

MAR 23 2018

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	AZ-17-1215-BLKu
)		
ROSE A. ROMEO,)	Bk. No.	2:14-07986-BKM
)		
Debtor.)		
<hr/>			
ROSE A. ROMEO,)		
)		
Appellant,)		
v.)	MEMORANDUM¹	
)		
EDWARD JOHN MANEY, Chapter 13)		
Trustee,)		
)		
Appellee.)		
<hr/>			

Argued and Submitted on February 23, 2018,
at Phoenix, Arizona

Filed - March 23, 2018

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Brenda K. Martin, Bankruptcy Judge, Presiding

Appearances: David Allegrucci argued for appellant Rose A. Romeo; Rachel Flinn argued for appellee Edward John Maney, Chapter 13 Trustee.

Before: BRAND, LAFFERTY and KURTZ, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1
2 Chapter 13² debtor Rose A. Romeo appeals an order overruling
3 her objection to the motion of the chapter 13 trustee, Edward J.
4 Maney ("Trustee"), for access to Romeo's postpetition Federal
5 income tax return transcripts on file with the court and for
6 turnover of her postpetition State income tax returns. We AFFIRM,
7 in part, and REVERSE, in part.

8 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

9 Romeo, a below median debtor, filed her chapter 13 bankruptcy
10 case on May 27, 2014. The bankruptcy court later entered an order
11 confirming Romeo's chapter 13 plan.

12 On September 1, 2016, Romeo filed a transcript of her 2015
13 Federal income tax return with the court.

14 Thereafter, Trustee filed a motion to allow electronic access
15 to Romeo's 2015 Federal tax return transcript and to order
16 turnover of her 2015 State income tax return to Trustee ("Tax
17 Return Motion"). Trustee cited his statutory duty to investigate
18 Romeo's financial affairs as a chapter 13 debtor as the basis for
19 gaining access to her tax information and argued that he was
20 authorized to receive the information contained in those returns
21 under § 521(g)(2).

22 Romeo raised two arguments in opposition: (1) neither the
23 Code nor the Final Guidance for Protection of Tax Information,
24 promulgated in March 2015 ("Final Guidance") provided for the
25 allowance of turnover of postpetition State income tax returns;

26
27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 and (2) although the Code allowed for Trustee's access to her
2 postpetition Federal income tax returns, he had failed to comply
3 with the Final Guidance by demonstrating a need for the requested
4 tax information; his statutory duty to investigate her financial
5 affairs was insufficient.

6 While the Tax Return Motion was pending, Romeo filed a
7 transcript of her 2016 Federal income tax return with the court.

8 At the hearing on the Tax Return Motion, counsel for Trustee
9 explained that a debtor's State income tax returns are needed to
10 ensure that the information being reported in both the Federal and
11 State returns is consistent, and because certain things may appear
12 in a State return that do not appear in a Federal return and vice
13 versa. Counsel argued that the information in postpetition tax
14 returns assists a trustee in carrying out his or her duties of
15 examining the financial affairs of the debtor and can provide a
16 basis for proposing plan modifications or requiring the filing of
17 amended Schedules I and J. The information could also assist in
18 revealing any potential fraud by the debtor.

19 After hearing argument from the parties, the bankruptcy court
20 determined that Trustee had demonstrated a need for the Federal
21 income tax returns and a need for turnover of the State returns.
22 The court granted Romeo's oral request for stay pending appeal.

23 The bankruptcy court entered (1) an order granting the Tax
24 Return Motion and (2) an order staying the court's ruling pending
25 appeal. Romeo timely appealed.

26 **II. JURISDICTION**

27 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
28 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

1 13 case was pending. See § 521(f).³ She also does not contest
2 that Trustee could access those Federal returns or transcripts
3 upon the proper showing pursuant to § 521(g) (2).

