

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

HERBERT HUNTER, JR.,

Debtor.

CASE NO. 98-24955

DECISION & ORDER

BACKGROUND

On December 31, 1998, Herbert Hunter, Jr. (the "Debtor") filed a petition initiating a Chapter 7 case. On February 5, 1999, the Debtor filed the schedules and statements required by Section 521 and Rule 1007 which indicated that: (1) he had no tax refunds due; (2) he was claiming a \$10,000.00 homestead exemption, as permitted by New York Law, in any equity which he had in his residence; (3) he had a total of \$1,000.00 in cash and on deposit in various financial institutions; (4) he had over \$63,000.00 in unsecured debt, an amount approximately equal to his \$65,000.00 annual salary as a supervisor after 25 years of employment with the U.S. Postal Service; and (5) he had no disposable monthly income after his monthly payroll deductions and living expenses for himself and his two teenage children, which expenses included: (a) \$750.00 for food; (b) \$75.00 for children's allowance; and (c) \$345.00 for a voluntary retirement contribution and loan repayment, which did not make clear how much, if any, was for loan repayment, and how much was for a voluntary retirement payment.

A Minute Report of a Section 341 Hearing conducted by the Debtor's trustee (the "Trustee") on February 11, 1999, indicated that the Trustee intended to administer the Debtor's non-exempt cash and tax refunds.

A Minute Report of an adjourned Section 341 Hearing conducted by the Trustee on September 15, 1999, indicated that the Debtor would turnover the amounts on deposit in various financial institutions at the time of the filing of the petition, but since there was a dispute as to whether the Debtor was required to turnover his tax refunds, the Trustee intended to file a turnover motion.

On November 16, 1999, the Trustee filed a motion (the "Turnover Motion") which requested that the Court order the Debtor to turnover to him the Debtor's 1998 federal income tax refund of \$7,005.00 and his 1998 New York State income tax refund of \$588.00. In a Memorandum of Law, the Trustee asserted that: (1) upon his filing on December 31, 1998, the Debtor's rights to receive federal and state tax refunds for the 1998 calendar year, as well as the refunds, were property of the bankruptcy estate under Section 541, since they were interests of the Debtor in property that were not otherwise excepted by that Section; (2) since the Debtor had claimed a New York State homestead exemption, he could not also claim a cash exemption for a portion of the tax refunds; and (3) every decision that the Trustee could find which was published after the Bankruptcy Code was enacted, including *In Re Barowsky*, 946 F.2d 1516 (11th Cir. 1991) ("*Barowsky*"), has held that the pre-petition portion of a debtor's income tax refund constitutes property of the estate, even when the relevant tax year did not end until after the filing of the debtor's petition.

On December 3, 1999, the attorney for the Debtor interposed a Responding Affirmation on his behalf, which asserted that: (1) on December 31, 1998 when he filed his petition, the Debtor had no right to a federal or state income tax refund, so that the refunds were not property of the estate; (2) to the best of the attorney's knowledge, no trustee in the Rochester Division of the Western District of New York had ever made claim to an income tax refund when the bankruptcy case was filed prior to the end of the tax year in question; and (3) because 28 U.S.C. § 1398 of the Bankruptcy Tax Act of 1980 ("Section 1398") makes any pre-petition tax liability a post-petition tax liability, if a Chapter 7 debtor fails to make the election permitted by that Section, when a debtor fails to make the required election, any income tax refund should also be deemed to be a post-petition asset.

At the Hearing on the Turnover Motion conducted by the Court on December 8, 1999, the Trustee indicated that it had never had been his practice as a Trustee for over 39 years not to have demanded the turnover of the non-exempt portion of any income tax refunds in a case that would otherwise be an asset case because the aggregate value of the debtor's non-exempt assets warranted the Trustee administering them. At the same time, the Trustee conceded that he may never have had a case where those requirements were met and the petition was filed before the end of the taxable year in question.

At the same Hearing, the attorney for the Debtor asserted that there was an actual policy in the Rochester Division of the Western District of New York that income tax refunds for taxable years where the petition was filed before the end of the taxable year were not property of the estate which a trustee would administer. However, the attorney for the Debtor also acknowledged that to

the best of his knowledge, no written decision to that effect, published or unpublished, had been filed by a Bankruptcy Judge of this Court.

DISCUSSION

The case law is clear that a debtor's income tax refund is property of the bankruptcy estate under Section 541, even though the amount of the refund and the right to receive it may not become fixed until the end of the tax year in question, even if the end of that tax year occurs after the date of the filing of the petition. See Barowsky and *In Re Doan*, 672 F.2d 831 (11th Cir. 1982) and the cases cited therein. I agree completely with the reasoning of these cases and hold that the portion of a Chapter 7 debtor's federal and state income tax refunds attributable to the pre-petition portion of the taxable year in question is property of the bankruptcy estate under Section 541, even if the petition is filed before the close of that taxable year in question, so that the income tax refunds do not become fixed or even payable until the close of the tax year in question.

Furthermore, the purpose of Section 1398, to eliminate both uncertainty and litigation by detailing how income tax attributes and liabilities are to be allocated between a bankruptcy estate and a debtor, does not warrant the conclusion that where a debtor fails to make such an election, and all of his pre-petition tax liabilities are deemed to be post-petition income tax liabilities, any income tax refunds should also be deemed to be post-petition assets.

In addition, based upon the statements of the Trustee at the Hearing on the Turnover Motion, there is no reason that his administration of this Debtor's estate should be limited by an alleged policy that: (1) the Trustee did not participate in or perpetuate; (2) is contrary to persuasive legal authority; and (3) does not appear to have been based upon a decision of this Court.

CONCLUSION

The Debtor shall immediately turnover to the Trustee his federal income tax refund of \$7,005.00 and his New York State income tax refund of \$588.00. If these refunds are not turned over to the Trustee within ten (10) days of the date of this Decision & Order, the Trustee can apply to this Court for further relief, which may include the entry of a judgment against the Debtor and other and further appropriate relief.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: December 10, 1999