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MEMORANDUM FOR ASSOCIATE AREA COUNSEL – BIRMINGHAM  
(SMALL BUSINESS / SELF-EMPLOYED)  
Attention: Charles Pillitteri

FROM: Joseph W. Clark  
Senior Technical Reviewer, Branch 2  
(Collection, Bankruptcy & Summonses)

SUBJECT: Claims for Post-petition Tax Periods in Chapter 13 Cases

This constitutes our response to your November 29, 2000, request for advice on whether a claim for taxes payable post-petition in a Chapter 13 case can be filed as an administrative claim, as opposed to a claim made pursuant to B.C. § 1305(a)(1). We believe that, in a Chapter 13 case, a claim for post-petition taxes is not properly characterized as one for administrative expenses.

ISSUE: Whether a claim for taxes payable post-petition in a Chapter 13 case can be filed as one for administrative expenses, entitled to first-priority status pursuant to B.C. § 507(a)(1), or whether such a claim can only be filed as one pursuant to B.C. § 1305(a)(1), entitled to eighth-priority status pursuant to B.C. § 507(a)(8).

CONCLUSION: Because a bankruptcy estate does not constitute a separate taxable entity in a Chapter 13, it cannot incur a tax liability constituting an administrative expense. Accordingly, claims for post-petition taxes should not be filed as administrative claims. Moreover, once a Chapter 13 plan is confirmed, estate property other than that needed to fund the plan generally vests in the debtor, so there no longer exists any bankruptcy estate which could potentially generate administrative expenses.

FACTUAL AND STATUTORY BACKGROUND: The relevant facts set forth in your request for advice are as follows. A debtor files a motion to modify his Chapter 13 plan to add a post-petition liability. This liability consists of federal income taxes which are payable post-petition. In your district, where the insolvency specialist agrees to allow the debtor to pay the liability through the plan, the specialist files an administrative claim.

As you point out, various reference materials developed by this division offer

contradictory guidance on whether this practice is appropriate. On the one hand, the most recent version of the Bankruptcy Practice Seminar materials 1/ indicates that this means of seeking payment of post-petition taxes in bankruptcy is acceptable. Litigation Guideline Memorandum (LGM) GL-26, dated December 16, 1996, in contrast, indicates that post-petition taxes, at least those incurred following confirmation 2/, do not constitute administrative expenses of a Chapter 13 estate since the estate essentially terminates upon confirmation. In light of this contradiction, you have requested that we provide this division's current position on whether post-petition taxes are properly the subject of an administrative claim in a Chapter 13 case.

Several statutory provisions are relevant to analysis of this issue. Initially, section 507 states, in pertinent part:

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title ... .

B.C. § 507(a)(1).

Section 503(b), in turn, provides that

...[T]here shall be allowed administrative expenses, ... including –

(1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title ... .

B.C. § 503(b)(1)(A), (B)(i).

Section 1306 of the Bankruptcy Code provides that “property of the estate” includes, in a Chapter 13 case, and in addition to the property specified in B.C. § 541, all property of the kind specified in section 541 which is acquired

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1/ These materials are in the process of being revised.

2/ GL-26 states that it concerns only collection of post-petition, post-confirmation tax liabilities.

post-petition and all earnings from services performed by the debtor post-petition, “but before the case is closed, dismissed, or converted ..., whichever occurs first.” B.C. § 1306(a)(1). Section 1327(b) provides:

Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

B.C. § 1327(b).

Finally, section 1305, entitled “Filing and allowance of postpetition claims,” provides that a creditor may file a proof of claim, inter alia, “for taxes that become payable to a governmental unit while the case is pending[.]” B.C. § 1305(a)(1). A claim filed under this provision is

determined as of the date such claim arises, and shall be allowed ... the same as if such claim had arisen before the date of the filing of the petition.

B.C. § 1305(b).

LAW AND ANALYSIS: The language of the first two relevant statutory provisions, sections 507 and 503, indicates that if an expense constitutes either “an actual, necessary cost of preserving the estate,” or “any tax ... incurred by the estate, except a tax of a kind specified in section 507(a)(8),” it can be characterized as an administrative expense, entitled to first-priority payment. See B.C. §§ 503(b)(1)(A), (B)(i), 507(a)(1)(emphasis supplied). Thus, the central issue to be addressed here is whether taxes incurred post-petition in a Chapter 13 case constitute an expense of the bankruptcy “estate,” or an expense of the debtor in his individual capacity.

The position of this division generally has been that, at least with respect to tax liabilities, no separate bankruptcy estate exists in a Chapter 13. The basis of this position is that the Internal Revenue Code creates a separate taxable entity upon the filing of certain petitions by individuals under Chapter 7 and Chapter 11, but does not create a separate taxable entity in any Chapter 13 case. See I.R.C. §§ 1398, 1399. As a result, separate tax returns are not required to be filed for Chapter 13 estates. Given these considerations, post-petition taxes are not “incurred by the estate” as is required for a tax to be characterized as an administrative expense pursuant to B.C. § 503(b)(1)(B)(i). Moreover, given our view that post-petition taxes constitute a liability of the debtor, rather than the estate, we would be reluctant to view a post-petition tax as an administrative expense even under section 503(b)(1)(A), which affords administrative expense status to costs and expenses necessary to preserve “the estate.” Thus, our position is that taxes payable post-petition are not properly the subject of an administrative claim in a Chapter 13.

We believe that this is particularly true with respect to post-petition taxes which are payable post-confirmation. The longstanding position of this division is that the Chapter 13 bankruptcy estate terminates upon confirmation, given section 1327(b), except to the extent that funds are either designated by the plan as estate property or are necessary to fund the plan. <sup>3/</sup> Since the bankruptcy estate does not, for the most part, even exist post-confirmation, clearly any tax liability incurred at that point is neither a cost or expense of “preserving” the Chapter 13 estate nor “incurred by” the estate.

As you indicate, the only existing judicial decision directly on point with respect to this issue is In re Gyulafia, 65 B.R. 913 (Bankr. D. Ks. 1986). <sup>4/</sup> In Gyulafia, a Chapter 13 case, both pre- and post-confirmation tax liabilities were at issue. The Government argued that the liabilities were actual, necessary costs of preserving the estate and should, accordingly, be granted administrative expense treatment. Initially, the court determined that in light of the language of section 1327(b) and (c) addressing the status of estate property upon confirmation, post-confirmation taxes are incurred by the debtor, rather than the bankruptcy estate. The court accordingly held that taxes incurred after confirmation do not constitute administrative expenses pursuant to B.C. § 503(b)(1). 65 B.R. at 915-917. With respect to pre-confirmation taxes, the court reached the same conclusion, but based on a different analysis. The court initially noted that since section 1305(a) provides that the Government may file a post-petition claim “against the debtor,” rather than the estate, “section 503 is not applicable to any post-petition tax claim in a chapter 13 case, prior to or subsequent to confirmation.” Id. at 917. The court also maintained that section 346(d) of the Bankruptcy Codes provides that, in Chapter 13 cases, “any income of the estate or the debtor may be taxed on or measured by income only to the debtor, and may not be taxed to the estate,” further supporting the conclusion that no post-petition tax liability is properly characterized as an expense of the estate itself. Id. Finally, the court reasoned that affording administrative expense status to post-petition tax claims would render section 1305(a) superfluous, as the Government presumably would never file claims under that section since a claim filed under section 503 would be entitled to a higher priority status. Id. <sup>5/</sup>

In finding the Government’s claim not entitled to administrative expense status, the court in Gyulafia relied in part on section 346(d). This provision, which was

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<sup>3/</sup> This position is substantially embodied in IRM 5.9.11.6.2.2(1).

<sup>4/</sup> In In re Gebhart, 1998 Bankr. LEXIS 611 (Bankr. M.D. Pa. 1998), however, the court, in dictum, cited the holding in Gyulafia on mischaracterization of post-petition tax liabilities as administrative expenses.

<sup>5/</sup> Claims filed pursuant to B.C. § 1305(a)(1) are entitled to eighth-level priority, along with claims for certain pre-petition taxes, pursuant to B.C. § 507(a)(8)(A).

not quoted in its entirety in Gyulafia, states:

In a case under chapter 13 of this title, any income of the estate or the debtor may be taxed under a State or local law imposing a tax on or measured by income only to the debtor, and may not be taxed to the estate.

B.C. § 346(d). In contrast to what the court suggested in Gyulafia, this provision addresses only taxation of income under “state or local” law, and does not require that income taxed under federal law be taxed only to the debtor. Accordingly, we disagree with that aspect of the analysis in Gyulafia which is based on section 346(d). Nonetheless, we agree with the remainder of the Gyulafia court’s analysis, and concur in its ultimate conclusion that neither pre- or post-confirmation taxes should be deemed administrative expenses in Chapter 13 cases.

We caution that taking this position could present certain litigating hazards. First, we reiterate that the only case which we have been able to locate on the issue of whether post-petition tax liabilities can enjoy administrative expense status in a Chapter 13 case is Gyulafia, a bankruptcy court decision. Moreover, in discussing the issue of characterizing post-petition, preconfirmation taxes as administrative expenses, the court in Gyulafia interpreted section 346(d) in a way which we regard as incomplete, weakening the force of its authority on this issue. Given the absence of judicial authority on whether preconfirmation taxes can be characterized as administrative expenses, it is at least arguable that they can be characterized as such. Further, if they can be so characterized, then our position on the issue of whether post-confirmation taxes constitute administrative expenses may not be applicable in all districts. This is because the view that the Chapter 13 bankruptcy estate terminates upon confirmation is not one which has been adopted across-the-board. As LGM GL-26 indicates, the case law reflects various other positions on this issue, including both the position that all estate property remains in the estate post-confirmation, and the position that property acquired post-confirmation, but not that acquired pre-confirmation, remains in the estate once confirmation occurs. <sup>6/</sup> In jurisdictions which view the Chapter 13 bankruptcy estate as continuing to exist after confirmation, either as a continuation of the preconfirmation estate or as a newly-constituted estate encompassing only property acquired post-confirmation, it is arguable (assuming that preconfirmation liabilities would constitute expenses of the estate) that even post-confirmation tax liabilities should enjoy administrative expense status, since they are similarly related to funding “the estate.” However, because we do not believe that tax liabilities incurred preconfirmation, while a bankruptcy estate

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<sup>6/</sup> The latter is the position taken in some of the more recent cases. See, e.g., Barbosa v. Soloman, 231 F.3d 31 (1st Cir. 2000); United States of America v. Holden, 2000 U.S. Dist. LEXIS 12825 (D. Vt. 2000); In re Reynard, 250 B.R. 241 (Bankr. E.D. Va. 2000)

clearly exists, are properly characterized as administrative expenses, we do not recommend that post-confirmation liabilities be claimed as administrative expenses even in jurisdictions where the bankruptcy estate continues after confirmation has occurred.

In summary, our position is that since post-petition tax liabilities are, in Chapter 13 cases, incurred by the debtor, rather than the bankruptcy estate, characterizing such liabilities as administrative expenses is inconsistent with section 503 of the Bankruptcy Code and is not a practice which should be perpetuated. This type of liability should instead be collected either by filing a claim under B.C. § 1305(a), if appropriate, or by pursuing collection outside of the bankruptcy. This position is consistent with LGM GL-26. Further, we plan to incorporate these conclusions into the current revision of the Bankruptcy Practice Seminar materials.

If you have further questions, please call 202/622-3620.