SO ORDERED.

SIGNED this 27 day of October, 2016.

Austin E. Carter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

In re:	)	
	)	Case No. 16-10213-AEC
Jason Eugene Wilkins,	)	
	)	Chapter 7
Debtor.	)	
	)	
	)	
United States of America,	)	
On behalf of United States	)	
Department of Agriculture,	)	
Farm Service Agency,	)	
	)	
Movant,	)	
	)	
v.	)	Contested Matter
	)	
Jason Eugene Wilkins,	)	
	)	
Debtor/Respondent.	)	

ORDER GRANTING FARM SERVICE AGENCY'S MOTION FOR RELIEF FROM STAY

A hearing was held on August 10, 2016 on the *Motion of the United States of America, United States Department of Agriculture, Farm Service Agency for Relief from Stay* (Dkt. 19) and the Debtor's Response thereto (Dkt. 24). The Farm Service Agency ("FSA") seeks a determination that the automatic stay is inapplicable to its setoff of the Debtor's tax

overpayments for 2013-2015 or, in the alternative, retroactive relief from the stay to validate the setoff. The Debtor opposes the FSA's request for relief from the stay and asserts the dischargeability of its obligation to the FSA as an affirmative defense to the FSA's motion. The Court has considered the parties' pleadings (both pre- and post-hearing), the remainder of the record, and the arguments of counsel made at the hearing on this matter.

FACTUAL BACKGROUND

The undisputed facts are as follows: The Debtor, Jason Eugene Wilkins, obtained a guaranteed loan from the United States Department of Agriculture/Farm Service Agency on March 23, 2006, which included a "Guaranteed Line of Credit" from the FSA. The Debtor defaulted on that loan and the FSA paid a Final Loss Claim on the Guaranteed Line of Credit on March 17, 2009 in the amount of $97,345.64. This resulted in the Debtor's owing the FSA a debt in the aforementioned amount.

In order to collect on the debt, the FSA sent the account to the Department of Treasury to obtain an offset under the Treasury Offset Program ("TOP") in 2009. Through the TOP, the FSA was able to offset a portion of the debt with the Debtor's 2010 and 2012 tax refunds.

The Debtor filed a Chapter 7 bankruptcy petition on February 24, 2016. Shortly thereafter, the Debtor filed tax returns for 2011, 2012, 2013, 2014, and 2015. The Debtor included a Washington, D.C. mailing address for the FSA on the creditor matrix accompanying his Chapter 7 petition (Dkt. 1). However, although the parties did not mention this at the hearing on this matter, the Bankruptcy Noticing Center ("BNC") appears to have sent the Notice of Chapter 7 Bankruptcy Case to the email address of Margie Williams (margie.williams@nc.usda.gov), instead of mailing the Notice to the address the Debtor listed on the creditor matrix (Dkt. 12).[1] Despite such notice being sent, the Debtor's local FSA office was not aware of the Debtor's bankruptcy filing until the Debtor called the local office. On March

[1] Presumably, the FSA submitted a request to the BNC that all bankruptcy filing notices be sent to this margie.williams@nc.usda.gov email address. However, any such request is not part of the record in this matter.

21, 2016, after the Debtor called the local FSA office, the Debtor's attorney called and sent a letter notice to the FSA regarding the Debtor's bankruptcy filing.

The Department of Treasury, through the TOP, issued the Debtor's tax refunds for 2013, 2014, and 2015 to the FSA before the FSA notified the Department of Treasury of the Debtor's bankruptcy filing. As a result, the FSA retained the Debtor's 2013 tax refund in the amount of $1,924.00, the Debtor's 2014 tax refund in the amount of $6,793.00, and the Debtor's 2015 tax refund in the amount of $7,139.00. The Debtor requested that the FSA return the funds seized to the Debtor. Although, the FSA retained the funds, it has not applied the funds to the Debtor's FSA debt. Instead it is holding the funds apart, awaiting the decision of the Court.

On May 20, 2016, the FSA filed a Motion for Relief from the Automatic Stay seeking retroactive relief from the stay under 11 U.S.C. § 362(d) of the Bankruptcy Code to allow the FSA to offset the funds it holds (Dkt. 19). In the Debtor's June 1, 2016 Response in Opposition, the Debtor contends that the FSA's action in connection with effectuating the setoff was a violation the stay and that the FSA's motion for relief should be denied (Dkt. 24). The Debtor received a Chapter 7 discharge in this case on July 8, 2016 (Dkt. 28).

