UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

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In re

DONALD C. DAVID
DIANE M. DAVID

Case No. 99-16388 K

Debtors

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Note: The Debtors withdrew their opposition to the Trustee's Motion in this matter on the eve of the Court's rendering of this Decision. This Decision is thus, *dictum*, in that the Motion will be granted as "unopposed." The Decision is offered for its informational value.

The Debtors' "bought" from the trustee a non-exempt boat. Then they received and spent (on necessaries) a $3800 tax refund which was almost all non-exempt. What they now seek is a ruling tantamount to a holding that if a Chapter 7 trustee pursues a debtor's turnover of one asset before another, the trustee somehow loses (by waiver, laches, abandonment, waste, or some other theory) the second asset. The Debtors' theory is not totally clear. The only statutory authority cited is the Trustee's duty under 11 U.S.C. § 704(1) to "collect and reduce to money the property of the estate for which such Trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." The only case authority cited is a case in which the actual value of a farm declined while under the Trustee's protection, which decline would not have occurred if the Trustee had acted more swiftly in selling the farm. (*In re Hutchinson,* 5 F.3rd 750 (4th Cir. 1993).)

The case is of no application here. The present case has nothing to do with

liquidating a physical asset. Rather, this case regards the Trustee's efforts to obtain turnover of non-exempt assets from the Debtors, and that is a matter upon which that case offers no guidance whatsoever.

The thrust of the § 704 argument here seems to be some sort of "merger" argument. That if a trustee negotiates a settlement of a debtor's interest in one non-exempt asset without at the same time raising all other claims the trustee plans to assert against the debtor, those remaining claims "merge" into the settlement and cannot later be raised by the trustee. (As noted above, a non-exempt boat was resolved by a promise by the Debtors to pay the Trustee $1200 therefor. Now that that has been paid, the Trustee seeks turnover of a non-exempt tax refund.)[1]

In this Court's view, the argument by the Debtors has the matter precisely backward. Under § 542, a debtor must turn over all non-exempt property, and scheduled assets may be "abandoned" only under 11 U.S.C. § 554. It is only by courtesy, not by right, that a debtor might be able to negotiate a sale without first having to turn the property over to the trustee.

The command of 11 U.S.C. § 542 to turn over property of the estate immediately upon filing is unequivocal.[2] Similarly unequivocal is 11 U.S.C. § 521 which commands that "the

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[1] The Trustee knew that the Debtors expected a tax refund, but he could not know its amount until the Debtors filed their tax returns. He did not keep the § 341 meeting open until that matter was resolved, but rather sought the cooperation of the Debtors' attorney toward keeping track of that matter.

[2] In pertinent part, § 542(a) states: "An entity . . . in possession, custody, or control, during the case, of property that the Trustee may use, sell, or lease . . . shall deliver to the Trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

debtor shall . . . cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties . . . [and] surrender to the trustee all property of the estate . . . ." Where, as here, a trustee is courteous enough to entertain a debtor's proposals with regard to non-exempt assets, which proposals might permit the debtor to retain the assets in exchange for paying their value, it is the debtor's burden, not the trustee's, to make sure that all of the trustee's claims or potential claims against the debtor are encompassed in those proposals, if that is the debtor's desire. And where, as here, the debtor did not do so, the trustee is not foreclosed by 11 U.S.C. § 704 or any other authority from pursuing other claims against the debtor.

In sum, a tax refund that is not exempt must be turned over without demand therefor. It is only by courtesy, not by right, that a debtor might negotiate "terms" with the trustee, and thereby avoid the need to turn over the full amount as a lump sum. A debtor may not benefit from violating two statutory commands.[3]

Indeed, the Debtors wish to kill the goose that laid the golden egg. If they are right in their argument, then from now on, any trustee must enforce turnover by the debtor of everything the trustee claims, and the trustee must obtain it all, before he or she consummates any sale or settlement with the debtor that might put any item back in the hands of the debtor.

The Court will not countenance such a result in the absence of compelling authority, and no such authority is cited by the Debtors here. Rather, a debtor who enjoys the luxury of sitting on two estate assets rather than one, and who negotiates to purchase one, does

[3] As this Court stated in *Jerome Paul Brylski*, Case No. 98-15731 K, "any debtor who thinks that a Chapter 7 trustee has no right to presume that the debtor will honor those duties, may be playing with that debtor's own privilege of discharge if the consequence of his game is to play hide and seek with an asset of the estate."

not "win" the second as a bonus. It is that debtor's responsibility to turn over the second asset without demand, regardless of what has been arranged as to the first asset, unless the second asset was expressly encompassed in the purchase.

Counsel's argument to the effect that this should not be the result because he has never before experienced this fact pattern is best directed at some other authority; e.g. Congress, his client, his malpractice insurer. And the argument that the asset was a tax refund, a right to which would not have ripened until December 31, 1999, and was dependent, at least in part, on whether and how the Debtors filed their tax return, is incorrect. To the extent that the tax refund is in fact a return of pre-petition withholding tax overpayments, it is nothing but a non-exempt account receivable. If the Debtors hadn't filed for it, the Trustee could. (One incentive for cooperation from debtors is the fact that a debtor who is eligible to claim a cash exemption may claim that cash exemption in a yet unpaid tax refund, under § 283 of the Debtor and Creditor Law.) As was stated by Chief Bankruptcy Judge Ninfo of this District in the case of *In re Hunter*, 98-24955, "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* [*In re Barowsky*, 946 F.2d 1516 (11th Cir. 1991)] and *In re Doan*, 672 F.2d 831 (11th Cir. 1992) and the cases cited therein."

*Barowsky* 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 petition.

The Trustee's motion is granted to the extent of the pre-petition portion of the Debtors' tax refund, computed by reference to the number of days before and after the filing of the petition in the year in which it was filed. Here, the petition was filed on November 19, 1999. As of that date, 322 days had passed in 1999, which was not a leap year. Dividing 322 by 365, it is concluded that 88.2% of the refund was the "pre-petition portion" and must be turned over to the Trustee - $3,113.99.

The fact that the Debtors spent the tax refund under the mistaken belief that it did not belong to the estate is tragic, but irrelevant to the principles of law that govern this decision. The consequences of such a misunderstanding fall on the shoulders of the Debtors, not on their creditors or the Trustee serving in their case. In any case filed by a W-2 wage earner toward the end of a calendar year,[4] it is critical for him or her to ask about rights regarding any tax refund before it is spent, not after.

SO ORDERED.

Dated: Buffalo, New York
September 11, 2000

/s/ Michael J. Kaplan

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

[4] Earlier in the year, or in cases not involving W-2 wage earners, a debtor might sometimes succeed in turning a "prediction" of "no refund expected" into a self-fulfilling prophecy, such as by reducing withholding allowances. The "speculative" nature of a possible tax refund moves closer to a calculable certainty as the filing date moves closer to the last day of any tax year.