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JUDGE: M. A. Mahoney

PARTIES: Pamela Marie Hayes, Robertson Banking Company

CHAPTER: 13

ATTORNEYS: H. D. Padgett, R. P. Reynolds, J. J. Hartley

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KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

PAMELA MARIE HAYES,

Case No. 01-13392

Debtor.

ORDER SUSTAINING THE OBJECTION TO CONFIRMATION

Herman D. Padgett, Mobile, Alabama, Attorney for Debtor
Robert P. Reynolds, Tuscaloosa, Alabama, Attorney for Robertson Banking Co.
John C. McAleer, III, Mobile, Alabama, Chapter 13 Trustee
Jeffery J. Hartley, Mobile, Alabama, Attorney for John C. McAleer, III

This matter is before the Court on the objection of Robertson Banking Company to confirmation of the debtor's chapter 13 plan. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is sustaining the objection of Robertson Banking Company to confirmation of Pamela Marie Hayes' plan.

FACTS

Pamela Marie Hayes filed a chapter 13 bankruptcy case on July 8, 2001. Ms. Hayes proposed a plan that would pay 0% to unsecured creditors. Ms. Hayes' schedules show her total income is \$1,400 per month and her total monthly expenses are \$1,272, leaving disposable income of \$128 per month. The trustee calculated that with \$128 of disposable income, a 1% plan would be feasible. In addition to the income listed in her schedules, Ms. Hayes is expected to receive this year an earned income tax refund of approximately \$3,860. If her situation does not materially change, Ms. Hayes can also be expected to receive similar tax refunds each year thereafter. Robertson Banking Company objected to the confirmation of debtor's plan on the

basis that it does not provide for the payment of all of debtor's disposable income into the plan as required by 11 U.S.C. § 1325. Robertson Banking asserts that the earned income tax credit is "disposable income."

LAW

The issue in this case is whether the earned income tax credit refund is property of the estate and should be paid to the trustee to be distributed to Hayes' unsecured creditors. The bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In a chapter 13 case, property of the estate includes all income earned and property acquired by the debtor before the case is closed, dismissed or converted. 11 U.S.C. § 1307. The plain language of the bankruptcy statute makes no express or implied reference to the exempt status of income. In fact, all assets of a debtor in the first instance come into the bankruptcy case at filing. Assets that are exempt are claimed as such thereafter. The income tax refund is property of Hayes' bankruptcy estate.

However, under Alabama state law:

All amounts paid or payable as public assistance to needy persons shall be exempt from any tax levied by the state or any subdivision thereof and shall be exempt from levy, garnishment, attachment or any other process whatsoever and shall be inalienable, and in the case of bankruptcy, shall not pass to the trustee or other person acting on behalf of the creditors of the recipient of public assistance.

ALA. CODE § 38-4-8 (1975). The Middle District of the Alabama District Court has ruled that an earned income tax refund is a kind of "public assistance" which may be exempted in a chapter 7 case pursuant to the above Alabama statute. *Brasher v. McGregor (In re Brasher)*, 253 B.R. 484 (M.D. Ala. 2000).

In the instant case, Ms. Hayes has not taken advantage of the public assistance exemption in her schedules. Thus, any tax refund Hayes receives is income that should be considered when

determining the appropriateness of her plan. Even if Hayes amends her schedules and exempts all earned income tax refunds, the income may still be taken into account. Section 1325(b)(1)(B) requires that upon objection to confirmation of the plan, the plan may not be confirmed unless “the plan provides that all of the debtor’s projected disposable income . . . will be applied to make payments under the plan.” The Code defines “disposable income” as “income which is received by the debtor and which is not reasonably necessary to be expended -- (A) for the maintenance or support of the debtor or a dependent of the debtor . . .” It does not exclude exempted income. Similarly, the income of a spouse is commonly considered when evaluating a debtor’s income and expenses even when the spouse is not a joint filer. *In re Schnabel*, 153 B.R. 809 (Bankr. N.D. Ill. 1993) (citing 1 K. Lundin, *Chapter 13 Bankruptcy*, § 5.32 (1992)). The income of a nonfiling spouse is not property of the estate, yet it is listed in the schedules and taken into account in calculating a debtor’s disposable income. Likewise, exempt income constitutes disposable income to the extent it is not reasonably necessary for support. Also, if it is exempt, then debtor’s other income is reachable by the trustee for plan purposes. The Court would consider the totality of Hayes’ income, but only take for plan purposes the non-exempt wages. The Court concludes that in this chapter 13 case, the earned income tax credit will provide substantial sums to Hayes and must be turned over to the trustee when received for distribution to creditors. If the refund possibility is remote or unpredictable, the Court may conclude otherwise. In this case, Hayes’ income level makes the earned income tax credit a very likely source of income each year. If, instead, a debtor had an extraordinary event occur which resulted in a one time only tax refund, the Court might not require its turnover.

The Court realizes that implementation of this ruling may be difficult. If the refund is to be distributed to unsecured creditors, the question remains as to how those payments are to be

structured under the plan. The amount of a tax refund for the year in which the debtor filed may not be precisely determined and tax refunds for the following years while the debtor's plan is still in effect are even less certain. Therefore, ordering scheduled monthly or yearly sums be paid to the trustee based on the earned income tax credit is inappropriate. Even if the debtor's circumstances remain the same, tax laws may not. Another complication is the fact that the refund is a lump sum that is received once a year. The refund income cannot be treated the same as other income in calculating the amount of disposable income regularly available for plan payments. The debtor would not have those funds available until she actually receives the refund, which may be many months after her plan payments begin. The Court is leaving the issue of implementation of this ruling (when payment is due, how payment will be enforced and monitored, etc.) to the chapter 13 trustee and parties in this case unless a problem is brought before the Court again or until the local bankruptcy committee addresses the issue.

IT IS ORDERED AND ADJUDGED that the objection of Robertson Banking Co. to confirmation of Pamela Marie Hayes' plan is SUSTAINED to the extent of requiring her to turn over to the trustee as soon as she receives it any federal income tax refund for so long as she is a debtor.

Dated: November 28, 2001

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE