

M e m o r a n d u m**320.0045**

To: Mr. Tom Childress
Collections Division

Date: January 7, 1991

From: Ronald L. Dick
Senior Tax Counsel

Subject: Setoff of Post-petition Debts on Pre-petition Claims

This is in response to the question you raised at the December 14, 1990 meeting of the Interagency Tax Collection Committee as to whether it is permissible to offset post-petition debts on pre-petition claims in bankruptcy.

I do not believe that the Bankruptcy Code permits such offsets. The right to setoff applies only to mutual debts that arose prior to the commencement of the bankruptcy case. (11 U.S.C. § 553(a).) In other words, the pre-petition debt is owed by or to the debtor. The post-petition debt is owed by or to the estate. Thus, a pre-petition debt and a post-petition claim lack the mutuality required by section 553(a). See Boston and Me Corp. v. Chicago Pac. Corp., 785 F.2d 562 (7th Cir.) (1986) where post-petition and pre-petition balances between two bankrupt railroads were not "mutual debts" that could be setoff. Although section 553 specifically discusses pre-petition debts, the court in In re Fordson Engineering Corp. 25 BR 506 (ED Mich. 1982) held that two mutual post-petition obligations may be setoff. But, again, the two obligations were mutual.

If you have further questions regarding this, feel free to contact me directly.

RLD:sr

cc: Mr. Robert D. Milam
Mr. Gordon P. Adelman