IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:	§	
	§	
KEITH CAUDLE	§	Case No. 00-10202
and TERESA CAUDLE	§	
	§	
Debtors	§	Chapter 13

MEMORANDUM OF DECISION

This matter is before the Court upon hearing of the Trustee's Motion to Modify Confirmed Chapter 13 Plan (the "Modification Motion") filed by the Chapter 13 Trustee, Michael Gross (the "Trustee") in the above-referenced case, and to which the Debtors, Keith and Teresa Caudle (the "Debtors"), have objected. At the conclusion of the hearing, the Court took the matter under advisement. This memorandum of decision disposes of all issues pending before the Court.[1]

Factual and Procedural Background

On February 2, 2000, the Debtors filed their Chapter 13 petition and concurrently filed their Chapter 13 plan. No objections were filed to this plan, by either the Trustee or any of the Debtors' creditors, and the plan was subsequently confirmed on August 23, 2000. The "Order Confirming Debtor's Plan and Related Orders" entered on August 24, 2000, provided as follows:

The Debtors shall pay the sum of $455.00 per month for 4 months and then

[1] This Court has jurisdiction to consider the motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (L), and (O).

> $575.00 per month for 56 months, for a total of $34,020.00 to Michael Gross, Trustee, payable in Tyler, Smith County, Texas, beginning the 2nd day of March, 2000, until all the allowed claims provided for under the Plan have been paid in accordance with the terms of the Plan, of this Order, or until the further order of this Court.

Approximately one and one-half years after confirmation, at a time when the Debtors were current on their payments under their confirmed Chapter 13 plan, the Internal Revenue Service forwarded to the Trustee an income tax refund of $5,323 owed to the Debtors for the 2001 tax year. Asserting that this amount constituted additional disposable income which the Debtors should be required to tender into their Chapter 13 plan, the Trustee filed his Modification Motion. The Debtors objected to the proposed modification, stating that the Trustee was bound by the provisions of the confirmed Chapter 13 plan, and that the Trustee should be directed to tender such funds to them. Thus, the Court is presented with the issue of whether the receipt of a tax refund by the Debtors in the post-confirmation period is solely sufficient to justify the modification of a confirmed Chapter 13 plan under §1329 to require the Debtors to tender that refund to the Trustee.

Discussion

The usual effect of a confirmed plan is to "bind the debtor and each creditor" to the terms of that plan, 11 U.S.C. §1327(a), and such terms are protected from a subsequent collateral attack by §1327(a) and the principles of res judicata. *Adair v. Sherman*, 230 F.3d 890, 894 (7th Cir. 2000); *United States v. Richman (In re Talbot)*, 124 F.3d 1201, 1209 (10th Cir. 1997). *See also* 3

KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY ¶ 229.1 at p. 229-21 (3d ed. 2000 & Supp. 2002) [observing that "§1327(a) is a comprehensive statutory declaration of binding effect" which stands independently of the "judge-made" rules of preclusion and any limitations associated therewith]. Supplementary to the enactment of §1327(a), the principles of res judicata insure that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action," *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). These finality principles are significant because they "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Id.* at 94, 101 S.Ct. at 415. *See generally* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §4403 (2d ed. 2002). However, Congress has the power by statutory enactment to override both common law preclusion principles and the preclusive effect intended under §1327(a). *See Astoria Federal Sav. and Loan Ass'n v. Solimino* 501 U.S. 104, 108-109, 111 S.Ct. 2166, 2169-70, 115 L.Ed.2d 96 (1991) ["Courts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand [and the imposition of such rules will be rejected] . . . 'when a statutory purpose to the contrary is evident.'" (*citing Isbrandtsen Co. v. Johnson,* 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952)); *In re Witkowski*, 16 F.3d 739, 745 (7th Cir. 1994) ["Congress need not state precisely any intention to overcome the application of res judicata. Rather, if the plain language of the statute makes it clear that res judicata does not apply, it is sufficient."].

11 U.S.C. §§ 1329(a) embodies such a statutory exception. "Congress, however, also provided a mechanism to change the binding effect of §§ 1327 when it passed §§ 1329 to allow for modifications." *Witkowski*, 16 F.3d at 745. Section 1329(a) provides that a confirmed plan may be modified to: "(1) increase or reduce the amount of payments on claims of a particular class provided for 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." Thus, under those delineated circumstances, a debtor, the Chapter 13 trustee or the holder of an allowed unsecured claim may avoid the binding effect of a confirmed Chapter 13 plan by obtaining a modification under §1329(a).

