

ORDERED.

Dated: November 23, 2015



Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

PETER BELMONT,

Case No. 6:15-bk-03714-CCJ
Chapter 7

Debtor.
_____ /

ORDER SUSTAINING TRUSTEE'S
OBJECTION TO PROPERTY CLAIMED AS EXEMPT

This case came before the Court on August 19, 2015, for consideration of the Trustee's Objection to Property Claimed as Exempt (Doc. No. 9; the "Objection to Exemption"). Having considered the pleadings and positions of the parties, the Court sustains the Objection to Exemption for the reasons set forth below.

Background

On April 29, 2015, the Debtor filed a Voluntary Petition for relief under Chapter 7 of Bankruptcy Code. The Debtor listed a bank account ending in 2278 (the “Account”), valued at \$5,365.00, on Schedule B. On Schedule C, the Debtor claimed \$4,619.00 of the Account as exempt under Section 222.25(3) of the Florida Statutes and \$746.00 of the Account as exempt under Section 222.25(4) of the Florida Statutes. The Trustee objects to the Debtor’s \$4,619.00 claim of exemption in the Account under Section 222.25(3).

Approximately one month prior to the petition date, the Debtor deposited his federal income tax refund, totaling \$8,365.00 (the “Tax Refund”), into the Account. The percentage of the Tax Refund that was directly attributable to the Earned Income Credit, as referenced by Section 222.25(3), was 55.22%, or \$4,619.00. No additional deposits were made to the Account between the deposit of the Tax Refund and the petition date. The Debtor did, however, write a check for \$3,000.00 on the Account (the “Disbursement”), which cleared approximately two weeks before the petition date, to pay for repairs and improvements to the bathroom in his home.¹

The sole issue before the Court is how the 55.22% Earned Income Credit should be applied to the Tax Refund in light of the \$3,000 Disbursement. The Trustee asserts that 55.22% of the Disbursement, or \$1,656.60, was directly attributable to the Earned Income Credit portion of the Tax Refund. As a result, the Trustee contends that only \$2,962.40 of the balance in the Account on the petition date is exempt under Section 222.25(3). The Debtor argues that the Disbursement was not made from any funds

¹ See Doc. No. 12.

attributable to the Earned Income Credit, but rather only from funds derived from the nonexempt portion of the Tax Refund. The Debtor, therefore, asserts that he is entitled to exempt \$4,619.00 of the balance in the Account in its entirety.

Discussion

Section 222.25(3) of the Florida Statutes permits a debtor to claim as exempt his “interest in a refund or a credit received or to be received, or the traceable deposits in a financial institution of a debtor's interest in a refund or credit, pursuant to s. 32 of the Internal Revenue Code of 1986 as amended [the Earned Income Credit].”² As a general rule, commingled funds that are traceable to exempt assets retain their exempt status.³

Courts generally follow one of three approaches to determine how to trace the exempt portion of the deposit where funds have been commingled.⁴ As explained by the court in *In re Wharton-Price*, these methods include the “lowest intermediate balance test,” the “straight percentage” method, and “first-in, first-out” method:

Under the “lowest intermediate balance test,” courts adopt the fiction that the debtor withdrew the entirety of the non-exempt portion of the tax refund from the bank account, leaving only the exempt portion of the refund in the account as of the petition date. Under the second approach, the “straight percentage” method, courts determine the exempt portion of the balance in the bank account by calculating the percentage of the earned income credit in relation to the total refund and then applying that percentage to the balance of the disputed funds...The third approach is known as the “first-in, first-out” method...[and] is most appropriately utilized when there

² Fla. Stat. 222.24(3).

³ *In re Hickox*, 215 B.R. 257, 260 (Bankr. M.D. Fla. 1997).

⁴ *In re Wharton-Price*, No. 9:15-BK-03126-FMD, 2015 WL 4230856, at *1 (Bankr. M.D. Fla. July 6, 2015) (citing *In re King*, 508 B.R. 71 (Bankr. N.D. Ind. 2014); *In re Marve*, 484 B.R. 735 (Bankr. N.D. Ind. 2013)).

are deposits and withdrawals after the initial deposit of the 23 tax refund. But this approach is of limited use when the exempt earned income credit is commingled within the non-exempt portion of the refund.⁵

Because the Debtor in the present case did not segregate the earned income portion of the Tax Refund in the Account, the Court is unable to directly trace the funds in the Account to the exempt Earned Income Credit. The non-exempt and exempt portions of the Debtor's Tax Refund were deposited in a single account and commingled in a single payment. The Debtor made no deposits to the Account between the deposit of the Tax Refund and the petition date. On nearly identical facts, the court in *In re Wharton-Price* found that the "straight percentage" method was the most practical and fairest approach to determine the exempt portion of the petition date balance.⁶ This Court agrees and finds that 55.22% of the Disbursement, or \$1,656.60, is directly attributable to the Earned Income Credit portion of the Tax Refund. "After all, just as Debtor argues that [he] first spent the non-exempt portion of the [Tax] Refund, leaving the exempt portion behind, the Trustee could argue the opposite and take the position that Debtor had first spent the exempt portion of the [Tax] Refund."⁷

⁵ *Id.* (internal citations omitted).

⁶ *Id.* at *2.

⁷ *Id.*

Conclusion

For the reasons set forth above, it is ORDERED that:

1. The Objection to Exemption is sustained.
2. The Debtor is entitled to exempt 55.22%, or \$2,962.40, of the \$5,365.00 balance in the Account as of the petition date. The remainder of the balance in the Account that is not otherwise exempt under Section 222.25(4) of the Florida Statutes constitutes nonexempt estate assets.

Clerk's office to serve