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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In Re:)
HOWARD KING and REBECCA KING,)
Debtors.)
_____)

CASE NO.: 93-13968-B13
MEMORANDUM DECISION

Howard and Rebecca King (“Debtors”) object to the allowance of the Internal Revenue Service (“IRS”) claim of \$33,534.14 for post-petition taxes. It appears Debtors believe allowance of this claim prejudices them because they will be unable to complete their Chapter 13 plan (“Plan”) within the 60-month limit. The IRS opposes, stating the claim must be allowed under 11 U.S.C. section 1305(a)(1)¹. Subsequently, the Chapter 13 trustee (“Trustee”) filed a Motion to Dismiss because the Debtors have not made any Plan payments since November 1997. These issues are intertwined and accordingly the Court discusses them together. First, the objection to the IRS claim for post-petition taxes is overruled and the claim allowed. Second, the case must be dismissed because there is a material default in performance of the Plan provisions.

¹ Hereinafter, all code and section references refer to 11 U.S.C. sections 101-1330 unless otherwise specified.

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I. FACTUAL BACKGROUND

Debtors filed a Chapter 13 bankruptcy petition on December 17, 1993. The Plan was confirmed without objections on April 26, 1994. The confirmed Plan called for \$705.00/month to be paid to the Trustee and provided a 10% dividend to unsecured creditors over a plan length of approximately 55 months. The Plan also provided that all priority and section 1305(a)(1) claims would be paid in full.² The Plan further stated that the Trustee in his discretion could pay in full any allowed post-petition claim³. After the Debtors completed all payments on pre-petition claims filed in the case and while they were awaiting their discharge, the IRS filed its claim for post-petition taxes of \$33,534.14.

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II. ISSUES

1. Should the Court allow the IRS to file a post-petition claim for taxes?
2. Should the case be dismissed for a material default in performance of the Plan provisions?

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III. DISCUSSION

1. Should the Court allow the IRS to file a post-petition claim for taxes?

There is no dispute that the claim for taxes is a post-petition claim as these taxes did not become due until after the filing of the petition. *See, In Re Ryan*, 78 B.R. 175, 183 (Bankr. E.D. Tenn. 1987). The IRS argues its claim should be allowed because section 1305(a)(1) was drafted to provide for such claims. The Court agrees with the IRS.

Section 1305(a) of the Bankruptcy Code provides that post-petition tax claims may be filed in a pending Chapter 13 case. This section supplements section 502 in Chapter 13 cases

22 ² Paragraph 1 of the Plan provides:
23 Administrative Claims. Trustee shall disburse dividends to all section 1326(b)
24 claims and charges in advance of all other claims, unless priority expressly
25 waived. All other section 1322(a) and section 1305(a)(1) claims allowed shall
26 be paid in full by deferred payments in such priority and installments as the
27 Trustee in his sole discretion deems appropriate.

28 ³ Paragraph 11 of the Plan provides in relevant part:
 Claims allowed for post-petition debts incurred by debtor(s) may be paid
 in full and in such order and on such terms as the Trustee, in his sole
 discretion, may determine.

1 by permitting these claims to be treated the same as pre-petition claims for purposes of proof,
2 allowance and distribution. Section 1305 provides,

3 (a) A proof of claim may be filed by any entity that holds a claim
4 against the debtor-

5 (1) for taxes that become payable to a governmental
6 unit while the case is pending.

7 * * *

8 (b) Except as provided in subsection (c) of this section, a claim filed
9 under subsection (a) of this section shall be allowed or disallowed
10 under section 502 of this title, but shall be determined as of the date
11 such claim arises, and *shall be allowed* under section 502(a),
12 502(b), or 502(c) of this title, *or disallowed* under section 502(d) or
13 502(e) of this title, *the same as if such claim had arisen before the*
14 *date of the filing of the petition.*[emphasis added]

15 Section 1305(b) creates, in effect, a legal fiction. Although in reality the IRS claim arose post-
16 petition, it is allowed under section 502(b)⁴ as though it arose pre-petition. As a pre-petition
17 claim, section 507(a)(8) becomes applicable and the IRS claim becomes a priority claim.

