

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

No. 02-17845
Chapter 13

GERALD V. SANDERFER

Debtor

MEMORANDUM

Appearances: Mark T. Young, Mark T. Young & Associates, Chattanooga, Tennessee,
Attorney for Debtor

M. Kent Anderson, Assistant U.S. Attorney, Chattanooga, Tennessee,
Attorney for Internal Revenue Service

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The Internal Revenue Service (IRS) objected to confirmation of the debtor's chapter 13 plan on the ground that it treats the IRS's secured claim as unsecured. The debtor contends the claim should be treated as unsecured because the IRS failed to perfect its tax lien before the debtor filed this chapter 13 case. 11 U.S.C. § 545(2).

The IRS must file a lien notice to perfect a tax lien on the debtor's property against other creditors. 35 Am.Jur.2d, *Federal Tax Enforcement* § 250. During the debtor's earlier chapter 13 case, the IRS assessed pre-petition and post-petition taxes against the debtor. "Pre-petition" and "post-petition" refer respectively to taxes incurred before and after the debtor filed the earlier chapter 13 case.

After confirmation of the debtor's plan in the earlier chapter 13 case, the IRS filed a lien notice to perfect a lien for the pre-petition and post-petition taxes. The IRS released the lien notice as to the pre-petition taxes but not the post-petition taxes. The court dismissed the earlier chapter 13 case, and less than a month later, the debtor filed this case. The IRS did not file another lien notice during the gap between the chapter 13 cases. The debtor argues the lien notice is void because its filing violated the automatic stay in the earlier chapter 13 case. 11 U.S.C. § 362(a).

Section 362(b)(9)(D) creates an exception from the automatic stay for the assessment of taxes during a bankruptcy case. If the assessment normally creates a tax lien, § 362(b)(9)(D) provides that the lien will not immediately attach to property of the bankruptcy estate. The tax lien will attach to property of the bankruptcy estate only when the property is transferred out of the bankruptcy estate or otherwise reverts in the debtor. Section 362(b)(9)(D) includes another restriction; the tax lien will secure only the portion of the tax debt that will not be discharged. 11 U.S.C. § 362(b)(9)(D).

The parties do not dispute that the assessment during the debtor's earlier chapter 13 case created a tax lien, as allowed by § 362(b)(9)(D), to secure the post-petition tax debt. They also do not dispute that when the court dismissed the earlier chapter 13 case, the tax lien attached to the debtor's property that had been in the bankruptcy estate. 11 U.S.C. § 349(b)(3); Keith M. Lundin, *Chapter 13 Bankruptcy* § 338.1 (3rd ed. 2002). The lien should also have attached to property the debtor acquired in the gap between the earlier chapter 13 case and this case. As a result, the debtor's property came into the bankruptcy estate in this chapter 13 case already subject to the IRS's lien. The question is whether the lien notice perfected the tax lien.

Section 362(b)(9)(D) allows creation of a tax lien without relief from the automatic stay, but it does not expressly allow perfection of the tax lien without relief from the automatic stay. See *In re LTV Steel Co.*, 264 B.R. 455 (Bankr. N. D. Ohio 2001); *United States v. Gold (In re Avis)*, 178 F.3d 718 (4th Cir. 1999). If Congress intended to except both creation and perfection of the tax lien from the automatic stay, Congress could have said it clearly. Compare 11 U.S.C. § 362(b)(18). The court concludes that § 362(b)(9)(D) allows the creation of a tax lien without relief from the stay, but it does not provide an exception from the automatic stay for perfection of the lien.

Since the exception does not expressly allow perfection of the lien, the IRS must rely on the argument that the automatic stay did not even apply to perfection. The automatic stay applied to the filing of the lien notice if it was an attempt to secure the post-petition tax debt by perfecting a lien on property of the bankruptcy estate. 11 U.S.C. § 362(a)(3), (4).

The IRS seems to be arguing that when it filed the lien notice, the debtor's property was no longer in the bankruptcy estate, except for the debtor's post-petition earnings. The IRS filed the lien notice after confirmation of the debtor's chapter 13 plan in the earlier case. Confirmation *may* vest all the property of the bankruptcy estate in the debtor except the debtor's future earnings. 11

U.S.C. § 1327(b); *Montclair Property Owners Assoc., Inc. v. Reynard (In re Reynard)*, 250 B.R. 241 (Bankr. E. D. Va. 2000). That reasoning does not apply in this case, however, because confirmation did not vest the property of the bankruptcy estate in the debtor. The confirmed plan provided that the property would vest in the debtor only when he completed the plan. 11 U.S.C. § 1327(b); *Clark v. United States (In re Clark)*, 207 B.R. 559 (Bankr. S. D. Ohio 1997). The debtor's property was still in the bankruptcy estate and protected by the automatic stay when the IRS filed the lien notice.

Section 362(b)(9)(D) gives rise to another argument: the lien notice was not filed to perfect the tax lien on property of the bankruptcy estate because the lien could not attach to property of the bankruptcy estate; the lien could only attach to property that was transferred out of the estate or otherwise re-vested in the debtor. This argument proposes that the automatic stay prevents the automatic stay from applying: since the automatic stay prevents the tax lien from immediately attaching to property of the bankruptcy estate, perfection of the lien cannot violate the automatic stay because the perfection will affect the property only after it has left the bankruptcy estate.

