


ORDERED.

Dated: August 09, 2018



Karen S. Jennemann  
United States Bankruptcy Judge

STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re	)	
	)	
ROBIN D. GILLAND,	)	Case No. 6:18-bk-00939-KSJ
	)	Chapter 7
Debtor.	)	
_____	)	

**ORDER PARTIALLY GRANTING CREDITOR’S MOTION FOR RELIEF FROM AUTOMATIC STAY NUNC PRO TUNC**

The Army and Air Force Exchange Service’s (the “AAFES”) seeks relief from stay *nunc pro tunc* to setoff the Debtor’s tax refunds against debts due to the Movant (the “Motion”).<sup>1</sup> The Debtor opposes the Motion.<sup>2</sup> The Court took the dispute under advisement on July 10, 2018. The Court will partially grant the Motion to allow AAFES to retain \$303 as a setoff from the Debtor’s 2017 tax income refund.

AAFES provides services to the military and authorized family members.<sup>3</sup> Debtor opened a line of credit with AAFES’s Military Star Program on March 3, 2004.<sup>4</sup> Debtor defaulted and AAFES

---

<sup>1</sup> Motion for Relief form Stay Nunc Pro Tunc (Doc. No. 13).  
<sup>2</sup> Response to (*In Opposition*) to Creditor United States of Ameriaca's Motion for Relief from Automatic Stay (Doc. No. 18).  
<sup>3</sup> Doc. No. 13, p. 1.  
<sup>4</sup> *Id.*

placed the account in the Treasury Offset Program.<sup>5</sup> The Treasury Offset Program exercises the government's right to setoff mutual obligations owed to federal agencies.<sup>6</sup> With accrued interest, Debtor owed \$7,608.17 to AAFES.<sup>7</sup>

On February 21, 2018, Debtor filed for bankruptcy relief under Chapter 7.<sup>8</sup> The Internal Revenue Service set off the Debtor's 2017 federal income tax refund against the outstanding Military Star debt.<sup>9</sup> On February 28, 2018, AAFES received, as part of setoff, a \$6,062.75 payment, plus a \$17.25 fee.<sup>10</sup> AAFES applied \$6,062.75 to the Military Star account.<sup>11</sup>

AAFES seeks to lift the automatic stay under § 362(d)(1) and (2)<sup>12</sup> of the Bankruptcy Code *nunc pro tunc* to permit AAFES to set off the Debtor's 2017 federal income tax refund against their Military Star debt.<sup>13</sup> It argues its common law right to setoff, coupled with the Treasury Offset Program's statutory authority, permits the Secretary of the Treasury to offset a taxpayer's tax refund against the debt owed to another federal agency.<sup>14</sup>

Debtor asserts AAFES's right to setoff under 31 U.S.C. § 3720A is limited under subsection (c) to only the amount of "federal taxes paid,"<sup>15</sup> which in this case was \$303. The rest of Debtor's income tax refund consisted of three different types of tax credits: earned income credit, an additional child tax credit, and an American opportunity credit.<sup>16</sup>

---

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*; *see also* 26 U.S.C. § 6402 and 31 U.S.C. § 3720A.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Doc. No. 1.

<sup>9</sup> Doc. No. 13, p. 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et. seq.*

<sup>13</sup> Doc. No. 13, p. 4.

<sup>14</sup> *Id.* at 3-4 (citing *U.S. v. Tafuya*, 803 F.2d 140, 414-142 (5th Cir. 1986); 26 U.S.C. § 6402; 31 U.S.C. § 3720A).

<sup>15</sup> Doc. No. 18, p. 1.

<sup>16</sup> *Id.*

The only issue before the Court is whether AAFES had the right to set off the entire tax refund including the tax credits or just the \$303 attributed to federal taxes paid by the Debtor. Under § 553 of the Bankruptcy Code, a creditor may set off a mutual debt against a claim by the creditor against the debtor, provided both debts arose before the commencement of the bankruptcy case. However, § 522(b) of the Bankruptcy Code allows a debtor to exempt specified property from the bankruptcy estate. The applicable undisputed state law here is Florida law. Section 222.25(3) of the Florida Statutes exempts “a debtor’s interest in a refund or a credit received or to be received . . . pursuant to s. 32 of the Internal Revenue Code of 1986, as amended” with the limited exception of debt owed for child support or spousal support is not exempt under § 222.25(3).<sup>17</sup>

The Eleventh Circuit has decided a similar issue.<sup>18</sup> In *In re James*, part of the debtors’ refunds included earned income tax credit (“EITC”) payments.<sup>19</sup> Debtors claimed an interest in the payments as exempt under the Alabama Code in their schedules.<sup>20</sup> Trustee objected to the exemption.<sup>21</sup> Applying Alabama law, the Court looked at the Alabama Code § 38-4-8, which exempts “all amounts paid or payable as public assistance to needy persons.”<sup>22</sup> The Court found that “public assistance” included EITC and the tax credit was therefore exempt under the Alabama Code.<sup>23</sup>

Here, the Debtor’s pre-petition Military Star’s debt and the IRS’s tax refund are mutual obligations because the IRS and AAFES, as federal agencies, are instrumentalities of the United States. Debtor, however, only paid \$303 in federal taxes and the rest of the refund were tax credits. Section 222.25(3) of Florida statutes is clear tax credits are exempt property unless the “debt [is] owed

---

<sup>17</sup> Fla. Stat. § 222.25(3).

<sup>18</sup> *In re James*, 406 F.3d 1340 (11th Cir. 2005).

<sup>19</sup> *Id.* at 1342.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1343.

<sup>23</sup> *Id.* at 1344-45.

for child support and spouse support.”<sup>24</sup> Movant’s debt does not fall within this limited exception. AAFES then may only offset the Debtor’s \$303 federal income tax withholdings.

Accordingly, it is

**ORDERED:**

1. AAFES’s Motion for Relief from Automatic Stay *Nunc Pro Tunc* (Doc. No. 13) is **PARTIALLY GRANTED.**
2. The automatic stay imposed by 11 U.S.C. § 362 is lifted *nunc pro tunc* to allow AAFES to setoff the Debtor’s federal income tax withholdings for \$303.
3. AAFES is directed to remit the balance of \$5,777 to the Debtor as exempt funds.

###

The Clerk is directed to serve a copy of this order on all interested parties.

---

<sup>24</sup> See FLA. STAT. § 222.25(3).