

## Tenancies By The Entirety And Joint Tax Refunds

The issue of whether an individual debtor can claim a joint tax refund exempt as tenancy by the entireties is an unsettled area of the law.

Section 522(b)(3)(B) of the Bankruptcy Code allows individual debtors to exempt any interest in property the debtor owns as tenancy by the entireties, provided that such interest is exempt under state law. It is well settled that under Florida law property may be held by a husband and wife as tenants by the entireties. See, e.g., Beal Bank, SSB v. Almand and Associates, 780 So.2d 45 (Fla. 2001).

Beal Bank is the seminal case in Florida on the issue of tenancy by the entireties. The Florida Supreme Court stated that property held as tenancy by the entireties possesses six characteristics:

(1) unity of possession (joint ownership and control); (2) unity of interest (the interests in the account must be identical); (3) unity of title (the interests must have originated in the same instrument); (4) unity of time (the interests must have commenced simultaneously); (5) survivorship; and (6) unity of marriage (the parties must be married at the time the property became titled in their joint names).

Beal Bank, 780 So.2d at 52.

Notwithstanding the Beal Bank decision, courts are split on whether a unity of interest exists in a post-petition tax refund resulting from a joint tax return file pre-petition. In a recent Southern District of Florida Bankruptcy Court opinion issued by Judge Mark, he held that there was no unity of interest in a joint tax refund and therefore the refund was not exempt as tenancy by the entireties. In re Ascuntar, -- B.R. --, 2013 WL 28709, 111 A.F.T.R.2d 2013-435 (Bankr. S.D.Fla. 2013). In his opinion, Judge Mark looked to federal law to determine the debtor's interest in the tax return, specifically relying on Internal Revenue Service Ruling 74-611 (the "IRS Ruling"). Id. at 2. The IRS Ruling stated:

when a husband and wife file a joint return, Section 6013 of the Internal Revenue Code imposes joint and several liability upon them for the tax computed on their aggregate income. Nevertheless, *this does not create a joint interest in any overpayment.* As the Ruling explained, "[c]ourt 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." Id. In addition, the Ruling states that "if one spouse goes bankrupt, only his share of the refund goes to the trustee in bankruptcy." Id. The Ruling's conclusion is clear: "Thus, a joint income tax return does not create new property interests for the husband or the wife in each other's income tax overpayment." Id.

Ascuntar, at 2 (citing Rev. Rul. 74-611, 1974-2 C.B. 399 (1974))(emphasis added). Based on the IRS ruling, and other case law, the Judge Mark held that the Debtor holds a separate and

distinct interest in the tax refund from his non-debtor wife, and therefore the portion of the return attributable to the debtor is property of the estate.

Other bankruptcy courts in the Southern District of Florida have taken a different view. In In re Kossow, Judge Hyman, looking at similar facts, followed an alternative analysis with respect to determining whether a joint tax refund can be exempt as tenancy by entireties. 325 B.R. 478. In Kossow, Judge Hyman looked to Beal Bank and concluded that the “policy justifications offered by the Florida Supreme Court. . . should be applied to all personal property, including joint tax refunds.” Id. at 488. Relying on Treasury Regulations and provision from the Internal Revenue Code, Judge Hyman determined that “a joint income tax refund constitutes personal property that satisfies the unities of possession, interest, title, and time with right of survivorship subject to a rebuttable presumption.” Id.

The issue of whether a tax refund resulting from a joint tax return is exempt may be determined based upon the identity of your bankruptcy judge. Accordingly, debtor’s attorneys should advise their clients as to the possible different outcomes they may face.

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