Such circumstances must be strictly construed, however, in order to protect the integrity of §1327(a) and the objectives which the principles of res judicata seek to accomplish.[2] Courts have struggled to balance these competing interests and to articulate a standard which can

[2] In order to further the objectives of res judicata, some courts have further restricted access to the plan modification powers granted by §1329 by requiring any trustee or unsecured creditor who seeks to invoke the modification process to prove the existence of a "substantial and unanticipated change" in the debtor's circumstances *as a prerequisite* to any consideration of any modification request. *See Arnold v. Weast (In re Arnold)* 869 F.2d 240 (4th Cir. 1989); *In re Wilson*, 157 B.R. 389, 390 (Bankr. S.D. Ohio 1993). However, the plain language of §1329 does not contain any such threshold requirement and, while the existence of a "substantial and unanticipated change" is certainly an important factor to be used by a bankruptcy court in deciding whether to *grant* a movant's motion to modify, *Barbosa v. Solomon*, 235 F.3d 31 (1st Cir. 2000), such a standard should not be viewed as an initial barrier to the filing of a modification motion. *See In re Witkowski*, 16 F.3d 739, 742-44 (7th Cir. 1994); *In re Perkins*, 111 B.R. 671, 673 (Bankr. M.D. Tenn. 1990) ["Changed circumstances, unanticipated or otherwise, is not imposed by the Code as a threshold barrier to access to modification under §1329."].

reliably and predictably address the need for both finality and flexibility.[3] One helpful perspective was presented in *In re Trumbas*, 245 B.R. 764 (Bankr. D. Mass. 2000), in which the Court observed that:

> [T]he chapter 13 statutory scheme is oriented toward the payment of creditors from projected future earnings of debtors who have regular income. It provides a vehicle through which an honest debtor can achieve fiscal rehabilitation by devoting all disposable income into a plan to pay creditors. Section 1329 is intended to promote the ability-to-pay standard to allow upward or downward adjustment of plan payments *in response to changes in a debtor's circumstances which substantially affect the ability to make future payments*. Accordingly, post-confirmation plan modification is usually sought by a debtor when there has been an unanticipated and substantial decrease in income (e.g., unemployment) or by an unsecured creditor or the trustee when the debtor experiences an increase or windfall (e.g., an inheritance or lottery winning).

Id. at 767 (emphasis added and citations omitted).

The *Trumbas* court succinctly summarized its approach by earlier noting that "[a]s a practical matter, a party requesting modification of a post-confirmation chapter 13 plan must have a legitimate reason for doing so, and the party must strictly conform to the three limited circumstances set forth in the statute." *Id*. at 766-67. This threshold must be zealously enforced if the original confirmation order is to possess any significance.

Despite that debate, virtually all courts on this topic agree that the burden of proof to demonstrate the proper circumstances for the modification of the plan under §1329 falls upon the

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[3] Both debtors and creditors should be interested in maintaining this balance since either might find themselves having to respond to a modification request since standing to request such a modification was expanded under the 1984 amendments to the Code.

party seeking modification. *Max Recovery, Inc. v. Than (In re Than)*, 215 B.R. 430, 434 (B.A.P. 9th Cir. 1997) [stating that movant "bore the burden of proof to show facts supporting modification after (debtor) objected to the motion"]. Thus:

> Section 1329(b)(1) fully circumscribes the standards for confirmation of a plan modification offered by an allowed unsecured claimholder or the trustee. The proponent of modification must satisfy the tests in "Sections 1322(a), 1322(b) . . . 1322(c) . . . and the requirements of 1325(a) . . . ." Changed circumstances or unanticipated events after confirmation of the original plan may be evidence relevant to one or more of the listed standards.

In re Perkins, 111 B.R. 671, 673 (Bankr. M.D. Tenn. 1990).

The Trustee in this instance seeks to invoke §1329(a)(1) which authorizes the modification of a confirmed plan in order to "increase . . . the amount of payments on claims of a particular class provided for by the plan." The sole evidence offered by the Trustee was the actual receipt by the Debtors of a 2001 income tax refund which was forwarded to the Trustee and which the Trustee interprets as the receipt of additional disposable income which should be committed by the Debtors to the payments under the plan under §1325(b)(1)(B). The issue of whether the disposable income test of §1325(b)(1)(B) is even applicable to a modification proposed under §1329 is a subject invoking considerable debate.[4] However, the Court need not reach that issue in order to determine the current dispute.

