

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: ) In Proceedings  
) Under Chapter 7  
ARIE ENTERPRISES, INC., )  
) No. BK 87-50572  
Debtor(s). )

OPINION

Arie Enterprises, Inc. ("debtor") filed a chapter bankruptcy petition on November 2, 1987. The case was subsequently converted to a chapter 7 proceeding on January 4, 1990. On May 7, 1990, debtor filed a motion to allocate tax payments, seeking an order directing the Internal Revenue Service ("IRS") to apply \$167,805.01 in previously paid taxes, as well as any future payments, to "trust fund" taxes.<sup>1</sup> Debtor's motion was denied on the basis that the payments to the IRS were involuntary, and on the further ground that even if the payments were considered voluntary, debtor had failed to direct application of the payments to trust fund taxes. See In re Arie Enterprises, Inc., 116 B.R. 641, 643 (Bankr. S.D. Ill. 1990).

On February 26, 1992, debtor filed another motion to allocate tax payments. In his motion, debtor states that the Trustee plans to sell all of the estate's assets for \$35,000.00. Debtor then asserts that any

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<sup>1</sup>The Internal Revenue Code requires employers to deduct and withhold income and social security taxes from the wages paid to their employees. These taxes are commonly referred to as "trust fund" taxes. Debtor had incurred post-petition trust fund taxes (and still owes) in excess of \$146,000.00.

payments made by the Trustee to the IRS, after liquidation, will be voluntary payments and that accordingly, the Trustee should be allowed to request, on behalf of debtor, that said payments be applied to trust fund taxes.<sup>2</sup>

As noted in this Court's prior opinion:

When a taxpayer makes voluntary payments to the IRS, he has a right to direct the application of [those] payments to whatever type of liability he chooses....If the tax-payer makes a voluntary payment without directing the application of the funds, the IRS may make whatever allocation it chooses ....However, when a payment is involuntary, IRS policy is to allocate the payment as it sees fit.

In re Arie Enterprises, Inc., 116 B.R. at 642-43 (citations omitted).

The Seventh Circuit has held that "[a]n involuntary payment of Federal taxes means any payment received by agents of the United States as a result of distraint or levy or from a legal proceeding in which the Government is seeking to collect its delinquent taxes or file a claim therefor." Muntwyler v. United States, 703 F.2d 1030, 1032 (7th Cir. 1983) (citing Amos v. Commissioner, 47 T.C. 65, 69 (1966)).<sup>3</sup>

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<sup>2</sup>Under section 6672(a) of the Internal Revenue Code, the IRS is entitled to assess a 100% penalty against the individual responsible for the nonpayment of trust fund taxes. In the present case, that individual is William Dillow, chief executive officer and principal stockholder of Arie Enterprises. Mr. Dillow has joined in the motion to allocate tax payments as "an interested party."

<sup>3</sup>The court in Muntwyler held that the mere filing of a claim by the IRS with an assignee for the benefit of creditors was not pursuant to levy, judicial order or execution by judicial sale, and

A number of courts have held that tax payments made in the course of a bankruptcy proceeding, and more specifically, payments made by a chapter 7 Trustee to the IRS, are involuntary payments. See In re Jehan-Das, Inc., 925 F.2d 237, 238 (8th Cir. 1991) (payments made to the IRS in a liquidating chapter 11 proceeding are involuntary); In re Optics of Kansas, Inc., 132 B.R. 446, 448 (Bankr. D. Kan. 1991) (payments by chapter 7 Trustee to IRS are involuntary); In re Looking Glass, Ltd., 113 B.R. 463, 466 (Bankr. N.D. Ill. 1990) (in context of chapter 7, payments by Trustee to IRS are involuntary); Matter of Riley, 88 B.R. 906, 910 (Bankr. W.D. Wis. 1987) (tax payments made in course of bankruptcy proceeding are by their nature involuntary). The Court agrees with those decisions. In the present case, the chapter 7 Trustee, not the debtor, controls the funds from which payments to the IRS will be made. The IRS seeks to collect its delinquent taxes through this bankruptcy proceeding, and any payments made to the IRS from the Trustee's sale of assets will be a direct result of court action based upon the report of the Trustee with respect to the IRS's claim. See In re Looking Glass, Ltd., 113 B.R. at 466. The payments cannot, under these circumstances, be considered voluntary.

The Supreme Court's decision in United States v. Energy Resources

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therefore, that the taxpayer's payment to the IRS was voluntary. The court noted, however, that the government's position (i.e., that the payment was involuntary) may have been correct had the corporation been in bankruptcy. Muntwyler, 703 F.2d at 1034 n.2.

Co., Inc., 495 U.S. 545, 110 S.Ct. 2139, 109 L.Ed.2d 580 (1990) is inapplicable to chapter 7 proceedings. While the Supreme Court held that a bankruptcy court has the authority to order the IRS to apply tax payments, whether voluntary or not, to trust fund taxes, the ruling was narrow and allowed such action only where "necessary to the success of a reorganization plan." Energy Resources, 110 S.Ct. at 2142. It is clear that the holding in Energy Resources is limited to chapter 11 reorganization proceedings and has no application in this case. See also In re Kare Kemical, Inc., 935 F.2d 243, 244 (11th Cir. 1991) (Energy Resources applies to chapter 11 reorganization cases only and not to liquidation proceedings).

Accordingly, for the reasons stated, debtor's motion to allocate tax payments, filed February 26, 1992, is DENIED.

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/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: April 10, 1992