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(Cite as: 1996 WL 774551(Bankr.E.D.Cal.))

In re William C. SMITH, Debtor.

Bankruptcy No. 96-30182-A-13.

United States Bankruptcy Court, E.D. California, Sacramento Division.

Nov. 5, 1996.

ORDER GRANTING RELIEF FROM AUTOMATIC STAY

DAVID E. RUSSELL, Chief Judge.

***1** The United States' Motion for Relief From Automatic Stay came on for continued hearing on October 22, 1996, at 10:00 a.m. The United States appeared by and through, Special Assistant United States Attorney, Laurel M. Costen. Allison Moss appeared on behalf of the Law Offices of Richard S. Dangler for the debtors. After having considered the evidence presented by the United States and the argument of Counsel, the Court incorporates the evidence presented and analysis made by the United States and finds as follows:

1. Debtor converted approximately $265,000.00 in assets to fully paid, fixed term annuities, which were guaranteed to provide debtor a stream of monthly income in payments over a 20 year period.

2. The annuities were purchased at approximately the same time that tax determinations were being made in 1993 as the results of lengthy audits related to the debtor's interests in Hoyt partnerships.

3. The Internal Revenue Service filed a Notice of Federal Tax Lien in the amount of $265,420.35, on February 4, 1994, against the debtor at the County Recorder for Nevada County in Nevada City, California, with a recording number of 94-05147.

4. On November 7, 1995, debtor filed a Chapter 7 bankruptcy petition in the Eastern District, Sacramento Division, which was assigned a case number of 95- 30597-B-7.

5. The annuities were listed on the debtor's schedule of assets in the Chapter 7 proceeding and are pre-Chapter 7 petition assets.

6. On February 15, 1996, debtor received a discharge of tax liabilities secured by the Notice of Federal Tax Lien as part of Chapter 7 discharge order.

7. Debtor's counsel and representatives of the Internal Revenue Service attempted after the debtor's discharge to reach a settlement of debtor's liabilities and a release of the federal tax lien, but were unsuccessful.

8. The Internal Revenue Service took steps to enforce its collection of the secured lien and issued Notices of Levy on August 6, 1996, to the issuers of the annuities.

9. On August 15, 1996, the debtor filed the above chapter 13 proceeding.

10. At the time of the filing of the debtor's Chapter 13 petition, the annuities had a value based on the projected income stream. *See,* United States v. National Bank of Commerce, 472 U.S. 713, 725, 105 S.Ct. 2919, 2927 (1985) (quoting *St. Louis Union Trust Co. v. United States,* 617 F.2d 1293, 1302 (8th Cir. 1980)(IRS acquired same rights to future income which taxpayer possessed on date lien arose));In re Carlson, 180 B.R. 593 (Bankr. E.D. Cal. 1995) (IRS lien attached to debtor's rights under a vested pension plan).

11. On August 30, 1996, the United States filed a Motion for Relief from Automatic Stay, the hearing for which was continued to October 22, 1996, to allow for briefing on the issues by both sides.

12. 11 U.S.C. § 362(d) provides that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay ... , such as by terminating, annulling, modifying, or conditioning such stay--
***2** (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

13. The Bankruptcy Code does not define the term "cause." Thus the definition of the term must be left to the courts to decide. The court must find a "cause" to lift the stay. "Cause

may exist whenever the stay will harm the creditor and lifting the stay will not unjustly harm the debtor or other creditors."In re Priestley, 93 B.R. 253, 261 (Bankr. D. N.M. 1988). *See also,* In re Opelika Mfg. Corp., 66 B.R. 444, 448 (Bankr. N.D. Ill. 1986);In re Chirillo, 84 B.R. 120 (Bankr. N. D. Ill. 1988);In re Drexel Burnham Lambert Group, Inc., 113 B.R. 830 (Bankr. S.D.N.Y. 1990); andIn re Siverling, 179 B.R. 909 (Bankr. E.D.Cal. 1995) aff'd 77 AFTR2d 96-1067 (E.D.Cal. 1996).