Notwithstanding any acknowledgment that the Debtors' receipt of a tax refund constitutes disposable income, the Trustee has failed to demonstrate any change in the Debtors' receipt of

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[4] *See* 3 LUNDIN, CHAPTER 13 BANKRUPTCY at ¶ 255.1 and the substantial number of cases cited therein which the author characterizes as "fractured."

projected disposable income since the time of confirmation. While it is undoubtedly true that the tax refund had not yet been actually received by the Debtors at the time of confirmation, there is no evidence that the tax refund was derived from any increase in income during the post-confirmation period. The refund instead admittedly arises from income which was clearly disclosed at confirmation. However, the trustee essentially argues that §1329(a)(1) has been properly invoked because the income was not projected as "disposable" at the time of confirmation. The Court disagrees.

At the time of confirmation, it was disclosed to the trustee and all of the unsecured creditors that a portion of the Debtors' income during each tax year would be initially withheld and deposited with the appropriate taxing authority. The trustee and the unsecured creditors knew or should have known that any excess over and above the then-unliquidated amount necessary to satisfy the Debtors' tax obligations for any particular tax year would constitute disposable income and would likely be refunded to the Debtors during the pendency of the plan. However, the Debtors' proposed plan did not contemplate the dedication of such disposable income to the plan payments. Instead, the Debtors' plan proposed the payment of an established amount on a monthly basis in order to satisfy all obligations addressed by the plan. Thus, if the trustee or the holder of any allowed unsecured claim "provided for by the plan" had wished to force the Debtors to commit to the plan any additional sums, the receipt of which could have been reasonably projected to occur within the first thirty-six months of the plan, an objection to the Debtors' proposed plan was required to be filed under §1325(b)(1)(B) for the Debtors' failure

to commit such projected disposable income to the obligations addressed by the plan.[5] No such objection was filed by any party. Under the literal language of the statute and the established jurisprudence construing it, the disposable income requirement otherwise imposed by §1325(b) is waived in the absence of a timely objection and any property which might otherwise have been committed to the plan is instead vested free and clear in the debtor. *See, e.g., In re Smith*, 237 B.R. 621, 624-25 (Bankr. E. D. Tex. 1999); *Matter of Collier,* 198 B.R. 816, 817 (Bankr. N. D.Ala. 1996); *In re Edwards*, 190 B.R. 91, 95-96 (Bankr. M. D. Tenn. 1995); *In re Davis,* 160 B.R. 577, 580 (Bankr. E.D. Tenn. 1993). As described by one noted commentator in the actual context of an income tax refund:

> To implement the disposable income test and to overcome the vesting effect in §1327(b), some jurisdictions include in the plan a provision that all income tax refunds to which the debtor becomes entitled during the life of the plan will be paid to the trustee for distribution to creditors. If the plan is silent with respect to postpetition tax refunds, §1327(b) would have its ordinary effect and any postpetition refund would vest in the debtor free and clear of the claims of creditors provided for by the plan.

See 3 LUNDIN, CHAPTER 13 BANKRUPTCY ¶ 236.1 at pp. 236-10 and 236-11.

This circumstance was directly addressed in *In re Grissom,* 137 B.R. 689 (Bankr. W.D. Tenn. 1992). In *Grissom*, as in the present case, the debtor confirmed his Chapter 13 plan

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[5] In this context, the trustee must insure that a provision dedicating the payment of post-confirmation tax refunds to the plan payments is included in the debtor's Chapter 13 plan or in the confirmation order. 11 U.S.C. §1306(a) clearly makes post-petition tax refunds a part of the Chapter 13 estate, and pursuant to §1306(b), the debtor is entitled to remain in possession of all property of the estate "[e]xcept as provided in a confirmed plan or order confirming a plan." 11 U.S.C. §1306(b).

without any objections. An unsecured creditor subsequently filed a modification motion to compel the debtor to pay to the trustee any tax refund received in the post-confirmation period, asserting that such payment was required as a component of the disposable income requirement. The Tennessee bankruptcy court found that it was "not required to go back now and conduct a disposable income inquiry" because the debtor's case has already been confirmed "with the effect of binding the debtor and creditors to the plan terms." *Id.* at 691. The *Grissom* Court observed that "[i]f there had been objections to confirmation, the Court at that time might have determined that, as a part of disposable income for three years, the debtors would be required to commit their future tax refunds to the plan." However, because there was no disposable income inquiry at confirmation due to the absence of any objection, the court determined that the unsecured creditor could not "evade now the binding effect of confirmation under §1327." *Id.*

