UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	:	CASE NO: 01-40268
	:	
SHANE' LATRELL JACKSON	:	CHAPTER 7
a/k/a SHANE' LATRELL RAMBO	:	
SSN: 422-06-4872	:	
	:	
Debtor.	:	
	:	

MEMORANDUM OPINION

On June 1, 2001, the court held a hearing on Trustee's objection to Debtor's amended claim of exemptions. At the conclusion of the hearing, the court took the matter under advisement and gave the parties an opportunity to submit letter briefs. Debtor filed a letter brief and also filed another amended claim of exemptions. Trustee filed a letter brief in response. After considering the parties' briefs and the applicable statutory and case law, the court will overrule Trustee's objection.

FACTS

On January 30, 2001, Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code ("Code"). In Debtor's Schedule C, she claimed a $1500.00 exemption in her federal income tax refund. Debtor valued this tax refund at $1500.00. She also claimed a $400.00 exemption in her state income tax refund which she valued at $400.00. In Debtor's Schedule B, she attested that

each refund was in the possession of the government.

On March 7, 2001, Trustee conducted a Meeting of Creditors pursuant to § 341(a) of the Code. While Trustee was questioning Debtor, it was revealed that Debtor had received a federal income tax refund of $3801.00 instead of $1500.00 as her schedules indicated. On March 28, 2001, Debtor amended her claim of exemptions reflecting a $3000.00 claim of exemption in the $3801.00 refund. Debtor relied on section 6-10-6 of the Alabama Code as authority for the $3000.00 claim of exemption.

On March 26, 2001, Trustee filed his objection to Debtor's amended claim of exemptions. Specifically, Trustee alleges "[t]he debtor failed to disclose an asset until questioned by the Trustee. The asset is a tax return, which is property of the estate." (Trustee's Objection, Doc. #6).[1]

At the June 1, 2001 hearing on Trustee's objection, Debtor testified that her father prepared her federal and state tax returns. At the end of February 2001, Debtor filed these returns. Debtor further testified that she received her refund before the March 7, 2001 Meeting of Creditors. When questioned about the whereabouts of the refunds, Debtor explained that she used them to bring automobile and mortgage payments current. However, on re-cross by Trustee, Debtor indicated that she did

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[1] Although Trustee's objection reads "asset is a tax *return. . .,*" the court will assume that Trustee intended to allege that the asset is a tax ***refund.***

not receive the refund until late March. Instead of receiving the refund Debtor stated that she actually wrote post-dated checks. Lastly, Debtor testified that a portion of her tax refund was an Earned Income Credit ("EIC"). As to Debtor's state income tax refund, she indicated that she received only $300.00 instead of $400.00 as indicated in her schedules.

The parties agree that under Alabama law, the amount and nature of Debtor's amended claim of exemptions could be allowed. However, the parties disagree as to whether Debtor's claim should be allowed given that she did not list the accurate amount of her refund in her original schedules and did not come forward with the correct information until the Meeting of Creditors. Trustee asserts that the EIC and tax refunds must be disclosed in the schedules filed with the original petition or they become property of the estate. Trustee further argues that it is inconsequential the information was disclosed at the Meeting of Creditors when the Debtor failed to disclose such information in her original schedules.

Debtor argues, however, that she did schedule an anticipated tax refund in her original schedules. Debtor explains that she scheduled an amount which she anticipated that she would receive. Once the refund was received, Debtor revealed it at the Meeting of Creditors. Therefore, Debtor asserts that there was no intent to deceive or conceal the refund. Debtor concedes that her testimony may have been inconsistent when she indicated that she

had received the refund when she actually had been writing post-dated checks. However, Debtor contends that this is immaterial because there was no intent to conceal the refund.

Before ruling on this issue, Trustee requested that the court consider the case of Brasher v. McGregor (In re Brasher), 253 B.R. 484 (M.D. Ala. 2000). The parties were given an opportunity to respond. On June 15, 2001, Debtor responded by filing another amended claim of exemptions claiming $1748.00, the EIC portion of the $3801.00 refund, as exempt pursuant to Brasher and ALA. CODE § 38-4-8. The amendment further claimed $1180.00 of the $3801.00 refund as exempt pursuant to section 6-10-6 of the Alabama Code. Furthermore, although Debtor testified she received a $300.00 income tax refund from the state, the amendment contained a $400.00 claim of exemptions as in her prior schedules.

On June 29, 2001, Trustee filed his response maintaining that Debtor's failure to disclose the full amount of the tax refund should result in his objection being sustained. Because Debtor knew she would receive a $400.00 state tax refund, Trustee asserts that Debtor likewise knew that her federal income tax refund would be $3801.00 Relying on Sixth and Tenth Circuit authority, Trustee furthers argues that EIC's are, in fact, property of the estate.

DISCUSSION

The primary issue before the court is whether Debtor's failure to schedule the correct amount of a tax refund in her original schedules precludes her from obtaining an exemption in that refund. Also before the court is the substantive issue of whether Debtor can claim the EIC portion of her refund as exempt under Alabama law. The court will address this latter issue first.

Under section 38-4-8 of the Alabama Code, "[a]ll amounts paid or payable as public assistance to needy persons shall be exempt from any tax levied . . . and in the case of bankruptcy, shall not pass to the trustee or other person acting on behalf of the creditors of the recipient of public assistance." As Trustee has pointed out to the court, the Middle District of Alabama has recently held that "public assistance" includes federal EICs. See Brasher, 253 B.R. at 489.

In Brasher, the debtor filed her Chapter 7 petition in January 1999. She did not list the EIC on her original schedules. On August 3, 1999, the debtor amended her petition to claim the EIC portion of her refund as exempt under ALA. CODE § 38-4-8. The debtor claimed as exempt the remainder of her refund pursuant to ALA. CODE § 6-10-6. The trustee objected to the debtor's claim of exemptions. The bankruptcy court sustained the trustee's objection. See In re Brasher, No. 99-405-WRS (Bankr.

M.D. Ala. Filed Sept. 28, 1999). However, the district court reversed and remanded holding that the debtor was allowed to claim the EIC as exempt pursuant to section 38-4-8. See Brasher, 253 B.R. at 489.

The court finds the Brasher decision to be directly on point. An Alabama district court having determined that the EIC falls within the exemption in section 38-4-8, the court finds that Debtor's claim of exemption in her EIC should be allowed.

The court notes that the Sixth Circuit and Tenth Circuit cases cited by Trustee are inapplicable to the facts of this case because neither case dealt with the issue of exemptions. See Baer v. Jones, 224 F.3d 1193 (10th Cir. 2000); Johnston v. Hazlett, 209 F.3d 611 (6th Cir. 2000). In Baer, the Tenth Circuit affirmed the Bankruptcy Appellate Panel ("BAP") and held that a debtor's EIC is property of the estate, as pro-rated to the date that the bankruptcy petition was filed. See Baer at 1194. However, as the Tenth Circuit BAP noted, the exemption issue was not before the court. See Baer v. Montgomery (In re Montgomery), 291 B.R. 913, 915 n.4 (B.A.P. 10th Cir. 1998).

In Johnston, the Sixth Circuit similarly held that the debtor's EIC was property of the estate even though the debtor filed bankruptcy prior to the end of year in which the EIC was earned. See Johnston at 612. Likewise, the Sixth Circuit never got to the issue of exemptions. Although the debtor claimed an

exemption pursuant to Ohio Revised Code § 2329.66(A)(9)(e), the bankruptcy court held and the Sixth Circuit BAP affirmed that the exemption was not available because that statute was repealed on July 15, 1995, two years after the debtor filed her petition. See Johnston v. Hazlett (In re Johnston), 222 B.R. 552, 553 (B.A.P. 6th Cir. 1998).

The court now turns to the issue of whether Debtor's claim of exemption in her tax refund should be disallowed because she did not schedule the correct amount in her original petition. Pursuant to FED. R. BANKR. P. 1009(a), "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." This rule denies the court discretion to deny leave to amend unless there is a showing of a debtor's bad faith or prejudice to creditors. See Doan v. Hudgins, 672 F.2d 831, 833 (11th Cir. 1982); Arnold v. Gill, 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000).

Under the bad faith ground, a showing that the debtor has attempted to hide assets is usually required. See Arnold, 252 B.R. at 785. In the case of an alleged concealment of a tax refund, sufficient evidence must exist that the debtor intentionally or fraudulently attempted to conceal the tax refund. Doan at 833.

In Doan, the debtors indicated in their original petition that they expected a tax refund but did not schedule or claim the refund as exempt. The debtors again mentioned the expected

refund at the meeting of creditors. When the debtors received the tax refund, they spent the money. The debtors subsequently moved to amend their schedules and claim the refund as exempt. The bankruptcy court allowed the debtors to schedule the asset but denied the motion to amend to claim the exemption. The district court affirmed the bankruptcy court, however, the Eleventh Circuit reversed and remanded with instructions granting the debtors' motion to amend to claim the tax refund as exempt. Id. at 834.

The second ground for denying leave to amend schedules is prejudice to creditors. Several courts have held that a simple delay in filing an amendment where the case has not been closed does not alone prejudice creditors. See Doan at 833; Arnold at 787 (citing Andermahr v. Barrus (In re Andermahr), 30 B.R. 532, 534 (B.A.P. 9th Cir. 1983). Creditors must "suffer an actual economic loss" as a result of the debtor's delay in claiming an exemption. Arnold at 787. Plainly stated, evidence of prejudice exists if the creditor would have acted differently had the creditor known of the full extent of the claimed exemptions. Id. (citing Grzesnikowski v. Shaffer (In re Shaffer), 92 B.R. 632, 635 (Bankr. E.D. Pa. 1988) which held that it would be prejudicial to creditors to allow a debtor to amend its exemptions if a distribution of assets had already been made based on the exemptions previously claimed). Furthermore, as the court in Arnold explained, no creditor in that case filed an

objection to the amended claim of exemptions alleging any prejudice. Id.

In the case before the court, the court finds that there is no evidence of bad faith, i.e., no attempt by Debtor to intentionally or fraudulently conceal her tax refund. Debtor scheduled an anticipated tax refund in her original schedules and claimed that amount exempt. The fact that Debtor scheduled an amount less than she actually received does not demonstrate an intent to conceal the entire refund. Debtor explained that she scheduled only $1500.00 because that was the amount she had received in the past. The court is satisfied with this explanation.

The court also finds that Debtor's inconsistent testimony is immaterial to the bad faith issue. The fact that she wrote post-dated checks in anticipation of receiving the refund instead of having actually received the refund as she initially testified does not exhibit an intent to fraudulently conceal this asset.

The court likewise finds no evidence of prejudice to creditors. Although Trustee did not raise this issue in his objection, he argued that Debtor delayed in disclosing the full amount of the refund until the meeting of creditors which should result in Debtor's claim of exemptions being denied. However, as the courts in Doan and Arnold held, simple delay alone does not demonstrate prejudice. Doan at 833; Arnold at 787. No creditors suffered any actual economic loss as a result of Debtor's delay.

In fact, as Debtor's claim of exemptions currently exist, $873.00 should be available to the estate for administration that was not available before Debtor's amendment.[2] Furthermore, no creditor objected indicating that it would have acted differently had the creditor known of the full extent of the claimed exemption. Accordingly, the court finds that Debtor's amended claim of exemption in her tax refund does not prejudice any creditors.

As to Trustee's argument in his June 29, 2001 response that Debtor should have known the correct amount she would receive, the court finds this argument without merit. See Andermahr, 30 B.R. at 533 (rejecting the trial court reasoning that "debtor should have anticipated a possible refund and claimed it as exempt.") Debtor testified that her father prepared her returns for the year in question and she based the $1500.00 amount on what she received in prior years.

In conclusion, the court finds that Debtor's $1748.00 claim of exemption in the EIC portion of her tax refund is allowed pursuant to ALA. CODE § 38-4-8. The court also finds that Debtor's $1180.00 claim of exemption in the non-EIC portion of her refund is allowed pursuant to ALA. CODE § 6-10-6. Therefore, Trustee's objection is overruled. Because section 6-10-6 allows an aggregate exemption of $3000.00 and Debtor testified that she received a state income tax refund of $300.00, not $400.00 as

[2] This is because of the $3801.00 refund, Debtor claimed a total of only $2928.00 leaving $873.00 available for the estate.

indicated in her schedules, the court will allow Debtor to exempt $300.00 in her state income tax refund.

An order in accordance with this Memorandum Opinion will be entered.

DATED this _____ day of July, 2001.

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JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE