

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 8:04-bk-20026-PMG
Chapter 7

SHARMA LACHMI KANT,
a/k/a Lachmi Sharma,
a/k/a Lachmi K. Sharma,

Debtor.

**ORDER ON TRUSTEE'S OBJECTION
TO PROPERTY CLAIMED AS EXEMPT**

THIS CASE came before the Court for hearing to consider the Trustee's Objection to Property Claimed as Exempt.

The issue is whether the Debtor, Sharma Lachmi Kant, is entitled to claim a joint tax refund as exempt in his chapter 7 case based on the status of the refund as tenancy by the entireties property under Florida law.

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on October 14, 2004. On his original "Schedule B – Personal Property," the Debtor listed a "possible income tax refund for year 2004" as an asset of undetermined value. The Debtor subsequently amended Schedule B, and disclosed that the value of the refund was \$6,117.00. The Debtor also filed an amended Schedule C, and claimed the full amount of the refund as exempt.

The Trustee filed a written objection to the claimed exemption, and asserted that the Debtor is not entitled to claim the tax refund as exempt as tenancy by the entireties property.

A. Beal Bank v. Almand and Associates, and the presumption that personal property owned by a husband and wife in Florida is owned as tenants by the entireties.

In 2001, the Supreme Court of Florida considered the issue of "whether bank accounts titled in the name of both spouses were held as tenancies by the entireties and, therefore, not subject to execution by a creditor of only one of the spouses." Beal Bank, SSB v. Almand and Associates, 780 So.2d 45, 48 (Fla. 2001). The Court held:

[A]s between the debtor and a third-party creditor (other than the financial institution into which the deposits have been made), if the signature card of the account does not expressly disclaim the tenancy by the entireties form of ownership, a presumption arises that a bank account titled in the names of both spouses is held as a tenancy by the entireties as long as the account is established by husband and wife in accordance with the unities of possession, interest, title, and time and with right of survivorship.

Id., at 58.

To arrive at the holding, the Court set out an extensive review of the forms of ownership of property by a husband and wife in Florida, the historical reasons for ownership of property by the entireties, the contemporary acceptance of this form of ownership, and the standards of proof and different presumptions that have been applied to prove this form of ownership for real and for personal property. After this extensive review, the Court stated:

Although we understand the considerations that originally led to this Court's decision not to adopt a presumption of a tenancy by the entireties in personal property similar to that in real property, we conclude that stronger policy considerations favor allowing the presumption in favor of a tenancy by the entireties when a married couple jointly owns personal property.

Id., at 57 (Emphasis added).

The decision in Beal Bank was subsequently applied to stock certificates issued in the joint names of a husband and wife. In Cacciatore v. Fisherman's Wharf Realty Limited Partnership, 821 So.2d 1251, 1252 (Fla. 4th DCA 2002), the Court concluded that "as between debtor and creditor the holding and rationale of *Beal*

Bank, SSB v. Almand & Associates, 780 So.2d 45 (Fla. 2001), should be extended to create a presumption of tenancy by the entireties in the stock certificate." The Court further stated that the "presumption arises from taking title in the spouses' joint names. The creditor then has the burden to prove by the preponderance of the evidence that one of the necessary unities (including, if such be the case, the right of survivorship) did not exist at the time the certificate was acquired." Cacciatore v. Fisherman's Wharf, 821 So.2d at 1254.

Recently, the decision in Beal Bank was further applied to joint income tax refunds issued by the IRS to a husband and wife who had filed a joint return. In In re Kossow, 325 B.R. 478 (Bankr. S.D. Fla. 2005), the debtor had claimed his 2003 tax refund as exempt as entireties property, and the trustee and a creditor objected to the claim of exemption. The Court concluded that a rebuttable presumption existed that "all personal property, including a joint tax refund, is held as a tenancy by the entireties as long as the personalty is acquired by husband and wife in accordance with the unities of possession, interest, title, and time with right of survivorship." In Kossow, the Court then found that a prenuptial agreement signed by the spouses raised issues of fact regarding whether the parties intended to hold the refund as entireties property, so that further proceedings were required to determine whether the refund actually created a tenancy by the entireties. Id. at 489.

As set forth in Kossow, therefore, a joint income tax refund issued to a husband as wife is presumed to satisfy all of the unities required for entireties property under Florida law, including the unity of interest. The presumption is rebuttable, however, and a creditor may overcome the presumption by establishing that the unities necessary to establish a tenancy by the entireties are not present. Under certain circumstances, for example, such proof may consist of evidence that the refund may be divided in proportion to the amount each spouse paid to the taxes owed, as suggested by Gordon and MacPhail, discussed hereafter.

B. Gordon v. United States, and the Internal Revenue Code.

To support his objection to the Debtor's claim of exemption, the Trustee relies primarily on the decision of the Eleventh Circuit Court of Appeals in Gordon v. United States, 757 F.2d 1157 (11th Cir. 1985). Gordon involved an action by a former wife to recover payment of the amount of a refund that had been issued on the

basis of joint tax returns filed by the former spouses, but that had been credited to a separate tax liability owed only by the former husband. Gordon, 757 F.2d at 1158.

In Gordon, the Eleventh Circuit found that although the liability for payment of taxes due under a joint return is joint and several, "[w]here spouses claim a refund under a joint return, the refund is divided between the spouses, with each receiving a percentage of the refund equivalent to his or her proportion of the withheld tax payments." Id. at 1160. In that case, the IRS was not required to reverse the credit that it had applied to the former husband's separate liability for other taxes, because the credit was entirely attributable to the overpayment that resulted from withholdings from the former husband's income.

Similarly, the Sixth Circuit Court of Appeals recently addressed the issue of allocating a refund between spouses who had filed a joint return.

As many courts have noted, 26 U.S.C. §6402(a) permits the IRS to credit an overpayment to "the person who made the overpayment." . . . In the case of joint filers, "a joint income tax return does not create new property interests for the husband or the wife in each other's income tax overpayment. . . ." Rev. Rul. 74-611, 1974-2 C.B. 399. Therefore, courts have consistently found that a refund should be disbursed in proportion to the amount each spouse paid to the taxes owed.

United States of America v. MacPhail, 2005 WL 2206681, at 3 (6th Cir. Ohio)(Emphasis supplied).

The determinations in Gordon and MacPhail indicate that a husband and wife may not have the unity of interest in a tax refund that is necessary for a tenancy by the entireties.

Section 6402(a) of the Internal Revenue Code (26 U.S.C. §6402(a)) provides that the IRS may credit an overpayment to the person who made the overpayment. "Court decisions have consistently held that a husband and wife who file a joint return do not have a joint interest in an overpayment; each has a separate interest." Rev. Rul. 74-611, 1974-2 C.B. 399.

Consistent with these provisions and cases, the Bankruptcy Court in the Middle District of Florida has stated:

The filing of a joint tax return does not affect the underlying property interests of the parties. *U.S. v. Elam*, 112 F.2d 1036, 1038 (9th Cir. 1997). "Spouses filing a joint return have separate interests in any overpayment, the interest of each depending upon his or her income, i.e., an overpayment is apportionable to a spouse to the extent that he or she contributed to the overpaid tax." *Rosen v. United States*, 397 F.Supp. 342, 343 (E.D.Pa. 1975). *See also Gordon v. United States*, 757 F.2d 1157, 1160 (11th Cir. 1985)("Where spouses claim a refund under a joint return, the refund is divided between the spouses, with each receiving a percentage of the refund equivalent to his or her proportion of the withheld tax payments."); *Gens v. United States*, 230 Ct.Cl. 42, 673 F.2d 366, 368 (1982), *cert. denied*, 459 U.S. 906, 103 S.Ct. 209, 74 L.Ed.2d 167 (1982), and *reh'g denied*, 459 U.S. 1081, 103 S.Ct. 503, 74 L.Ed.2d 642 (1982)(holding that Wife was not entitled to any part of the overpayment for failure of proof that she paid any part of it).

In re Jones, 219 B.R. 631, 635 (Bankr. M.D.Fla. 1998).

C. Application

In Florida, when personal property is held in the joint names of a husband and wife, it is presumed that the property is held by the spouses as tenants by the entirety. The presumption is rebuttable, however, and the burden is on another to show that the unities necessary to establish the tenancy by the entirety do not exist.

In this case, it appears that the spouses do not have a unity of interest in the tax refund. The spouses' tax return for the year in question shows that the Debtor was the only spouse with income and withholdings for the year, and that a portion of the refund is attributable to the overpayment of the withholdings. Accordingly, the portion of the tax refund that is attributable to the overpayment of withholdings from the husband's income

is attributable to the husband, the Debtor in this case, so the refund is not exempt as being owned by the Debtor and his wife as tenants by the entirety.

The Trustee's Objection to Property Claimed as Exempt should be sustained, and the exemption claimed by the Debtor with respect to his income tax refund should be disallowed.

Accordingly:

IT IS ORDERED that:

1. The Trustee's Objection to Property Claimed as Exempt is sustained.
2. The income tax refund listed on the Debtor's Amended Schedule B and Amended Schedule C is not exempt from property of his Chapter 7 estate.

DATED this 12th day of April, 2006.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge