

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

IN RE: )  
DONALD L. HADAN and )  
NANCY S. HADAN, )  
Debtors. )  
----- )  
UNITED STATES OF AMERICA, )  
Plaintiff, )  
vs. )  
DONALD L. AND NANCY S. HADAN, )  
Defendants. )

BK 84-758

**FILED**  
DISTRICT OF NEBRASKA  
AT \_\_\_\_\_ M  
DEC 17 1985  
William L. Olson, Clerk  
Deput

CV 85-0-381

MEMORANDUM AND ORDER

This matter is before the Court on appeal from a default judgment against the United States entered by the United States Bankruptcy Court for the District of Nebraska. The United States was found to be in default for failure to appear on January 30, 1985, at an adversary proceeding to determine the dischargeability of the income taxes owed to the United States. The Court finds the decision of the Bankruptcy Court must be reversed.

The facts are not in dispute. This action began when the debtors, Donald L. and Nancy S. Hadan, filed a Chapter 7 petition in the United States Bankruptcy Court for the District of Nebraska. The debtors followed this petition with an adversary proceeding to determine the dischargeability of income taxes owed to the United States. The matter was set for trial as the third alternate in Lincoln in front of the Honorable David Crawford, on January 30, 1985, and notice was set to both parties advising of the date.

The notice provides as follows:

If the other cases do not use that date, failure to prosecute this case may result in its dismissal with prejudice. However, if any prior case is settled or terminated later than 8:00 a.m. of the business day preceding the day scheduled for this trial, any party may elect not to proceed by notifying all other parties, and the Clerk of the Bankruptcy Court by 12:00 noon of the business day preceding the day scheduled for this trial of the election not to proceed.

On January 28, 1985, James E. Shively, Trial Attorney, U.S. Department of Justice, contacted the clerk's office for the United States Bankruptcy Court for the District of Nebraska. Mr. Shively was informed that this case would probably not be heard. On January 29, 1985, the Courtroom Deputy contacted Mr. Daniel Ross, Trial Attorney, U.S. Department of Justice and informed him that this case was now in posture to be heard if government counsel so desired. Mr. Ross informed the Courtroom Deputy that the Department of Justice would call her back. Mr. Shively returned the call and requested that the trial be reset. The deputy indicated that this was not a problem and that the trial would be reset.

Jerry J. Milner, attorney for the debtors, Donald L. and Nancy S. Hadan, traveled approximately 90 miles through a snow storm to appear for the trial. Upon arrival, it was discovered that the United States Department of Justice was not present. On January 30, 1985, trial was held without the Government's knowledge. At that trial, Judge David Crawford entered a default

judgment against the United States for failure to appear and upon oral motion of the plaintiff discharged the taxes due the United States.

The appellees contend the United States had failed to contact either Jerry J. Milner, the attorney for the debtors, or the debtors, Donald L. and Nancy S. Hadan, advising of their desire to continue the matter.

#### DISCUSSION

A review of the briefs and the record on appeal indicates that the Bankruptcy Court sustained and entered a default judgment against the United States without ascertaining why government counsel failed to appear or giving the government an opportunity to show its failure to appear was excusable. Further, it does not appear that the Bankruptcy Court considered satisfactory evidence that the requirements for a discharge were met as set forth in 11 U.S.C. § 523 before granting the discharge of the taxes. Fed. R. Civ. P. 55(e) ("[N]o default judgment shall be entered against the United States unless the claim is established by satisfactory evidence.") The discharge was granted upon an oral motion with no evidence admitted into the record.

The Court finds that sustaining the motion was improper. In this case, the decision to sustain the motion could be regarded as a dismissal of the claim of the Internal Revenue Service without a consideration of the merits of the claim. "The norm of judicial practice should be to dispose of cases on their merits, and dismissals [or defaults] on procedural grounds are justified only

in exceptional circumstances." Farmers Plant Food, Inc. v. Fisher, 746 F.2d 451, 452 (8th Cir. 1984). The case at bar is not an exceptional circumstance warranting such drastic result. The brief of the United States indicates that the misunderstanding between the courtroom deputy and the government counsel was the reason counsel for the United States failed to appear. There are no allegations that the government had been repeatedly disregarding orders or that it intentionally missed the hearing. See also Campbell v. Eastland, 307 F.2d 478, 491 (5th Cir. 1962), cert. denied, 371 U.S. 975 (1963) (default judgment against the United States is against public policy); Fed. R. Civ. P. 55(e) (before judgment by default may be entered against the United States a claim for relief must be established by satisfactory evidence to the Court). Compare Alameda v. Secretary of Health Ed. and Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980) (after repeated disregard of the judge's orders, judgment of default was properly entered against the government under Fed. R. Civ. P. 55(a) for failure to defend).

The Court finds that entering a default judgment against the United States was under the circumstances of this case an abuse of discretion.

Accordingly,

IT IS ORDERED that the judgment is reversed and remanded to the Bankruptcy Court for such action as it deems proper and which is consistent with this Memorandum.

DATED this 17<sup>th</sup> day of December, 1985.

BY THE COURT:



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C. ARLEN BEAM  
UNITED STATES DISTRICT JUDGE