

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

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| In re: |) | Bankr. No. 95-10202 |
| |) | Chapter 7 |
| JOEL LAWRENCE TORIGIAN |) | |
| Soc. Sec. No. [REDACTED]-1888 |) | MEMORANDUM OF DECISION RE: |
| |) | TRUSTEE'S OBJECTION TO |
| and |) | CLAIMED EXEMPT PROPERTY |
| |) | |
| DIANE JUNE TORIGIAN |) | |
| Soc. Sec. No. [REDACTED]-0584 |) | |
| |) | |
| Debtors. |) | |

The matter before the Court is the Objection to Claimed Exempt Property filed by Trustee William J. Pfeiffer on January 19, 1996. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of 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 an expected refund of taxes is estate property that has value even when the petition is filed before the end of the taxable year. Accordingly, the Trustee's objection will be sustained.

I.

Debtors filed their Chapter 7 petition on November 24, 1995. In their schedules, Debtors claimed exempt, among other things, a "Possible 1995 Tax Refund." They valued the refund at "0." On January 19, 1996, Trustee William J. Pfeiffer objected to Debtors' exemptions on the grounds that the value of the assets claimed exempt exceeded the amount allowed by state statute.

Efforts to settle the Trustee's objection were unsuccessful.

An evidentiary hearing was held May 15, 1996. The issue presented was whether a possible federal income tax refund has any value to the bankruptcy estate when the petition date is before the end of the tax year. Debtors argued that the potential refund had no value before the end of the year. Trustee Pfeiffer supported the Court's prior practice of pro rating the refund between the estate and the debtor based on the petition date; that is, only the portion of the actual refund attributable to the pre-petition earnings is estate property that a debtor may claim wholly or partially exempt under S.D.C.L. § 43-45-5.

Debtors presented two witnesses. Debtor Diane J. Torigian testified about how her schedules were completed. She said they received a refund of \$292.00. Long-time South Dakota banker and attorney and a former Internal Revenue Service employee, Frank L. Farrar, testified that in the business world a potential tax refund is not accepted as loan collateral nor purchased before the end of the tax year. He further testified that a potential refund is usually discounted if it secures a loan or if someone purchases the right to it. It was his opinion that a potential tax refund has no ascertainable, commercial value before the end of the tax year.

Neither party filed a post-petition brief. The matter was then taken under advisement.

II.

Exempt property. A debtor's entitlement to an exemption is

determined on the day he files his bankruptcy petition. See *Armstrong v. Peterson (In re Armstrong)*, 897 F.2d 935 (8th Cir. 1990)(debtor's post-petition death did not result in reversion of exempt property to estate); *Armstrong v. Harris (In re Harris)*, 886 F.2d 1011 (8th Cir. 1989)(cites therein). The value of exempt property, unless an exemption in the proceeds of a homestead in some states, also is determined on the date of the petition. *In re Sherbahn*, 170 B.R. 137, 140 (Bankr. N.D. Ind. 1994)(amount of exemption is controlled by value the debtor ascribes to it in the schedules); *In re Dore*, 124 B.R. 94, 96 (Bankr. S.D. Cal. 1991)(value of exempt property is determined at the time of filing); see also *Hyman v. Plotkin (In re Hyman)*, 967 F.2d 1316 (9th Cir. 1992), and *Robertson v. Alsberg (In re Alsberg)*, 161 B.R. 680, 684-85 (BAP 9th Cir. 1993), *aff'd*, *Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312 (9th Cir. 1995) (where state law allows a debtor to exempt a fixed amount from the proceeds of a homestead sale, the amount of the homestead exemption is determined when the trustee actually sells the property).

Income tax refunds. Courts have consistently held that a potential income tax refund is property of the estate. See *Kokoszka v. Belford*, 417 U.S. 642, 648 (1974); *Barowsky v. Serelson (In re Barowsky)*, 946 F.2d 1516, 1518 (10th Cir. 1991)(cites therein); *Wetteroff v. Grand (In re Wetteroff)*, 453 F.2d 544, 546 (8th Cir. 1972); and *Riske v. Oliver (In re Oliver)*, 172 B.R. 924,

926 (Bankr. E.D. Mo. 1994). Compare *Gehrig v. Shreves (In re Gehrig)*, 491 F.2d 668 (8th Cir. 1974)(called into doubt by *Kokoszka*, 417 U.S. at 651, as discussed in *Wallerstedt v. Sosne (In re Wallerstedt)*, 930 F.2d. 630, 632 (8th Cir. 1991)). Further, the potential refund has value, even if the tax year is not complete when the petition is filed. See *Doan v. Hudgins (In re Doan)*, 672 F.2d 831, (11th Cir. 1982)(citing *Segal v. Rochelle*, 382 U.S. 375 (1966)); and *United States v. Johnson (In re Johnson)*, 136 B.R. 306, 309 (Bankr. M.D. Ga. 1991). In a Chapter 7 case, the value of the estate's interest in the refund generally is prorated between the estate and debtors based on the filing date. *In re Orndoff*, 100 B.R. 516, 517-18 (Bankr. E.D. Ca. 1989)(cites therein).

III.

Upon review of the facts and law presented, the Court concludes that Debtors' potential income tax refund was estate property that had value on the petition date. Although the tax year was not complete, that potential interest is clearly estate property under § 541(a), as the case law cited above discusses. Moreover, this Court's method of valuing that interest, based on a pro rata distribution of the actual refund between the estate and the debtor based on the petition date (as discussed at the hearing), is well supported by other courts.

Accordingly, Debtors' 1995 income tax refund is valuable estate property that Debtors could have claimed exempt. At this

time, however, Debtors have claimed no amount of that refund exempt. Therefore, absent an amendment to schedules, Trustee Pfeiffer is entitled to 89% of the \$292.00 total refund. That is the percentage of the pre-petition tax year that is estate property [the petition was filed on the 327 day of the year].

An order will be entered sustaining the Trustee's objection.

Dated this _____ day of July, 1996.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)