On August 10, 2016, at the hearing on this matter, each party presented positions consistent with their pre-hearing filings and raised new contentions. The FSA raised the additional contention that it is exempt from the automatic stay pursuant to § 362(b)(26). The Debtor asserted that § 363(b)(26) does not apply because the Debtor does not owe the FSA a tax liability. The Debtor further argued that his discharge is a defense to the FSA's requested relief and that the FSA admitted it did not have a valid right to setoff by filing a proof of claim signifying that its claim is unsecured and not subject to setoff. Finally, the Debtor contends in the alternative that the 2015 tax refund should not be subject to setoff because the refund did not generate a prepetition obligation to the Debtor because his 2015 tax return was not yet due at the time of the filing of the Debtor's bankruptcy petition.

LEGAL ANALYSIS

I. Right of Setoff under § 553.

"Setoff is an established creditor's right to cancel out mutual debts against one another in full or in part. The purpose of setoff is to avoid 'the absurdity of making A pay B when B owes A.'" *In re Patterson*, 967 F.2d 505, 508 (11th Cir. 1992) (quoting *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)). Section 533, governing setoff in bankruptcy, does not create a federal right to setoff in bankruptcy cases; it merely preserves whatever right to setoff exists in accordance with other applicable law. *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995). In part, § 553(a) provides:

> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor 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 . . . .

11 U.S.C. § 553(a). Thus, a right to setoff under § 553 is preserved by the Code when: (1) the creditor has a valid prepetition claim against the debtor; (2) the creditor owes a valid prepetition debt to the debtor; and (3) the claim and debt are mutual obligations. *See In re Reed*, 500 B.R. 564, 566 (Bankr. W.D. Wis. 2013); *Okwukwu v. IRS (In re Okwukwu)*, 210 B.R. 194, 196 (Bankr. N.D. Ala. 1997); 5 *Collier on Bankruptcy* ¶ 553.01[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.).

The Debtor does not contest that his obligation to the FSA or that the IRS's obligation to him for the 2013 and 2014 tax overpayments arose prepetition. However, he contends that the IRS's obligation for the 2015 tax overpayment arose postpetition. FSA's claim against the Debtor undisputedly arose in 2009 as the result of the Debtor's default on a "Guaranteed Line of Credit" from the FSA that resulted in the FSA paying a "Final Loss Claim" on behalf of the Debtor. Further, it is well-established that the IRS's obligation to pay a tax refund (or to repay an overpayment to a taxpayer) "'arises at the end of the taxable year to which [the refund] relates, and not when that right of refund is claimed by the taxpayer/debtor.'" *In re Reed*, 500

B.R. at 566 (quoting *Rozel Indus., Inc. v. IRS (In re Rozel Indus., Inc.)*, 120 B.R. 944, 950-51 (Bankr. N.D. Ill. 1990)); *see also In re Bourne*, 262 B.R. 745, 749 (Bankr. E.D. Tenn. 2001) ("The IRS's obligation to the debtor to refund her overpayment of income taxes in 1999 arose at the end of 1999 prior to her bankruptcy filing in May 2000."); *In re Okwukwu*, 210 B.R. at 196 ("Courts have repeatedly held that the substantive right to a tax refund arises at the end of the tax year to which the refund relates."); *United States ex rel. IRS v. Johnson (In re Johnson)*, 136 B.R. 306, 309 (Bankr. M.D. Ga. 1991); *In re Conti*, 50 B.R. 142, 148 (Bankr. E.D. Va. 1985). This is true even when the taxpayer files his income tax returns for preceding years after filing a bankruptcy petition. *In re Okwukwu*, 210 B.R. at 196 (finding that IRS's obligation for a tax overpayment arose at the end of the taxable year for which the refund applied even though the debtor did not file his income tax return for the applicable year until after filing bankruptcy). In this case, even though the Debtor did not file tax returns for 2013-2015 until after he filed this bankruptcy case, the IRS's obligation to him arose at the end of those respective years. The established case law undermines the Debtor's contention that the 2015 refund was not a prepetition liability that the government owed the Debtor at the time of filing. In this case, the IRS's obligation to the Debtor for the 2015 tax refund arose prepetition, on December 31, 2015. Thus, the first two requirements of setoff under § 553 are met.

The third requirement – mutuality – is also satisfied in this case. The federal government is generally considered a "unitary creditor" for the purposes of setoff, meaning that the different federal government agencies are considered a single creditor (the United States). *See, e.g.*, *In re Bourne*, 262 B.R. at 749 (mutual obligations exist for purpose of setoff where debtor owed HUD and the IRS owed debtor); *see also Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539–40 (1946); *United States v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998); *Lopes v. United States Dep't of Housing & Urban Dev. (In re Lopes)*, 211 B.R. 443, 445-46 (D.R.I. 1997); *In re Lykes Bros. S.S. Co., Inc.*, 217 B.R. 304, 309 (Bankr. M.D. Fla. 1997). Thus, under the unitary creditor theory, the FSA's claim against the Debtor and the IRS's debt to the Debtor are mutual obligations for the purposes of setoff.

Since the requirements of § 553 have been met in this case, it is necessary to evaluate whether non-bankruptcy law provides a right to setoff for the FSA, as § 553 does not independently provide a right to setoff. The FSA relies on 26 U.S.C. § 6402 to establish its right to setoff. The Debtor does not dispute the FSA's use of this statute. The statute operates, in relevant part, as described by the court in *In re Sexton*:

> In this case, the "applicable nonbankruptcy law" authorizing setoff is the Treasury Offset Program, which authorizes the Secretary of the Treasury to intercept an individual's tax overpayment and apply it to preexisting debts. 26 U.S.C. § 6402. This statute has multiple subsections, including subsection (a) that permits the Secretary of Treasury to offset a tax overpayment to satisfy tax liability and additional subsections under which the Secretary of the Treasury may offset to satisfy nontax debt. *See id.* at 6402(c), (d), (e) and (f).
>
> Under the provisions of 26 U.S.C. § 6402(d)(1), when the Secretary receives notice that a taxpayer owes a "past–due legally enforceable debt" to another federal agency, "the Secretary *shall* ... reduce the amount of any overpayment payable to such person by the amount of such debt ..." *Id.* at § 6402(d)(1)(A) (emphasis added). The provisions further instruct the Secretary to forward the withheld amount to the appropriate federal agency and notify the taxpayer of the offset. *Id.* at § 6402(d)(1)(B) & (C). After compliance with the provisions of the intercept statute, the Secretary must refund any remaining balance to the taxpayer. *Id.* at 6402(a).

In re Sexton, 508 B.R. 646, 658 (Bankr. W.D. Va. 2014) (footnotes omitted), *appeal dismissed* sub nom. *U.S. Dep't of Agric. v. Sexton*, 529 B.R. 667 (W.D. Va. 2015). "It is clear that but for the debtor's bankruptcy filing, the federal government would have a statutory right under 26 U.S.C. § 6402(d) to offset the debtor's tax refund." *In re Bourne*, 262 B.R. at 750.

Finally, while the Court is surprised that the FSA has failed to amend its proof of claim, under these circumstances the fact that its proof of claim does not identify the claim as secured or subject to setoff does not serve as an admission by the FSA that the debt is unsecured and not subject to setoff. Under the "informal proof of claim" doctrine, recognized by the 11th Circuit in *In re Charter Co.*, a motion filed in a bankruptcy case can constitute a proof of claim if it (1)

apprises the court "of the existence, nature and amount of the claim (if ascertainable)," and (2) "makes clear the claimant's intent to hold the debtor liable for the claim." *Charter Co. v. Dioxin Claimants (In re Charter Co.),* 876 F.2d 861, 863-64 (11th Cir. 1989) (citing *In re South Atlantic Fin. Corp.,* 767 F.2d 814, 819 (11th Cir. 1985) and *In re Guardian Mortgage Investors,* 15 B.R. 284 (Bankr. M.D. Fla. 1981)). It is well-established that a motion for relief from the automatic stay may constitute an informal proof of claim. *See id.* at 846 (citing *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985) and *In re Guardian Mortgage Investors*, 15 B.R. 284 (Bankr. M.D. Fla. 1981)); *see also Brown v. Turner (In re Brown),* 76 Fed. Appx. 471 (3d Cir. 2003). In this case, the FSA's motion for relief meets the 11th Circuit's requirements of an informal proof of claim that states the debt is subject to setoff. Thus, the FSA has a valid right to setoff despite the indication to the contrary in the FSA's formal proof of claim.

