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ADV. NUMBER: 99-1190
JUDGE: M. A. Mahoney
PARTIES: Donald Gerald Merren, Angela Clark Merren, United States of America, Alabama Department of Human Resources, Donna Joyner
CHAPTER: 13
ATTORNEYS: T. L. Hall, D. R. Rudicell, C. Baer
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

DONALD GERALD MERREN
ANGELA CLARK MERREN

Case No. 99-10286-MAM-13

Debtors.

DONALD GERALD MERREN
ANGELA CLARK MERREN

Plaintiffs,

v.

Adv. No. 99-1190

UNITED STATES OF AMERICA,
ALABAMA DEPARTMENT OF HUMAN RESOURCES,
and DONNA JOYNER

Defendants.

Theodore L. Hall, Mobile, Alabama, Attorney for Debtors/Plaintiffs
Daphne R. Rudicell, Mobile, Alabama, Attorney for ADHR
Charles Baer, Mobile, Alabama, Attorney for United States
Donna Joyner, Mobile, Alabama, pro se

ORDER AND JUDGMENT DENYING COMPLAINT OF DEBTORS FOR TURNOVER OF FEDERAL INCOME TAX REFUND

This matter came before the Court on the trial of the complaint of Donald and Angela Merren for turnover of a 1998 federal income tax refund. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 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 finds that the complaint of the Merrens for turnover is due to be denied.

FACTS

The Merrens filed for relief pursuant to chapter 13 of the Bankruptcy Code on January 22, 1999. The Merrens scheduled a priority claim for $1,442.00 owed to Donna Joyner for child support arrears. On February 19, 1999, the Alabama Department of Human Resources (ADHR) filed a claim on behalf of Donna Joyner for child support arrears in the amount of $1,538.35.

The Merrens' plan of reorganization was confirmed by order dated April 30, 1999. The plan provided for payment of any claims entitled to priority under § 507 of the Bankruptcy Code. Subsection (a)(7) of this provision encompasses Donna Joyner's child support claim.

On July 27, 1999, the Merrens objected to the claim of the ADHR filed on behalf of Donna Joyner. The Merrens contended that this claim had been offset by their 1998 federal income tax refund of $1,493.00 and should therefore be reduced by that sum to $45.35. The ADHR consented to an order sustaining the Merrens' objection. Accordingly, the claim of the ADHR was reduced and allowed for $45.35 as a priority claim on September 8, 1999. The order was entered without prejudice. The ADHR forwarded the $1,493.00 to Donna Joyner. She spent the money and cannot afford to repay this amount at this time.

On September 8, 1999, the same date of the order sustaining the objection to the claim of the ADHR, the Merrens filed this adversary proceeding seeking turnover of their 1998 federal income tax refund from the United States, Internal Revenue Division, the ADHR, and/or Donna Joyner. The matter was tried on December 14, 1999, and the Court took the matter under advisement.

LAW

A.

Generally, prepetition tax refunds or overpayments are property of the bankruptcy estate subject to turnover pursuant to 11 U.S.C. § 542. *United States v. Pritchard (In re Block)*, 141 B.R. 609 (N.D. Tex. 1992); *compare Grant v. United States (In re Simmons)*, 124 B.R. 606 (Bankr. M.D. Fla. 1991) (prepetition tax refund not subject to turnover if prior to filing bankruptcy, debtor elected to have refund applied to succeeding taxable year). The Merrens' 1998 tax refund right arose prior to the commencement of their bankruptcy case. Thus, when the Merrens filed their petition for bankruptcy, the refund became property of their bankruptcy estate subject to turnover.

The defendants contend that the doctrine of election of remedies precludes the Merrens' request for turnover. In other words, the Merrens chose to have their child support debt offset by their refund, rather than paying their refund into their chapter 13 plan, and now they are bound by that choice.

"An election of remedies is the act of choosing between two or more different and coexisting methods of procedure and relief allowed by law on the same set of facts." 25 AM. JUR. 2D *Election of Remedies* § 1 (1996). The purpose of the doctrine is to prevent double recovery. *Id*. at § 2. It is of limited application and has been criticized or at least treated circumspectly by courts. *Id*. at § 4. The Merrens are not seeking double recovery. They concede that the claim of the ADHR must be increased by the amount of the refund if the refund is turned over to their estate. Based primarily on this fact and the narrow construction of the election of remedies doctrine, the Court finds that this doctrine does not preclude the Merrens' complaint.

The Court also rejects the defendants' argument that this action is precluded by the doctrine of judicial estoppel or res judicata. Findings of fact and conclusions of law were not made when the order setting the amount of the ADHR's claim was entered, which explains why it was entered without prejudice. It is true that this complaint for turnover is inconsistent with the Merrens' acquiescence to the September 8, 1999, order of this Court. However, the concerns generally addressed by preclusive doctrines are not present in this case primarily because the order at issue was not decided on the merits and was not intended by the parties to be preclusive. *Talavera v. School Bd. of Palm Beach County*, 129 F.3d 1214, 1217 (11th Cir. 1997) ("Judicial estoppel 'is applied to the calculated assertion of divergent sworn positions. The doctrine is designed to prevent parties from making a mockery of justice by inconsistent positions' [cite omitted]"); *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1549 (11th Cir. 1990) (claim preclusion or res judicata required a final decision on the merits); *Martino v. McDonald's System, Inc.*, 598 F.2d 1079 (7th Cir. 1979); *Pollack v. FDIC (In re Monument Records Corp.)*, 71 B.R. 853 (Bankr. M.D. Tenn. 1987) (consent judgment has preclusive effect only if parties intended that findings be preclusive); *but see Markow v. Alcock*, 356 F.2d 194, 198 (5th Cir. 1966) (party precluded from taking position inconsistent with stipulation). In sum, the September 8, 1999, order of this Court does not have preclusive effect for purposes of this complaint.

B.

Although the order offsetting the tax refund and claim of ADHR probably does not preclude this action, it effectively divested the Merrens' estate of the tax refund. The order regarding the ADHR claim must be amended, set aside or reconsidered for the refund to be

considered property of the Merrens' estate subject to turnover. Section 502(j) of the Bankruptcy Code governs reconsideration of claims.

Section 502(j) of the Bankruptcy Code permits a debtor to seek reconsideration of any allowed claim "according to the equities of the case." The Court finds that the equities favor the defendants. After the offset was authorized by order of the Court, the Merrens' tax refund was paid by the ADHR to Donna Joyner. Ms. Joyner testified that she spent the money. Ms Joyner's action was reasonable in light of the Court's order regarding the claim of the ADHR and was necessary for the support of her family. Offsetting the Merrens' refund and the ADHR's claim rather than applying the refund to the Merrens' chapter 13 plan may impose a hardship on the Merrens. The offset leaves the Merrens with less cash on hand to make their chapter 13 payments and direct payments to their home mortgage holder and vehicle lessor. However, the offset also satisfies most of the Merrens' nondischargeable child support arrears. This in turn satisfies a substantial portion of the claims paid through the Merrens' chapter 13 plan and it may permit a reduction in plan payments. Moreover, the Merrens consented to the offset. The Court is reluctant to penalize Ms. Joyner in light of the Merrens' decision not to contest the offset. Therefore, the Court finds that the equities are against a reconsideration of the order offsetting the Merrens' child support arrears by their 1998 tax refund.

Although not expressly raised by the Merrens, it is worth mentioning that the offset cannot be avoided as an unauthorized postpetition transfer pursuant to 11 U.S.C. § 549. Section 549(a) avoidability requires that two conditions be met: (1) the transfer occur postpetition; and

(2) it not be authorized by the Bankruptcy Code or Court. The "transfer" of the tax refund was authorized by order of this Court and § 549 is therefore inapplicable. [1]

C.

The Merrens' final contention is that the offset of the claim of the ADHR by their 1998 tax refund was impermissible because the claim was already provided for in their confirmed plan. A confirmed plan has res judicata effect. *Wallis*, 898 F.2d at 1550. However, a plan confirmation does not finally settle claims in all cases in this district. *Coleman v. First Family Financial Services, Inc. (In re Coleman)*, 200 B.R. 403, 406 (Bankr. S.D. Ala. 1996); *compare United States v. Continental Airlines (In re Continental Airlines)*, 134 F.3d 536 (3rd Cir. 1998) (confirmed chapter 11 plan extinguished government's right of setoff). The Merrens' confirmed plan provided for priority claims, which includes the child support claim of the ADHR, but it did not finally determine the amount of the ADHR's claim or preclude the consent order in which the claim of the ADHR was reduced by the Merrens' 1998 tax refund and allowed in the amount of $45.35. *United States v. Orlinski (In re Orlinski)*, 140 B.R. 600 (Bankr. S.D. Ga. 1991) (confirmed chapter 13 plan that provided for full payment of IRS's claim did not bind IRS so as to preclude setoff). The amount of the ADHR's claim was finally set in September 1999, approximately four months after the confirmation order. This was the proper, standard procedure for this district.

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[1]There is a split of authority as to whether an authorized setoff of prepetition indebtedness is subject to avoidance under § 549. *Compare In re Clearwater Discount Marine, Inc.*, 150 B.R. 74 (Bankr. M.D. Fla. 1993) (bank's setoff of funds to apply to prepetition indebtedness subject to avoidance); *with In re Massachusetts Gas and Elec. Light Supply Co.*, 200 B.R. 471 (Bankr. D. Mass. 1996) (setoff is not a transfer)

THEREFORE IT IS ORDERED AND ADJUDGED that the complaint of Donald and Angela Merren for turnover of a 1998 federal income tax refund is DENIED.

Dated: December 30, 1999

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE