

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE: :
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NOAH J. PETERSON, : CASE NO. 03-40732
CONNIE C. PETERSON, : CHAPTER 13
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Debtors. :
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UNITED STATES DEPARTMENT OF : CONTESTED MATTER
TREASURY, INTERNAL REVENUE :
SERVICE, :
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Movants, :
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vs. :
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NOAH J. AND CONNIE C. PETERSON, :
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Repspondents. :
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NOAH J. AND CONNIE C. PETERSON, :
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Movants, :
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vs. :
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UNITED STATES DEPARTMENT OF :
TREASURY, INTERNAL REVENUE :
SERVICE, :
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Repspondents. :
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MEMORANDUM OPINION

On April 6, 2004, the Court held a hearing on the Motion of U.S.A./I.R.S. for Relief from the Automatic Stay to Exercise the Right of Setoff and the Motion of Noah J. and Connie C. Peterson ("Debtors") for Contempt against the United

States Department of Treasury and the Internal Revenue Service ("U.S.A./I.R.S."). At the request of the parties, at the conclusion of the hearing, the court took the matter under advisement. The Court has considered the parties' briefs and oral arguments, as well as applicable statutory and case law. For the reasons that follow, the Court finds that U.S.A./I.R.S. did not waive its right of setoff.

CONCLUSIONS OF FACT

Both parties are in agreement regarding the facts. Debtors filed a Chapter 13 Bankruptcy petition on March 14, 2003. On July 18, 2003, U.S.A./I.R.S. filed a proof of claim in the amount of \$68,416.82. Debtors filed their 2002 tax return on or about October 28, 2003, which entitled them to a refund in the amount of \$4,226.00. On March 10, 2003, U.S.A./I.R.S. filed its Motion for Relief from the Automatic Stay to Exercise Right of Setoff. On March 15, 2003, Debtors filed their Motion for Contempt against U.S.A./I.R.S.

CONCLUSIONS OF LAW

Debtors concede that U.S.A./I.R.S. has satisfied all of the requirements under 11 U.S.C. § 553 for setoff. 11 U.S.C. § 553 (1993 & Supp. 2003). However, Debtors now argue that U.S.A./I.R.S. waived its right of setoff because it did not assert a claim to a setoff in its proof of claim. Debtors

cite to Tavormina v. ITT Comm. Fin. Corp. (In re Aquasport, Inc.), 115 B.R. 720 (Bankr. S.D. Fla. 1990) as support for this contention. Aquasport, 115 B.R. at 721-722. U.S.A./I.R.S. responded by arguing that the Aquasport case is factually distinct from the case before the Court. Id. at 721. Further, U.S.A./I.R.S. cited to other cases that support its position that failure to assert the right of setoff in the proof of claim did not waive its right of setoff. See Weems v. U.S. (In re The Custom Ctr., Inc.), 163 B.R. 309, 316-317 (Bankr. E.D. Tenn. 1994); In re Sound Emporium, Inc., 48 B.R. 1, 2 (Bankr. W.D. Tex. 1984) *aff'd*, 70 B.R. 22 (W.D. Tex. 1987).

Unfortunately for Debtors, their argument is not persuasive because the case they cited in support of their argument was reversed on that specific point by the district court. See In re Aquasport, 155 B.R. 245, 247 (S.D. Fla. 1992), *aff'd*, ITT Comm. Fin. Corp. v. Tavormina, 985 F.2d 579 (11th Cir. 1993). The district court did uphold the bankruptcy court's decision that the creditor was not entitled to a setoff. See id. at 249. However, the district court specifically stated, "A review of these arguments, the pertinent portions of the record, and the relevant case law leads this Court, in accordance with the standard of appellate

review that this Court must follow, *to a conclusion at odds with the one reached by the bankruptcy court*. In effect, this Court determines that ITT did *not* procedurally waive its right to setoff in the instant case." Id. at 247 (emphasis added).

Further, the Court finds the Custom Ctr. decision, cited by U.S.A./I.R.S., to be more persuasive. Custom Ctr., 163 B.R. at 316-317. The court in Custom Ctr. stated that "The bankruptcy statutes and the rules of procedure do not require a rule that a creditor waives setoff by failing to assert it in the original proof of claim. However, setoff can be denied on equitable grounds that would normally justify denying setoff." Id. at 316 (citations omitted). The court went on to state, "The creditor's actions or failure to act during the bankruptcy case may give rise to equitable grounds for denying setoff." Id. In analyzing the case law on point, the court observed that other courts' decisions often did not focus on the failure to assert a right of setoff in a proof of claim, but on the creditor's continued failure to assert the setoff as the bankruptcy case progressed. See id. The court concluded that there is "no hard and fast rule that a creditor waives setoff by failing to assert it in the creditor's original proof of claim." Id. at 317.

Here, U.S.A./I.R.S. was unaware of Debtors' entitlement to a refund until Debtors' filed their 2002 tax return, which occurred after U.S.A./I.R.S. filed its proof of claim. In fact, Debtors did not file their 2002 tax return until after the 180 day bar date for government entities to file a proof of claim. U.S.A./I.R.S. filed its Motion for Relief from the Automatic Stay to Excise Right of Setoff once it became aware of Debtors' 2002 tax refund. None of U.S.A./I.R.S.'s actions can be construed to be a waiver of its right of setoff.

Therefore, the Court finds in favor of U.S.A./I.R.S. The Court grants U.S.A./I.R.S.'s Motion for Relief from the Automatic Stay to Exercise Right of Setoff and denies Debtors' Motion for Contempt Against U.S.A./I.R.S. An order in accordance with this Memorandum Opinion will be entered.

DATED this _____ day of June, 2004.

JUDGE

JOHN T. LANEY, III
UNITED STATES BANKRUPTCY