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distributed payments on unsecured claims pursuant to Debtor's plan. Although no evidence was submitted regarding the value of these payments, Trustee acknowledges that the value of the payments exceeds the amount that would have been paid to creditors on those claims in a Chapter 7 liquidation. (Objection ¶ 2).

Debtor's current troubles relate to his 1993 federal income tax liability. He testified that his employer under withheld taxes for his 1992 taxes after which time he asked the company to withhold sufficient funds in the future. Despite this request, the amount withheld for tax year 1993 fell short by more than \$4800. Debtor knew of this liability in about March of 1994 and did not file a motion to modify his plan at that time. On October 20, 1995, the Internal Revenue Service ("IRS") filed a Request for Payment of the post-petition 1993 income taxes as an administrative expense in the amount of \$4852.33. Debtor does not dispute the propriety of this request.

Trustee filed a Motion to dismiss for lack of feasible plan based on (1) the IRS request for payment of post-petition taxes and (2) tax claims which were filed in amounts in excess of the amounts scheduled. (Docket 32; Dec. 12, 1995). The plan payments are insufficient to pay these additional claims. Debtor would have to increase his monthly payments from \$222 a month to \$1,139 to complete the plan within the allowable 60-month period, based on there being only six months remaining at the time of hearing. Debtor's position is that he is unable to modify his plan to provide payment of the taxes within the applicable period. He responded to the Motion to Dismiss by filing the Motion for Hardship Discharge. (Docket 34; Jan. 17, 1996).

**DISCUSSION**

**I. Motion for Hardship Discharge**

Debtor requests a hardship discharge under § 1328(b) of the Bankruptcy Code, which provides:

- (b) Any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if -
- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
  - (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and
  - (3) modification of the plan under section 1329 of this title is not practicable.

11 U.S.C. § 1328(b).

Debtor must demonstrate the existence of facts to support all three subsections as a basis for relief under this section. *In re Schleppi*, 103 B.R. 901 (Bankr. S.D. Ohio 1989). Trustee does not dispute that Debtor meets the (b)(2) test. Debtor claims that modification is not practicable under (b)(3), although he did not present evidence on that point. The only issue on which evidence was presented was whether Debtor's inability to complete his plan payments is due to circumstances for which he should not be held accountable. 11 U.S.C. § 1328(b)(1).

Subsection 1328(b)(1) has been construed to require circumstances beyond a debtor's control. *In re Schleppe*. A leading treatise on Chapter 13 describes the requirement of § 1328(b)(1) as follows:

At a hardship discharge hearing, the debtor has the burden to prove the maximum misery possible. Almost every Chapter 13 debtor experiences some hardship during the years of payments under the plan. Hardship discharge under § 1328(b) is reserved for the truly worst of the awfuls - something more than just the temporary loss of a job or temporary physical disability. Circumstances more compelling of true hardship are those that are permanent in nature, those that are not caused by some misconduct by the debtor, and circumstances that arise after the filing of the case.

3 Keith M. Lundin, Chapter 13 Bankruptcy, § 9.20 (1994). Cases which have denied relief based on § 1328(b)(1) include: *In re Nelson*, 135 B.R. 304 (Bankr. N.D. Ill. 1991) (debtor's loss of truck, inability to find employment and unexpected expenses not a basis for relief); *In re White*, 126 B.R. 542 (Bankr. N.D. Ill. 1991) (debtors denied a hardship discharge based on loss of temporary disability payments and chronic back pain which did not prevent employment); *In re Dark*, 87 B.R. 497 (Bankr. N.D. Ohio 1988) (debtor's termination of marriage, loss of contribution from mother and surgery insufficient basis for hardship discharge).

Debtor's inability to complete plan payments results from his unanticipated 1993 income tax liability. Debtor has not cited any cases in which a hardship discharge has been granted based on similar circumstances and the Court's research did not disclose any. While Debtor did attempt to avoid this problem by asking his employer to withhold sufficient taxes to cover his liabilities, the ultimate responsibility for compliance remained with Debtor. Failure to withhold sufficient tax to cover one's federal income tax liability is not a compelling hardship within the meaning of § 1328(b)(1) because the liability results from circumstances within Debtor's control and for

which he must be held accountable. Debtor has, therefore, failed to establish the requirement of § 1328(b)(1).

Debtor asserts in his Motion that a modification of his plan to provide for payment of the IRS claim is not practicable at this time; however, Debtor did not present any evidence to support this conclusion. Moreover, while modification may not be practicable at this late date there is no evidence a modification of his plan would not have been available earlier when the circumstances cited as the basis for the hardship arose. This delay, without sufficient excuse, precludes a finding that modification is impracticable. *In re Nelson*, 135 B.R. 304 (Bankr. N.D. Ill. 1991). Debtor's request for a hardship discharge will, therefore, be denied.

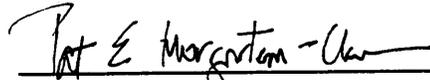
## **II. Motion to Dismiss**

Trustee requests dismissal of the Debtor's case for lack of a feasible plan. Debtor's counsel conceded at hearing that the confirmed plan cannot be completed and stated his belief that a modification is not practical. Under § 1307 (c) a Chapter 13 case can be dismissed for "cause." 11 U.S.C. § 1307(c). Cause for dismissal exists here because the confirmed plan cannot be completed, a modification will not be proposed, and a hardship discharge is inappropriate. An order dismissing this case will, therefore, be entered.

**CONCLUSION**

For the reasons stated, Debtor's Motion for Hardship Discharge is denied and Trustee's Objection to the Motion is sustained. Trustee's Motion to dismiss this Chapter 13 case is granted. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 8 May 1996



Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served on: Thomas Pavlik, Esq. (by mail)  
Myron Wasserman, Esq. (by mail)

By: Joyce L. Gordon, Secretary

Date: 5/8/96

