No. 165 89-1328-C J Van Voorhis
NOTE: In re LeMaire, 883 F.2d 1373 (8th Cir. 1989) was vacated and rehearing en banc was granted. See In re LeMaire, 898 F.2d 1346 (8th Cir. 1990).

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

HAROLD L. VAN VOORHIS, Case No. 89-1328-C J

Debtor. Chapter 13

MEMORANDUM OF DECISION AND ORDER ON MOTION FOR RECONSIDERATION

On January 30, 1990 the United States of America on behalf of the Internal Revenue Service (IRS) filed a motion for reconsideration of this court's October 6, 1989 order pursuant to Bankruptcy Rule 9024. The motion was supplemented on January 30, 1990.

BACKGROUND FACTS

Objections to confirmation of the Chapter 13 plan and the government's motion to dismiss were heard on October 5, 1989. The debtor and his attorney, Donald F. Neiman, were present. John E. Beamer, Assistant U.S. Attorney, represented the IRS. Joe W. Warford, the Chapter 13 trustee, was present. Only the debtor presented evidence which consisted of his testimony. At the close of the hearing the court entered the following order:

> Based on today's hearing, it is hereby ORDERED that: the debtor file an amended plan (including a liquidation analysis) which resolves the concerns of the court at today's hearing. The debtor shall file a bar date notice for objections.
>
> With respect to the motion to dismiss, the court finds that the plan was filed in good faith and that the feasibility concerns will be satisfied by a provisional order of confirmation. That is, the debtor must actually pay twenty percent of the priority taxes by the end of the first year of the plan term or confirma-

> tion of the five year plan will not be granted and the case will be dismissed.

The order was entered on the docket on October 6, 1989.

On November 13, 1989 the debtor filed a second amended plan and an objection to the claim of the IRS. On November 16, 1989 the debtor filed a notice of bar date to object to the amended plan and on December 11, 1989 he filed a similar notice with regard to the objection to the IRS claim. The IRS did not object to the amended plan. The IRS filed a timely response to the objection to its claim, noting that it had filed an amended claim on December 21, 1989. (Whereas the proof of claim filed July 31, 1989 evidenced $72,860.30 indebtedness consisting of $13,373.22 in general unsecured claims and the rest in unsecured priority claims, the amended proof of claim indicated that the debtor owed $75,308.61 of which $200.00 was a secured claim and the rest amounted to general unsecured claims.)

On December 27, 1989 an order approving the second amended plan was signed by another bankruptcy judge and entered on the docket. When that order was brought to the undersigned's attention, she directed that it be amended to include the provisos contained in the October 6, 1989 order. on January 30, 1990 the court received a proposed amended order which clarified that: "[T]he debtor must actually pay 20% of the allowed 507 priority tax claim by the end of the first year of the plan term, and that confirmation of the plan, as amended, is provisionally approved.". The undersigned has not entered that amended order pending receipt and review of the transcript of the October 5,

1989 hearing.

ISSUE

The motion for reconsideration is based on the mistake regarding the nature of the IRS claim. In essence, the government asks the court to reconsider all the earlier arguments for dismissal based on the IRS claim being a general unsecured claim rather than a priority claim.

DISCUSSION

At the outset of the analysis, the court notes that the debtor has been intent on avoiding any determination that the taxes due and owing are secured claims even though these secured tax claims do not fall under the priority umbrella of 11 U.S.C. section 507(a)(7)(A).[1] Although the debtor's counsel made some

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[1] 11 U.S.C. section 507(a)(7)(A) provides that:

> (a) The following expenses and claims have priority in the following order:
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> ...
>
> (7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for--
>
> (A) a tax on or measured by income or gross receipts—
>
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
>
> (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise

statements at the time of the hearing that appear to be in conflict regarding the status of the taxes as general unsecured claims or as unsecured priority claims, the record viewed as a whole establishes that the debtor was not contending that he did not owe some priority claims. Indeed, the plan under consideration on October 5, 1989 provided for full payment of all claims entitled to priority under section 507 and for submission of as much income for five years as was necessary to ensure full payment as required by 11 U.S.C. sections 1322(a)(2) and 1325(a)(1).[2] Debtor's counsel explained that the plan did not

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> with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
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> (iii)other than a tax of a kind specified in section 523(a)(1)(B)or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

[2] 11 U.S.C. section 1322(a)(2) mandates that:

> (a) The plan shall--
>
> ...
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; ...

In turn, 11 U.S.C. section 1325(a)(1) requires that:

specifically provide for unsecured claims because he did not believe the debtor had any unsecured claims at the time the plan was prepared and filed.

It should also be emphasized that the court was concerned about the debtor's ability to complete the plan payments after hearing his testimony on October 5, 1989. On the other hand, the court had no serious reservation finding that the plan had been filed in good faith as required by 11 U.S.C. 1325(a)(3). That the parties and the court now know that the IRS holds only a small secured claim and a general unsecured claim--meaning that it does not hold a priority claim and the debtor is not required to pay its general claim in full in order to satisfy sections 1322(a)(2) and 1325(a)(l)--does not justify rehearing the good faith issue. Parenthetically, the court again notes that the government chose not to put on any evidence at the time of the earlier hearing.

In the supplement to its motion for reconsideration, the government relies on In re Rasmussen, 888 F.2d 703 (10th Cir. 1989), which cites with favor Education Assistants Corporation v. Zellner, 827 F.2d 1228 (8th Cir. 1987) and In re Estus, 695 F.2d 311 (8th Cir. 1982). The government contends that the Rasmussen

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> (a) Except as provided in subsection (b), the court shall confirm a plan if--
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> (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

case and this case are similar and that the court should conclude, as did the Tenth Circuit Court of Appeals, that the plan has not been filed in good faith. The court finds no merit in the attempted comparison and further finds that Rasmussen does not control.

Whereas in Rasmussen the debtor was unable to obtain a discharge of a particular unsecured debt because the debt had been obtained through fraud, the debtor in this case was unable to obtain a discharge of the tax claim due to the statutory requirements of 11 U.S.C. section 523(a)(1).[3] In Rasmussen the

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[3] 11 U.S.C. section 523(a)(1) states in relevant part that:

> (a) A discharge under section 727...of this title does not discharge an individual debtor from any debt--
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> (1) for a tax or a customs duty--
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required--
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

debtor could not have filed a Chapter 13 plan initially because his unsecured debt exceeded the limit set by 11 U.S.C. 109(e).[4] Then, after receiving a discharge of all but one of his unsecured debts, he filed a Chapter 13 plan which proposed to pay only 1.5% of the amount due on the debt that had been determined nondischargeable in the Chapter 7 case. By sharp contrast, the Chapter 7 file in this case reveals that the debtor would not have been eligible for Chapter 13 relief when he filed the Chapter 7 case because his secured debt exceeded the statutory limit. In turn, he proposed to pay the debt that was otherwise nondischargeable in the Chapter 7 case in full over five years under his Chapter 13 plan.

Neither the Tenth Circuit nor the government cites In re LeMaire, 883 F.2d 1373 (8th Cir. 1989). In that case, the Eighth Circuit court of Appeals reviewed the development of its good faith analysis in caselaw before and after the Bankruptcy.

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[4] With respect to Chapter 13 eligibility, 11 U.S.C. section 109(e) specifies:

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individuals spouse, except a stock-broker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

Amendments and Federal Judgeship Act of 1984 (BAFJA). Of importance to this case, is the appellate court's clarification that the Estus list of good faith factors has been modified somewhat by the significant amendment in 1984 to section 1325. That is, before a court may confirm a plan over the objection of an unsecured claim holder, section 1325(b) requires that the plan must provide for payment of that claim in full or for submission of all of the debtor's disposable income for three years.[5]

Thus, the mistake upon which the IRS relies for its motion

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[5] 11 U.S.C. section 1325(b) provides:

> (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.
>
> (2) For purposes of this subsection, "disposable income,, means income which is received by the debtor and which is not reasonably necessary to be expended--
>
> (A) for the maintenance or support of the debtor or a dependent of the debtor; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

for reconsideration is of no consequence. Had it realized that it held a general unsecured claim as of the confirmation date and had it objected on the basis provided in 1325(b)(1), the debtor would have had to agree to pay the claim in full or to submit three years disposable income to the trustee for plan payments. Yet, the debtor did agree to pay the claim in full and to submit as much disposable income for five years as was necessary to make those payments. (Indeed, the debtor would have been required to comply with section 1325(b)(1) even if the government had not raised such an objection because the trustee had also objected to confirmation of the plan.)

The only change in circumstances for the IRS lies in the fact that the majority of the IRS claim is now characterized as a general unsecured claim. That is due to the post Chapter 7 petition date upon which the IRS assessed the taxes in issue and to the application of section 507(a)(7)(A)(ii). If the debtor fails to pay the claim in full over the five year period of the Chapter 13 plan, the balance of the unsecured claim will be discharged. The debtor will not suffer the consequences of 1322(a)(2) and 1328(c)(2).[6]

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[6] If a debtor who is unable to complete the plan payments successfully applies for a hardship discharge under 11 U.S.C. section 1328(b), the discharge is not as far reaching as that received under 11 U.S.C. section 1328(a). 11 U.S.C. section 1328(c) describes the extent of the hardship discharge:

> (c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt--

The court further notes that the debtor has not attempted to modify the plan to limit it to three years, rather than five, despite the IRS amended proof of claim and sections 1325(b)(1)(B) and 1329(a)[7] Accordingly, the court finds that cause, as required by 11 U.S.C. section 1322(c)[8] continues to exist and

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(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

Thus, although a section 507(a)(7)(A) claim would not be discharged by operation of section 523(a)(1), a general unsecured tax claim would be discharged.

[7] 11 U.S.C. section 1329(a) provides:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
>
> (1) increase or reduce the amount of paymentson claims of a particular class providedfor by the plan;
>
> (2) extend or reduce the time for such payments; or
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan.

[8] 11 U.S.C. section 1322(c) states:

> (c) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

that the debtor's willingness to commit five years of disposable income to the plan is further evidence of good faith as contemplated by section 1325(a)(3).

Finally, it should be pointed out that the IRS still benefits from the court's provisional order of confirmation. The fact that the taxes are now general unsecured claims instead of priority claims does not mitigate the court's general concern about the plan satisfying the feasibility standard of 1325(a)(6). That is, the court's previous determination that at least 20% of the taxes must be paid in the first year still stands except that "the year" concept for purposes of paying at least 20% of the taxes will be extended to March 22, 1991 due to the clarification necessitated by the amended claim. If the debtor is not successful in meeting this requirement, the case will be dismissed. If the debtor is successful, the confirmation order will become final and the debtor must continue to pay as much of the tax claim as he can by submitting all of his disposable income for the remaining plan term to the trustee for plan payments.

CONCLUSION

WHEREFORE, based on the foregoing discussion, the court concludes that the fact that the IRS no longer holds a priority claim does not satisfy the grounds for reconsideration found in Bankruptcy Rule 9024.

ORDER

THEREFORE, IT IS ORDERED that the motion for reconsideration is denied. A separate amended order of confirmation, consistent with this memorandum and order, shall be entered by the court.

Signed and filed this 22nd day of March, 1990.

LEE M. JACKWIG
CHIEF U.S. BANKRUPTCY JUDGE