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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 FRESNO DIVISION

6 In re) Case No. 05-10567-B-13
7 Nora J. Rivera,)
8 Debtor.)
9 United States of America on behalf of the)
10 Internal Revenue Service,)
11 Movant.)

12
13 **MEMORANDUM DECISION REGARDING INTERNAL
REVENUE SERVICE'S MOTION FOR RELIEF FROM STAY**

14 James A. Whitten, Esq., Special Assistant for United States Attorney, appeared telephonically
15 for Movant, United States of America on behalf of the Internal Revenue Service ("IRS").

16 Bruce Leichty, Esq., of the Law Offices of Bruce Leichty, appeared for debtor Nora J. Rivera
(the "Debtor").

17 James Flanagan, Esq., appeared for M. Nelson Enmark, Esq., chapter 13 trustee.

18 The IRS' Motion for Relief From the Automatic Stay (the "Motion") was heard on July
19 14, 2005. The IRS seeks authority to offset the Debtor's 2004 income tax overpayment against
20 her pre-petition tax liability. The court has jurisdiction over this matter pursuant to 28 U.S.C.
21 section 1334 and 11 U.S.C. §§ 362 & 553. This is a core proceeding as defined in 28 U.S.C. §
22 157(b)(2)(G) & (O). This Memorandum contains the court's findings of fact and conclusions of
23 law. For the reasons set forth below, the Motion will be GRANTED.

24 **Background.**

25 This bankruptcy commenced with a voluntary petition filed under chapter 13 on January
26 26, 2005. The Debtor's schedules filed with the petition listed two unpaid pre-petition tax
27 liability to the IRS totaling \$69,061. Schedule B listed a "Projected 2004 income tax refund"
28 valued at \$1,500. The Debtor did not claim an exemption of the tax refund.

1 On February 14, 2005, the Debtor received from the IRS two Notices of Intent to Levy
2 on unspecified assets, based on the pre-petition tax liability. On February 22, 2005, Debtor's
3 counsel sent a letter to the IRS notifying it of the bankruptcy filing. The IRS did not levy any of
4 the Debtor's assets. On or about February 28, 2005, the Debtor filed her federal income tax
5 return for tax year 2004. On that return, she claimed that her estimated taxes had been overpaid
6 in the amount of \$3,681 which the IRS has not disputed. The 2004 tax return was not in the
7 record. However, the court can infer from the Debtor's fervent opposition to this Motion, that
8 she requested a refund of the overpayment (the "2004 Overpayment"). On February 28, 2005,
9 the IRS sent to the Debtor a letter notifying her that the 2004 Overpayment had been applied to
10 the unpaid tax liability. The 2004 Overpayment is now under "administrative freeze."

11 On April 11, 2005, the IRS filed a proof of claim. That proof of claim stated a general
12 unsecured claim in the amount of \$5,180.95 for taxes, interest, and penalties relating back to the
13 1996, 1997, and 1998 tax years (the "Unsecured Tax Claim"). The proof of claim also stated a
14 priority unsecured claim in the amount of \$3,747.99 for taxes and interest relating back to the
15 1999 and 2000 tax years (the "Priority Tax Claim"). The IRS' total claim is \$8,928.94.

16 On April 14, 2005, the Debtor filed her Third Amended Chapter 13 Plan (the "Plan").
17 The Plan provides for monthly payments to the chapter 13 trustee in the amount of \$2,709, over
18 a period of 54 months. It provides for treatment of the IRS' Priority Tax Claim in Class 5,
19 payable over an unspecified term without interest. It also provides for 100% payment of all
20 general unsecured claims, which would include the Unsecured Tax Claim, payable over the life
21 of the Plan without interest. The Plan was served on creditors by first-class mail on April 14,
22 2005, together with a notice of hearing and a motion to confirm the Plan. The IRS did not object
23 to confirmation of the Plan.

