

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

**In re Phyllis COHEN, Debtor.
No. 92-16014-BKC-AJC**

**ORDER DETERMINING THAT THE INTERNAL REVENUE SERVICE
IS STILL NAUGHTY AND NOT NICE**

THIS CAUSE came on to be heard on June 29, 1999, on the motion of the Debtor, Phyllis Cohen, to hold the Internal Revenue Service (hereinafter referred to as "IRS") in contempt for violation of the discharge injunction and for a declaratory judgment with respect to the release of federal tax liens. The Court having reviewed the record and supporting documentation, having heard the arguments of counsel, and being otherwise fully advised in the premises, finds as follows:

FINDINGS OF FACT:

1. On October 15, 1992, the Debtor filed a petition for relief under Chapter 7, which she later converted to Chapter 11. The Chapter 11 Fifth Amended Plan was confirmed by the Court on May 15, 1997, through agreement with the IRS.

2. On July 1, 1996, the Court entered a Memorandum Decision and Final Judgment determining that the federal tax lien for 1983 is unenforceable as to the Debtor and that the IRS is barred from collecting any tax from Phyllis Cohen for 1983. The IRS failed to release that lien as to Phyllis Cohen until March 2, 1998, almost two years after the Court's Order.

3. During the pendency of the bankruptcy proceeding, the IRS violated the automatic stay five different times.¹ A motion for sanctions was filed with the Court on February 11, 1997, and

¹ On November 3, 1993, Revenue Officer Joel Gerwitz visited the Debtor's residence in an effort to collect the tax liability at issue in this case, in violation of the automatic stay. On June 30, 1994, the Court entered an Order dismissing this case with prejudice. The Debtor moved for reconsideration. The hearing for reconsideration was scheduled for July 27, 1994. The parties agreed to continue the hearing on the motions at issue at the request of the attorney for the United States until September 13, 1994. The record indicates that the debtor and the trustee agreed that the status quo would be maintained as to the assets of the estate. The attorney for the United States stood silent. On or after July 29, 1994, the Internal Revenue Service ("IRS") issued a Notice of Intent to Levy on the debtor's and the estate's assets and wages. On August 29, 1994, the IRS issued Notices of Levy and Notices of Levy on Wages, Salary and Other Income, to the following entities: Co-Counsel CSW, P.A., Metropolitan Life Insurance Co., United States Life Insurance Co., Nationsbank of Florida, First Interstate Bank of California, Oppenheimer & Co., and Chemical Bank.

On September 20, 1994, the Debtor filed an Emergency Motion for Stay Pending Appeal, which was heard and/or granted on or before September 21, 1994. The Order was signed on September 27, 1994.

dismissed as moot because of the agreement between the Debtor and the Internal Revenue Service for confirmation of the Fifth Amended Plan on May 15, 1997.

4. On March 27, 1996, the Court entered an Agreed Order, signed by an attorney for the IRS, determining that the tax lien for 1980 does not attach, nor is it enforceable against the Debtor's post-petition, after-acquired property upon entry of discharge or confirmation of a plan.

5. On October 15, 1996, the Debtor filed a Fifth Amended Plan which provided that all of the Debtor's pre-petition assets, including three annuities, a New York co-op, and any and all prepetition claims of Phyllis Cohen against Shearson Lehman,² and any and all legal and accounting professionals, be paid or assigned to the IRS, (subject to the payment of court approved administrative expenses), upon confirmation of the Plan, and in full satisfaction of any and all pre-petition liability and that all tax liens to be released upon confirmation of the Plan. The Debtor retained no pre-petition assets, except those purchased from the Trustee free and clear of liens.

6. On May 15, 1997, the Court entered an Order confirming the Plan as proposed, except that

On February 21, 1995, the District Court granted a permanent stay pending appeal, thus replacing this Court's temporary stay.

On September 21, 1994, counsel for the Debtor notified the IRS Special Procedures, Barbara Restaino by telephone and facsimile of this Court's ruling and temporary stay, and requested that the IRS notify the levy recipients and release the levies. No releases were received by debtor's counsel, and for approximately 18 months neither the debtor nor the trustee received the monthly payment from the annuity because of the pending levy. The levy on Nationsbank Account 3706369710 was an account holding Mrs. Cohen's funds in the amount of \$896.77, which the bank advised would be remitted to the IRS on September 27, 1994. Those funds were held by the bank pursuant to written instructions by the IRS, and refusal to release even after confirmation.

On November 28, 1994, without seeking relief from the stay, the IRS seized the Debtor's 1993, post-bankruptcy overpayment in the amount of \$7,119.00 and applied it to the pre-petition 1980 tax at issue in this proceeding. The debtor had requested the overpayment be applied to the 1994 post-bankruptcy tax as a prepayment. On January 17, 1995 and again on February 14, 1995, debtor's counsel requested release of those funds. The IRS did not even request the Service Center to release the funds until February 28, 1995, three months after said seizure violated the stay.

On April 21, 1995, Revenue Officer W. Schechter, IRS, personally served a summons at the Debtor's residence in an effort to collect the tax at issue in this case, in violation of the District Court's stay. Debtor's counsel contacted the Revenue Officer and attorney for the United States regarding this violation of the stay and requested that a written withdrawal be issued. No written response was received by debtor's counsel.

² The District Court entered an order granting preliminary and permanent injunction and closing the case entitled Smith Barney Inc., Shearson Lehman et.al. v. Arthur Weitzner, Trustee, Number 98-841-CIV-GOLD on May 11, 1999. Thus, there is zero recovery for the bankruptcy estate with respect to the Shearson litigation.

the Debtor's professionals agreed to partial payment of their fees from the funds held by the Trustee, and the remainder of the fees to be paid from proceeds of the Shearson Lehman litigation.

7. On February 7, 1998, counsel for the Debtor requested Release of the federal tax liens for 1980 and 1983, pursuant to I.R.C. Section 6325(a)(1), which requires the IRS to release liens within 30 days of the time that the lien becomes unenforceable. I.R.C. Section 6325(a)(1). On February 12, 1998, the IRS, through counsel, in violation of the Court's March 27, 1996 Order as well as the Order confirming the Plan, refused to release said lien for 1980, and denied that there existed a lien for 1983.

9. On or about October 5, 1998, the Debtor filed her 1997 tax return, requesting a refund in the approximate amount of \$1,752.00. In violation of the bankruptcy injunction, said refund was held by the IRS until April 12, 1999.

10. On April 19, 1999, the IRS apparently assessed additional interest for the discharged 1980 tax liability and requested payment from Phyllis Cohen for \$281,887.96, in violation of the discharge injunction.

11. The IRS argues that: (a) the Debtor is trying to set up damages; (b) just because there is a discharge doesn't require release of the liens; (c) the liens cannot be released until the Shearson litigation is concluded and paid over to the IRS; (d) this case is not like the Holland case because in that case the order itself provided for the release of liens upon assignment of the promissory note, while this case the agreed upon Plan provides for the release of liens, (although the IRS admits that if there is no Shearson recovery, the liens would have to be released); and (d) the IRS further admits that they are not looking to the Debtor for anything. The Court takes note of the fact that the IRS does not deny or offer any excuses for the failure to release the Nationsbank levy; does not deny or offer any excuses for the failure to timely release the 1983 lien; does not deny or offer any excuses for continuing collection action against the Debtor, including the withholding of the post bankruptcy tax refunds and sending the April 1999 notice of tax due for 1980.

12. The IRS violated the Discharge Injunction by: (a) continual failure to release the levy on Nationsbank issued in 1994 post-confirmation until June 8, 1999, and which the Debtor states has never been returned to her; (b) holding the Debtor's post-bankruptcy tax refunds for 1997, 1996, and 1995; (c) on April 19, 1999 by issuing a notice of taxes due for the discharged tax liabilities of 1980; and, (d) failing to timely release the federal tax liens for 1983 and 1980 deemed unenforceable against the Debtor pursuant to this Court's orders dated July 1, 1996, March 27, 1996, and May 15, 1997.

13. The IRS has not acted in good faith in this matter.

DISCUSSION:

The IRS is required to "issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which-(1) the Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or . . ." I.R.C. Section 6325(a)(1).

The effects of the discharge injunction invoked by the confirmation of a plan, pursuant to 11 U.S.C. Section 524(a) are as follows:

(a)(1) voids any judgment ... to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 . . .

(a)(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, . . . ; and

(a)(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) . . . that is acquired after the commencement of the case . . .

The consequences of a willful violation of the injunction are essentially the same as the consequences for willful violation of the automatic stay. They are actual damages, costs and attorney's fees. Sovereign immunity is waived pursuant to Section 106(a)(3). Sanctions for violation of the injunction are also provided for in Section 105(a). The Eleventh Circuit recently reversed the District Court's decision in Jove Engineering, Inc. v. United States, 92 F.3d 1539 (11th Cir.1996) and held that if the IRS violates the stay they can be held accountable for attorney's fees, costs and damages, as discretionary under Section 105(a), and, as mandatory under Section 362(h). Jove, 92 F.3d at 1539. In that case, the Eleventh Circuit Court espoused the view in In re Flynn, 169 Bankr.1007 (S.D.Ga.1994), that the IRS' repeated violation of "the automatic stay constitutes bad faith and an arrogant defiance of the majesty of the Federal law which has embodied 11 U.S.C. Section 362 as its "fundamental protection' to debtors in bankruptcy. In re Flynn, 169 Bankr.at 1024." Jove, 92 F.3d at 1539. Furthermore, taxpayers are entitled to be compensated for the attorneys fees incurred in defending themselves against the IRS's collection efforts for discharged taxes in violation of the bankruptcy injunction, through actions for civil contempt. 11 U.S.C. Section 524(a) and E.M. McCullough, 63 Bankr.97, (B.C.Pa.1986).

The IRS relies on two Chapter 7 cases in which the Debtors retained interest, post-bankruptcy, in exempt and/or abandoned property. In re Isom, 901 F.2d 744 (9th Cir.1990); United States v. Uria, 180 Bankr.688 (S.D.Fla.1995). In those cases, the Courts determined that the federal tax liens for discharged taxes survive to the extent of any pre- petition exempt or abandoned property. In a more recent case, the Court allowed a Chapter 13 Debtor to pursue the IRS for sanctions for contempt for violation of the bankruptcy injunction because of post-bankruptcy collection action for discharged liabilities. In re Hardy, 97 F.3d 1384 (11th Cir.1996). And certainly, if a Debtor is committed to make Plan payments over time from post-petition earnings or assets, the IRS is entitled to retain their lien until the Plan payments are made. In re Haas, 195 B.R. 933 (S.D.Ala.1996).

However, in this case, the Debtor, Phyllis Cohen, retained no pre-petition assets. She is not committed to making any Plan payments. And the Plan and Confirmation Order require either immediate payment or assignment of all estate assets to the IRS and no other creditors, except for

the agreed-upon compensation of professionals. All assets of the estate have been liquidated and the proceeds paid over to the IRS, subject only to administrative expenses of the estate, including the Shearson Lehman litigation which is now concluded with zero recovery for the estate. Even if it had not been concluded, the Shearson litigation was assigned to the IRS at confirmation, subject only to compensation of professionals as approved by the Court. Mrs. Cohen had no control over that litigation nor does she hold any interest in it. In the agreement between the debtor and the government in the case of In re Holland, 77 B.R. 954 (Bankr.1987), the government agreed to the dischargeability of taxes and was assigned a promissory note as part of that agreement. In this case, the government agreed that the tax liens were unenforceable against Mrs. Cohen on confirmation or discharge, agreed through the confirmed plan that the liens would be released upon confirmation in exchange for over \$1,000,000.00 in assets, yet failed to abide by their agreement. Contrary to the arguments of the IRS, Debtors cannot be required to carry multiple orders of the bankruptcy court to their prospective creditors and explain the legal significance of the orders as being equivalent to Certificates of Release of Lien when the IRS has no further hold on the Debtor. In this case, the IRS is not competing with other creditors for any funds in the bankruptcy estate. There is no question that by agreement, orders of this Court and an agreed confirmed plan, the IRS has been vested in all proceeds of the estate subject only to administrative costs approved by this Court. The Debtor should get the benefit of her bargain and not be held hostage for liens which attach to nothing.

Furthermore, this Court has entered Orders determining the unenforceability of the tax liens for 1983, (July 1, 1996), and requiring the release of the 1980 tax liens upon confirmation of a Plan, (March 27, 1996), and the confirmation Order (May 15, 1997).

With respect to 1983, I.R.C. Section 6325(a)(1) requires that the 1983 tax lien should have been released no later than August 1996. Yet, the IRS failed to file that release until March 2, 1998. Thus, the IRS ignored the requirements of I.R.C. Section 6325(a) and violated the July 1, 1996 Order of this Court and continued to violate that Order from August 1996 to March 1998.

With respect to 1980, I.R.C. 6325(a)(1) requires that the 1980 tax liens in Florida, California and New York should have been released no later than June 1997. Yet, the IRS continues to refuse to release those liens to this date, continues to ignore the requirements of I.R.C. Section 6325(a) and, continues to violate the March 27, 1996 Order of this Court and the May 15, 1997 Order Confirming the Agreed Plan. In addition, the IRS refused for months to refund the Debtor's post-bankruptcy tax refunds for 1997 because of the 1980 tax liability. The IRS continues collection action against the Debtor for the 1980 discharged liability, in violation of the discharge injunction by sending the Debtor a notice of taxes due for 1980 on April 19, 1999.

CONCLUSION:

Based on the foregoing, it is ORDERED:

1. The IRS is found in civil contempt of: the Memorandum Decision and Final Judgment dated July 1, 1996; of the Agreed Order dated March 27, 1996; and of the Order confirming the Plan dated May 15, 1997 and the discharge injunction. The IRS continued to fail to release the levy on Nationsbank issued in 1994 post-confirmation until June 8, 1999; continued to pursue collection of discharged liabilities; and failed to timely issue releases of federal tax liens.

2. As a penalty for the civil contempt of the IRS to remedy the damage caused to the Debtor and to prevent such conduct from occurring in the future, the IRS is ordered to pay a fine to the Clerk of the Bankruptcy Court in the amount of \$10,000,000. The contempt and the related penalty may be purged by the IRS' issuance and recording of Releases of Federal Tax Liens. Said Releases shall specifically state that "All income tax liabilities due from the Debtor for the taxable years 1980 and 1983 are forever satisfied and discharged." Said Release shall be signed by authorized officials of the IRS and the Department of Justice and shall be provided to the Debtor's counsel within twenty-one (21) days of the date of this Order.

3. The Court will conduct a further hearing on damages. This hearing will determine: the amount of legal expenses and related costs incurred by the Debtor in connection with any and all disputes concerning' tax matters set forth in the IRS proof of claim, and such other actual damages as may be established by the Debtor including whether to award punitive damages and if so the amount of the punitive damages, and the damages relative to the Nationsbank account.

4. Counsel for the parties are directed to schedule a hearing at a mutually agreeable time for the determination of the amount of damages to the Movant.

ORDERED in the Southern District of Florida on this 28th day of December, 1999.

A. JAY CRISTOL
United States Bankruptcy Judge