

-Exemptions  
-Failure to schedule underlying  
property

In re James and Pamela Harris

697-60319-fra7

8/8/97

FRA

Unpublished

The Debtors filed their Chapter 7 bankruptcy petition on January 21, 1997. They did not list tax refunds as property of the estate because they did not know at the time they filed their petition whether they would be receiving refunds. At the § 341 hearing held after tax returns had been filed and in response to the trustee's routine question regarding tax refunds, the debtors indicated that they did indeed have tax refunds coming. The refunds were transferred to the trustee by the Debtors. The Debtors filed an amended Schedule B showing the tax refunds as property of the estate and an amended Schedule C claiming a \$414 exemption against those refunds under ORS 23.160(1)(k). The trustee filed an objection to the exemption on the ground that the Debtors had failed to properly schedule the property and should not receive the exemption.

The court cited a BAP opinion which adopted the rule suggested by the Eleventh Circuit that an exemption should be allowed no matter when it is claimed absent a showing of bad faith by the debtor or prejudice to creditors. Because there was no indication of bad faith or prejudice in this case, the trustee's objection was overruled.

E97-13(3)



1           The trustee objects to the claimed exemption, claiming that  
2 the debtors are not entitled to claim an exemption in property which  
3 was not disclosed in the schedules filed with the petition.

4           There is substantial authority that an exemption may be  
5 denied with respect to assets which were fraudulently concealed from  
6 the trustee or creditors. In the Matter of Doan, 672 F.2d 831, 833  
7 (11<sup>th</sup> Cir. 1992), In re Yonikus, 992 F.2d 866, 871 (7<sup>th</sup> Cir. 1993).  
8 Here, however, the trustee concedes that the debtors did not attempt  
9 to defraud the estate. Debtors represent that they were not aware  
10 that the tax refund would be received at the time they filed their  
11 petition. They did become aware of the likelihood of a tax refund  
12 prior to the §341(a) hearing, and they duly disclosed that fact to  
13 the trustee. (The fact that the disclosure was made in response to  
14 a standard question from the trustee is, in this case, immaterial.)  
15 The Bankruptcy Appellate Panel for the 9<sup>th</sup> Circuit has adopted the  
16 rule suggested in Doan, *supra* "that an exemption should be allowed  
17 no matter when it is claimed absent a showing of bad faith by the  
18 debtor or prejudice to creditors." In re Andermahr, 30 B.R. 532,  
19 533 (9<sup>th</sup> Cir. BAP 1983). In Andermahr the court found that there  
20 was no showing of bad faith by the debtors or prejudice to the  
21 creditors. The record here supports the same findings.

22           At the conclusion of the hearing the court remarked that  
23 there is no authority under the Bankruptcy Code for the denial of an  
24 exemption, of any property of the estate, even if its existence had  
25 been concealed. See In re Summerell, 194 B.R. 818 (Bankr. E.D.  
26 Tenn. 1996). The panel in Andermahr, *in dicta*, suggests otherwise.

1 30 B.R. at 533. However, given the facts of this case, and the  
2 authority of Andermahr, it is not necessary to reach that point.

3 An order will be entered overruling the Trustee's objection.  
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Frank R. Alley, III  
Bankruptcy Judge

8 cc: Michael Spencer  
9 Rex Daines  
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