24 On April 26, 2005, the Debtor filed amended schedules in which she declared "Projected
25 2004 income tax refunds - IRS and CA" valued at \$4,000. Again, the projected tax refunds were
26 not exempt. At some time prior to filing this Motion, the IRS placed an administrative hold on
27 the 2004 Overpayment which prevents the money from being returned to the Debtor. On June
28 13, 2005, the IRS filed this Motion seeking relief from the automatic stay to offset the 2004

1 Overpayment against the Priority Tax Claim. On June 15, 2005, the court entered an order
2 confirming the Plan.

3 **Analysis.**

4 The IRS contends that it has a statutory right to offset the pre-petition 2004 Overpayment
5 against the Priority Tax Claim pursuant to 26 U.S.C. subsection 6402(a)¹ and 11 U.S.C. §
6 553(a).² There is no dispute that the 2004 Overpayment occurred in a tax year that concluded
7 before commencement of the bankruptcy case and that the elements for setoff under § 553(a) are
8 satisfied. The Debtor acknowledges that in her opposition brief.

9 The Debtor vehemently opposes the Motion. She contends that full payment of her tax
10 liability is provided for in the confirmed Plan, that the IRS did not declare a right of setoff in its
11 proof of claim, that the IRS did not object to confirmation of the Plan, and that the IRS is now
12 bound by the Plan to accept payment of its claim through the Plan. She also contends that the
13 IRS violated the automatic stay under, *inter alia*, 11 U.S.C. § 362(a)(7)³ by serving the notices of
14

15 ¹26 U.S.C. subsection 6402(a) states:

16 General rule.--In the case of any overpayment, the Secretary, within the applicable period
17 of limitations, may credit the amount of such overpayment, including any interest
18 allowed thereon, against any liability in respect of an internal revenue tax on the part of
19 the person who made the overpayment and shall, subject to subsections (c), (d) and (e),
refund any balance to such person.

20 ²11 U.S.C. subsection 553(a) states in pertinent part:

21 Except as otherwise provided in this section and in sections 362 and 363 of this
22 title, this title does not affect any right of a creditor to offset a mutual debt owing by such
23 creditor to the debtor that arose before the commencement of the case under this title
24 against a claim of such creditor against the debtor that arose before the commencement of
the case

25 ³11 U.S.C. subsection 362(a)(7) provides in pertinent part:

26 (a) Except as provided in subsection (b) of this section, a petition filed under
27 section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of--
. . . .

28 (7) the setoff of any debt owing to the debtor that arose before the
commencement of the case under this title against any claim against the debtor.

1 intent to levy on the Debtor and by actually setting off the 2004 Overpayment before
2 administratively freezing it. She demands that the 2004 Overpayment be turned over to her and
3 that the IRS should be sanctioned pursuant to 11 U.S.C. § 362(h).⁴ She also requests an award of
4 attorney fees for having to oppose the Motion.

5 The Debtor argues that the IRS is now bound by the confirmed Plan, which allows the
6 Debtor to fully pay both the Priority and the Unsecured Tax Claims, over a period of up to 54
7 months without interest through the chapter 13 trustee. The authority for this argument lies in 11
8 U.S.C. § 1327(a) which states:

9 The provisions of a confirmed plan bind the debtor and each creditor, whether or not the
10 claim of such creditor is provided for by the plan, and whether or not such creditor has
objected to, has accepted, or has rejected the plan.

11 Conversely, there is no question that the IRS has a statutory right to offset the 2004
12 Overpayment against the Debtor's tax liability pursuant to 26 U.S.C. § 6402(a). 11 U.S.C.
13 subsection 523(a) expressly preserves the IRS' right of offset under certain conditions, all of
14 which are satisfied here. Therein lies the apparent contradiction: the Plan does not provide for
15 an offset. Neither does it provide for nor require the IRS to turnover the 2004 Overpayment.
16 However, resolution of this conflict lies in the language of subsection 553(a) itself.

17 Except as otherwise provided in this section and in sections 362 and 363 of this title, *this*
18 *title does not affect any right of a creditor to offset* a mutual debt owing by such creditor
19 to the debtor that arose before the commencement of the case under this title against a
claim of such creditor against the debtor that arose before the commencement of the case
. . . . (emphasis added.)

20 By the plain language of subsection 553(a), no provision of title 11, except sections 362
21 and 363, can be interpreted to effect or impair a creditor's right of offset - that limitation
22 necessarily excludes the provisions of subsection 1327(a).

23 The Fifth Circuit reached a similar conclusion in *Internal Revenue Service v. Luongo (In*
24 *re Luongo)*, 259 F.3d 323 (5th Cir. 2001). In *Luongo*, the IRS set off its claim against the chapter
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26 ⁴The Debtor did not file an adversary proceeding for turnover of the 2004
27 Overpayment, as required by Fed.R.Bankr.P. 7001(1). Neither did she file and serve a counter-
28 motion for sanctions. The court will address those issues herein because neither argument has
merit and further proceedings to reach that conclusion would be a waste of time and resources.

1 7 debtor’s pre-petition tax overpayment. The debtor had already received a discharge of her tax
2 liability and the case had been closed, so the automatic stay was not an issue. The debtor
3 reopened her case, amended her schedules to disclose, for the first time, and exempt the tax
4 overpayment, and she filed an adversary proceeding against the IRS to recover the money.

5 On cross-motions for summary judgment, the bankruptcy court ruled in favor of the
6 debtor based on her exemption of the overpayment and the language of 11 U.S.C. subsection
7 522(c) which stated: “property exempted under this section [522] is not liable . . . for any debt of
8 the debtor that arose . . . before the commencement of the case” The trial court construed
9 the “not liable for any debt” language of subsection 522(c) to take precedence over the “does not
10 affect any right to offset” language in subsection 553(a). The district court reversed, and the
11 Court of Appeals affirmed the district court.

12 The court first looked to the “clear statement” of subsection 553(a) that “this title [the
13 Bankruptcy Code] does not affect any right of a creditor to offset.” *Id.* at 333. The court then
14 looked at the decisions of other courts, including the Ninth Circuit Bankruptcy Appellate Panel’s
15 decision in *In re Buckenmaier*, 127 B.R. 233 (9th Cir. BAP 1991), which have construed
16 subsection 553 to take priority over the discharge injunction of subsection 524(a) – a creditor’s
17 right of setoff is not barred by the debtor’s discharge because § 524 is not a listed exception to
18 subsection 553(a).

19 Finally, looking to 26 U.S.C. § 6402(a), the *Luongo* court concluded that the debtor was,
20 “only entitled to a tax refund to the extent that her overpayment exceeds her unpaid tax liability.”
21 *Id.* at 335 citing *In re Davis*, 889 F.2d 658, 661 (5th Cir. 1989). Based thereon, the court
22 concluded that neither the discharge injunction, nor the exemption of Ms. Luongo’s tax refund
23 could prevent the IRS from exercising its statutory right of offset.

24 Here, subsection 1327(a) is not one of the stated exceptions to subsection § 553(a). This
25 court, therefore, concludes that the IRS has a statutory right to credit the 2004 Overpayment
26 against its tax claim which is not impaired by the confirmed Plan. Neither is the IRS prejudiced
27 by the fact that it did not acknowledge the setoff in its proof of claim. A proof of claim can be
28 amended at any time so long as the amendment relates back to the original claim and there is no

1 prejudice to the Debtor. The court can deem the IRS' Motion to be an informal amendment of
2 the claim. It would be superfluous to require the IRS to formally amend its claim just so the
3 court could grant this Motion. The Debtor has not shown any prejudice as a result of the IRS'
4 handling of this matter, other than her statement that she needs the 2004 Overpayment to pay for
5 car repairs.

6 The IRS' right to offset the 2004 Overpayment has always existed, as a matter of law.
7 The Debtor knew that she owed thousands of dollars in unpaid taxes to the IRS when she filed
8 her bankruptcy petition. She knew that the 2004 taxes had been overpaid when she filed her
9 bankruptcy petition. She knew the exact amount of that overpayment when she filed her 2004
10 tax return, long before she filed her Plan. As a matter of law, she was deemed to know that the
11 IRS had a right to credit the 2004 Overpayment to her tax liability pursuant to § 6402(a),
12 regardless of whether she had an actual understanding of that right. The Debtor could have
13 provided for the setoff as partial payment of the Priority Tax Claim in her Plan, and thereby
14 realized the immediate economic benefit of a reduced claim and reduced payments to the chapter
15 13 trustee. For some reason she chose not to, opting instead to pay the Priority Tax Claim
16 through the Plan, together with the added burden of the chapter 13 trustee fees. If the Debtor
17 somehow relied on a belief that the IRS would have to surrender the 2004 Overpayment, and
18 thereafter wait for the Plan payments, then she was mistaken.

