THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 00-50328
	)	
LARRY C. BURNER	)	CHAPTER 13
LINDA R. BURNER,	)	
	)	JUDGE MARILYN SHEA-STONUM
	)	
Debtors.	)	**ORDER RE: MOTION TO FIND**
	)	**CREDITOR IN CONTEMPT OF**
	)	**COURT AND FOR AWARD OF**
	)	**SANCTIONS**

This matter was heard on June 5, 2000 on the debtors' motion to find the Internal Revenue Service ("IRS") in contempt for violating the automatic stay under 11 U.S.C. § 362(a) and for an award of sanctions (the "Sanctions Motion"), the response and supplemental response of the IRS, the motion of the IRS for relief from stay, the trustee's response and the debtors' response to the IRS's motion for relief from stay.[1]

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

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[1] Along with the Sanctions Motion, the debtors contemporaneously filed a motion to find the Summit County Child Support Enforcement Agency in contempt for violation of the automatic stay. The debtors subsequently withdrew that motion.

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I. Issues:

1. Whether a willful violation of the automatic stay occurred when the IRS set-off funds from the debtors' 1999 federal income tax refund and applied the set-off amount to the debtors' 1998 tax liability.

2. Whether relief from the automatic stay should be granted with respect to the funds which the IRS seeks to set-off from the debtors' 1999 federal income tax refund.

II. Findings of Fact:

Based upon the stipulations of the parties and the record evidence, the Court makes the following findings of fact:

1. The debtors filed their 1999 federal income tax return on February 9, 2000 with an expected overpayment/refund of $1,225. The debtors filed for relief under chapter 13 of the bankruptcy code on February 11, 2000. The debtors' plan proposes to pay all allowed claims of the IRS in full inside the plan as a priority creditor. The plan is set for 60 months and provides for a 9% dividend to unsecured creditors.

2. On February 15, 2000, the debtors' counsel mailed a complete copy of the debtors' proposed chapter 13 plan to IRS Special Procedures in Cleveland, Ohio. On February 22, 2000, IRS Special Procedures received notice of the first meeting of creditors. IRS Special Procedures advisor, Fred Yellon, testified that according to special procedures records, the set-off of the 1999 tax refund occurred during the eighth week of 2000, i.e., between February 21, 2000 and February 25, 2000. Mr. Yellon, testified that IRS records showed that the February 22, 2000 notice was the first notice the IRS had of the debtors' bankruptcy. Mr. Yellon was unable to confirm whether the offset occurred before or after IRS Special Procedures received the February 22nd notice.

3. The IRS intercepted a portion of the debtors' 1999 federal income tax refund in

the amount of $658.98 and applied the set-off amount to the debtors' existing 1998 federal income tax liability. The IRS initially reported the debtors' 1998 income tax liability as $2,545.79 but that amount was amended to approximately $600 plus interest.

4. Mr. Yellon testified that after receiving the February 22, 2000 notice, IRS Special Procedures input information of the debtors' bankruptcy into the IRS computer system so that a report could be generated that would show whether a proof of claim should be filed for any outstanding tax liabilities and to see whether the debtors had satisfied all of their filing requirements. IRS Exhibit 1. IRS records show that IRS Special Procedures received a report from the computer system on March 7, 2000. IRS Exhibit 1. IRS Special Procedures records further show that a Special Procedures technician noted on March 14, 2000 that the set-off of the 1999 tax refund against the1998 tax liability should not have occurred. IRS Exhibit 1. The IRS then instituted the corrective measures within its control. Mr. Yellon testified that the funds offset from the 1999 tax refund to the 1998 tax liability had been reversed as of the date of the hearing.

III. Conclusions of Law:

A. Violation of the Automatic Stay

The automatic stay becomes effective at the moment a debtor's bankruptcy petition is filed. 11 U.S.C. §362(a). Once effective, the automatic stay applies to "all entities" and to "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. §362(a)(6). Unless otherwise ordered by the bankruptcy court, the protection afforded by the automatic stay continues until a discharge is granted or denied. 11 U.S.C. §362(c). Pursuant to §362(h), a person shall recover actual damages, including costs and attorney fees, and, in some circumstances, punitive damages, when that person is injured by a "willful" violation of the

