Cause for dismissal
Failure to pay post-petition taxes

In re Kathryn Robertson 697-61956-fra13

1/7/2000 Alley Unpublished

Debtor filed bankruptcy under Chapter 13 and her plan was confirmed. Thereafter, debtor failed to pay post-petition income taxes and the State of Oregon moved to dismiss the case under Code § 1307 on the grounds that failure to pay taxes violates the provision of the confirmation order prohibiting the debtor from incurring "credit obligations." The State futher asserted that failure to pay taxes violates 28 U.S.C. § 959 which requires a trustee or debtor-in-possession to obey all state laws.

The court held that a failure to pay taxes is not the same as incurring a credit obligation, which in this context requires a degree of voluntariness on both sides. Further, 28 U.S.C. § 959 does not apply as the Debtor is neither a trustee nor a debtor-in-possession since all property revested in the Debtor at confirmation. The court held, however, that failure to pay post-petition taxes may constitute cause for dismissal based on the facts of the individual case. In this case, the court would not order the case dismissed as the amount unpaid was relatively slight, there were no prior motions addressing failure to pay taxes, the obligation to pay taxes was not clearly stated in the confirmation order, and the absence of caselaw in this District interpreting the confirmation order with respect to this issue. The Debtor was given 180 days to bring all tax obligations current with the requirement that the confirmation order be amended to provide that all future tax obligations be paid on or before their due date.

00-2(7)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	697-61956-fra13
KATHRYN M. ROBERTSON,	)	
	)	MEMORANDUM OPINION
Debtor.	)	

The State of Oregon has moved to dismiss this case pursuant to Bankruptcy Code § 1307. The Court finds that, while cause for dismissal does exist, the case should not be dismissed so long as certain conditions are met.

I. BACKGROUND

Debtor filed her petition for relief under Chapter 13 of the Bankruptcy Code on April 7, 1997. Her plan of reorganization was confirmed by an order filed on June 26, 1997.

Debtor's schedules revealed minor debts owed to taxing authorities.[1] The confirmed plan provides that these priority debts would be paid in full. None of the holders of nonpriority unsecured claims receive any payment.

[1] $540 to the Internal Revenue Service for 1996 income taxes, and $50 to the Oregon Department of Revenue for 1996 income taxes.

The order confirming the plan provides, in pertinent part, that:

> 2. The debtor shall incur no credit obligations during the life of the plan without the trustee's written consent unless made necessary by emergency or incurred in the ordinary course of operating the debtor's business. . . .
>
> 3. The debtor shall during the life of the plan timely file all required tax returns and provide copies of all tax returns to the trustee each year immediately upon filing with the taxing authority.

Debtor has failed to pay postpetition income taxes due for the tax year 1997. The State of Oregon has moved to dismiss the case pursuant to Code § 1307, on the grounds that the Debtor's failure to pay taxes violates the provision in the confirmation order prohibiting Debtor from incurring "credit obligations." The State further asserts that Debtor's failure to obey state law is a violation of 28 U.S.C. § 959, and is therefore further cause for dismissal under § 1307.[2] The Debtor's response avers that failure to pay postpetition income taxes is not grounds for dismissal of the case, and, further, that the failure to pay taxes does not give rise to a "credit obligation." The Debtor further alleges that the tax obligation was incurred in the ordinary course of her business.

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[2] The State also moved to dismiss on the grounds that the Debtor had not timely filed her tax returns. This failure was cured by the time the matter came on for hearing, and was not pressed by the State at the hearing.

II. DISCUSSION

Bankruptcy Code § 1307 provides that a Chapter 13 case may be dismissed or converted for cause. A nonexclusive list of circumstances giving rise to cause for dismissal includes "(1) Unreasonable delay that is prejudicial to creditors" and "(6) Material default by debtor with respect to a term of a confirmed plan."

The State's motion is premised, in part, on the argument that the Debtor's failure to pay postpetition tax obligations violates the confirmation order's proscription of unauthorized credit transactions. Violation of the terms of an order of confirmation does provide "cause" for dismissal. However, the phrase "incur no credit obligation" refers to transactions wherein each party consents to the extension of credit, that is, an obligation to pay in return for the lending of money or provision of goods or services. Failure to pay taxes is certainly problematical, as discussed further below. However, it does not involve an agreement to extend credit or defer payment. It is no more a "credit obligation" than failure to pay a speeding ticket.

It might be argued that the requirement that the debtor file required tax returns implicitly requires payment of taxes as well. However, it is just as easily argued that, had the court meant as much, the order would have required payment of taxes due with the returns. Failure to respond to an indefinite requirement should not lead to dismissal of a case under § 1307.