18 The IRS points to section 1322(b)(6)⁵ as the section in this case which permits allowance
19 of post-petition claims. However, the Court believes reliance on that section is misplaced.
20 Rather, the Court believes section 1322(a) applies to this situation. Specifically, section
21 1322(a)(2) states the plan must provide for the full payment of all claims entitled to priority
22 under section 507. Section 507(a)(8) provides that income taxes are an eighth priority claim.⁶
23 Section 1322(a)(2) requires the Plan to provide for full payment of priority claims; otherwise,
24 it cannot be confirmed. Debtors' Plan, under paragraph 1, provides that priority claims are to

25 ⁴ Although neither party addressed this issue, the Court finds that this claim is
26 allowable under section 502.

27 ⁵ Section 1322(b)(6) states that the plan may provide for the payment of section
28 1305 post-petition claims.

⁶ Section 507(a)(8) in pertinent part provides:

(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;

1 be paid in full.

2 The Court is troubled by the language found in paragraph 11 of the Plan⁷ which appears
3 to give the Trustee the discretion to pay section 1305 post-petition claims. Paragraph 11 does
4 not state to which type of section 1305 post-petition claim it applies. However, it can only apply
5 to post-petition consumer debt claims because to interpret it otherwise would be to circumvent
6 the clear requirements of section 1322(a)(2). The Court finds the IRS tax claim for post-petition
7 taxes must be allowed under section 1305 and must be satisfied in full under the Plan.

8 Debtors appear to argue they will be prejudiced by the allowance of the IRS claim
9 because they will be unable to complete their Plan within the 60-month limit. The IRS responds
10 that Debtors have paid off the Plan by using the money which should have been paid to the IRS.
11 When one compares the \$33,534.14 owed in taxes to the \$30,130.56 paid to date to the Trustee,
12 that conclusion is inescapable. The legal fiction of allowing the claim as though it had arisen
13 pre-petition is usually a benefit for debtors in a Chapter 13. Debtors are given the opportunity
14 to pay off post-petition taxes over the remaining life of their Chapter 13 plan, rather than
15 required to pay the taxes in a lump sum. It does not give debtors the option to disregard
16 payment of taxes completely, as Debtors have done in this case. The Court believes any
17 prejudice which occurs by the allowance of the IRS claim has been brought upon Debtors by
18 themselves. The IRS claim is allowed and the objection overruled.

19 **2. Should the case be dismissed for a material default in performance of Plan**
20 **provisions?**

21 This Court may dismiss a Chapter 13 case pursuant to section 1307(c) if it is in the best
22 interest of creditors and for cause. A material default by the debtor with respect to a term of a
23 confirmed plan is considered cause for dismissal. The Plan provides in paragraph 1 for the full
24 payment of priority and section 1305(a)(1) claims and provides for a 10% dividend to unsecured
25 creditors. Debtors have failed to make Plan payments to the Trustee since November 1997.

26 ⁷ See fn. 3 *supra*. The Plan utilized by the Debtors is the Chapter 13 Trustee's
27 recommended plan for the Southern District of California.

1 Since substantial tax claims remain unpaid, the Court finds dismissal for nonpayment is
2 warranted and grants the Trustee's motion.

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IV. CONCLUSION

Following the standards of section 1305(a)(1) the IRS claim for post-petition taxes is allowed. The Court overrules the Debtors' objection to the claim. Also, cause exists for dismissal because the Debtors have failed to make payments as required under the Plan since November 1997. The Trustee is directed to prepare an order in accordance with this Memorandum Decision within ten (10) days of the date of entry.

DATED: June 10, 1998

LOUISE DeCARL ADLER, Chief Judge
United States Bankruptcy Court

1 1CSD 168
[Revised July 1985]

2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF CALIFORNIA

4 In re Bankruptcy Case No(s). 93-13968-B13
Case Name: In re KING.

5 CERTIFICATE OF MAILING

6 The undersigned, a regularly appointed and qualified clerk in the Office of the United
States Bankruptcy Court for the Southern District of California, at San Diego, hereby
certifies that a true copy of the attached document, to-wit:

7 **MEMORANDUM DECISION**

8 was enclosed in a sealed envelope bearing the lawful meter of the Bankruptcy Judges and
mailed to the following parties at their respective addresses listed below:

9 Attorneys for Debtors

10 David E. Britton
Lockhart & Britton
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12 Chapter 13 Trustee

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21 Scott N. Orona
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22 Telephone: (619) 338-4007

23 The envelope(s) containing the above document was deposited in a regular United States
24 mail box in the City of San Diego in said district on March 16, 1998.

25 _____
26 DEBORAH HOLT, Deputy Clerk

27 CSD 1681

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