

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-88-437

CHERYL L. McPECK,

MEMORANDUM ORDER

Debtor.

At Minneapolis, Minnesota, January 16, 1990.

The above-entitled matter came on for hearing before the undersigned on the 15th day of November, 1990 on Debtor's motion for an order requiring the Internal Revenue Service ("IRS") to pay Debtor's reasonable attorney's fees under 11 U.S.C. Section 362(h) and/or 26 U.S.C. Section 7430. The appearances were as follows: Tracy Anagnost for the IRS; and Ian Ball for the Debtor. This Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate this motion because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. Section 157(b)(2)(O).

PROCEDURAL HISTORY

The instant motion marks another chapter in a protracted struggle between the Debtor and the IRS that has spanned several years and has found its way to the United States Court of Appeals for the Eighth Circuit and back. This Chapter 13 case was filed on February 2, 1988.

On April 5, 1988, Debtor filed a motion under 11 U.S.C. Section 362(h) to recover damages for the IRS' alleged willful violation of the automatic stay. The IRS failed to appear at the initial hearing held April 12, 1988. At the request of the IRS, Debtor's motion was reset for hearing. After a number of continuances, a full-fledged hearing on Debtor's motion was finally held on August 3, 1988, following which I took the matter under advisement. On October 12, 1988, Debtor filed a second motion to recover damages under 11 U.S.C. Section 362(h) and for attorney's fees under 26 U.S.C. Section 7430. By Memorandum Order entered October 13, 1988, I awarded Debtor \$1,925.25 for attorney's fees based on her first motion. A hearing on Debtor's second motion was held on November 2, 1988. By Memorandum Order entered November 3, 1990, I awarded the Debtor \$900 for additional attorney's fees, \$1,489.05 for other actual damages, and punitive damages in the amount of \$2,500.00. The IRS appealed both orders.

On June 23, 1989, the United States Supreme Court issued its opinion in Hoffman v. Connecticut Dept. of Income Maintenance. See ___ U.S. ___, 109 S. Ct. 2818 (1989). On June 26, 1989, the United States District Court for the District of Minnesota affirmed both of my orders. United States v. McPeck, Civ. No. 4-89-102 (D. Minn. June 26, 1989). Based, on the Hoffman decision, the IRS moved for reconsideration, which motion the District Court denied. The IRS appealed to the Eighth Circuit.

On June 30, 1989, Debtor moved for an order requiring the IRS to pay Debtor's attorney's fees in connection with the appeal to the District Court pursuant to 11 U.S.C. Section 362(h), 5 U.S.C.

Section 504, and 42 U.S.C. Section 1988. By Order entered August 9, 1989, I awarded Debtor \$1,430.00 in additional attorney's fees. The IRS filed a notice of appeal, but at the IRS' request this Court entered an order staying said appeal pending resolution of the Eighth Circuit appeal. It now appears that said appeal will not be pursued. On August 6, 1990, the Eighth Circuit issued an opinion affirming the District Court's order of June 27, 1989. *United States v. McPeck*, 910 F.2d 509 (8th Cir. 1990).

At the conclusion of said opinion, however, the Eighth Circuit remanded to this Court the question of whether the Debtor could have been awarded litigation expenses under 26 U.S.C. Section 7430 rather than under 11 U.S.C. Section 362(h). (FN1) *Id.* at 514. At a status conference held September 26, 1990, I requested the parties to submit memoranda regarding the award of such litigation expenses. On November 8, 1990, Debtor moved for an order 1) requiring the IRS to pay Debtor's attorney's fees in connection with the appeal to the Eighth Circuit pursuant to 26 U.S.C. Section 7430 or 11 U.S.C. Section 362(h); 2) modifying the Court's orders of October 13 and November 3, 1988 to provide that the awards of attorney's fees granted therein were made pursuant to 26 U.S.C. Section 7430; and 3) granting such other relief as is just and equitable. The parties filed their memoranda the day before the November 15 hearing on this matter.

(FN1) The United States is immune to an award of attorney's fees under 11 U.S.C. 362(h) except to the extent that such award is offset against a prepetition debt, and therefore an award of fees to Debtor's attorney would be offset against her prepetition debt to the IRS rather than paid to her attorney. *McPeck*, 910 F.2d 509, 513. In contrast, any attorney's fees awarded under 26 U.S.C. 7430 will not be offset against the debt to the IRS, since section 7430 constitutes an independent waiver of sovereign immunity.

DISCUSSION

This Court has discretion to award the Debtor attorney's fees under 26 U.S.C. Section 7430 if the requirements of that statute have been fulfilled:

(a) In any . . . court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment . . . for--

. . .

(2) reasonable litigation costs incurred in connection with such court proceeding.

. . .

(c) For purposes of this section--

. . .

(4)(A) The term "prevailing party" means any

party in any proceeding to which subsection (a) applies . . . --

(i) which establishes that the position of the United States in the proceeding was not substantially justified,

(ii) which (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(iii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code

26 U.S.C. Section 7430 (emphasis added). The IRS contends 1) Debtor does not qualify as a "prevailing party" entitled to recover attorney's fees under section 7430; 2) Debtor's motion improperly includes attorney's fees incurred prior to the time the IRS took a position in this litigation; and 3) Debtor's motion improperly requests an award of attorney's fees in excess of the fee cap section 7430 imposes.

A. "Prevailing Party"

In order to qualify as a "prevailing party", the Debtor must meet the three requirements provided in section 7430(c)(4)(A). The Debtor has clearly demonstrated that the IRS was not substantially justified in the proceedings before this Court and the District Court, where the IRS took the position that it had not willfully violated the automatic stay. My previous orders and the District Court's order of affirmance all concluded that the IRS' position was meritless. Furthermore, the IRS does not dispute that the Debtor meets the other two requirements for being a "prevailing party" during that phase of the litigation.(FN2) Consequently, I

have

discretion to award the Debtor attorney's fees under section 7430 for fees incurred during that period.