14. Numerous courts have determined that cause includes lack of good faith.In re Hundley, 99 B.R. 306, 308 (Bankr.E.D.Va. 1989) ("[L]ack of good faith is sufficient ground upon which to either dismiss the Chapter 13 case or deny confirmation of a plan."). *See also* In re Elisade, 172 B.R. 996 (Bankr. M.D. Fla. 1994);In re Powers, 135 B.R. 980, 991 (Bankr.N.D.Cal. 1991);In re Fulks, 93 B.R. 274, 276 (Bankr.M.Fla. 1988);In re Lawson, 93 B.R. 979 (Bankr.N.D.Ill. 1988).

15. To determine good faith, the Court should consider the totality of the facts and circumstances presented, giving no single fact preeminence in making the decision.In re Powers, 135 B.R. 980, 992 (Bankr.N.D.Cal. 1991);In re Lawson, 93 B.R. 979, 986 (Bankr.N.D.Ill. 1988). Recent cases in the Ninth Circuit have found Chapter 13 cases dismissed because the court found bad faith based upon the debtor's failure to file federal income tax returns.In re Greatwood, 194 B.R. 637 (9th Cir. BAP 1996)In re Morimoto, 171 B.R. 85 (9th Cir. BAP 1994).

16. The Internal Revenue Service here filed a Notice of Federal Tax Lien prior to the debtor's filing of his Chapter 7 petition. Accordingly, the Service retains its lien after the discharge as to pre-petition and exempt assets.In re Isom, 901 F.2d 744 (9th Cir. 1990);In re Thomas, 883 F.2d 991 (11th Cir. 1989);In re Tarnow, 749 F.2d 464 (7th Cir. 1984); andJohnson v. Home State Bank, 501 U.S. 78 (1991).

17. The debtor filed the chapter 13 proceeding as a tactic to delay collection efforts of the Service.

18. There are no other encumbrances on the assets which are the subject of the Service's Motion for Relief From Stay.

19. 11 U.S.C. § 362(d) provides an alternative ground on which to seek lifting of the stay when:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay ... , such as by terminating, annulling, modifying, or conditioning such

stay--

* * *

(2) with respect to a stay of an act against property under subsection (a) of this section, if--
(A) the debtor does not have an equity in such property; and
***3** (B) such property is not necessary to an effective reorganization; * * *

20. The Supreme Court in United States Assc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 375, 108 S.Ct. 626, 632 (1988), interpreted the language "equity in property" to mean when a creditor is undersecured.

21. The discharge received by the debtor in the Chapter 7 proceeding did not invalidate the lien as to the debtor's interest in the annuities, which were his property prior to the Chapter 7. As a result the debtor has no equity in the assets which are the subject of the Service's Motion for Relief From Stay.

22. The Supreme Court in Timbers of Inwood, supra, 484 U.S. at 375, 108 S.Ct. at 632 (1988), also interpreted 11 U.S.C. § 362(d)(2) and the language "necessary to an effective reorganization" and held that:

What this requires is not merely a showing that if there is conceivable to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization *that is in prospect.* This means, * * *, that there must be "a reasonable possibility of a successful reorganization within a reasonable time."

23. There is no way, given the assets shown on the debtor's schedules, that he can effectively reorganize to pay the debts of the Service as well as his two other secured creditors.

24. The debtor's actions have shown that his only motivation in filing the instant Chapter 13 is to avoid the collection efforts of the Service. He has no adequate protection to offer the Service.

25. Pursuant to 11 U.S.C. § 362(g) debtor bears the burden of proof on all issues in opposing the relief from stay, except for the showing of lack of equity. The United States has shown that the debtor has no equity in the property. Debtor did not

carry his burden of proof.

For the reasons set forth herein, it is

ORDERED AND DECIDED: That the United States' Motion for Relief from the Automatic Stay is granted.

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