II. The Automatic Stay and Setoff

"Section 553, by its terms, makes a creditor's right of setoff subject to the automatic stay provisions of 11 U.S.C. § 362." *In re Okwukwu*, 210 B.R. at 196. 11 U.S.C. § 362(a)(7) provides that a bankruptcy petition operates as a stay of "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."[2] "The right to setoff is automatically stayed until the matter is presented to the court for a determination of the validity of the setoff and the need for a stay in order to efficiently manage the bankruptcy proceedings." *United States v. Ruff (In re Rush-Hampton Indus., Inc.),* 98 F.3d 614 (11th Cir. 1996). Thus, in order to effectuate a post-petition setoff, a creditor must seek relief from the automatic stay pursuant to § 362(d). *See B.F. Goodrich Employee Fed. Credit Union v. Patterson (In re Patterson),* 967 F.2d 505, 509 (11th Cir. 1992); *In re Okwukwu,*

[2] The FSA contends that the Debtor's tax overpayment is distinct from the Debtor's right to a tax refund for that overpayment, and, as such, the overpayment is not part of the Debtor's bankruptcy estate. Yet, despite this distinction, the overpayment is subject to the automatic stay pursuant to § 362(a)(7). *See In re Buttrill*, 549 B.R. 197, 204 (Bankr. E.D. Tenn. 2016) ("Cases which have considered what interest the debtor has in an overpayment have found that the debtor has a contingent interest in the overpayment of taxes . . . That contingent interest is included as property of the estate."); *Addison v. U.S. Dep't of Agric. (In re Addison),* 533 B.R. 520, 529-30 (Bankr. W.D. Va. 2015) (explaining, at length, the reasons why a debtor's tax overpayment or right to refund becomes property of the bankruptcy estate upon the filing of the bankruptcy petition).

210 B.R. at 196 (citing *In re Hudson,* 168 B.R. 449 (Bankr. S.D. Ga. 1994). "'Courts generally recognize that, by establishing a right to setoff, the creditor has established a prima facie showing of cause for relief from the automatic stay under §362(d)(1).'" *In re MCB Fin. Grp., Inc.,* No. 10-11176-WHD, 2011 WL 8609454, at *3 (Bankr. N.D. Ga March 31, 2011) (quoting *In re Szymanski,* 413 B.R. 232 (Bankr. E.D. Pa. 2009); *see also In re Reed,* 500 B.R. 564, 569 (Bankr. W.D. Wis 2013) ("Finding that the IRS has a right to set off does not necessarily mean that the stay of that setoff must be terminated. It means only that it has made a prima facie showing of "cause" for relief from the automatic stay under § 362(d)(1).").

In this case, the FSA filed its motion for relief from the automatic stay on May 20, 2016 (Dkt. 19), but the IRS effectuated the setoff before the FSA submitted the motion for relief. The FSA contends that the setoff is exempted from the automatic stay under 11 U.S.C. § 362(b)(26) such that the FSA's post-filing action in connection with the effectuation of the setoff, without first seeking relief from the stay, was appropriate. In the alternative, the FSA contends that it should be granted retroactive relief from the automatic stay under § 362(d) and that the Court should find it's effectuation of the setoff prior to the request for relief a harmless error.

A. FSA's setoff is not exempted from the automatic stay under § 362(b)(26)

Section 362(b)(26) provides:

> The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
> under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief *against an income tax liability* for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a).

11 U.S.C. § 362(b)(26) (emphasis added). The FSA, relying on *In re Stiles*, contends that § 362(b)(26) carves out an exception to the automatic stay in this case because the setoff was an income tax setoff by a government agency. However, § 362(b)(26) applies only to a setoff of a tax refund against the debtor's "income tax liability." *Id.* The exception does not apply to the debtor's non-income tax liabilities to a governmental creditor. *See In re Buttrill*, 549 B.R. 197, 204-05 (Bankr. E.D. Tenn. 2016). "Had Congress wanted to except from violating the automatic stay the setoff of a debtor's income tax refund against *any* governmental debts—whether it be income tax liability or non-tax liability—Congress simply could have worded subsection (b)(26) accordingly." *Addison v. U.S. Dep't of Agric. (In re Addison),* 533 B.R. 520, 530 (Bankr. W.D. Va. 2015).