19 The Debtor argues that the right of setoff, standing alone, is not cause to grant relief from
20 the automatic stay. The court disagrees - there are many reasons to grant the Motion. For
21 example, denial of the Motion would be a blatant disregard of the obvious intent of Congress
22 when it enacted 26 U.S.C. § 6402(a) – that the IRS should have a right to credit an overpayment
23 against taxes owed. Denial of the Motion would be tantamount to denial of the IRS' status as a
24 secured creditor under 11 U.S.C. § 506(a).⁵ Denial of the Motion without a turnover order
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26 ⁵11 U.S.C. § 506(a) states in pertinent part:
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28 An allowed claim of a creditor . . . that is subject to setoff under section 553 of this title,
is a secured claim . . . to the extent of the amount subject to setoff

1 would be meaningless because neither the Debtor nor the IRS would benefit from the money.
2 Denial of the Motion coupled with a turnover order would have the practical effect of avoiding
3 the IRS' lien rights under § 506(a) even though the Debtor has not brought an adversary
4 proceeding, or otherwise shown grounds to avoid or subordinate those rights. Denial of the
5 Motion, coupled with a turnover order, would effectively force the IRS to finance a portion of
6 the Plan from its cash collateral, without any showing of adequate protection as required by 11
7 U.S.C. § 363(e).

8 Finally, denial of the IRS' Motion will have a substantial economic impact on both the
9 IRS and the Debtor. Under the Plan, the IRS will be forced to wait months for payment of its
10 Priority Tax Claim, without interest. The IRS would lose the present value of its interest in the
11 2004 Overpayment. Under the Plan, the Debtor loses the benefit of having her priority
12 obligation to the IRS immediately reduced and virtually eliminated. She will have to make
13 higher payments each month to the chapter 13 trustee, thus increasing the risk of Plan failure.
14 She will also have to pay the chapter 13 trustee's fees that are added to all monies distributed
15 through the trustee. Denial of the IRS' Motion would have no apparent overall benefit for either
16 party and that alone is cause to grant relief.

17 **The Debtor is Not Entitled to Sanctions.**

18 The Debtor contends that the IRS should be sanctioned because it sent levy notices and
19 initially setoff the 2004 Overpayment, without first getting relief from the automatic stay. The
20 remedy for violation of the automatic stay lies in 11 U.S.C. subsection 362(h).⁶ The evidence is
21 inconclusive as to when and if the IRS actually set off the 2004 Overpayment. However, even if
22 it did, the Debtor's request for sanctions must be denied for two reasons.

23 First, if the IRS offset the 2004 Overpayment before reversing the offset and filing this
24 Motion, what was the effect of that action? If the IRS violated the automatic stay, then there is

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26 ⁶11 U.S.C. subsection 362(h) states:

27 An individual injured by any willful violation of a stay provided by this section shall
28 recover actual damages, including costs and attorney's fees, and, in appropriate circumstances,
may recover punitive damages.

1 no argument that the act was void as a matter of Ninth Circuit law. *Schwartz v. United States of*
2 *America (In re Schwartz)*, 954 F.2d 569, 570-72 (9th Cir. 1992). (Post-petition tax assessment in
3 violation of the automatic stay was void and given no effect in a subsequent bankruptcy
4 proceeding.) The IRS says that the 2004 Overpayment is now under administrative freeze. The
5 question of whether the exercise of setoff violated the automatic stay is now moot. It is well
6 established that the placing of funds in administrative freeze pending a motion for relief to
7 exercise the right of setoff is not in itself a violation of the automatic stay. *Citizen's Bank of*
8 *Maryland v. Strumpf*, 516 U.S. 16, 116 S.Ct. 286, 290, 133 L.Ed. 2d. 258 (1995).

9 The Debtor has not shown that the IRS engaged in any conduct sufficiently egregious to
10 warrant punishment. An award of punitive damages under section 362(h) requires not only a
11 willful violation of the automatic stay, but also a finding of "appropriate circumstances." Courts
12 have generally interpreted this language to require that the disputed acts be egregious, vindictive,
13 malicious, or accompanied by bad faith. *United States v. Ketelsen (In re Ketelsen)*, 880 F.2d 990,
14 993 (8th Cir. 1989); *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen-*
15 *Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2nd Cir. 1990); *McHenry v. Key Bank (In re*
16 *McHenry)*, 179 B.R. 165, 168 (9th Cir. BAP, 1995).

