

**IT IS SO ORDERED.**

**Dated: 05:19 PM November 22 2005**

  
MARILYN SHEA-STONUM *AFL*  
U.S. Bankruptcy Judge  


**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CASE NO. 05-51741
	)	
Beverly Richards-Ward,	)	CHAPTER 13
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	<b>ORDER GRANTING MOTION</b>
	)	<b>FOR RELIEF FROM STAY</b>
	)	
	)	

This matter is before the Court on the Motion for Relief From Stay (the “Motion”) to offset an income tax overpayment filed by the United States of America, on behalf of the Internal Revenue Service (the “IRS”) [docket #44]. The Debtor filed an objection to the Motion [docket #46], and the IRS filed a Reply Memorandum in Support of its Motion. The Court held a hearing in this matter on August 25, 2005, at which Martha Hom appeared on behalf of the debtor Beverly Richards-Ward (the “Debtor”), and James Bickett appeared on behalf of the IRS.

Neither party disputes the factual findings of this case. The Debtor filed for chapter 13 relief on March 30, 2005, and listed the IRS on her petition as a creditor holding an unsecured priority claim for \$3,429.33 for a 2003 income tax liability. On May 9, 2005, the Debtor filed a sixty-month plan that was later amended, which allowed for full repayment of secured claims and unsecured priority claims, and repayment of unsecured creditors at one percent (1%) [docket ## 22 and 43 respectively]. On April 26, 2005, the IRS timely filed a proof of claim for \$8,425.77, which included a claim for \$5000 of unassessed taxes for 2004. On May 17, 2005, the IRS amended its claim having determined that the debtor had a \$1,796 overpayment of income tax in 2004. On July 17, 2005, the IRS filed its Motion seeking relief from the automatic stay to exercise its right to setoff against her unpaid 2003 income tax debt. The Debtor has not objected to the IRS's proof of claim.

The IRS argues that 26 U.S.C. § 6402 affords it the right to setoff a tax overpayment against a tax liability for a prior year, and that 11 U.S.C. § 553 preserves that right within the bankruptcy context. The debtor argues that the administrative freeze exercised over the debtor's 2004 tax overpayment violates 11 U.S.C. § 362(a)(6) and (a)(7) as it is an attempt to collect and setoff a prepetition debt owed to the IRS, and further, that the IRS does not have a right to setoff.

Section 553(a) does not create a right to setoff, but merely preserves the right where it exists under applicable bankruptcy law. *In re Whitaker* 173 B.R. 359, 361 (Bankr. S.D. Ohio 1994). To be enforce its right to setoff, a creditor must establish:

- 1) a debt owed by the creditor to the debtor which arose prior to the commencement of the bankruptcy case;
- 2) A claim of the creditor against he debtor which arose prior to the commencement

of the bankruptcy case;

- 3) the debt and the claim are mutual obligations; and
- 4) a right to setoff the debts under nonbankruptcy law.

*Id.* Here, neither party disputes that the 2004 tax overpayment and the 2003 tax liability are both prepetition obligations that are mutual between the parties. Additionally, the IRS correctly asserts that 26 U.S.C. § 6402 provides it a right to setoff outside of bankruptcy.<sup>1</sup>

The decision to apply setoff is permissive and courts have equitable discretion to determine when it should be applied. *In re Southern Industrial Banking*, 809 F.2d 329, 332 (6th Cir. 1987). Set off is generally favored in bankruptcy. *In re Sedlock*, 219 B.R. 207, 211 (Bankr. N.D. Ohio 1998). By establishing its right to setoff under 11 U.S.C. § 553(a), the IRS makes a prima facie showing of “cause” for relief from stay under 11 U.S.C. § 362(d)(1), which the debtor is then free to challenge as unwarranted or inequitable. *In re Orlinski*, 140 B.R. 600, 603 (Bankr. S.D. Ga. 1991). As such, debtors can rebut a creditor’s prima facie case by asserting that the exercise of set off would be inequitable in their case because it may, for example, impede the debtors’ ability to make a fresh start, it may prejudice other creditors, or that it may cause other harm. *In re Sedlock*, 219 B.R. at 211.

The Debtor has failed to assert, either in her objection or in her argument at the hearing, any reason why allowing the IRS to exercise its right to setoff may be inequitable or what exigent circumstances may make the set off unjust in her case. The Debtor was similarly unable to offer any form of adequate protection to the IRS with respect to its collateral, therefore, the Court will grant the IRS’s Motion and allow it to exercise its right

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<sup>1</sup> The Debtor incorrectly asserts in her objection that the IRS acknowledged that they do not have a right to setoff, which misstates the IRS’s position as stated in its Motion. Rather, the IRS acknowledges that its *does* have a right to set off, but that its exercise of that setoff right is subject to the automatic stay provisions of §362, thus the reason for its request for relief from the stay.

to setoff.

**IT IS SO ORDERED.**

**# # #**

cc: Martha Hom (via electronic mail)  
James Bickett (via electronic mail)