

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION**

In Re:
WALTER HASH

Debtor.

) **Case No. 95-50597**
) **Chapter 13**
)
)
)
)

ORDER

This matter comes before the Court upon the Motion of the Internal Revenue Service ("IRS") for Relief from Stay and the Debtor's Objections to the Claim of the IRS and to the IRS' Motion for Relief from Stay. A hearing was held on the matter in Statesville, North Carolina on November 7, 1995 and the attorneys for both parties subsequently submitted memorandum in support of their positions. Based on the hearing and the Court's records, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Debtor initially filed bankruptcy under Chapter 7 of the Code on March 3, 1995 ("first case"). Following that filing, the Debtor received a discharge on June 14, 1995.

2. As part of the June 14 discharge, the Debtor was discharged from a federal tax debt which arose out of the 1982 tax year.

3. In connection with the 1982 tax debt, the IRS had previously recorded a Notice of Lien with the Ashe County Clerk of Superior Court on November 28, 1994. The proof of lien indicates that the taxes were assessed on June 30, 1986 and that the balance of the debt at the recordation date was \$24,351.50.

4. Following the Debtor's Chapter 7 discharge, the IRS issued a Notice of Levy to the National Electric Benefit Fund ("NEBF") on June 30, 1995 indicating its intent to levy on the Debtor's interest in his ERISA qualified retirement plan. The NEBF manages that plan. That Notice of Levy indicated that the Debtor owed a total of \$76,980.79 in taxes and penalties as of the date of the Notice.

5. Subsequent to the Debtor's discharge and the Notice of Levy, the Debtor filed this case, a second bankruptcy petition, under Chapter 13 of the Bankruptcy Code on August 30, 1995 ("current case").

6. On September 27, 1995, following the filing of the Debtor's current case, the IRS filed a Motion for Relief from Stay to continue its levy on the Debtor's ERISA benefits. The Debtor responded by filing an objection to the IRS' claim. The Debtor contends that the tax debt was discharged in the Debtor's first case, and further that the IRS was not entitled to reach the Debtor's ERISA benefits due to the antialienation provisions of the NEBF plan, which are required by ERISA.

CONCLUSIONS OF LAW

1. It is well settled that an individual's benefits under an ERISA qualified retirement plan are not property of the bankruptcy estate under section 541(c)(2) of the Bankruptcy Code and subsequent case law. Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242 (1992).

2. However, the levy issue is still germane to this bankruptcy case. While not estate property, pursuant to subsection 1322(a)(1), a Debtor may use assets that are not property of the bankruptcy estate to fund a Chapter 13 plan. Here, the Debtor has proposed to use these ERISA benefits to partially fund his Chapter 13 plan. Therefore, any garnishment of those benefits by the IRS will affect the Debtor's ability to make his plan payments, and the administration of the current case. As a result, the current issue represents a core matter and this court retains jurisdiction to determine whether the IRS may properly levy on the Debtor's ERISA benefits.

3. Generally, a debtor's ERISA benefits cannot be reached by his creditors. 26 C.F.R. § 1.401(a)-13(b)(1). However, an exception for the IRS has been carved out by ERISA regulations. Subsection 1.401(a)-13(b)(2)(i) of title 26 of the Code of Federal Regulations provides in pertinent part; "[a] plan provision . . . shall not preclude . . . [t]he enforcement of a Federal tax levy made pursuant to section 6331." In the current case, the IRS properly levied on the Debtor's ERISA benefits interest pursuant to section 6331 of the Internal Revenue Code ("IRC"). Further, section 6334 of the IRC enumerates all types of property that are exempt from levy by the IRS. ERISA benefits do not appear on that list. As a result, the IRS can reach the Debtor's ERISA benefits to satisfy a lien on the Debtor's property.

4. Section 6321 of the IRC states that "[i]f any person refuses to pay the same after demand, the amount [owed to the

government] . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Under Section 6322 of the IRC such liens arise as of the time of assessment. The 1982 taxes were assessed against the Debtor on June 30, 1986. Therefore, as of that date, the IRS had a lien on all of the Debtor's property, whether personal or real, then in existence. Further, the IRS recorded a Notice of Lien with the Ashe County Clerk of Superior Court on November 28, 1994, several months prior to the Debtor's first petition.

5. Although the Debtor may not have obtained rights in his ERISA plan before the 1986 assessment date, tax liens attach to after acquired property as well as property in an individual's possession at the time of attachment. Kuffel v. U.S., 441 P.2d 771 (1968). The record is not clear when the Debtor acquired his pension plan interest. It is clear that the Debtor did have rights in his ERISA plan at the time of his Chapter 7 petition filing on March 3, 1995. Therefore, at some time prior to bankruptcy by virtue of its assessment and lien, the IRS had a lien on this account. Therefore, unless the Debtor's Chapter 7 Bankruptcy affected this interest, the IRS continues to hold a lien on this account.

6. It is undisputed that the 1982 tax debt was discharged in the Debtor's Chapter 7 case on June 15, 1995. However, unless specifically ordered otherwise, a prepetition lien on a debtor's property survives bankruptcy and the creditor retains the right to

levy on property that is the subject of that prepetition lien. U.S. v. Whiting Pools, 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). The record is devoid of any action seeking to set aside this lien. Therefore, the IRS' lien flowed through the case, and while the Debtor's personal liability for these taxes was discharged, the IRS retained a lien on the Debtor's ERISA plan account following that case. As a result, the IRS acted properly in sending the Notice of Levy to the NEBF on June 15, 1995 and in beginning to attach the Debtor's benefit checks.

7. While it is true that the ERISA benefit checks may represent income that the Debtor could use to fund his Chapter 13 plan, the funds are not part of the bankruptcy estate and the IRS has a perfected lien against them. Therefore, the Debtor cannot prevent the IRS from continuing its levy against the funds by proposing to commit these to his Plan. As a result, the automatic stay must be lifted and the IRS permitted to continue its levy on the Debtor's ERISA benefits.

THEREFORE, THE FOLLOWING IS ORDERED:

The automatic stay of section 362 will be lifted with regard to the Debtor in the current case to allow the IRS to continue its garnishment of the Debtor's ERISA plan benefits from the National Electric Benefit Fund in order to satisfy its lien relating to the Debtor's 1982 Federal tax liability. Further, the Debtor's

objection to the claim of the IRS and the Debtor's objection to the IRS's Motion for Relief from Stay are **OVERRULED**.

This the _____ day of _____, 1995.

United States Bankruptcy Judge