

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

GLORIA L. McGRUDER,

Debtor.

Case No. DL 06-03201
Hon. Scott W. Dales
Chapter 13

**MEMORANDUM OF DECISION REGARDING
UNITED STATES' MOTION TO DISMISS**

The United States of America, on behalf of its agency, the Internal Revenue Service (the "IRS"), filed the United States' Motion to Dismiss, Docket No. 41 (the "Motion"), contending that Debtor Gloria McGruder (the "Debtor") has incurred substantial post-petition tax liabilities in violation of her confirmed Chapter 13 Plan. The court has jurisdiction pursuant to 28 U.S.C. § 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

On August 13, 2008, in Lansing, Michigan, I held a hearing to consider the Motion. The IRS and the Debtor appeared through counsel, and the Chapter 13 Trustee also participated. The following facts are not disputed:

- The court confirmed the Debtor's Chapter 13 Plan, as amended (the "Plan"), on September 25, 2006;
- The Debtor cannot afford to make her Chapter 13 Plan payments, meet her basic living expenses, and withhold enough money from her paycheck each pay period to satisfy her post-petition federal income tax liabilities;

- The Plan prohibits the Debtor from, among other things, “incur[ring] post-petition debts in excess of \$1,000.00 without first obtaining approval from the Court . . .”;
- The Plan requires the Debtor to “maintain the same level of exemptions as when the case was filed except as dictated by a change in dependency allowance(s) and/or marital status”;
- The Debtor incurred post-petition tax debt to the IRS in the amount of \$4,210.59 (for tax year 2006) and \$3,560.04 (for tax year 2007); and
- The Debtor changed her income tax withholding allowances, presumably by submitting a revised IRS Form W-4 to her employer.

I heard argument on the Motion and took the matter under advisement so I could consider whether the Debtor’s admitted default under the Plan amounts to a “material default” warranting dismissal under 11 U.S.C. § 1307(c)(6). Upon reflection, I have determined that the Debtor’s default is material within the meaning of the statute.

First, the plan could hardly be more specific with respect to the precise issue -- income tax withholding allowances. The Chapter 13 Trustee stated that, as a matter of fact, the “model” plan that she advocates includes this prohibition against changing allowances precisely to prevent Debtors from funding their Chapter 13 plans by incurring post-petition tax liabilities. The Debtor’s Plan also includes this provision for this reason.

Second, the amount of the post-petition tax liability here is substantial or, in the words of the statute, “material.” In the two years since confirmation, Debtor has incurred and not paid post-petition tax liabilities to the IRS in the amount of \$7,770.63. The Plan’s one-thousand dollar threshold for post-petition

debt informs my decision about materiality. Even though the debt that inspired this Motion is a tax debt, and not a typical “consumer” debt that we might regard as the target of this particular plan provision, the text of the Plan is not limited to post-petition consumer debts, even assuming, *arguendo*, that tax debt is not consumer debt. Voluntarily incurring debt in excess of the Plan threshold is a material default under the Plan.

From the poignant statements of her counsel on the record describing the Debtor’s post-petition financial distress, it seems quite clear that these post-petition tax liabilities will grow with each passing tax year and with every day that the taxes remain unpaid.

Although the IRS might have obviated the need to file the Motion by instead filing proofs of claim under 11 U.S.C. § 1305(a)(1), the decision to file post-petition proofs of claim belongs to the IRS, not the Debtor, and not the court. The IRS has elected not to file such proofs of claim in this case, and I must respect that choice.

Based on the undisputed facts, and the statements of the Debtor’s counsel on the record, it plainly appears that the Debtor cannot afford to make her Chapter 13 plan payments without, in effect, borrowing from the United States Treasury. I am not willing to permit such borrowing to continue over the objection of the IRS, and therefore have determined that I must dismiss the case unless the Debtor converts the case to Chapter 7 before the dismissal becomes effective.

I will enter a separate order to that effect.

Date: August 14, 2008
Grand Rapids, Michigan

Scott W. Dales
United States Bankruptcy Judge