In this case, the Debtor's FSA debt is not an income tax liability; rather, it arose from the Debtor's default on the Guaranteed Line of Credit. Thus, the exception to the automatic stay in § 362(b)(26) is inapplicable. As a result, the Court turns to the FSA's request for retroactive relief from the stay for the IRS's effectuation of the setoff.

B. Retroactive relief from the automatic stay is appropriate in this case.

The Court has the discretion to grant retroactive relief from (or annul) the automatic stay pursuant to § 362(d)(1). *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.),* 749 F.2d 670, 674-75 (11th Cir. 1984) (recognizing the right to retroactive relief from the automatic stay under § 362(d)). Granting or denying retroactive relief from the automatic stay is an equitable determination within the discretion of the bankruptcy court. *See, e.g., In re Buttrill,* 549 B.R. at 210 (refusing to annul the automatic stay because of the creditor's "failure to act promptly" in filing for relief). In making this determination, the court "should consider whether annulling the stay would 'interfere with the 'breathing spell' that the stay affords' debtors." *In re MCB Fin. Grp., Inc.*, 2011 WL 8609454, at *3 (quoting *In re Brown*, 251 B.R. 916, 919 (Bankr. M.D. Ga. 2000)). In other words, the court should consider whether the stay violation was merely a harmless error – including whether the court would have granted relief if the party had requested relief before violating the stay – or whether the violation caused harm to the Debtor or

other creditors. *See In re Bourne,* 262 B.R. at 761 ("Other courts presented with similar facts have agreed [that retroactive relief is appropriate], especially where stay relief would have been granted prospectively, the stay violation was not willful and no damages or harm resulted from the violation.")

Balancing the equities, particularly considering the factors above, the Court finds that retroactive relief from the automatic stay is appropriate in this case. The Court finds that the FSA did not intentionally violate the automatic stay, as the FSA filed the motion for relief shortly after learning of the inadvertent violation and did not apply the setoff funds to the debt at issue, but rather held them apart, waiting on a judgment from the Court. Though there is a factual dispute over whether the FSA received proper notice of the bankruptcy, even if the Court charges the FSA with notice, the Court still finds that the stay violation was inadvertent based on the FSA's attempt to stop the setoff and its post-violation response.[3] Further, except for the FSA's stay violation, the Debtor has no other viable defense to the FSA's setoff right. As discussed in more detail below, "but for this violation and the ensuing motions before this court, the government could have waited until discharge was entered and then exercised its right of offset without permission from this court." *In re Bourne,* 262 B.R. at 761. The fact that the FSA exercised its right to setoff prematurely "does not present a sound basis to refuse the United States' request for post facto relief from the automatic stay." *Id.* Finally, because the FSA has a valid right to setoff, which is treated as a secured claim, the Court does not find any harm to the Debtor or the Debtor's other creditors.[4] Thus, the Court finds that the violation of the stay by the FSA is harmless error and retroactive relief is appropriate.

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[3] Some courts consider whether the creditor violated the stay while they had "knowledge" of the bankruptcy filing. *See In re MCB Fin. Grp., Inc.,* 2011 WL 8609454, at *3. The purpose of this inquiry is to prevent retroactive relief for those who willfully violate the stay. *Id.* In this case, the actions of the FSA clearly indicate that it did not intend for the setoff to occur during the Debtor's bankruptcy without the court's permission. Thus, charging the FSA with notice of the Debtor's bankruptcy does not undermine the Court's allowing retroactive relief from the stay given that by considering the totality of the circumstances, the equities weigh in favor of allowing such relief.

[4] At the hearing, the Debtor contended that the setoff harmed the Debtor by increasing his attorneys' fees and harmed the Debtor's unsecured creditors because the withheld tax refund could have been distributed to unsecured creditors. Neither of these arguments passes muster. Attorneys' fees incurred for the unsuccessful defense of a motion do not qualify as actionable damages in this setting. With respect to the alleged harm to unsecured creditors,

III. Dischargeability Defense to Request for Relief from Stay

The Debtor contends that the discharge he received on July 8, 2016 extinguishes his debt to the FSA, which in turn undermines the attempt to setoff the funds. As a result, the Debtor argues that the FSA's attempt to setoff the debt post-discharge is a violation of the discharge injunction of § 524(a)(2), which reads:

> [a] discharge in a case under this title – operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

11 U.S.C. § 524(a)(2). Relying on *Davenport*, the Debtor further contends that the fact that the debt was dischargeable at the time the motion was filed, and was subsequently discharged, serves as a defense to the FSA's motion for relief. *Univ. State Bank v. Davenport (In re Davenport)*, 34 B.R. 463, 466 (Bankr. M.D. Fla. 1983).[5]

Dischargeability is not a valid defense to the FSA's motion for relief. The discharge injunction in § 524(a)(2) does not extinguish a creditor's right to setoff. *See In re Bourne*, 262 B.R. at 758-59 (describing that the majority of courts agree that a discharge does not extinguish the right to setoff prepetition debts). The court in *Conti* described how dischargeability effects a creditor's right to setoff as follows:

> It is well-settled that the automatic stay prohibits the exercise of the right of setoff but does not destroy the right to setoff itself. Courts have allowed a creditor to seek relief from stay in order to exercise setoff rights prior to discharge. However, nothing in the Code or in case law would indicate that discharge would bar a creditor from

under § 506(a)(1), the FSA's right to setoff is a secured claim. Even if the refunds had not been diverted in technical violation of the stay, the FSA's right to setoff would have superseded the unsecured creditors' claim to those funds, if any.

[5] The Debtor relies on the case to establish that the dischargeability of the debt at issue should be considered an affirmative defense to the FSA's motion for stay relief. The *Davenport* court conceded that counterclaims and affirmative defenses are not typically considered in motions for relief. *In re Davenport*, 34 B.R. at 466. However, the court noted "when the affirmative defense contests the validity of the lien at issue, such affirmative defense should be considered in determining whether or not the automatic stay should be lifted." *Id.*

> exercising a right to setoff which existed at the time of filing the petition.
> . . .
> This Court finds that the injunction of § 524(a)(2) which enjoins creditors from offsetting any debt which has been discharged refers only to the setoff of a post-petition debt owed by a creditor to the debtor which the creditor would then seek to setoff against a pre-petition discharged debt owed by the debtor to the creditor. This Court finds that § 524(a)(2) is not meant to extinguish the right to setoff which is preserved in § 553 of the Code, and thus the Court disapproves of the debtor's conclusion that the setoff here cannot be achieved post-discharge.

In re Conti, 50 B.R. 142, 149 (Bankr. E.D. Va. 1985) (citations omitted). As the *Bourne* court noted, this interpretation of the connection between § 524(a)(2) and § 553 is "consistent with the rights of a secured creditor granted to a setoff creditor under § 506(a)." *In re Bourne,* 262 B.R. at 759. "Because 'a bankruptcy discharge extinguishes only one mode of enforcing a claim namely, an action against the debtor in personam,' it leaves intact other modes of enforcement, including, without limitation, an action against the debtor *in rem*." *Couture v. Pawtucket Credit Union,* 765 A.2d 831, 833 (R.I. 2001) (citations omitted).

> Indeed, a right of setoff has been described as a "security of the most perfect kind." *In re Yale Express System, Inc.*, 362 F.2d 111, 114 (2d Cir. 1966). As a result, courts have held that 11 U.S.C. § 553 takes precedence over § 524(a)(2) (the discharge provision) in a Chapter 7 case so that "a right of setoff * * * survives a discharge just as much as a claim secured by a mortgage or any other lien." *In re Thompson*, 182 B.R. 140, 154 (Bankr. E.D. Va. 1995); *see also In re Buckenmaier*, 127 B.R. 233, 237 (B.A.P. 9th Cir. 1991) (holding that 11 U.S.C. § 553 takes precedence over § 524(a)(2) in Chapter 7 case); *Posey v. United States Department of the Treasury*, 156 B.R. 910, 915 (W.D.N.Y. 1993) (same); *In re Runnels*, 134 B.R. 562, 565 (Bankr. E.D. Tex. 1991) (same).

Id. at 836-37.

The Debtor's discharge has successfully extinguished his personal liability to the FSA, but it did not affect the FSA's secured claim in the right of setoff. Thus, the Debtor's position that his discharge extinguished the FSA's right to setoff and that the FSA's motion for relief should thus be denied is without merit.

For these reasons, the Court hereby GRANTS the FSA's Motion for Relief from Stay. The stay is hereby lifted retroactively, so that the FSA may retain the Debtor's tax overpayments and apply them to the FSA's claim in this case.

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