Section 362(b)(9)(D) is a limited exception from the automatic stay. It allows a tax assessment to create a tax lien, but it does not allow the tax lien to attach to property of the bankruptcy estate. The automatic stay still applies to attachment of the tax lien to property of the bankruptcy estate. See *In re LTV Steel Co.*, 264 B.R. 455 (Bankr. N. D. Ohio 2001); *United States v. Gold (In re Avis)*, 178 F.3d 718 (4th Cir. 1999). It does not make sense to say that the automatic stay prevents attachment of the tax lien to property of the bankruptcy estate but does not stay acts by the creditor to perfect the lien as to property of the bankruptcy estate. If the tax creditor wants to take the steps required to perfect the lien *before* the property exits the bankruptcy estate and the automatic stay expires, the creditor should ask the bankruptcy court for relief from the automatic stay. Otherwise, the tax creditor is free to make the lien records show that it has a perfected tax lien on property that never left the bankruptcy estate and never became subject to the lien.

Section 362(b)(9)(D) gives rise to the argument that since the tax lien attaches to property only when it leaves the bankruptcy estate, then there can never be a good, bankruptcy-related reason for staying the tax creditor from perfecting the lien while the property is still in the bankruptcy estate. Even if this argument is correct for most circumstances, the court cannot say that it is true for all circumstances. If Congress had thought it was true for all circumstances, then Congress should have made § 362(b)(9)(D) an express exception from the automatic stay for perfection of the floating tax lien allowed by § 362(b)(9)(D). Depending on the circumstances, the automatic stay may serve a bankruptcy purpose by temporarily preventing the tax creditor from perfecting the lien allowed by § 362(b)(9)(D). In this regard, the automatic stay is not a permanent injunction. The question is whether the tax creditor should be required to obtain relief from the automatic stay if it wants to take the steps necessary to perfect the tax lien *before* the property leaves the bankruptcy estate and the automatic stay expires. 11 U.S.C. § 362(c).

The IRS has argued that requiring it to obtain relief from the stay is impractical. The argument is that the IRS can file a notice to perfect the lien on property that is not in the bankruptcy estate, without obtaining relief from the stay, and the notice should also apply to property that leaves the bankruptcy estate because there is no other practical way for the IRS to file notice as to property that leaves the bankruptcy estate.

The court disagrees. In many cases, the IRS may simply wait for the stay to expire. Section 362(b)(9)(D) gives tax creditors an advantage by allowing the post-petition creation of a lien that will attach to property as soon as it leaves the bankruptcy estate or otherwise vests in the debtor. This advantage may be enough for the IRS's purposes in almost all cases. The burden of obtaining relief from the stay is light. It is not sufficient to imply an intent by Congress that the automatic stay would not apply to perfection of the tax lien. Likewise, it does not imply that Congress intended §

362(b)(9)(D) to be an exception from the automatic stay for both creation and perfection of the tax lien.

The court concludes that filing of the lien notice violated the automatic stay in the debtor's earlier chapter 13 case.

Is the notice of tax lien void?

Actions that violate the automatic stay will be voided by the court, but the court may grant relief from the general rule and validate the action on limited equitable grounds. *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993).

At least one court has held that dismissal of a bankruptcy case validates a creditor's actions that violated the automatic stay. The court based its holding on the rule that actions in violation of the stay are voidable, not void. *Shell Oil Co. v. Capital Financial Services*, 170 B.R. 903 (S. D. Tex. 1994). The rule that an action in violation of the stay is voidable, instead of void, does not necessarily lead to the result reached by the court. The question should still be whether the action that violated the stay should be validated on some equitable ground.

Dismissal of the bankruptcy case, by itself, should not be an equitable ground for validating an action that violated the stay. The better rule is that an act done in violation of the automatic stay in an earlier bankruptcy case may be voided by the court even though the case was subsequently dismissed. Otherwise, any creditor can decide whether to violate the automatic stay based on weighing the potential harm to it against the likelihood the case will subsequently be dismissed. *In re Dandridge*, 221 B.R. 741 (Bankr. W. D. Tenn. 1998) (not a tax lien case); *In re Ullrich*, 186 B.R. 742 (Bankr. M. D. Fla. 1995); *Overland National Bank v. Olson (In re Olson)*, 101 B.R. 134 (Bankr. D. Neb. 1989).

The passage of time after dismissal of the bankruptcy case, combined with subsequent changes in position by the creditor or the debtor, may make it inequitable to treat an act done in violation of the stay as void. The facts in this case, however, do not reveal any such ground for not enforcing the general rule of voidness. The IRS has not proved any other equitable ground for giving effect to the lien notice despite its having been filed in violation of the automatic stay.

Conclusion

The lien notice was filed in violation of the automatic stay in the debtor's earlier chapter 13, and as a result, the lien notice is void, and the IRS's claim should be treated as unsecured. The court will enter an order accordingly.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

(Entered 8/27/03)