

M e m o r a n d u m

580.0170

To: Mr. Rick Slater
Collections Section

Date: March 6, 1992

From: Gordon P. Adelman
Tax Counsel

Subject: _____

At issue in your memorandum of January 22, 1992 is whether clearances for certain vehicles ordered transferred by the Court in the above entitled matter should be exempt from tax pursuant to 11 U.S.C. § 1146(c). The same section was at issue in a related matter of the transfer of assets from _____ to _____. The Court rendered a decision in _____ favorable to the Board that 1146(c) did not apply, and the decision is on appeal.

Differences between the two cases include these primary issues: 1) _____ transfers were not pursuant to a confirmed plan under section 1129, and this case is pursuant to a confirmed plan; 2) _____ was a transfer of assets where the case involves only the transfer of a fleet of vehicles.

The question presented is whether Section 1146(c) of the Bankruptcy Code exempts the transfer of a fleet of vehicles subject to tax delinquencies for which clearances are required before DMV will effect registration.

In my opinion, Section 1146(c), U.S. Bankruptcy Code, does not apply to sales and use taxes. My reasons for this conclusion follow.

In California, sales tax is imposed on the seller for the privilege of selling tangible personal property at retail (Section 6051, Rev. & Tax. Code—all sections cited are Revenue and Taxation Code unless otherwise indicated). A retail sale means a sale for any purpose other than resale in the regular course of business (Section 6007). Use tax is imposed for the storage, use, or consumption of tangible personal property in California (Section 6201).

In this case, _____ and _____ are assigned assets from the estate in a Confirmed Plan by Order and desire to transfer vehicles which are subject to delinquent tax. The transfers cannot occur without tax clearances issued by the Board.

Two issues immediately arise. The first issue is whether the Court by virtue of its Order has directed the transfers take place without taxation. I do not see in the Order signed by Judge Kelly on December 6, 1991 any directive to issue tax clearances without payment of the delinquency. In fact, the Order decrees that the automatic stay imposed by Section 362, Bankruptcy Code, is modified to "allow execution, delivery, filing and recordation...of documents, reports or instruments as are

necessary, useful or appropriate to effectuate, implement and consummate the Plan.” The Order is very specific as to those transfers exempt pursuant to sections 1145(a) and (b), Bankruptcy Code, and to the application of 1141(d) of the Code. In addition, the Court is specific as to those items which are covered by Section 1146, Bankruptcy Code. These include deeds, mortgages, deeds of trust, financing statements, and other instruments of transfer which shall not be subject to tax under any law imposing a stamp tax or similar tax. Since the Court has not ordered that the transfer take place ex-tax, some exemption must be applicable or the tax must be paid.

Recognizing this, attorneys for debtors have alleged that an exemption exists pursuant to Section 1146(c), U.S. Bankruptcy Code. Section 1146(c) does not exempt the debtor’s liability for sales and use taxes, because those taxes are not stamp taxes or similar taxes.

The U. S. Supreme Court has stated:

“It is evident that whatever immunity the bankrupt estate once enjoyed from taxation on its operations has long since eroded and that there is now no constitutional impediment to the imposition of a sales tax or use tax on a liquidation sale.” California State Board of Equalization v. Sierra Summit, Inc. (1989) 109 S.Ct. at 2232.

Further, the court held that:

“Nothing in the plain language of, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States made impose on the bankrupt estate.” Id. 109 S.Ct. at 2235.

The Court went on to state that while Congress could create exemptions from state and local taxes, the purported exemption must be clearly expressed. (See also In re Hatfield Construction Co. 494 F.2d 1181.)

Thus, while debtor contends that Section 1146(c), Bankruptcy Code, exempts it from sales and use taxes, under authority of Sierra Summit and Hatfield Construction, the exemption, if it exists, must be “clearly expressed in the statute.”

Section 1146(c) of the Bankruptcy Code provides:

“The issuance, transfer, or exchange of a security, or the making or delivery of an instrument or transfer under a plan confirmed under Section 1129 of this Title, may not be taxed under any law imposing a stamp tax or similar tax.”

Where the language of a statute is plain, “the sole function of the Courts is to enforce it according to its terms.” United States v. Ron Pair Enterprises, Inc. (1989) 489 U.S. 235, 109 S.Ct. 1030, L.Ed.2d 290, quoting (Aminetti v. United States) (1917) 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, Sutton v. United States (1987) 819 F.2d 1289.

To the extent the language is unclear or ambiguous, courts may rely upon established rules of construction. Statutes in derogation of the common law, especially those in derogation of governmental rights, are to be strictly construed. United States v. Tilleraas (1983) 709 F.2d 1088.

The rule is particularly well established that statutes granting tax exemptions are to be strictly construed. Matter of Fox 609 F.2d 178 (1980) cert. denied, 449 U.S. 821, 101 S.Ct. 78, 66 L.Ed.2d 23 (1980).

Section 1146(c) exempts from taxation “the making or delivery of an instrument of transfer.” Congress undoubtedly meant what it said when it required the existence of “an instrument of transfer.” Had Congress intended to grant the exemption from tax on any transfer not involving an instrument of transfer, it surely knew how to draft accordingly. E.g., 11 U.S.C.A. §§ 547(b) and 548(a) (both referring to “any transfer,” without regard to the existence of an instrument of transfer.

“Stamp tax” is defined as “the cost of stamps which are required to be affixed to legal documents such as deeds, certificates, and the like.” Black’s Law Dictionary 1259 (5th Ed. 1979). Payment of the tax is evidence by revenue stamps or documentary stamps which are affixed to legal documents of various types.

While it is clear from the language of Section 1146(c) that the exemption is not limited just to stamp taxes in the traditional sense, it is also clear that the scope of the exemption is limited to “other similar taxes.” Analyzing the New York City Real Estate Transfer Tax,* the Bankruptcy Court in In re Jacoby-Bender, Inc., identified five basic characteristics of a stamp tax:

- (1) The amount of the tax is usually determined by the consideration recited in the document;
- (2) The tax must be paid as a prerequisite to recordation;
- (3) The stamp provides clear and visible evidence of payment;
- (4) The tax is charged on written instruments as such; and
- (5) The written instruments which are made the subjects of the tax are recognized in law as important evidence of the enforcement of legal rights.

40 B.R. at 13, aff’d, 758 F.2d 840 (2d Cir. 1985); see In re Amsterdam Avenue Development Assoc., 103 B.R. 454, 456-57 (Bankr. S.D.N.Y. 1989).

The California state and local sales tax is clearly not a stamp tax in the sense that an actual stamp is affixed. Its only vague similarity to a stamp tax, based on the basic characteristics identified by the Jacoby-Bender court, is that the amount of the California sales tax is based on the gross receipts received. It is not based on the consideration recited in an instrument nor must the tax be paid as a prerequisite to recordation. Furthermore, the California state and local sales tax provides no mechanism, by stamp, mark or otherwise, for conveniently ascertaining whether the tax has been paid. The California tax is charged not on an instrument as such, but rather, it is charged without regard to the existence or nonexistence of a written instrument recognized in law as important evidence of the enforcement of legal rights. Accordingly, the California state and local sales tax bears virtually no similarity to a stamp tax and is not a “similar tax” within the scope of

*In Jacoby-Bender, the issue before the court was whether New York City’s tax on deeds and mortgages was a stamp tax or other similar tax. The court noted that the State of New York imposed an identical tax pursuant to an enabling statute that authorized the use of stamps or metering machines to evidence payment of the tax. The court held that the City’s tax was a stamp tax or similar tax on the basis of the facts, among others, that the tax was imposed on the document and that it was required to be paid as a condition to recordation. In re Jacoby-Bender, Inc., 40 B.R. at 15-16.

1146(c). The California use tax is even more dis*In Jacoby-Bender, the issue before the court was whether New York City's tax on deeds and mortgages was a stamp tax or other similar tax. The court noted that the State of New York imposed an identical tax pursuant to an enabling statute that authorized the use of stamps or metering machines to evidence payment of the tax. The court held that the City's tax was a stamp tax or similar tax on the basis of the facts, among others, that the tax was imposed on the document and that it was required to be paid as a condition to recordation. In re Jacoby-Bender, Inc., 40 B.R. at 15-16. milar to a stamp tax. Because the use tax is imposed on "storage, use or consumption," it is totally different from a stamp tax in all respects.

In light of the federal and state statutes, case law and practical usage of the plain language, the sale of the vehicles is not exempt pursuant to 11 U.S.C. § 1146(c) from sales and use taxes. Such tax is not imposed on the making or delivery of an instrument or transfer and is not a stamp tax or similar tax.

Your files are returned herewith.

GPA:sr

cc: Mr. Joseph O'Heron
Mr. James Cuneo