4 Section § 521(g) (2) provides that "[t]he tax returns,
5 amendments, and statement of income and expenditures described in
6 subsections (e) (2) (A) and (f) shall be available to the United
7 States trustee (or the bankruptcy administrator, if any), the
8 trustee, and any party in interest for inspection and copying,
9 **subject to the requirements of section 315(c) of the Bankruptcy**
10 **Abuse Prevention and Consumer Protection Act of 2005**" ("BAPCPA")
11 (emphasis added).

12 Section 315(c) of BAPCPA mandates that the Director of the

13
14 ³ Section 521(f) requires chapter 13 debtors to file with
15 the court their postpetition Federal income tax returns or
16 transcripts (and any amendments thereto) while their chapter 13
17 case is pending. Specifically, that statute provides, in relevant
18 part:

17 (f) At the request of the court, the United States
18 trustee, or any party in interest in a case under chapter
19 7, 11, or 13, a debtor who is an individual shall file
20 with the court-

21 (1) at the same time filed with the taxing authority, a
22 copy of each Federal income tax return required under
23 applicable law (or at the election of the debtor, a
24 transcript of such tax return) with respect to each tax
25 year of the debtor ending while the case is pending under
26 such chapter;

23 (2) at the same time filed with the taxing authority,
24 each Federal income tax return required under applicable
25 law (or at the election of the debtor, a transcript of
26 such tax return) that had not been filed with such
27 authority as of the date of the commencement of the case
28 and that was subsequently filed for any tax year of the
debtor ending in the 3-year period ending on the date of
the commencement of the case;

27 (3) a copy of each amendment to any Federal income tax
28 return or transcript filed with the court under paragraph
(1) or (2)[.]

1 Administrative Office of the United States Courts establish
2 procedures for safeguarding the confidentiality of tax information
3 required to be produced under § 521. On September 20, 2005, the
4 Judicial Conference approved interim guidance drafted to implement
5 this statutory directive, effective October 17, 2005, the
6 effective date of BAPCPA. In March 2015, the Director issued the
7 Final Guidance, which established the following procedures for
8 obtaining access to a debtor's tax information filed with the
9 bankruptcy court:

10 **§ 830.30 Tax Information Disclosure Requests**

11 To gain access to a debtor's tax information under
12 11 U.S.C. § 521(f), the United States trustee or
13 bankruptcy administrator, case trustee, and any party in
interest, including a creditor, must follow the procedures
set forth below.

14 (a) A written request that a debtor file copies of tax
15 returns with the court under 11 U.S.C. § 521(f) must be
16 filed with the court and served on the debtor and debtor's
counsel, if any.

17 (b) To obtain access to debtor's tax information that is
18 filed with the bankruptcy court, the movant must file a
motion with the court, which should include:

19 (1) a description of the movant's status in the case,
20 to allow the court to ascertain whether the movant
may properly be given access to the requested tax
information;

21 (2) a description of the specific tax information
22 sought;

23 (3) a statement indicating that the information
24 cannot be obtained by the movant from any other
source; and

25 (4) a statement showing a demonstrated need for the
tax information[.]

26 (c) An order granting a motion for access to tax
27 information should include language advising the movant
28 that the tax information obtained is confidential and
should condition dissemination of the tax information as
appropriate under the circumstances of a particular case.

1 At the discretion of the court, the order may state that
2 sanctions may be imposed for improper use, disclosure, or
dissemination of the tax information.

3 Guide to Judiciary Policy, Vol. 4, Ch. 8, found on the public
4 website of the Administrative Office of the United States Courts
5 at: http://www.uscourts.gov/sites/default/files/vol04_ch08.pdf.

6 Thus, the safeguards set forth in the Final Guidance reflect
7 a strong intention for the court to determine when a trustee's or
8 creditor's need for information is outweighed by the debtor's
9 right to keep that information confidential. See In re Tomer,
10 508 B.R. 641, 646 (Bankr. W.D. Va. 2014); see also In re Byrne,
11 2007 WL 2580834, at *2 (Bankr. D. Vt. June 15, 2007) (interpreting
12 the interim guidance).

