay until the expiration of a forty-five (45) day period, regardless of whether or not the debtor or any other party in interest files an objection within this time period. As a result, the IRS's act of depositing the tax refund into the Department of Education's account and the Department's subsequent set-off constituted a violation of the automatic stay. This violation entitles the Debtor to a turn-over of the seized tax refund in the amount of \$2484.00.

### **III. ORDER**

It is therefore **ORDERED** that the debtor's Complaint to Compel Turnover of a Tax Refund in the amount of \$2484.00 from the Defendant is **GRANTED**.

**IT IS SO ORDERED.**

**BY THE COURT,**

**G. HARVEY BOSWELL**  
**United States Bankruptcy Judge**

**Date: October 30, 1997**