17 In the present case, even if the IRS "willfully" violated the automatic stay through the
18 mailing of a levy notice and setoff of the 2004 Overpayment, there is absolutely no evidence to
19 suggest that the IRS' acts were egregious, vindictive, malicious, or accompanied by bad faith.
20 The IRS' prompt remediation of the problem mitigates against the imposition of punitive
21 damages. *See Cox v. Billy Pound Motors, Inc. (In re Cox)*, 214 B.R. 635, 646 (Bkrtcy.N.D.Ala
22 1997).

23 Courts have shown a tendency to award punitive damages where creditors have acted
24 egregiously in violating the automatic stay, or have continued to persist in a course of conduct
25 once it becomes clear that such conduct violates the automatic stay. In *Knaus v. Concordia*
26 *Lumber Company, Inc. (In Re Knaus)*, 889 F.2d 773 (8th Cir. 1989), the court reviewed an award
27 of punitive damages where a creditor not only refused to turn over property in violation of the
28 automatic stay, but also attempted to have the debtor excommunicated from his church for

1 having declared bankruptcy. The court affirmed the award, holding that the creditor's actions
2 were sufficiently egregious to warrant punitive damages. *Id.* Similarly, in *In re Gault*, 136 B.R.
3 736 (Bkrcty.E.D.Tenn. 1991), a bankruptcy court concluded that punitive damages were
4 appropriate where the Internal Revenue Service, *after acknowledging that the automatic stay*
5 *precluded it from proceeding against the debtor*, nonetheless proceeded to serve notice of intent
6 to levy on both the debtor and her nondebtor husband.

7 Courts have generally declined to award punitive damages where creditors acted in a
8 mistaken belief that their conduct was lawful and promptly remedied the violation once their
9 mistake became known. In *Cox*, the bankruptcy court declined to award punitive damages where
10 the creditor, acting under a mistaken belief that the bankruptcy case had been dismissed,
11 repossessed the debtor's car, but promptly returned the vehicle upon learning that the case had in
12 fact not been dismissed. Similarly, in *In re Lord*, 270 B.R. 787(Bkrcty.M.D.Ga. 1998), the
13 bankruptcy court declined to award punitive damages where it appeared that the stay violation
14 was the result of carelessness or negligence, rather than an intentional act of misconduct.

15 The facts of the present case closely mirror the latter examples where courts have
16 declined to award punitive damages for a violation of the automatic stay. The setoff itself was
17 always a void act. The IRS promptly remedied the problem and reversed the setoff once it
18 became aware of the error. The Debtor's interest, if any, in the 2004 Overpayment was never
19 impaired and the Debtor suffered no actual injury. Based on this record, the court cannot find
20 that the IRS' acts were egregious, vindictive, malicious, or accompanied by bad faith such as to
21 warrant punitive damages.

22 The Debtor does not allege in opposition to the Motion that she has, or will, suffer any
23 actual harm as a result of anything the IRS may have done. Indeed, it appears that the Debtor
24 will actually benefit from the offset because it will virtually eliminate the IRS' Priority Tax
25 Claim. Nevertheless, the Debtor argues that the IRS should be punished solely because, in
26 Debtor's counsel's words, "the IRS is not God and the IRS is not allowed to just act above the
27 law."⁷

28 ⁷The Debtor's efforts to oppose this Motion do not appear to be based on economic reality. The Debtor has committed through the Plan to fully pay her liability to the IRS. It must,

1 The remedial application of subsection 362(h) is not intended for the Debtor's monetary
2 gain. "[Sub]ection 362 is intended to be a shield protecting debtors and their estates, and should
3 not be used as a sword for their enrichment." *McHenry*, 179 B.R. at 169. In *McHenry*, the
4 bankruptcy court rejected the debtors' application for punitive damages based on a creditor's
5 violation of the automatic stay. In affirming the bankruptcy court's decision, the BAP observed

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7 therefore, be paid one way or another. Yet the Debtor filed a 36 page opposition, including a 13
8 page points and authorities, 8 pages of declarations with a request for judicial notice and 15
9 pages of exhibits. The Debtor's attorney also appeared at the hearing to argue against the
10 Motion. It is clear to the court that the legal fees for the Debtor's opposition, if approved by the
11 court, will consume a large part, if not all, of the 2004 Overpayment which the Debtor seeks to
12 recover. The following excerpt from the transcript of the hearing suggests that the Debtor is
13 angry with the IRS and that the Debtor's opposition is focused not so much on achieving a
14 beneficial result, but more in furtherance of her goal to punish the IRS for some reason that is
15 not clear from the record:

16 MR. LEICHTY: . . . The IRS has not shown cause, it has not even purported that it needs
17 to show cause. It's simply acted without getting relief from this court. I think that a number of
18 courts have made it very clear that that tramples on the prerogatives of a bankruptcy court and
19 the Court should be concerned about that.