13 **2. Analysis**

14 The bankruptcy court agreed with Romeo that Trustee was
15 subject to the Final Guidance, and that he had to show more than
16 his general statutory duty of investigating a debtor's financial
17 affairs to meet his burden of showing a "demonstrated need" for
18 Romeo's Federal income tax return transcripts. That was a proper
19 application of § 521(g)(2) with respect to the Federal returns.

20 Romeo takes issue with the bankruptcy court's finding that
21 Trustee showed a "demonstrated need for the tax information" as
22 required by the Final Guidance. Romeo has not cited, and we could
23 not locate, any published (or unpublished) authority stating what
24 constitutes sufficient evidence to show a demonstrated need for
25 tax information. In his Tax Return Motion, Trustee did not
26 articulate any factual basis for needing Romeo's Federal returns
27 other than his fiduciary duty to investigate her financial
28 affairs. However, at the hearing, Trustee's counsel articulated a

1 list of reasons for why they were needed, which the bankruptcy
2 court found established a "demonstrated need" for the Federal
3 returns under § 521(g) (2):

4 I agree with you that there needs to be some further
5 demonstration, but [Trustee's counsel] has elaborated to
6 some degree in stating today that the reason for wanting
7 to see it is to confirm that there doesn't need to be a
8 modification to the plan, there doesn't need to be a
9 modification to the amendments, and to confirm the numbers
10 that have been shown to you. That's more of an
11 elaboration than simply an automatic turn it over to me
12 because I have a duty.

13 Hr'g Tr. (June 13, 2017) 11:7-14.

14 We conclude that the bankruptcy court's finding that Trustee
15 had shown a "demonstrated need" for accessing Romeo's Federal
16 income tax return transcripts was not illogical, implausible, or
17 without support in the record. In re Retz, 606 F.3d at 1196.
18 Trustee established that the tax information would aid in the
19 administration of the chapter 13 case; it was not being obtained
20 for an improper purpose, such as a discovery tool to assist a
21 creditor with a nondischargeable judgment in aid of collection or
22 to harass the debtor. See In re Tomer, 508 B.R. at 644; In re
23 Byrne, 2007 WL 2580834, at *2.

24 Romeo's real issue with Trustee having access to her tax
25 information is what he may do with it. Specifically, Romeo
26 complains that Trustee will use the information as a basis for
27 plan modification – i.e., to increase her plan payments. However,
28 the purpose of § 521(f) – added by BAPCPA in 2005 – appears to be
to allow interested parties like Trustee to monitor a debtor's
financial condition during the pendency of the chapter 13 case and

1 to seek plan modification under § 1329⁴ if there are material
2 increases in net income that can be captured for contribution. We
3 have held that utilizing a chapter 13 debtor's tax information as
4 a means for plan modification is proper and consistent with the
5 Code:

6 The obvious purpose of this self-reporting obligation [in
7 § 521(f) & (g)] is to provide information needed by a
8 trustee or holder of an allowed unsecured claim in order
to decide whether to propose hostile § 1329 plan
modifications.

9 This power of the trustee and of creditors holding allowed
10 unsecured claims to request that a confirmed plan be
11 modified by increasing payments in order to capture
material increases in net income that occur during the
life of the plan is an important feature of chapter 13.

