

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In the Matter of	:	Case No. 97 – 4088 - CH
	:	
DENNIS HARKER,	:	Chapter 7
	:	
	:	
Debtor.	:	
	:	

ORDER – MOTION TO DISMISS

On September 8, 1997, Debtor, Dennis Harker, filed a Voluntary Petition for Chapter 7 relief under the U.S. Bankruptcy Code. On February 17, 1998, hearing was held on the United States of America's Motion to Dismiss and Debtor's Objection thereto. Debtor was represented by attorney Jerrold Wanek; USA/IRS was represented by attorney Robert D. Metcalfe. At the conclusion of the hearing, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. In 1986 and 1987 Dennis Harker owned an electronics and computer business in Laredo Texas that led to tax consequences.
2. In 1989, Dennis Harker and two other persons were indicted for federal tax evasion and conspiracy.

3. As the result of a plea agreement in 1990, Dennis Harker pled guilty to tax evasion for the taxable year ending December 31, 1987. He and his wife paid more than \$245,000 for 1987 taxes and interest.

4. The U.S. Tax Court determined that Dennis and Mary Harker were liable for deficiencies in income tax for 1985 and 1986. The Court additionally found the Harkers liable for additions to tax for fraud for 1985 under 26 U.S.C. §§ 6653 (b)(1), (2), for 1986 and 1987 under 26 U.S.C. §§ 6653 (b)(1)(A), (B), and for additions to tax for 1985-1987 under 26 U.S.C. § 6661. See Harker v. Commissioner, Docket No. 15092-92 (J. Colvin May 1, 1995); Harker v. Commissioner, 68 T.C.M. (CCH) 1272 (1994).

5. After the Tax Court decision, Dennis Harker filed a Chapter 13 bankruptcy petition, 95-1417-CH.

6. After filing the Chapter 13 case, Debtor appealed the decision of the U.S. Tax Court. The Eighth Circuit Court of Appeals affirmed the decision of the Tax Court. See In re Harker, 82 F.3d 806 (8th Cir. 1996).

7. On June 14, 1996, this Court found that Dennis Harker's Chapter 13 case was not filed in good faith and was subject to dismissal or conversion. The decision was affirmed on appeals to the U.S. District Court for the Southern District of Iowa and the Eighth Circuit Court of Appeals. See Matter of Harker, 1996 WL 905910 (Bankr. S.D.Iowa 1996), aff'd, Harker v. United States, 1996 WL 905909 (S.D.Iowa 1996), aff'd without pub. op., 112 F.3d 513 (8th Cir. 1997), cert. denied, 118 S.Ct. 686 (1998).

8. Debtor's Boone County property was scheduled to be sold by the USA/IRS on September 9, 1997; his West Des Moines residence was scheduled to be sold one day later.

9. On September 8, 1997, Dennis Harker filed this Chapter 7 bankruptcy petition.

10. The USA/IRS filed a Motion to Dismiss on December 9, 1997, asserting that Debtor's Chapter 7 bankruptcy petition is a bad faith filing.

DISCUSSION

The Court may dismiss a Chapter 7 case under § 707 (a) only "for cause." The Code provides three specific examples of "cause" but the list is neither exhaustive nor exclusive. See 11 U.S.C. § 102 (3). The Eighth Circuit has adopted a narrow approach to the use of bad faith as cause for dismissal of Chapter 7 cases. See In re Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994).

The USA/IRS seeks to have this Chapter 7 case dismissed for cause, as a bad faith filing.

This Court found that the earlier Chapter 13 case filed by this same debtor was not filed in good faith. Debtor filed his Chapter 13 bankruptcy as a litigation tactic to avoid posting a supersedeas bond while he appealed the decision of the Tax Court. After this Court made its finding of bad faith, Debtor was provided an opportunity to convert to Chapter 7 or have the Chapter 13 case dismissed. Those same circumstances are not present in the case at bar.

Although Debtor's appeal of the decision in the Chapter 13 case was pending at the time he filed the Chapter 7, the Tax Court case had been concluded. The USA/IRS had scheduled the sale of Debtor's farm property located in Boone County and of Debtor's residence located in West Des Moines, Iowa. After Harker was unable to successfully negotiate with the USA/IRS, he filed this Chapter 7 to delay the tax sales of his real properties and to discharge as many of the government's claims as permitted by law. Bankruptcy planning that stalls real estate foreclosures and sales through imposition of the automatic stay is not uncommon and is not, by itself, an abuse of the Bankruptcy Code provisions and spirit. The USA/IRS was not without available avenues of relief; it moved for relief from the automatic stay. After hearing on February 25, 1998, stay

was terminated "permitting the United States to proceed in rem against the real estate located in Boone County and the dwelling located in Polk County."

The USA/IRS argues that Harker filed bankruptcy to avoid paying a large, nondischargeable debt owed to the USA/IRS, one of only two creditors listed in the bankruptcy petition. Harker filed an Adversary Proceeding in which he seeks a determination that debts owed the USA/IRS are dischargeable. Although the USA/IRS argues that this is a hallmark of bad faith, it does not fit within a narrow approach to finding bad faith. Harker's actions are not unlike those of most debtors. For the most part, the fresh start that debtors obtain through bankruptcy is the result of discharging unsecured debt. A determination of dischargeability of certain debt is properly before the court in an Adversary Proceeding.

Nothing in the record indicates that Debtor lied or misled the court or failed to fully disclose his assets on his bankruptcy schedules. His efforts to obtain a fresh start through bankruptcy within the parameters set in the Code do not justify a finding of cause to dismiss this Chapter 7 case.

ORDER

IT IS THEREFORE ORDERED that USA/IRS Motion to Dismiss is DENIED.

Dated this _____ day of July, 1998.

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT