

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROBERT M. D'AGOSTINO
LORIANN D'AGOSTINO

Case No. 97-10743 K

Debtors

Mr. D'Agostino had accrued a Kodak bonus of \$2,630.32 that had not yet been paid as of the petition date. The Chapter 7 Trustee demanded that bonus. What Mr. D'Agostino turned over was the net check he received from Kodak of \$1,499.28. Kodak had made payroll deductions of \$1,131.04. The Trustee seeks turnover of the full, gross amount, since nothing would have been withheld had Mr. D'Agostino instructed Kodak to pay the money to the Trustee.

The Court rules that any tax liability that the Debtors would have had if the gross bonus had been paid, rather than the net, should be borne by the estate -- the asset comes *cum onere*. The burden is the asset's burden, not the Debtors' burden, to carry.

Conversely, any tax benefit that the Debtors enjoy as a result of the withholding must be turned over to the Trustee, whether the benefit is a larger tax refund or a smaller tax bill.

That being said, a practical application thereof seems difficult, unless the Trustee can show that this would have no tax consequences for the Debtors had they instructed Kodak to pay the Trustee directly.

Because the Court believes it likely that someone has to pay taxes on that income, and that that burden would fall on the Debtors if the gross amount had been paid to the Trustee, the Court finds that unless this matter is otherwise settled, its resolution must await the ultimate results of Debtors' Tax Year 1997 tax filings. If the amounts withheld approximate the Debtors' tax liability resulting from the bonus, then they owe the Trustee nothing. If the amounts withheld turn out to have contributed to excess withholding, or to have reduced the Debtors' unpaid tax liability attributable to other taxable events, then the benefit must be paid to the Trustee.

Unless this matter is otherwise settled, the Trustee's motion is denied, without prejudice to renewal at the end of the 1997 Tax Year.

In a hope of promoting settlement (in the event that the Trustee were to find that payment of gross would have had tax consequences to the Debtors), the Court observes that from the Trustee's perspective, the value of his claim against the Debtors is so speculative as to be viewed as a "spin of the wheel." Congress, in its wisdom, has elected not to bifurcate the tax year of Chapter 7 debtors who are natural persons. 11 U.S.C. § 346(h). This means that it is impossible to know, prior to the end of the 1997 Tax Year, what effect the withholdings on Mr. D'Agostino's bonus will have as balanced against any good faith tax planning or other tax-sensitive activities engaged in by the Debtors for the balance of the tax year. This Court cannot direct the Debtors to conduct their taxable lives in any particular manner after their chapter 7 filing.

Whether the estate will win or lose when Tax Year 1997 is said and done is beyond this Court's control and beyond the realm of oddsmaking. The time value of money and

the uncertainty of the effect of this transaction on the totality of the Debtors' 1997 taxable lives calls out for immediate settlement, unless the Trustee is certain that remittance to him of the gross amount by Kodak could have had no tax effect on the Debtors.

SO ORDERED.

Dated: Buffalo, New York
August 19, 1997

Michael J. Kaplan, U.S.B.J.