

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>89-11583</u>
ODESSA H. TAYLOR)	
)	FILED
Debtor)	at 4 O'clock & 58 min. P.M.
_____)	Date: 3-25-91	
ODESSA H. TAYLOR)	
)	
Plaintiff)	
vs.)	Adversary Proceeding
)	Number <u>90-1036</u>
UNITED STATES OF AMERICA)	
)	
Defendant)	

ORDER

Odessa H. Taylor, plaintiff in this adversary proceeding and debtor in the underlying Chapter 13 case, brings her complaint against the United States of America acting through the Internal Revenue Service (hereinafter "IRS") alleging a violation of the automatic stay provision of 11 U.S.C. §362(a). Based upon the testimony and evidence submitted at trial, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

In October 1989 the debtor commenced a voluntary proceeding under Chapter 13 of Title 11 United States Code (the Bankruptcy Code), Chapter 13 case No. 89-11583 (hereinafter "1989 case"). Pursuant to 11 U.S.C. §301, an order for relief was entered on October 13, 1989.

The IRS was listed as a creditor in the debtor's petition and actual

notice of the debtor's bankruptcy filing was sent and received by the IRS. Postpetition, the debtor filed her 1989 federal income tax return and from the return was due a refund of One Thousand Eighty-Five and 45/100 (\$1,085.45) Dollars. On or about March 5, 1990, the IRS refunded to the debtor Five Hundred Thirty-Three and 36/100 (\$533.36) and setoff from the amount of refund due Five Hundred Fifty-Two and 09/100 (\$552.09) Dollars. By notice, the debtor was informed that the IRS had setoff a portion of her 1989 income tax refund against a prepetition 1988 tax liability.

Upon receipt of the notice the debtor contacted her attorney of record in the underlying Chapter 13 case who thereupon contacted the IRS regarding the setoff. The IRS acknowledged that it had actual notice of the filing before the setoff and undertook to refund the withheld money. However, as of trial, more than six (6) months after setoff, the refund had not yet been received by the debtor.

This is not the debtor's first Chapter 13 proceeding nor is it her first encounter with a postpetition setoff by the IRS. During the pendency of the debtor's first Chapter 13 proceeding

In re: Odessa H. Taylor, Chapter 13 case No. 186-00583, (Bankr.

S.D. Ga., 1986) (hereinafter "1986 case") the IRS setoff a prepetition tax liability against a claimed 1988 tax refund. This setoff was refunded to the debtor approximately seven (7) months after setoff. In the 1989 case, the debtor does not owe a 1988 tax liability. The debtor did and still owes a 1980 tax liability in the amount of Eight Hundred Fourteen and 85/100 (\$814.85) Dollars. As late as July 9, 1990, the date of hearing on motion to dismiss based upon a claim of sovereign immunity by the IRS, the IRS was asserting a 1988 tax debt due from the debtor. The IRS has not yet filed a proof of claim in the 1989 case. The debtor was required to hire a lawyer to bring this action.

CONCLUSIONS OF LAW

By order dated September 21, 1990 this court denied a motion to dismiss this adversary proceeding based upon a claim of sovereign immunity by the IRS. At

the close of the trial of this adversary proceeding, the IRS renewed its motion to dismiss. The only difference in facts presented at the hearing on the motion to dismiss on July 9, 1990 and trial was that rather than a 1988 tax debt due on the date of filing of the debtor's 1989 case, the actual debt to the IRS was for 1980 taxes. This factual difference is of no consequence to the sovereign immunity issue. As of the date of the filing of this Chapter 13 petition, the IRS had a claim. See, Odessa H. Taylor v. United States of America, (In re: Taylor) Chapter 13 case No. 89-11583 Adversary Proceeding No. 90-1036

(Bankr. S.D. Ga. Aug. Div., Dalis, J. September 21, 1990). The analysis in the above referenced order denying dismissal based upon a claim of sovereign immunity is a part of the record in this adversary proceeding and does not require repeating. The motion to dismiss is again ORDERED denied.

The stay of 11 U.S.C. §362(a) applies to all entities, including the IRS. See, In re: Inslaw, Inc., 83 B.R. 89, 158 (Bankr. D.D.C. 1988); In re: Santa Rosa Truck Stop, Inc., 74 B.R. 641, 643 (Bankr. N.D. Fla. 1987). The federal income tax refund due the debtor for the prepetition 1989 tax period is an asset of the bankruptcy estate. See generally, 11 U.S.C. §541, 1306; United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed. 515 (1983); In re: Greene, 50 B.R. 785 (S.D.N.Y. 1985); In re: Holcomb, 18 B.R. 839 (Bankr. S.D. Ohio 1982). The IRS action in withholding a portion of the 1989 refund constituted an act to exercise control over property of the estate in violation of 11 U.S.C. §362(a)(3).

The duty to turnover the property is not contingent upon any predicate violation of the stay, any order of the court, or any demand of the creditor [cite omitted] . . . Rather, the duty arises upon the filing of the bankruptcy petition. The failure to fulfill this duty, regardless of whether the original seizure was lawful, constitutes a prohibited attempt to 'exercise control over the property of the estate' in violation of the automatic stay.

In re: Knaus, 889 F.2d 773, 775 (8th Cir. 1989).

Bankruptcy Code §362(h) provides that "an individual injured by any willful violation of a stay provided by this section [362] shall recover actual damages, including costs and attorneys fees and in appropriate circumstances, may recover punitive damages." In order to recover, it is necessary for the debtor to establish by a preponderance of the evidence not only that a violation of the automatic stay of §362 has occurred but also that the violation was willful. "Willful" as used in §362(h) does not require a showing of a conscious intent to harm. What is required is a showing that the party knew of the filing of the bankruptcy petition and with that knowledge acted intentionally or deliberately. In re: Atlantic Business & Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990); In re: Bloom, 875 F.2d 224, 227 (9th Cir. 1989); Aponte v. Aungst (In re: Aponte), 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988); In re: Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985). In this case, the IRS had actual knowledge of the bankruptcy filing and acted to withhold a portion of the debtor's 1989 tax refund.

Having determined a willful violation of the automatic stay, this court is required to award actual damages including attorney's fees and may award punitive damages under appropriate circumstances. "By using the word 'shall recover' Congress intended that the award of actual damages, costs-and attorneys fees is mandatory and not within the discretion of the court." In re: Inslaw, Inc., supra at 165.

The amount of actual damages sustained by the debtor as a result of the willful violation of the automatic stay by the IRS is Two Thousand Five Hundred Forty-Two and No/100 (\$2,542.00) Dollars. Eight Hundred Fourteen and 85/100 (\$814.85) Dollars of the judgment is satisfied by setoff against the amount of debt due the IRS. This ordered setoff satisfies in full any and all prepetition debt due from the debtor to the United States of America. The balance of the damages awarded, One Thousand Seven Hundred Twenty Seven and 15/100 (\$1,727.15)

Dollars, represents reasonable attorneys fees incurred by the debtor in bringing this adversary proceeding. Even though this is the second such violation by the IRS against this debtor, the facts of this case do not warrant an award of punitive damages. Money judgment is ORDERED entered for the debtor, Odessa H. Taylor, against the United States of America, defendant for One Thousand Seven Hundred Twenty-Seven and 15/100 (\$1,727.15) Dollars together with future interest as provided by law.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 25th day of March, 1991.