

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of
ACE ENTERPRISES, INC.,

An Iowa Corporation,
Debtor.

Case No. 87-1405

Chapter 11

ORDER ON MOTION TO DISMISS

On January 13, 1988, the motions to dismiss filed September 25, 1987, by the United States of America on behalf of the Internal Revenue Service (hereinafter "I.R.S.") and filed October 13, 1987, by the United States Trustee (hereinafter "Trustee"), and resistance thereto filed October 7, 1987, by debtor Ace Enterprises, Inc. (hereinafter "Debtor"), and amendment thereto filed December 8, 1987, by Trustee, came on for a hearing before this court in Davenport, Iowa. Kevin R. Query appeared on behalf of I.R.S., Marlyn S. Jensen appeared on behalf of Debtor, and Terry L. Gibson appeared on behalf of Trustee. The court considers the matter fully submitted.

FACTUAL BACKGROUND

On February 28, 1983, Debtor filed a voluntary Chapter 11 petition with this court. Since 1980, Debtor had consistently failed to comply with the requirements of Title 26 of the United States Code (Internal Revenue Code) regarding the withholding of income and FICA tax from the wages of its employees, and the timely filing of deposits of its post-petition employment tax liabilities.

On February 15, 1984, I.R.S. filed a motion to convert the case to Chapter 7 because Debtor failed to timely file a proposed plan of reorganization. On April 3, 1984, Debtor eventually filed a plan; but on July 6, 1984, I.R.S. filed an objection. On October 11, 1984, Debtor filed an amended plan, and then filed amendments thereto on December 17, 1984, March 13, 1985, and May 3, 1985.

On May 7, 1985, the court confirmed Debtor's amended plan. However, Debtor then continued to fail to comply with Internal Revenue Code withholding requirements on employee wages, and the timely filing of deposits of its post-petition employment tax liabilities. In addition, Debtor failed to comply with the terms of its confirmed plan by not making any payments to I.R.S.

As a result of Debtor's failure to comply with the terms of its confirmed plan and its failure to pay its employment tax obligations, I.R.S. filed on February 3, 1986, a motion to convert the case to Chapter 7. On March 5, 1986, this court granted the motion to convert. On May 1, 1986, the Chapter 7 trustee applied to abandon the majority of Debtor's property, and on May 2, 1986, the case was closed.

After the Chapter 7 case was closed, Debtor again continued to fail to comply with Internal Revenue Code withholding requirements on employee wages, and the timely filing of deposits of its employment tax liabilities. As a

result, on April 7, 1987, I.R.S. filed in United States District Court for the Southern District of Iowa, an application to enter the premises of Debtor to effect levy to collect delinquent employment taxes. On April 17, 1987, United States District Court Judge William C. Stuart signed the order for entry on Debtor's premises to effect levy.

Shortly thereafter, revenue officers entered Debtor's premises pursuant to the entry order and seized property found therein, which was subject to levy by the United States. The sale of the seized assets was scheduled for May 27, 1987. However, on May 26, 1987, one day prior to the sale, Debtor filed the instant Chapter 11 voluntary petition.

On September 25, 1987, I.R.S. filed a motion to dismiss and argued Debtor was not acting in good faith and was incapable of operating at a profit. I.R.S.'s proof of claim on file showed Debtor was indebted for employment taxes of \$191,137.64 on the date of its Chapter 11 petition filing.

On October 7, 1987, Debtor filed its resistance and denied the statements in I.R.S.'s motion. In the affirmative, Debtor argued it had not had possession of the business during the course of this Chapter 11 proceeding and that it had made a diligent effort to determine the amount of taxes owed to the I.R.S.

On October 13, 1987, Trustee joined the motion to dismiss and argued dismissal was in the best interests of

creditors and the estate because pursuant to 11 U.S.C. §1112(b)(3), Debtor's lack of a business operation to reorganize under Chapter 11 constituted an unreasonable delay by Debtor that was prejudicial to the creditors. On December 8, 1987, Trustee filed an amendment to his motion and argued an additional ground for dismissal was nonpayment of fees pursuant to section 1112(b) (10).

DISCUSSION

The issue in this case is whether Debtor's Chapter 11 proceeding should be dismissed.

A motion to dismiss a Chapter 11 case for cause is authorized under 11 U.S.C. §1112(b). In determining what constitutes "cause," the court may consider ten statutorily enumerated factors, including:

- (2) inability to effectuate a plan;
- (3) unreasonable delay by the debtor that is prejudicial to creditors; ... or
- (10) nonpayment of any fees or charges required under chapter 123 of title 28.

11 U.S.C. §1112(b). The causes for dismissal enumerated in subsection (b) are nonexclusive, and the bankruptcy court has the inherent power to determine what constitutes cause to dismiss in any given case. In re Alton Tel. Printing Co., 14 B.R. 238, 240 (Bankr. S.D. Ill. 1981).

Applying the facts in the case at bar to section 1112(b), the court holds that I.R.S.'s and Trustee's motion to dismiss is granted for the following reasons. First,

pursuant to section 1112(b)(2), Debtor is unable to effectuate a plan. It is undisputed that since Debtor's business was lawfully levied upon by revenue officers, Debtor has not been in business. In addition, Debtor's monthly report for July of 1987 shows no ongoing business. Because I.R.S. lawfully levied upon Debtor's business, Debtor cannot get its business back. Thus, since Debtor has no business left to reorganize, it will not be able to effectuate a plan.

Second, pursuant to section 1112(b)(3), there is unreasonable delay by Debtor that is prejudicial to creditors. Taking prior Chapters 11 and 7 history into account, Debtor has frustrated the collection of taxes since 1980. As noted earlier, Debtor was indebted to I.R.S. for unpaid employment taxes of \$191,137.64 on May 26, 1987, the date of the filing of its petition. Thus, Debtor's continual failure to pay withholding taxes over the past eight years, now totaling at least \$191,137.64, clearly constitutes unreasonable delay that is prejudicial to creditors.

Finally, pursuant to section 1112(b)(10), Debtor is guilty of nonpayment of fees required under chapter 123 of title 28. Pursuant to 28 U.S.C. §1930(a)(6), Debtor owes Trustee a quarterly fee for the second, third and fourth quarters of 1987, and the first quarter of 1988. The minimal amount owing each quarter under §1930(a) (6) is \$150.

The exact amount cannot yet be determined because Debtor has consistently failed to file the required monthly reports which Trustee needs in order to calculate his fees.

Any of the three grounds described above is sufficient in itself to warrant dismissal. See Alton Tel., 14 B.R. at 240. While the court believes other grounds for dismissal can also be met, it points out three to show its displeasure with Debtor's abusive use of the Bankruptcy Code.

As a result of this decision, all other matters taken under advisement following the January 13, 1988, hearing on this case are now rendered moot.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes cause exists and that it is in the best interests of the creditors and the estate to dismiss this Chapter 11 case.

THEREFORE, IT IS ORDERED, that the motions to dismiss filed by I.R.S. and Trustee are hereby granted.

IT IS FURTHER ORDERED, that Debtor pay to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. §1930(a) (6) within 10 days of the entry of this Order and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the relevant period.

IT IS FURTHER ORDERED, that the United States Trustee have judgment against Debtor for the sums due pursuant to 28 U.S.C. § 1930(a) (6) upon said dismissal.

Dated this 10th day of March, 1988.

RUSSELL J. HILL
UNITED STATES BANKRUPTCY JUDGE