

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:) Chapter 11 Case
) Number 88-11533
GEORGIA SCALE COMPANY, INC.)
) FILED
Debtor) at 3 O'clock & 41 min. P.M.
Date: 6-30-89

ORDER

Debtor, Georgia Scale Company, filed for protection under Chapter 11 of the United States Bankruptcy Code on December 1, 1988. Prior to the filing of the petition on November 22, 1988, the United States of America through the Internal Revenue Service (IRS) made a levy pursuant to the provisions of 26 U.S.C. §6331 and seized six corporate vehicles for collection of taxes due by the debtor. Before the vehicles were sold debtor filed its petition in bankruptcy. The IRS has petitioned the court for relief from stay to permit it to sell the vehicles and apply the proceeds to the taxes owed by the debtor.

At the hearing on the motion for relief from stay and pursuant to the notice of hearing which provided for consideration of any settlement in accordance with Bankruptcy Rule 4001(d), the debtor and IRS announced that a settlement had been reached and presented a consent order to the court for approval. The

settlement

provided that the IRS would release its levy on the six vehicles and two of the vehicles would be returned for debtor's use. The remaining four vehicles were to be sold by the debtor free and clear of the tax liens with the lien to attach to the first Six Thousand and No/100 dollars (\$6,000 00) of proceeds realized from the sale of the vehicles after satisfaction of lien claimants as set forth on the vehicle titles. Two attorneys representing unsecured creditors objected to the settlement contending that the IRS was receiving a preference as defined by 11 U.S.C §547.

In an order entered May 1, 1989, this court ordered that the IRS release its levy on the vehicles and turn the vehicles over to the debtor. The debtor was to retain two vehicles and sell the remaining four by the terms of the order. The debtor was to pay the first Six Thousand and No/100 dollars (\$6,000.00) of net sale proceeds into the registry of this court pending further order. Parties in interest were permitted two weeks in which to file briefs outlining their position on the disbursement of the funds to be held in the registry of the court. The only brief filed with the court on this issue was on behalf of the IRS.

After considering the arguments of counsel and the briefs filed on behalf of the IRS, the court concludes that the IRS should receive the funds. Section 547(c)(6) specifically

prevents the avoidance of statutory tax liens perfected within 90 days of the date the petition was filed. No similar exemption exists, however, for tax payments made within the preference period See Cleveland Graphics Reproduction. Inc., 78 B. R. 819 (Bankr. N.D. Ohio 1987). Payments included within the scope of §547 include tax levies by the IRS. See In re: R & T Roofing Structures, 42 B.R. 908 (Bankr Nev. 1984).

However, to establish that the levy by the IRS constituted a voidable preferential transfer, the objecting party¹ bears the burden of persuasion that must be carried by clear and convincing evidence showing

(1) that the transfer is to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) within ninety days before the date of the filing of the petition; and (5) enabled the creditor to receive more than such creditor would receive if the case had been filed under Chapter 7.

In re: Cleveland Graphic Reproduction, supra at 822; 11 U.S.C. §547(b).

It appears that each element of a voidable preference is present in this case except that no evidence has been presented to support a finding that the IRS is receiving more through its tax levy and

¹The IRS contends that only the trustee or a debtor-in-possession may void a transfer as a preference. The court, however, does not reach this argument in resolving the issue of whether the IRS is receiving a preference.

subsequent settlement within the ninety day preference period than it would receive if the case were filed under Chapter 7.

Wherefore, because the parties in interest objecting to the tax levy and subsequent sale of the vehicles have failed to meet their burden of proof, it is hereby ORDERED that the first Six Thousand and No/~00 dollars (\$6,000.00) realized from the sale of the four vehicles be paid to the IRS.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 30th day of June, 1989.