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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

TERRY DONALD SUROVICH, SR. Case No. 97-14040-MAM-13

Debtor.

EN BANC ORDER GRANTING MOTION TO REOPEN CASE AND SETTING HEARING FOR DEBTOR TO ELECT TREATMENT

Charles Baer, Mobile, AL, Assistant U. S. Attorney appearing on behalf of the Internal Revenue Service
Herman D. Padgett, Mobile, AL, Attorney for the Debtor
Jeffery J. Hartley, Mobile, AL, Attorney for the Chapter 13 Trustee
John C. McAleer, III, Chapter 13 Trustee

This case is before the Court on the Motion of the United States to reopen the case and the Motion of the United States for Relief from an Order. This 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. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is granting the Motion of the United States to Reopen the Case and setting a hearing at which the debtor can elect whether to have (1) the discharge order set aside so that he can pay the priority debt during the remainder of the sixty months available to him for plan payments or (2) the Court declare the remainder of the priority debt nondischargeable.

FACTS

The debtor filed a chapter 13 case on November 10, 1997. On March 19, 1998, the Court confirmed the debtor's plan as amended which stated:

From the payment so received, the Trustee shall make disbursement as follows:

a. The priority payments required by Sec. 507(a), Bankruptcy Code . . .

The confirmation order stated that "the Standing Trustee shall pay . . . in order of priority . . . (c) Any claims entitled to priority under and in the order prescribed by § 507 of the Code unless the priority has been waived." The plan was not a plan which proposed to pay unsecured creditors in full, but rather one which was to pay 15.43% of unsecured claims filed and allowed. The Internal Revenue Service did not waive its priority.

The Internal Revenue Service filed a claim in the amount of $6,417.11 of which it listed $5,439.87 as a priority debt under § 507 of the Bankruptcy Code and $977.24 as an unsecured claim. The trustee, following what was then the trustee's standard procedure, paid 15.43% of all priority and unsecured claims. The trustee did not pay priority claims in full unless the claim was expressly ordered to be paid in full in the plan through specific language addressing the claim.

On October 25, 1999, a discharge was entered in the case which "discharged . . . all debts provided for by the plan or disallowed under 11 U.S.C. Section 502." The discharge order has a list of debts excepted from the discharge, but a priority tax debt is not one of the excepted debts.

LAW

The Internal Revenue Service asserts that the case should be reopened and the discharge should be set aside as to it because its priority claim was not paid in full under the plan as required by the Bankruptcy Code and the plan and order confirming the plan. The IRS reads the language of the plan to require full payment. Section 1322(a)(2) also requires full payment.[1] At the

[1]Section 1322 (a)(2) states:

The plan shall . . . provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507of this title, unless the holder of a

hearing the IRS indicated that it also would be satisfied if the Court did not undo the plan or discharge if the Court made it clear that the priority debt of the IRS was not discharged by the completion of the plan.

The debtor asserts that the plan was confirmed in 1998. The Internal Revenue Service had notice of the confirmation and did not object to its treatment at that time. The IRS also received a copy of the discharge entered on October 25, 1999, and did not bring this motion until July 14, 2000. The confirmation order is res judicata and binds the IRS. 11 U.S.C.§ 1327(a). The discharge order is also a final nonappealable order at this point. The debtor's discharge should not be disturbed. It would be prejudicial to the debtor to reopen the case and make him pay the debt through the plan or to make the remaining priority tax debt nondischargeable.

The Court will discuss the motion to reopen and then discuss the motion for relief from order.

A.

The Internal Revenue Service seeks to reopen the case to allow consideration of its motion for relief from the discharge order. Section 350 of the Bankruptcy Code governs reopening of a case. It provides that a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." The relief is discretionary. *U.S. ex rel. Bell v. Rhodey (In re R & W Enters.)*, 181 B.R. 624 (Bankr. N.D. Fla. 1994). In this case, if the Court is to set aside the discharge order, or declare it inapplicable to the IRS, the case will need to be open. The underlying motion of the IRS has merit and therefore the case is ordered to be reopened.

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particular claim agrees to a different treatment of such claim.

B.

The IRS wants the discharge order set aside under Fed. R. Bankr. P. 9024. This rule incorporates into the Bankruptcy Rules, Rule 60 of the Federal Rules of Civil Procedure. Rule 60(b) allows a party to be relieved from an order for reasons which include "mistake, . . . surprise . . . or any other reason justifying relief from the operation of the judgment." The IRS asserts it was surprised by the discharge order or it was a mistake because the plan and confirmation order language required its claim to be paid in full. It is the burden of the Internal Revenue Service to prove that it was surprised or the Court was mistaken. *In re J. B. Winchells, Inc.*, 106 B.R. 384 (Bankr. E.D. Pa. 1989). There are three factors that courts generally discuss: merits of movant's claim, extent of prejudice to debtor, and culpability of movant. *Express Air, Inc. v. Gen. Aviation Servs., Inc.*, 806 F. Supp. 619 (S.D. Miss. 1992).

The language of the plans and confirmation orders used in 1997 and 1998 was ambiguous.[2] The Court has already so ruled in the *In re Spivey* case where priority creditors read the language to require the payment of priority debts in full before any other claimants, including secured claimants, were paid any monies under the plan. *In re Kenneth Randall Spivey*, Case No. 99-12990-MAM-13 (Bankr. S.D. Ala. May 18, 2000). The Court ruled that the plan would be interpreted in accordance with the language of § 1322 which only required that priority claimants be paid in full at some point during the case. The IRS's motion raises a new problem.

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[2]This case is distinguishable from cases in which a creditor's treatment is clearly and unambiguously declared in the plan and the creditor, after confirmation, objects. *E.g. In re Poteet Constr. Co.*, 122 B.R. 616 (Bankr. S.D. Ga. 1990); *In re O. D. Jones*, Case No. 99-13914-MAM-13 (Bankr. S.D. Ala. August 21, 2000). In such a case, res judicata controls and the plan will not be disturbed.

Case law is clear that if a plan clearly states that priority debts are to be paid in full and those debts cannot be paid in full by the end of the plan, then the case is due to be dismissed without a discharge. *In re Goude*, 201 B.R. 275 (Bankr. D. Or. 1996). In this case, the trustee allowed the discharge to occur in the mistaken belief that the payment of a portion of the priority debts was sufficient (the same percentage as paid to unsecured creditors). The entry of the discharge order, in light of the plan and confirmation order language, was a mistake which should be corrected, or the Internal Revenue Service's claim of surprise at the trustee's interpretation justifies the set aside of the order. The inadvertence or mistake can be on the part of the court or trustee as well as the parties. *Buggs v. Elgin, Joliet & Eastern Ry. Co.*, 852 F.2d 318 (7th Cir. 1988); *Brandon v. Chicago Bd. of Educ.*, 143 F.3d 293 (7th Cir. 1998).

The Court concludes that the IRS's reading of the plan language was not inappropriate and the Government could easily have been mistaken as to what payments it could expect from Mr. Surovich's plan. This surprise is sufficient to require the Court to set aside the discharge order if necessary. The IRS will be prejudiced if the discharge is not set aside because tax claims are dischargeable in a chapter 13 case in which the plan is completed.[3]

The Government indicated that it would be satisfied with an order declaring nondischarged the priority debt which remains. The Court will give the debtor the option of

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[3]In the cases of James Hall and Luck Chambers, the Court ruled that it would not require debtors to reform previously confirmed plans which did not pay priority debts in full. *In re James Augusta Hall*, Case No. 98-12573-MAM-13 (Bankr. S.D. Ala. August 2, 2000 (en banc)); *In re Luck Chambers*, Case No. 00-10454-MAM-13 (Bankr. S.D. Ala. August 2, 2000 (en banc)). The cases dealt with child support after a discharge under § 1328(a). Tax debts are discharged under § 1328(a). Therefore if the IRS or State of Alabama (or any other appropriate governmental agency) seeks to be relieved from the discharge order in a completed case, the court may grant the motion.

deciding whether he prefers to (1) have the discharge order set aside so that he can make payments to the IRS through his plan for another two to three years and pay off the debt in that manner, or (2) leave the discharge in place with the declaration of nondischargeability of the remainder of the priority tax debt.

CONCLUSION

The Court concludes that the Internal Revenue Service could have interpreted the plan and confirmation orders in the debtor's case as requiring full payment of its priority claim. Therefore, under Rule 60(b) it is due to have the discharge order set aside. In order to do this, the motion of the IRS to reopen the case must also be granted.

THEREFORE IT IS ORDERED:

1. The motion of the Internal Revenue Service to reopen the debtor's case is GRANTED; and

2. The motion of the Internal Revenue Service to set aside the discharge order is continued for further hearing on **September 27, 2000 at 8:30 a.m.** in Courtroom 2, United States Bankruptcy Court, 201 St. Louis Street, Mobile, AL 36602 to give the debtor an opportunity to declare whether he prefers (1) set aside of the discharge order or (2) declaration of nondischargeability.

Dated: August 29, 2000

Margaret A. Mahoney

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

William S. Shulman

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE