

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
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IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

November 7, 1996

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DISTRICT COURT
PIERRE, S.D.

Subject: ***In re Dakota Industries, Inc.,***
Chapter 11; Bankr. No. 87-40209

Dear Counsel:

The matter before the Court is the PETITION [motion] TO REOPEN BANKRUPTCY filed by Debtor on September 5, 1996 and the joinder therein filed by the Internal Revenue Service (IRS) on September 30, 1996. A motion to reopen is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that this case shall be reopened for the limited purpose of interpreting the Court's prior orders and the confirmed plan regarding the amount and treatment of the IRS's claim.

Summary of Case. A review of the Debtor's and the IRS's dealings -- or lack thereof -- in this case indicates that determining the IRS's claim and providing appropriate plan treatment was low on everyone's priority list. Nonetheless, the file indicates that the parties and Court¹ thought all matters, except the amount of interest owed, were finally determined by the Court's October 28, 1991 Order. It is that Order, plus the plan and confirmation order entered earlier, that Debtor now wants interpreted.

¹ The Hon. Peder K. Ecker, presiding.

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The IRS's joinder in the motion to reopen is veiled support. The IRS only wants the case reopened so that it can file a motion to dismiss or convert.

Discussion. Upon review of 11 U.S.C. §§ 1141 and 1142 and 28 U.S.C. §§ 157 and 1334, as interpreted by applicable case law, the Court is satisfied that it has jurisdiction to interpret its prior orders. See *Norwest Equipment Finance, Inc. v. Nath (In re D & P Partnership)*, 91 F.3d 1072, 1074 (8th Cir. 1996); and *United States v. Unger*, 949 F.2d 231, 234 (8th Cir. 1991). While parties to a bankruptcy case cannot create post-confirmation jurisdiction by consent, they may agree what matters may be addressed within the jurisdiction created by statute. In *re Pauling Auto Supply, Inc.*, 158 B.R. 789, 794 (Bankr. N.D. Iowa 1993); *Harstad v. First American Bank (In re Harstad)*, 155 B.R. 500, 507 and 507 n.7 (Bankr. D. Minn. 1993), *aff'd*, 39 F.2d 898 (8th Cir. 1994). In this case, the confirmed plan provides that the Bankruptcy Court shall retain jurisdiction over several matters "until all payments . . . called for under the plan have been made and until the entry of the final decree[.]" While the drafting is not artful, the Court concludes that provision to mean that jurisdiction is retained until both conditions have been met. Although the final decree has been entered, all plan payments have not been made. Consequently, the jurisdiction-descriptive provision in this plan is still effective.

Included in the plan's list of matters over which jurisdiction is retained is to "interpret the provisions of this plan" That is what the Debtor is asking the Court to do. Therefore, this case will be reopened for that limited purpose.

Both parties will be allowed to file briefs on their respective interpretations of what the plan, confirmation order, and the October 28, 1991 order provide regarding how interest on the IRS's claim was to be calculated and how it was to be paid, including whether Debtor's payments were to go to principal or interest first. If either party's interpretation goes beyond the face of the relevant orders or confirmed plan, that party must insure that the Court's file contains the additional evidence of intent on which that party relies. See generally *United States v. Cook*, 147 B.R. 513, 516-17 (D.S.D. 1992).

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The Court will not reopen the case to allow either party to seek a plan modification. The window of opportunity to modify Debtor's plan has passed because the plan has been substantially consummated. 11 U.S.C. § 1127(b); *Metropolitan Life Insurance Co. v. Olsen (In re Olsen)*, 861 F.2d 188, 190 (8th Cir. 1988); and *United States v. Novak*, 86 B.R. 625 (D.S.D. 1988).

Likewise, the Court will not reopen the case so that the IRS can seek dismissal or conversion of the case, though jurisdiction to do so exists. See *In re Jordan Manufacturing Co.*, 138 B.R. 30, 36 (Bankr. C.D. Ill. 1992). The confirmed plan is binding on all parties. 11 U.S.C. § 1141(a). A discharge has been entered. 11 U.S.C. § 1141(d). The plan is substantially consummated. *Olsen*, 861 F.2d at 188; and *Novak*, 86 B.R. at 629-31. The time for seeking revocation of the confirmation order, including the October 28, 1991 order modifying the IRS's claim and plan treatment, has expired and no fraud has been alleged. 11 U.S.C. § 1144. The bankruptcy estate has been dissolved or at least is without assets. *Harstad*, 39 F.3d at 904; *Pauling Auto Supply*, 158 B.R. at 793; *In re Winom Tool and Die, Inc.*, 173 B.R. 613, 625 (Bankr. E.D. Mich. 1994). There is no estate property to transfer to a Chapter 7 trustee under 11 U.S.C. § 348 or to return to its pre-petition status under 11 U.S.C. § 349(b)(3). *Winon Tool and Die*, 173 B.R. at 615-27. A dismissal or conversion of the case would not reinstate the IRS's pre-petition claim nor otherwise disturb the confirmation and discharge orders. 11 U.S.C. §§ 348 and 349(b)(1) and (2); see *Winon Tool and Die*, 173 B.R. at 615-27; *American Bank and Trust Co. v. United States (In re Barton Industries, Inc.)*, 159 B.R. 954, 959-62 (Bankr. W.D. Okla. 1993); *In re Lopez Development, Inc.*, 154 B.R. 607 (Bankr. S.D. Fla. 1993); *Buckhead American Corp. v. Mulberry Chesterton Inn (In re Mulberry Chesterton Inn)*, 142 B.R. 566, (Bankr. S.D. Ga. 1992); *In re Depew*, 115 B.R. 965 (Bankr. N.D. Ind. 1989); *United States v. Standard State Bank*, 91 B.R. 874 (W.D. Mo. 1988), *aff'd on other grounds*, 905 F.2d 195 (8th Cir. 1990); compare *Derrick v. Richard L. Grafe Commodities, Inc. (In re Derrick)*, 190 B.R. 346 (Bankr. W.D. Wis. 1995). Finally, the remaining dispute involves only Debtor and the IRS. Both parties failed to timely and aggressively seek to resolve the IRS's claim and to address any payment defaults. The IRS has already sought to enforce its claim by seizing all Debtor's property. Consequently, the present circumstances do not warrant reopening the case to consider a dismissal or conversion motion. *In re Jankins*, 184 B.R. 488, 494 (Bankr. E.D. Va. 1995); *Pauling Auto Supply*, 158 B.R. at 795.

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An order will be entered reopening the case for the limited purpose of interpreting the Court's orders and confirmed plan regarding the amount and treatment of the IRS's claim. The Clerk shall return the IRS's motion to dismiss or convert and related documents without filing them.

Sincerely,

A handwritten signature in black ink, appearing to read "Irvin N. Hoyt", written in a cursive style.

Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

NOTICE OF ENTRY
Under F.R. Bankr. P. 9022(a)
Entered

NOV 08 1996

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota