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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:)
LESTER and KAREN HAY,) No. 99-01989-W12
Debtor(s).) MEMORANDUM DECISION RE:
DEBTORS' MOTION FOR
RECONSIDERATION

The debtor, Lester Hay, through his counsel, Dale L. Russell, moves this court to reconsider it's Order of Dismissal to be entered on September 17, 1999. The Order of Dismissal was only to be entered in the event that the debtor did not convert to some other Chapter for which he is eligible.

In its "Amended Request for Declaratory Ruling, Should Be Changed to Motion for Reconsideration and Request to Shorten Time and Notice Thereof," the debtor sets forth five bases upon which the alleges the court erred in its August 30, 1999 oral ruling that the debtor was ineligible for Chapter 12 relief. The debtor provides neither citations to the record nor case law to support his allegations. Upon review of the debtor's assertions, but without relying upon the debtor's post-hearing Declaration filed September 15, 1999, the court concludes that reconsideration is not appropriate for the following reasons:

1. The debtor argues that the court erred when it determined that the debtor did not meet its burden of proof on its qualifications for eligibility in the absence of any evidence to the contrary.

FILED
SEP 28 1999

The debtor bears the burden of proof. T.S. McGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

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W. J. ...

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1 proper for this court to dismiss for lack of jurisdiction where the
2 debtor did not prove he was eligible for relief. The party seeking
3 dismissal does not have the burden to prove that the debtor was not
4 eligible. *McLaughlin Land & Livestock Co. v. Bank of America Nat.*
5 *Trust & Savings Ass'n*, 122 F.2d 193 (C.C.A.9(Cal.) 1941), cert.
6 *denied* 314 U.S. 700 (1942), cited with approval in *In re Quintana*,
7 107 B.R. 234 (9th Cir. BAP 1989), affirmed on other grounds, *In re*
8 *Quintana*, 915 F.2d 513 (9th Cir. (Wash.) 1990).

9 2. The debtor argues that the court erred when it used gross
10 receipts instead of gross profit in the 50-50 qualification
11 computation for Chapter 12.

12 11 U.S.C. § 101(18) states in part ". . . and such individual
13 or such individual and spouse receive from such farming operation
14 more than 50 percent of such individual's or such individual and
15 spouse's gross income for the taxable year preceding the taxable
16 year in which the case concerning such individual or such
17 individual and spouse was filed . . .".

18 Gross income is not defined in the Code but case authority
19 interprets the term as defined in section 61 of the IRS Code of
20 1954, as amended. Gross income is usually the same as gross
21 profit, not gross receipts. *In re Pratt*, 78 B.R. 277 (D. Mont.
22 1987).

23 The gross income reflected on the 1998 Schedule "F" of the
24 1040 was \$72,655 of which \$4,407 represented income from pasture
25 rent. The controversy primarily concerned the remaining \$68,248 of
26 gross income which was based on gross receipts of \$230,195 less
27 cost of sales of \$161,947. Much of the testimony focused on the
28 source of the \$230,195 and apportioning it between the equipment

1 sales and the sales of crops and livestock. There was a wide
2 disparity between the sources of the receipts, i.e. equipment sale
3 gross receipts were estimated as \$190,000 and receipts from sales
4 of crop and livestock at \$40,800.

5 There were no records submitted to demonstrate the source of
6 either gross receipts or cost of sales. The testimony concerning
7 the apportionment of cost of sales was replete with phrases such as
8 "I don't remember" . . . "I assume" . . . "I would have to look at
9 (my records)". . . . Clearly, the debtor was guessing as to the
10 apportionment. He did state, however, "I assume" that the cost of
11 equipment was the "majority" of the \$161,947. In 1997, the
12 debtor's tax return indicates equipment sales of \$151,000 and costs
13 of \$117,000 for roughly a 20% profit margin. The debtor testified
14 that in 1998 the profit margin on sales of equipment could have
15 been the same or "give or take" 10% either way, i.e. a gross profit
16 margin of 10% to 30%. In response to questioning, the debtor did
17 a calculation based on a 15% figure.

18 Taken as a whole, the evidence is that the debtor without
19 reviewing his records was simply unable to reliably apportion the
20 cost of sales between the equipment sales and the sales of crop and
21 livestock but did know that the majority of the cost of sales was
22 attributable to the equipment. The debtor has the burden of
23 producing evidence to establish eligibility for Chapter 12 relief.
24 *In re Montgomery v. Ryan*, 37 F.3d 413 (8th Cir. 1994). The only
25 reasonable inference that can be drawn from the evidence is that
26 the source of the cost of sales was somewhat in proportion to the
27 source of the gross receipts, i.e. there was wide disparity between
28 the sources with by far the greatest amount attributable to the

1 sales of equipment. Consequently, by far the greatest amount of
2 the \$68,448 of gross income was attributable to sales of equipment.
3 As previously ruled, equipment sales proceeds do not in this case
4 constitute farm income.

5 3. The debtor argues that the court erred when it found
6 pasture rental to be non-farm income.

7 The amount of income derived from pasture rental in this case
8 was \$4,407.00. Even if the pasture rental income were to be
9 calculated as farm income, the ultimate determination of the
10 debtor's ineligibility would not change due to the conclusion that
11 the greatest amount of other gross income was attributable to the
12 sale of equipment.

13 4. The debtor argues that the court erred when it chose to
14 disbelieve Mr. Hay's evidence without opposing evidence.

15 The bankruptcy judge sits as trier of fact. In it's oral
16 ruling, the court found Mr. Hay's testimony not credible regarding
17 his purpose in purchasing the equipment in 1998. Considering the
18 totality of the evidence presented by the debtor, the court found
19 that the debtor had not made his prima facie case as to
20 eligibility. If the debtor believes the court's finding of fact
21 was clearly erroneous, he has the appellate process available to
22 him. Furthermore, opposing evidence is not required. See
23 *McLaughlin Land & Livestock, supra*.

24 5. The debtor argues that the court erred when it failed to
25 note that once the debtor's prima facie case is established, the
26 burden of proof shifts to the objecting parties.

27 Debtor's counsel is correct when it concludes that once the
28 debtor has made a prima facie case for eligibility, the burden of

1 going forward with the evidence on the SBA's Motion to Dismiss
2 shifts. Debtor's counsel is in error however in its belief that
3 the debtor made its prima facie case. This court found that the
4 debtor did not make its prima facie case. Therefore, the necessity
5 of going forward with evidence was no longer required.

6 In conclusion, the debtor has provided no information as to
7 how the court might have misconstrued any material facts, nor has
8 it provided the court with controlling precedent to support its
9 contradictory conclusions of law. The Motion for Reconsideration
10 is DENIED and an order will be entered accordingly. The debtor may
11 convert to a proceeding for which he is eligible, but if no Motion
12 to Convert is filed by October 15, 1999 this proceeding will be
13 dismissed.

14 The Clerk of Court is directed to file this Memorandum
15 Decision and provide copies to counsel.

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17 DATED this 28th day of September, 1999.

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20 PATRICIA C. WILLIAMS, Bankruptcy Judge

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