

requested that the court direct the IRS to apply the levied funds against the portion of the tax liabilities which would not have been dischargeable in bankruptcy.

5) The IRS filed its answer on January 2, 1991. It contended the government had not waived its sovereign immunity and the bankruptcy court lacked jurisdiction to order a monetary recovery against the United States.

6) Pursuant to a July 3, 1991 court order, the parties filed a stipulation of facts on July 24, 1991. In the stipulation the debtors concede that were they pursuing a monetary judgment against the United States, the doctrine of sovereign immunity would directly apply. However, in the stipulation the debtors appear to limit the relief they seek to equitable relief. They ask only that the court order the IRS to apply the levied funds to tax obligations which would not have been dischargeable in bankruptcy.

7) On July 24, 1991, the IRS filed a Motion for Summary Judgment.

8) On August 5, 1991, the debtors filed an Objection to Motion for Summary Judgment. The debtors contend the parties had agreed to submit the matter to the court on the stipulation of facts.

9) A telephonic hearing on the Motion for Summary Judgment was held on September 12, 1991. Steven R. Hahn appeared for the debtors, and Keven Query appeared for the

I.R.S.

The Court now considers the matter fully submitted. This is a core proceeding pursuant to 28 U.S.C. 8 157(b)(2)(o) and the Court enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

SUMMARY JUDGMENT

Summary judgment is appropriate when there is no genuine issue of material fact and the dispute may be decided on purely legal grounds. Parmenter v. Federal Deposit Ins. Corp., 925 F.2d 1088, 1092 (8th Cir. 1991). The Judge's function is not to weigh the evidence; rather is to determine as a matter of law whether there are genuine factual conflicts. In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts. Id. Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. Postscript Enterprises v. City of Bridgeton, 905 F.2d 223, 225 (8th Cir. 1990).

The parties submitted a stipulation of facts on July 24, 1991. There being no genuine issue of material fact, this matter is particularly appropriate for disposition by summary

judgment.

SOVEREIGN IMMUNITY

A review of the case file reveals the issue of sovereign immunity is dispositive in this case. Section 106 of the Bankruptcy Code addresses the waiver of sovereign immunity:

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity--

(1) a provision of this title [11 USCS §§ 101 et seq.] that contains "creditor," "entity," or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. § 106.

The prevailing view is that a governmental unit must file a proof of claim before a waiver is deemed to have occurred. See Collier on Bankruptcy ¶ 106.02 (15th Ed. 1991). As no claim was filed in this case, any waiver of sovereign immunity will have to arise under § 106(c).

The Eighth Circuit has held the United States Supreme Court § 106(c) analysis in Hoffman v. Connecticut Department

of Income Maintenance, 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989), applies to the waiver of federal government sovereign immunity and precludes the entry of monetary awards against the federal government. Small Business Administration v. Rinehart, 887 F.2d 165, 170 (8th Cir. 1989); see also Laughlin v. U.S., 912 F.2d 197, 200-01 n.8 (8th Cir. 1990), cert. denied, ___ U.S. ___ 111 S.Ct, 1073, 112 L.Ed.2d 1179 (1991); U.S. v. McPeck, 910 F.2d 509, 512 (8th Cir. 1990). This Court similarly ruled that sovereign immunity barred a trustee's turnover action against the I.R.S. in Matter of Wilwerding, No. 89-2125-W-H, Adv. No. 90-0062 (Bankr. S.D. Iowa April 5, 1991) [Decision Book #171].¹

The debtors are not specifically seeking the recovery of a monetary judgment against the IRS. Instead, they request a court order requiring the IRS to apply funds levied prepetition against the nondischargeable portion of their tax obligation. They contend such an order would not be precluded by the government's sovereign immunity.

While § 106(c) does not prevent a bankruptcy court from determining the amount or dischargeability of tax liabilities owed by a debtor, Collier on Bankruptcy ¶ 106.04 (15th ed.

¹The court is aware that the issue of the waiver of § 106(c) federal government sovereign immunity is presently pending before the United States Supreme Court. See In re Nordic Village, Inc., 915 F.2d 1049 (6th Cir. 1990), cert. granted, ___ U.S. ___, 111 S.Ct. 2823, 115 L.Ed.2d 994 (1991). Pending disposition of that case, this court remains bound by the Eighth Circuit's interpretation of § 106(c).

1991), this Court is of the view that the relief sought by the debtors would be barred by § 106(c). To order application of the funds against the debtors' nondischargeable tax obligations would require the court to have jurisdiction over the funds. Acquiring such jurisdiction would necessitate an order turning the funds over to the estate--in essence the entry of a monetary judgment against the IRS. This is precisely the type of conduct barred by the government's sovereign immunity.

The Court has found no statutory or case law authority to support the proposition that it could direct the IRS on how to allocate funds levied prepetition. If the IRS chooses to apply the funds towards the debtors' dischargeable tax debts, then it is its prerogative to do so. This is not a situation in which the dischargeable and nondischargeable debts have been consolidated into a single obligation and the court must ascertain how a prepetition payment is to be apportioned between the dischargeable and nondischargeable portions of the debt. See In re Hunter, 771 F.2d 1126 (8th Cir. 1985).

IT IS HEREBY ORDERED that sovereign immunity bars the court from granting the debtors the relief they seek. The defendants' motion for summary judgment is granted, and defendant shall have judgment against plaintiffs dismissing the complaint.

Dated this 30th day of December 1991.

/S/
RUSSELL J. HILL
U.S. Bankruptcy Judge