12 Fridley v. Forsythe (In re Fridley), 380 B.R. 538, 544 (9th Cir.
13 BAP 2007). Accord Danielson v. Flores (In re Flores), 735 F.3d
14 855, 860 n.7 (9th Cir. 2013); In re Escarcega, 573 B.R. 219, 224
15 (9th Cir. BAP 2017); In re King, 2010 WL 4363173, at *3 (Bankr. D.
16 Colo. Oct. 27, 2010) (together § 521(f) and § 1329 ensure that
17 debtors repay the maximum they can afford over the course of their
18 chapter 13 case); In re Self, 2009 WL 2969489, at *5 (Bankr. D.
19 Kan. Sept. 11, 2009) (in reading § 1329 together with § 1325 and
20 § 521, it is clear that Congress intended to allow case trustees
21 to seek modifications of plans postpetition in order to address

22 ⁴ Section 1329 provides, in relevant part:

23 (a) At any time after confirmation of the plan but before
24 the completion of payments under such plan, the plan may
25 be modified, upon request of the debtor, **the trustee**, or
the holder of an allowed unsecured claim, to –

26 (1) **increase or reduce the amount of payments on**
27 **claims** of a particular class provided for by the
plan[.]

28 11 U.S.C. § 1329(a)(1) (emphasis added).

1 changes in disposable income); In re Slusher, 359 B.R. 290, 304
2 (Bankr. D. Nev. 2007) (stating that § 1329 is bolstered by the
3 reporting requirements of § 521(f)).

4 To the extent Romeo argues that using her tax information as
5 a means to involuntarily increase her plan payments violates the
6 Thirteenth Amendment to the U.S. Constitution, that issue is not
7 ripe for appeal.

8 Ripeness doctrine is drawn both from Article III
9 limitations on judicial power and from prudential reasons
10 for refusing to exercise jurisdiction. In measuring
11 whether the litigant has asserted an injury that is real
12 and concrete rather than speculative and hypothetical, the
13 ripeness inquiry merges almost completely with standing.
14 As a prudential matter, we will not consider a claim to be
ripe for judicial resolution if it rests upon contingent
future events that may not occur as anticipated, or indeed
may not occur at all. . . . The prudential considerations
of ripeness are amplified where constitutional issues are
concerned.

15 Scott v. Pasadena Unified Sch. Dist., 306 F.3d 646, 662 (9th Cir.
16 2002) (internal quotation marks and citations omitted). See also
17 Ray Charles Found. v. Robinson, 795 F.3d 1109, 1117 (9th Cir.
18 2015) ("abstract inquiries about speculative injuries" are not
19 ripe for review).

20 Here, the constitutional issues are woefully inadequate for
21 adjudication. Because the bankruptcy court issued a stay of its
22 order, Trustee has yet to even gain access to Romeo's Federal
23 income tax return transcripts or receive copies of her State
24 income tax returns. Further, Trustee has not sought modification
25 of Romeo's plan, and he may never do so once he does receive her
26 tax information. Thus, any ruling from the Panel on this issue
27 would be advisory, because the events that might raise a
28 constitutional question are still hypothetical. Accordingly,

1 because this issue is not ripe for review, we lack subject-matter
2 jurisdiction to consider it. Principal Life Ins. Co. v. Robinson,
3 394 F.3d 665, 669 (9th Cir. 2006) ("If a case is not ripe for
4 review, then there is no case or controversy, and the court lacks
5 subject-matter jurisdiction").

6 **B. The bankruptcy court erred by relying on § 521(g) (2) to order
7 turnover of Romeo's State income tax returns to Trustee.**

8 Romeo argues that the bankruptcy court erred in ordering her
9 to turn over to Trustee her State income tax returns for years
10 2015 and 2016. Specifically, she argues that, while § 521(f)
11 requires the filing of postpetition Federal income tax returns or
12 transcripts with the court, it makes no mention of "State" income
13 tax returns. In addition, she argues, the Final Guidance
14 references only Federal income tax returns or transcripts thereof.
15 See § 830.10(b). Romeo has not cited, and we could not locate,
16 any published authority addressing this issue.⁵

17 It appears that the bankruptcy court relied on § 521(g) (2)
18 and the Final Guidance to order turnover of the State income tax
19 returns, given its finding that Trustee had shown a "demonstrated
20 need" for them.

21 To be sure, § 521(f) references only "Federal" income tax
22 returns. Section 521(g) (2), which provides for access to an
23 individual debtor's tax information to a party in interest, states
24 that "[t]he tax returns, amendments, and statement of income and
25

26 ⁵ Romeo's counsel raised this issue in In re Ridenhour, 2016
27 WL 1688734, at *2 (Bankr. D. Ariz. Apr. 25, 2016). The bankruptcy
28 court sustained the debtors' objection that they were not required
to file their postpetition State income tax returns with the court
under § 521(f). However, the debtors and the trustee in that case
agreed that the statute did not require it.

1 expenditures described in subsections (e) (2) (A) and (f)" shall be
2 available for inspection and copying. Subsections (e) (2) (A) and
3 (f) of § 521 reference only "Federal" income tax returns or
4 transcripts. Therefore, the question is whether § 521(f) includes
5 "State" income tax returns.

6 The starting point in discerning congressional intent is the
7 existing statutory text. Lamie v. U.S. Tr., 540 U.S. 526, 534
8 (2004). Our inquiry will "end[] there as well if the text [of the
9 statute] is unambiguous." BedRoc Ltd. v. United States, 541 U.S.
10 176, 183 (2004). "The preeminent canon of statutory
11 interpretation requires us to 'presume that [the] legislature says
12 in a statute what it means and means in a statute what it says
13 there.'" Id. (alteration in original) (quoting Conn. Nat'l Bank
14 v. Germain, 503 U.S. 249, 253-54 (1992)); In re Meruelo Maddux
15 Props., Inc., 667 F.3d at 1076. If "the statute's language is
16 plain, the sole function of the courts . . . is to enforce it
17 according to its terms." Lamie, 540 U.S. at 534.

18 As stated above, § 521(f) is silent on whether postpetition
19 "State" income tax returns or transcripts must be filed with the
20 court during the pendency of an individual debtor's case.
21 Notably, a chapter 13 debtor is required under § 1308 – another
22 BAPCPA provision – to file all prepetition Federal, State and
23 local tax returns due for all of the taxable periods ending during
24 the four year period ending on the date the bankruptcy petition
25 was filed. § 1308(a). Specifically, § 1308(c) states that: "For
26 purposes of this section, the term 'return' includes a return
27 prepared pursuant to subsection (a) or (b) of section 6020 of the
28 Internal Revenue Code of 1986, or a similar State or local law, or

1 a written stipulation to a judgment or a final order entered by a
2 nonbankruptcy tribunal." In addition, to confirm a chapter 13
3 plan, § 1325(b)(9) – another BAPCPA provision – requires the
4 debtor to file "all applicable Federal, State, and local tax
5 returns as required by section 1308."

6 Thus, Congress has been very clear as to when State income
7 tax returns are required under the Code. If Congress intended
8 that postpetition State income tax returns or transcripts be filed
9 with the court under § 521(f), it could have easily stated so.
10 The omission of the word "State" in § 521(f) strongly suggests
11 that such tax returns or transcripts are not required to be filed
12 with the court. Nor would it appear that § 521(g)(2) is the
13 proper authority under which to gain access to them.

14 Therefore, we believe the bankruptcy court erred in applying
15 § 521(g)(2) to order turnover of Romeo's 2015 and 2016 State
16 income tax returns to Trustee. Perhaps another means is available
17 for obtaining them, such as Rule 2004 or some other discovery
18 rule. See In re Collins, 393 B.R. 835, 837 (Bankr. E.D. Wis.
19 2008); In re Fontaine, 397 B.R. 191, 194 (Bankr. D. Mass. 2008).
20 However, we make no determination on that. We do determine,
21 however, that § 521(g)(2) is not the proper means. Accordingly,
22 we must reverse the bankruptcy court's order to the extent it
23 ordered turnover of the State income tax returns to Trustee.

24 VI. CONCLUSION

25 For the above reasons, we AFFIRM, in part, and REVERSE, in
26 part.

27
28