I have concluded that such an award is warranted, since otherwise Debtor's counsel will not be paid for his efforts. The previous awards of attorney's fees under 11 U.S.C. Section 362(h) will be reduced accordingly.

Debtor, however, has failed to show that the IRS' position before the Eighth Circuit was not substantially justified. By that point in the course of the proceedings, the IRS had essentially abandoned its position that it had not willfully violated the stay, but instead argued that the doctrine of sovereign immunity shielded

(FN2) The IRS explicitly concedes in its memorandum that Debtor meets the "net worth" requirement of 26 U.S.C. 7430(c)(4)(A)(iii).

it from sanction under 11 U.S.C. Section 362(h). The Eighth Circuit avoided confronting the jurisdictional issue the parties

thoroughly briefed, the proper interpretation of 11 U.S.C. Section 106(a), and instead held for the Debtor based on 11 U.S.C. Section 106(b), the proper interpretation of which neither party extensively briefed.

Debtor relies on the Eighth Circuit's opinion as her sole basis for contending that the IRS' position on appeal was not substantially justified. The Eighth Circuit held in favor of the Debtor, but the opinion does not indicate that the IRS' proffered interpretations of 11 U.S.C. Section 106(a) and (b) were meritless. Therefore, I cannot award the Debtor attorney's fees under section 7430 for fees incurred in the Eighth Circuit appeal.(FN3)

B. "Position of the United States"

The IRS objects that the award of attorneys fees in the Memorandum Order entered October 16, 1988 included fees incurred before the IRS had taken a position in the litigation. At the hearing on this matter, Debtor's counsel conceded that 1.4 hours of his time expended before April 1, 1988, the date he prepared the first motion, could not be included in an award under section 7430.

C. Fee Cap

Section 7430 generally limits the recovery of attorney's fees to \$75 per hour:

(FN3) Consequently, I need not reach the issue of whether the Debtor substantially prevailed with respect to the most significant issue or set of issues presented to the Eighth Circuit. See 26 U.S.C. Section 7430(c)(4)(A)(ii)(II).

[S]uch fees shall not exceed \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorney's for such proceeding, justifies a higher rate.

26 U.S.C. Section 7430(c)(1)(B)(iii). I have concluded that an increase in the cost of living justifies a rate higher than \$75 per hour. Fees awarded in the Memorandum Order entered October 13, 1988 will be awarded at a rate of \$75 per hour plus an adjustment for inflation from the effective date of the \$75 fee cap to the entry date of the order. Similarly, the fees awarded in the orders entered November 3, 1988 and August 9, 1989 will be adjusted for inflation from the effective date of the fee cap to the entry date of the orders. Debtor's attorney will receive postjudgment interest on said awards from the entry dates of the orders through the date of payment.

CONCLUSION

Debtor is entitled to an award of attorney's fees under 26 U.S.C. Section 7430 for 21.25 of the 22.65 hours awarded in the Memorandum Order enter October 13, 1988, for all hours awarded in the Memorandum Order enter November 3, 1988, and for all hours awarded in the Order enter August 9, 1989.(FN4)

Debtor continues to be entitled to an award of the remaining 1.4 hours of attorney's fees previously awarded in the October 13 order and the \$1,489.05 in actual damages and the \$2,500.00 in

(FN4) Debtor's motion did not specifically address the award provided in the August 9, 1989 order, but her prayer for "such other relief as is just and equitable" is sufficient to justify this relief.

punitive damages awarded in the November 3 order under 11 U.S.C. Section 362(h). Debtor also continues to be entitled to an award of attorney's fees under 11 U.S.C. Section 362(h) for all other previously awarded attorney's fees to the extent such fees have not been awarded under section 7430. In addition, I will now award Debtor 47 hours of attorney's fees for the Eighth Circuit appeal and the hearing on the instant motion at the reasonable rate of \$125 per hour pursuant to 11 U.S.C. Section 362(h). These awards under section 362(h) will be offset against the debt to the IRS.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Debtor is awarded damages in the amount of \$5,875.00 pursuant to 11 U.S.C. Section 362(h) for attorney's fees incurred in contesting the IRS' appeal to the Eighth Circuit and in pursuing the instant motion, which award shall be offset against the debt to the IRS;

2. The IRS shall pay to the Debtor's attorney the sum of \$1,593.75 (21.25 hours x \$75 per hour) plus a cost-of-living increase calculated in the manner set forth above, plus interest on said sum from October 13, 1988, under this Court's order of said date and pursuant to 26 U.S.C. Section 7430;

3. The IRS shall pay to the Debtor's attorney the sum of \$794.12 ($[\$900 / \$85 \text{ per hour}] \times \75 per hour) plus a cost-of-living increase calculated in the manner set forth above, plus interest on said sum from the date of November 3, 1988, under this Court's order of said date and pursuant to 26 U.S.C. Section 7430;

4. The IRS shall pay to the Debtor's attorney the sum of \$975.00 (13 hours x \$75 per hour) plus a cost-of-living increase calculated in the manner set forth above, plus interest on said sum from August 9, 1989, under this Court's order of said date and pursuant to 26 U.S.C. Section 7430; and

5. The awards of attorney's fees made under 11 U.S.C. Section 362(h) in the Court's orders of October 13 and November 3, 1988 and August 9, 1989 shall be reduced by the amounts of fees awarded in terms 2 through 4 of this Order, and the remainder shall be offset against the debt to the IRS.

Nancy C. Dreher
United States Bankruptcy Judge