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The State argues that 28 U.S.C. § 959 requires the Debtor to pay postpetition taxes as they become due.[3] The statute applies to the management and operation of property in the hands of a trustee or receiver, and has been construed to include trustees and debtors-in-possession operating under the provisions of the Bankruptcy Code. See In re White Crane Trading Co., Inc., 170 B.R. 694 (Bankr. E.D. Cal. 1994). However, even if the statute's language can be read to require payment of taxes, it is not applicable to a postconfirmation debtor in a Chapter 13 case. Code § 1327 provides that, upon confirmation, property of the estate is revested in the debtors. It follows that the Debtor here is neither a trustee nor a debtor-in-possession, and is not subject to 28 U.S.C. § 959.

There are few reported cases involving the effect of failure to pay postpetition taxes under Code § 1307. In In re Bennett, 200 B.R. 252 (Bankr. M.D. Fl. 1996), the debtor's failure to pay postpetition taxes was found to be in violation of an "order establishing duties of debtor" requiring the debtor to meet all personal tax obligations, and a confirmation order providing that the debtor not incur any indebtedness without prior approval of the court or the trustee. Similarly, In re Koval, 205 B.R. 72 (Bankr.

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[3] 28 U.S.C. § 959(b) provides as follows:
Except as provided in section 1166 of Title 11 [which is not applicable here] a trustee, receiver or manager appointed in any case pending in any court of the United States, including a debtor-in-possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

N.D. Tx. 1996), found that failure to pay postpetition taxes violated the "spirit" of a general order requiring not only the timely filing of tax returns but the payment of taxes due pursuant to such returns. There is no equivalent general order in effect in the District of Oregon, and, as seen, no explicit direction in the confirmation order requiring payment of postpetition taxes.

While no specific directive has been violated, it remains an open question whether failure to pay postpetition taxes constitutes cause for dismissal under Code § 1307. In my opinion it does. The general purpose of Chapter 13 is to allow an honest debtor the opportunity to pay her debts, or at least some of them, through application of future assets, such as income, as opposed to the liquidation of present assets. See In re Cornelius, 195 B.R. 831, 837 (Bankr. N.D. N.Y. 1995). Willful avoidance by a debtor of legal obligations as they become due postpetition is inconsistent with Congress' purpose in establishing Chapter 13.

There is also a specific prejudice to the creditors subject to the Chapter 13 plan. The holders of postpetition obligations are not stayed by the Code from enforcing the debts due to them. Failure to make mandatory tax payments subjects the Debtor to the extensive collection weaponry available to taxing authorities. Employment of these tools in turn limits the Debtor's ability to make the payments required of her under her Chapter 13 plan, which in turn prejudices her creditors.

The payment of postpetition taxes as they come due is required by law. Nothing in the Bankruptcy Code, the plan confirmed

by the Court, or the confirmation order, can be said to relieve the Debtor of that duty; nor can failure to pay taxes without legal justification be said to be within the ordinary course; by putting herself in a position of having to choose between making mandatory tax payments or mandatory plan payments, the Debtor has effectively destroyed the rehabilitative effect of the plan, and thus the plan's very purpose. It follows that failure to make the required tax payments is cause for dismissal under Code § 1307.

While failure to pay post-petition taxes gives rise to authority to dismiss a case, the court is not required to do so under the permissive language of §1307(c). In re Green, 64 B.R. 530 (9th Cir. BAP 1986), In re Howell, 76 B. R. 793 (Bankr. D. Or. 1987). In considering whether a case should be dismissed for cause under §1307 the court should also consider the circumstances of the default, the debtor's ability to cure the default, and whether the interests of creditors and the estate will be better served by some other remedy. Each case must, therefore, be considered on its own merits.

In this instance I find that the case should not be dismissed, for the following reasons:

1. The unpaid amount is relatively slight[4], and may be paid over the remaining life of the plan;

2. There have been no prior motions addressing failure to pay taxes;

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[4]$1,100.00, according to the State's counsel at the hearing.

3. The obligation to pay taxes has not been clearly stated in the confirmation order; and

4. The absence (heretofore) of case law interpreting the confirmation order used in this District.

Accordingly, an order will be entered allowing the Debtor to bring current all tax obligations (state and federal) within 180 days. This may be accomplished by providing for the payments in a modified plan pursuant to Code § 1305, if the requirements of that section are otherwise satisfied. Any borrowing to satisfy this directive must, of course, be approved by the Trustee.

In addition, the order confirming the plan shall be amended to provide that all the Debtor shall pay all future tax obligations on or before their due date.

The foregoing constitutes the Court's findings of fact and conclusions of law. Counsel for Debtor shall submit a form of order consistent with this memorandum.

FRANK R. ALLEY, III
Bankruptcy Judge