automatic stay.[2] The term "willful," while not defined in the Bankruptcy Code, has been interpreted to mean simply acting intentionally and deliberately while knowing of a pending bankruptcy. *See, e.g., Cuffee v. Atlantic Business & Community Dev. Corp. (In re Atlantic Business & Community Dev. Corp.)*, 901 F.2d 325, 329 (3rd Cir. 1990); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989); *In re Bloom*, 875 F.2d 224, 227 (9th Cir. 1989). The issue, thus framed, is when a large organization should be imputed to have knowledge generally of an individual's filing such to warrant a conclusion that the violation of the stay was "willful." On the facts of this case, discussed below, the Court finds that the IRS set-off from the debtors' 1999 federal income tax refund to the debtors' existing 1998 tax liability should not be treated as a willful violation of the automatic stay.

The IRS acted intentionally when it set-off the debtors' 1999 tax refund to their 1998 tax liability. However, whether the IRS should be viewed as having working knowledge of the debtors' bankruptcy when the set-off occurred is not clear. The copy of the plan mailed to the IRS on Tuesday, February 15, 2000 is sufficient to have provided the IRS with the requisite knowledge for a willful violation. *See In re Bragg*, 56 B.R. 46, 49 (Bankr. M.D. Ala. 1985) (knowledge of bankruptcy filing need not be from formal notice of commencement of case where party has sufficient facts to cause reasonably prudent person to make further inquiry). *See also In re Withrow*, 93 B.R. 436 (Bankr. W.D. N.C. 1988) (knowledge of bankruptcy filing imputed to Citibank (South Dakota)

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[2] Section 362(h) states that:
[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
11 U.S.C. § 362(h).

NA by notice to its apparent agents); *In re Santa Rosa Truck Stop, Inc.*, 74 B.R. 641 (Bankr. N.D. Fla. 1987) (I.R.S. charged with knowledge of bankruptcy filing through communication between debtor's attorney and I.R.S. agent). It is a well settled rule that a letter that is properly addressed and placed in the mail is presumed to be delivered to the addressee in a timely manner. *Hagner v. United States*, 285 U.S. 427, 430 (1932). The copy of the plan was not returned, and therefore, the presumption is that the plan was received by the IRS. The IRS alleges that it did not receive notice of the debtors' bankruptcy until it received the notice of the first meeting of creditors on Tuesday, February 22, 2000. It is possible that IRS Special Procedures would have received the copy of the debtors' plan within the same week it was mailed. However, February 22nd is only five business days after the plan was mailed and it is also possible that the plan would not have been received until that date.

The set-off occurred between February 21, 2000 and February 25, 2000. If the set-off occurred after February 22, 2000, the IRS would have had knowledge of the debtors' bankruptcy based upon receipt of the notice of the meeting of creditors and would be liable for a willful violation of the automatic stay. The IRS would also be liable for a willful violation if the set-off occurred after it received the debtors' plan. The Court, however, is unable to determine (1) the exact date of the set-off and (2) the date the IRS received the debtors' plan. As such, the Court cannot determine with sufficient specificity whether the IRS acted intentionally with knowledge of the debtors' bankruptcy.

Particularly significant to this Court is what procedures, if any, a large organization has developed to spread the working knowledge of the receipt of notice of bankruptcy filings within the organization. Failure to develop good procedures would support a finding of willful violation. Likewise failure to take corrective steps with regard to initially inadvertent violations might lead to an adverse finding with respect to willfulness. The record in this case is of an agency that takes the automatic stay seriously and has developed procedures with respect to the congressional mandate in 11 U.S.C. § 362(a).

B. Relief from the Automatic Stay

The debtors' dispute that the IRS is entitled to relief from stay with respect to the amount it seeks to offset from the debtors' 1999 federal income tax refund to amounts owed on the debtors' 1998 tax liability. During the June 5, 2000 hearing on this matter, counsel for the IRS reported that the IRS is to be paid in full inside the plan and therefore, the issue of relief from stay is ancillary to the contempt issue which counsel for the IRS noted was the more pressing issue for the IRS. Accordingly, since it appears that the IRS is scheduled to be paid in full inside the plan, the IRS's motion for relief from the automatic stay is denied.

IV. Conclusion:

The debtors have not shown that the IRS wilfully violated the automatic stay and therefore, the Sanctions Motion is denied. The IRS's motion for relief from stay is also denied.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 8/17/00