20 THE COURT: They fixed - - they reversed - - whatever they did, it's been reversed, and
21 as I understand it, the refund's now in administrative freeze, so I'm not offended by that.

22 MR. LEICHTY: With all due respect, your Honor, I think you should be. And I hope
23 that some court would be, because the IRS is not God and the IRS is not allowed to just act
24 above the law. And that's something that's - - you know, that's - - there's a long tradition of that
25 in this country.

26 THE COURT: So you want me to punish the IRS - -

27 MR. LEICHTY: Absolutely.

28 THE COURT: - - for something that they did administratively, and so is that what this is
all about?

 MR LEICHTY: No. This is all about observing the law, your Honor. The IRS is not
above the law. The IRS acted in violation of the law. The debtor did everything she was
supposed to do in this matter and the debtor is entitled to those funds.

 The IRS should not be rewarded. And in fact, the IRS should be sanctioned

1 that there is no appropriate way to measure punitive damages when the offended party has not
2 suffered actual damages. *Id.* at 169. The BAP concluded that “no punitive damages should be
3 awarded in the absence of actual damages.” *Id.* at 168. In the present case, the IRS may have
4 technically violated the automatic stay by sending levy notices and then setting off the 2004
5 Overpayment for a short period of time, but the Debtor suffered no actual damages as a result
6 and the setoff was promptly reversed. The court concludes that sanctions are not appropriate in
7 the present case.

8 The second reason for rejecting the Debtor’s argument is more pragmatic. The Debtor
9 argues, “[The IRS’] rights are subject to the automatic stay of Section 362(a)(7). *Congress*
10 *would not have imposed a stay under these circumstances* if all the IRS is required to do is come
11 to court and ask that it be lifted.” (emphasis added.) At oral argument, Debtor’s counsel insisted
12 that this court should be outraged by the IRS’ handling of the 2004 Overpayment and its refusal
13 to give the money back to the Debtor. (See footnote 7, *supra.*) For guidance on this issue, the
14 court need only look to the United States Congress itself, the governing body that created the
15 automatic stay in the first place. Congress recently amended the Bankruptcy Code with passage
16 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub.L. 109-8, 119
17 Stat. 23) (“BAPCPA”), effective with cases filed October 17, 2005. If this case had been filed
18 under BAPCPA, the IRS would not have to come to court at all to setoff the 2004 Overpayment.
19 BAPCPA includes a new subsection 362(b)(26) which expressly exempts the setoff of pre-
20 petition tax refunds from the automatic stay. It states in pertinent part,
21

22 The filing of a petition under section 301, 302, or 303 of this title, . . . does not
23 operate as a stay—
24 . . .

25 “[U]nder subsection (a), of the setoff under applicable nonbankruptcy law of an income
26 tax refund, by a governmental unit, with respect to a taxable period that ended before the
27 date of the order for relief against an income tax liability for a taxable period that also
28 ended before the date of the order for relief”

29 Although new subsection 362(b)(26) will not apply to this case, it does indicate that
30 Congress is deeply concerned with a debtor’s duty to pay taxes and the IRS’ ability to collect

1 taxes, even in bankruptcy, with a minimum of delay and procedural difficulty. Congress would
2 not view the IRS' actions here to be as outrageous as the Debtor does. Neither would Congress
3 be as offended at the IRS' handling of this matter as the Debtor demands that this court should
4 be.

5 **Conclusion.**

6 Based on the foregoing, the IRS' motion to setoff the Debtor's 2004 income tax
7 overpayment will be GRANTED. The IRS may credit the Debtor's 2004 Overpayment against
8 the priority portion of the Debtor's pre-petition tax liability and the IRS shall file an amended
9 proof of claim to reflect the remaining priority claim balance. The Debtor and the chapter 13
10 trustee may stipulate to reduce the Plan payments to reflect the amended priority claim, without
11 the necessity of an amended plan or a noticed motion.

12 Dated: September _____, 2005

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16 /s/ W. Richard Lee
17 W. Richard Lee
18 United States Bankruptcy Judge
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