

*Court denied Debtors' Motion to Modify where the Debtors attempted to justify their retaining all of their tax refund that they had spent prior to filing Motion to Modify. Case dismissed per Trustee's pending Motion to Dismiss.*

**Rice 16-60569**

**Facts:** The Court's docket sheet reflects the following:

11/22/16: Debtors' Chapter 13 Plan confirmed requiring the Debtors to pay to the Trustee all of their tax refunds in excess of \$4,800 within days of receipt starting with the tax year 2016, such tax refunds to be added to the plan base. The Debtors made their first plan payment to the Trustee in November, 2016, to bring their plan payments current in order to get their Plan confirmed.

2/3/17: Trustee filed his Motion to Dismiss based upon the Debtors' failure to make plan payments. Debtor made their second plan payment to the Trustee in February, 2017, to bring their plan payments current and the Trustee accordingly withdrew his Motion to Dismiss. [This payment was apparently made with a portion of the Debtors' tax refund]

6/1/17: Trustee filed his second Motion to Dismiss based upon the Debtors' failure to make plan payments since the second plan payment. The Debtors made their third plan payment to the Trustee in June, 2017, in order to qualify for the entry of a Conditional Dismissal Order ("CDO") which in turn gave the Debtors until 8/22/17 to bring their plan payments current or their case would automatically be dismissed without further notice or hearing. The Debtor made their fourth plan payment to the Trustee in August, 2017, to bring their plan payments current to prevent the dismissal of their case under the CDO. [These payments were apparently made with a portion of the Debtors' tax refund]

10/26/17: Trustee filed his third Motion to Dismiss based upon the Debtors' failure to make plan payments after their fourth plan payment under the CDO, including the Debtors' failure to turn over to the Trustee the unprotected portion of their tax refund (per their 2016 tax return, the Debtors' tax refund was \$8,046 less protected amount of \$4,800 equals \$3,246 to be turned over to the Trustee and added to the plan base). Debtors filed their Motion to Modify for the stated purpose of bringing the Debtors current on their plan payments. The Dismissal hearing was continued to 1/25/18. After the Trustee objected to the Motion to Modify (including an objection concerning the Debtors' failure to turn over their 2016 tax refund along with a request for an accounting on how such was spent), the Motion to Modify was also set for hearing on 1/25/18. The Debtors made their fifth plan payment on the eve of the hearing to bring their plan payments current under the pending Motion to Modify. [This payment was apparently made with a portion of the Debtors' tax refund]

At the hearing held on 1/25/18, the Debtor testified that she received the tax refund in the amount of \$8,046 in February, 2017, at about the time her husband lost his job. The Debtor further testified that they spent all of this tax refund as follows: cure delinquent post-petition mortgage payments (\$2,500); pay back a post-petition loan from her sister (\$1,500); reimburse Grandmother for some post-petition charges made by the Debtors on the Grandmother's credit card (\$600); purchase some furniture (\$1500); and made the last four plan payments made to the Trustee as described above.

**Held:** The Court denied the motion to modify and dismissed the case pursuant to the Trustee's Motion to Dismiss. The Court based its ruling on the Debtors' failure to be transparent to creditors with regards to their spending of the tax refund during the year before the hearing on the Motion to Modify. The Court noted that when the Debtors availed themselves of bankruptcy protection, the Debtors are held to a much higher standard of disclosure. In this case, the Debtors had both spent the tax refund in violation of their

confirmed Plan and failed to notify anyone that the tax refund had been spent until after being forced to respond to the Trustee's third Motion to Dismiss.

**Trustee's Additional Comments concerning this case:** During the hearing, the Judge appeared to agree with the Trustee's staff attorney when he said that the old adage that "it is better to ask for forgiveness than to ask for permission" for spending the unprotected portion of the tax refund does not apply. Again, the Judge emphasized that the issues in this case were: (1) Debtors' failure to make timely disclosure vs. the Debtors' unilateral spending of bankruptcy funds; and (2) the repayment of unauthorized post-petition indebtedness from family members.<sup>1</sup>

**"Old" Form Plan Cases: Trustee's Policy relating to Tax Refunds and Motions to Modify filed by debtors in an effort to increase their protected amount:** The Trustee will review these cases on a case-by-case basis. The best practice is for the Motion to Modify to be filed prior to the debtors spending such. In all of these cases, the Trustee will request an accounting on how the debtors want to spend the tax refund (or, where applicable, how the debtors have already spent such and whether such was spent on an "emergency" basis that rendered requesting prior permission impracticable through a Motion to Modify). The expenses need to be reasonable and necessary (as Judge Parker has stated in the past, the fact that the debtors have found a way to spend a tax refund does not mean that such expenditures are reasonable and necessary expenses). If possible, the tax refund should be paid back to the plan base (through higher plan payments) over the remaining term of the Plan if supported by the debtors' budget.

**"New" Form Plan Cases filed on or after 12/1/17: Trustee's Policy relating to any attempt by the debtors to retain more than the \$2,000 as allowed under the "New" form Plan and Court's Local Rules:** As all parties know or should know concerning all cases filed on or after December 1, 2017, the debtors must use the new form Chapter 13 Plan adopted in the Eastern District of Texas. Pursuant to the provisions as set forth in this new form Plan as supported by the new Court's Local Rules, the debtors are allowed to keep the first \$2,000 of their tax refunds while turning over the excess of the refund to the Trustee to be added to the plan base for the benefit of the creditors. The Trustee intends to enforce this provision of the new form Plan with the following observations:

--This \$2,000 should not be prorated as additional income on Schedule I.

--The Trustee will object to any attempt by the debtors to justify retaining more than the \$2,000 as allowed under the provisions of the "New" form Plan filed in these cases. All such cases will be called for hearing and the debtors will need to be prepared to present evidence to justify their keeping more than \$2,000 of their tax refunds.

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<sup>1</sup> The Debtors' attorney attempted to argue that these family advances were not loans but merely family assistance given to the Debtors due to their financial situation. The Judge rejected this argument by noting that the Debtors treated it as loans when the Debtors repaid such from bankruptcy funds.