Admittedly the affected parties in the present case could not have known with certainty at confirmation whether the Debtors would actually receive a tax refund during the pendency of the plan. However, no one ever knows at confirmation whether a debtor will actually receive *any* income in the post-confirmation period. Actual receipt of income is not the standard. *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 358 (9th Cir. 1994). The Bankruptcy Code forces a debtor to calculate and to disclose his *projected* disposable income, the accuracy of which is evaluated at the time of confirmation. These Debtors complied with that obligation and their disclosure encompassed the withholding of these excess sums which the taxing authority is now returning to them. This is not new or unanticipated income. This is not comparable to the

unexpected receipt of lottery winnings which would constitute a windfall to a debtor. These are sums which were clearly subject to scrutiny at the time of the original confirmation hearing. And while the actual amount needed to satisfy the Debtors' tax obligations in a particular year (and the subsequent remittance of any excess sums in the form of a refund) may not have been ascertainable at the time of confirmation, the trustee could have verified the accuracy of the Debtors' proposed withholding amount and correspondingly forced the Debtors to commit any refunds which they might ultimately realize from the overpayment of such disclosed income by filing an objection to the Debtors' proposed plan.[6] Section 1325(b)(1)(B) certainly contemplates the commitment of such income. *See, e.g., In re Midkiff*, 271 B.R. 383 (B.A.P. 10th Cir. 2002) [finding that debtor's plan specifically provided that tax refunds to which debtor became entitled during first 36 months of the plan were deemed "disposable income"]*; Freeman v. Schulman (In re Freeman),* 86 F.3d 478 (6th Cir. 1996) [income tax refunds constitute projected disposable income which must be surrendered under §1325(b)(1) for the applicable 3-year period]; *In re Abner*, 234 B.R. 825, 826 (Bankr. M.D. Ala. 1999) [sustaining trustee's disposable income objection to debtors' proposed plan which failed to commit non-exemptible portion of future tax refunds to plan payments when reasonable inspection of debtors' history of income and tax refunds revealed that likelihood of receipt of tax refunds by debtors during plan period was sufficient for court to conclude that "projected disposable income over the next 36 months will

[6] It should be clear that a debtor cannot be obligated to structure tax payments in a manner calculated to insure the receipt of a post-confirmation tax refund. However, the trustee has the ability to insure at the initial confirmation hearing that any refund actually received by the debtor in the post-confirmation period is committed to performance under the proposed plan.

contain similar tax refunds"].

However, once waived, the actual subsequent receipt of such a refund by the Debtors cannot now open the door for the Trustee to take the action under the auspices of §1329(a) which should have been taken under §1325(b)(1)(B) at the original confirmation hearing. There has been no change in the Debtors' projected disposable income since the confirmation of the original plan. There has been no evidentiary basis presented upon which the Trustee can rightfully seek an increase in payments under §1329(a)(1). Certainly his own pretermissions cannot create such a basis.

As Judge Lundin has astutely observed, "[o]ver the long run, the growth and success of Chapter 13 programs depend upon a plain meaning of the effects of confirmation under §1327." 3 LUNDIN, CHAPTER 13 BANKRUPTCY ¶ 228.1 at p. 228-3. To grant at this stage a post-confirmation modification based upon grounds which should have properly been raised at the time of the original confirmation hearing would dramatically diminish the binding effect which §1327(a) and the common-law principles of res judicata seek to invoke and which this Court is under a duty to protect. *Sun Fin. Co., Inc. v. Howard (Matter of Howard),* 972 F.2d 639, 641 (5th Cir. 1992) [construing its prior decision in *Republic Supply Co. v. Shoaf,* 815 F.2d 1046 (5th Cir. 1987) and stating that "*Shoaf* stands for the proposition that a confirmed Chapter 13 plan is *res judicata* as to all parties who participate in the confirmation process"]; *see also In re Cameron*, 274 B.R. 457, 460 (Bankr. N.D. Tex. 2002) ["Numerous courts have held that confirmation of a plan is res judicata of all issues that could or should have been litigated at the confirmation

hearing."]; *In re Coffman*, 271 B.R. 492, 495-96 (Bankr. N.D. Tex. 2002) and the cases regarding res judicata cited therein; and 8 COLLIER ON BANKRUPTCY §1329.03 at pp. 1329-6 and 1329-7. ["A trustee or unsecured claim holder may not raise as grounds for modification under this section facts that were known and could have been raised in the original confirmation proceedings, because the order of confirmation must be considered *res judicata* as to that set of circumstances."].

Thus, because the opportunity to object to the Debtors' exclusion of any post-confirmation tax refunds from those sums dedicated to their plan payments has been waived by the trustee, he may not utilize the provisions of §1329 to resurrect that opportunity through a post-confirmation modification. Accordingly, the Trustee's Motion to Modify Confirmed Chapter 13 Plan must be denied and the Trustee is hereby directed to immediately tender the referenced tax refund to the Debtors.

This memorandum of decision constitutes the Court's findings of fact and conclusions of law[7] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. A separate order will be entered which is consistent with this opinion.

Signed on 09/30/2002

BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

[7] To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.

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