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Title: "Things Just Got a Whole Lot Better..." A Look Back at the 2005 Amendments to the Bankruptcy Code and How Those Amendments are Affecting Cities and Counties in Their Attempt to Collect Taxes in Bankruptcy Cases

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"Things Just Got A Whole Lot Better…"

A Look Back at the 2005 Amendments to the Bankruptcy Code and How Those Amendments are Affecting Cities and Counties in Their Attempt to Collect Taxes in Bankruptcy Cases

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCA") (effective on October 17, 2005) enacted major changes of interest to state and local governmental taxing authorities who are charged with assessment and collection of taxes. Typically overlooked or marginalized by debtors in all types of bankruptcy cases, these tax creditors now receive greater protection under BAPCA to ensure payment of taxes in accordance with state statutes.

It has now been almost one year since BAPCA became effective. Although it is too soon to see significant reported decisions interpreting BAPCA, from all indications, state and local taxing authorities appear to be among the big winners under BAPCA.

The amendments limit the ability of the debtor to redetermine previously assessed taxes by filing bankruptcy and eliminate costly litigation to determine applicable rates of interest to a tax claim. The amendments also reduce hardship on state and local governments to provide funding for essential services by requiring timely post-petition payment of administrative expense taxes and limiting serial bankruptcy filings.

In the following materials, relevant portions of the text of each statute affecting treatment of taxes are set forth prior to an analysis of those provisions. Newly added statutory material is indicated in italics; deleted material is indicated by strike-out. For convenience, the materials are organized according statutory section, from the lowest to the highest numbered sections, except as otherwise indicated.

1. 11 U.S.C. § 342 -- Reasonable Notice to Governmental Units

a) New Amendments.

§ 342. Notice.
…

(f)(1) An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

(2) In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).

(3) A notice filed under paragraph (1) may be withdrawn by such entity.

(g)(1) Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or an organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision.

(2) A monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) or for failure to comply with section 542 or 543 unless the conduct that is the basis of such violation or of such failure occurs after such creditor receives notice effective under this section of the order for relief.

b) Analysis.

This new section applies to all "entities" in Chapter 7 and 13 cases. See, 11 USC § 101(15)("The term 'entity' includes person, estate, trust, governmental unit, and United States Trustee"). The provisions are permissive, only, which

presumably places the burden on the Debtor to provide effective notice even if an entity does not utilize §342.

Any governmental unit may file with the Bankruptcy Court notice of an address to be used for all Chapter 7 or 13 cases and can designate a person or department to receive notices.

If such a notice is filed, notice by the Debtor which is not in accordance with the governmental unit's instructions is not effective until it is "brought to the attention of the creditor." Also, under subsection (g)(2), the Debtor cannot recover a penalty from the creditor for violation of the automatic stay, unless the conduct occurs after the notice is effective.

2. 11 USC § 362 – Automatic Stay and Serial Bankruptcy Filings.

a) New Amendments.

Of particular interest are subsections 362 (b)(9),(18),(20),(21); 362(c)(3)(4) and 362(d)(4).

b) Analysis.

The problem of serial bankruptcy filing, particularly by so-called "Chapter 20" Debtors and Chapter 13 debtors who file to avoid tax foreclosures for non-payment of property taxes, is addressed in amendments to 11 USC §362. Although these amendments benefit all types of creditors, the serial filing issue has been of particular concern to state and local taxing authorities.

The changes to §362 are extensive. New limitations on serial filing exceed those already in place under 11 USC §109(g), which excluded from eligibility any individual or family farmer who had been a debtor in a case pending within the previous 180 days where the case was dismissed under certain described circumstances. In addition to §109(g) grounds for dismissal, a substantial body of case law developed under § 1307(c) in which courts dismissed Chapter 13 cases upon a showing that the case was filed in "bad faith." In such cases, courts exercised discretion to dismiss the cases of repeat filers where there was essentially no change of circumstances from prior bankruptcy filings. *See, eg. In Re Leavitt,* 171 F3d 1219, 1224 (9th Cir 1999); *In Re Casse,* 198 F3d 127 (2d Cir 1999).

The new amendments legislate strict parameters for repeat filers and arguably give bankruptcy courts less discretion in defining what constitutes a "bad faith" filing. The text of § 362 should be consulted for particular requirements; however, the major changes pertinent to tax creditors and debtors are summarized as follows:

1. Two filings in one year. If any new case is filed within one year after an earlier case was dismissed, the automatic stay terminates 30 days after the new case is filed, unless, on motion and after notice and hearing, the court continues the stay because the court finds the new case is filed in "good faith." 11 USC § 362(a)(3).

2. "Good Faith" – A new case is presumed not in good faith as to all creditors, if:

    a. Debtor had been a debtor in more than one case in the preceding year; or
    b. A prior case was dismissed during the preceding one-year period for:
        i. failure to amend the petition or to file documents without excuse;
        ii. failure to provide adequate protection;
        iii. failure to perform the terms of a confirmed plan; or
        iv. there has been no substantial change of the debtor's circumstances since the last dismissal that would indicate the new case could be successfully concluded.

    c. There is a presumption of bad faith as to a single creditor, if the creditor filed a motion for relief from stay in the prior case that was either pending or granted at the time of dismissal.

    d. The court may order that the stay will take effect upon a showing that the latest case is filed in good faith. The presumption that a case was filed not in good faith must be rebutted by clear and convincing evidence.

3. More Than 2 Cases. If 2 or more cases were filed within the previous year and dismissed, the automatic stay does not go into effect upon the filing of the latter case. A party in interest can, however, file a motion for an order to make the automatic stay take effect. This will require proof that the most recent case was filed in good faith. 11 USC § 362(c)(4).

4. §362(d)(4) – "*In Rem*" Orders for Relief.

The Bankruptcy Court can give a creditor, who is secured by an interest in real property, an *in rem* order allowing actions with respect to the property only, if the petition was part of a scheme to hinder, delay, and defraud creditors involving transfer of ownership interests or multiple bankruptcy filings affecting the property.

An *In Rem* Order granting relief from stay may be recorded under state recording statutes, and is binding in any case that affects the property and is filed within 2 years after order is entered.

3. <u>11 USC § 503 and 28 USC § 960 – Post-Petition Administrative Taxes</u>

a) New Amendments.

§ 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including

(1)(A) the actual, necessary costs and expenses of preserving the estate, including

(B) any tax

(i) incurred by the estate *whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both,* except a tax of a kind specified in section 507(a)(8) of this title; or

…

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; *and*

(D) *notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;*

….

28 USC § 960 --General Provisions Applicable to Court Officers and Employees/ Tax liability

(a) Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

(b) A tax under subsection (a) shall be paid on or before the due date of the tax under applicable nonbankruptcy law, unless

(1) the tax is a property tax secured by a lien against property that is abandoned under section 554 of title 11, within a reasonable period of time after the lien attaches, by the trustee in a case under title 11; or

(2) payment of the tax is excused under a specific provision of title 11.

(c) In a case pending under chapter 7 of title 11, payment of a tax may be deferred until final distribution is made under section 726 of title 11, if

(1) the tax was not incurred by a trustee duly appointed or elected under chapter 7 of title 11; or

(2) before the due date of the tax, an order of the court makes a finding of probable insufficiency of funds of the estate to pay in full the administrative expenses allowed under section 503(b) of title 11 that have the same priority in distribution under section 726(b) of title 11 as the priority of that tax.

b) Analysis.

Under these amendments, Congress substantially clarified and strengthened the right of state and local governments to require that all post-petition *ad valorem* property taxes, whether secured or unsecured, must be characterized as an administrative expense and paid in the ordinary course of a bankruptcy proceeding.

Administrative tax creditors are no longer required to file a request for payment of an administrative tax claim as a condition of allowance of that claim.

Because administrative priority status applies to both secured and unsecured tax claims, including property taxes for which liability is *in rem*, *in personam* or both, the Bankruptcy courts appear to be precluded from disallowing a request for payment of an administrative tax claim and directing the tax creditor to rely upon its statutory lien.

Thus, under 28 USC § 960, all "officers and agents" of the Bankruptcy Court, shall be subject to all taxes and shall pay such taxes on or before the due date thereof (determined by non-bankruptcy law), unless

a. the tax is a secured tax claim and the property is abandoned within a "reasonable time" after lien attaches; or

b. Payment is otherwise "excused" under Title 11.

In a Chapter 7 case, payment of the administrative tax may be deferred until final distribution under §726 if,

a. The tax was not incurred by Trustee; or

b. Before the due date for payment, the court makes a finding of probable insufficiency of funds to pay in full administrative expenses with the same priority of distribution as the administrative tax claim.

4. <u>11 USC §505(a) and (b) – New Limitations on Bankruptcy Court Authority to Determine Tax Liability.</u>

a) The Amendments.

§ 505. Determination of tax liability

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; ~~or~~

(B) any right of the estate to a tax refund, before the earlier of

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request~~.~~; or

(C) *the amount or legality of any amount arising in connection with an ad valorem tax on real or personal property of the estate, if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired.*

(b)(1)(A) The clerk shall maintain a list under which a Federal, State, or local governmental unit responsible for the collection of taxes within the district may

(i) designate an address for service of requests under this subsection; and

(ii) describe where further information concerning additional requirements for filing such requests may be found.

(B) If such governmental unit does not designate an address and provide such address to the clerk under subparagraph (A), any request made under this subsection may be served at the address for the filing of a tax return or protest with the appropriate taxing authority of such governmental unit.

….

b) Analysis.

505(a): This amendment limits intervention by Bankruptcy Courts to determine or re-determine taxes where the debtor failed to timely challenge assessments under state law procedures. The pivotal question is whether the time period for contesting the amount due has expired under applicable non-bankruptcy law.

Under prior law, state and local taxing authorities were subject to costly administrative burdens when § 505 actions were commenced in foreign bankruptcy courts to redetermine taxes, notwithstanding that the Debtor had failed to follow applicable state law procedures to challenge the tax in a timely manner before the petition date. The amendments recognize the hardships placed on such governmental entities and are designated to prevent forum shopping in this situation.

Property tax appeals in Oregon are governed by ORS 305.005 et seq. *See,* ORS 305.265; 305.275-280 for applicable time periods for challenging the tax.

505(b)(1)(A): This amendment is designed to assist both tax creditors and debtors by setting up a procedure to provide timely and reasonable notice to taxing authorities of a §505(a) request for determination of tax. This section requires each local district (through the bankruptcy court clerks) to maintain a registry. Governmental units may designate addresses for service, and may describe particular information required for the governmental unit to process § 505 requests.

The registry is permissive, only. The burden remains on the Debtor to provide notice of the commencement of a § 505(a) action.

5. 11 U.S.C. § 506 –Determination of Secured Amounts and Surcharge.

a) The Amendments.

§ 506. Determination of secured status

…

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or *State statute* under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim~~.~~, *including the payment of all ad valorem property taxes with respect to the property.*

b) Analysis.

Subsection (b) makes clear that oversecured tax creditors can recover interest on their claims as well as reasonable fees, costs, or charges if and as provided in the state statute under which the claim arose.

Oregon statutes generally provide for the recovery of interest and penalties, but not for attorneys' fees incurred by the tax creditor in collecting the taxes from the debtor.

Under subsection (c), if the Trustee or debtor-in-possession pays *ad valorem* property taxes to preserve property of the estate, such payments can be surcharged. This amendment is intended to prevent secured creditors from receiving a windfall at the estate's expense.

6. 11 USC § 507(a)(8)(B)—Unsecured Priority Taxes

a) The Amendments.

§ 507. Priorities.

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

…

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for

…

(B) a property tax ~~assessed~~ *incurred* before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

….

b) Analysis.

It is unclear what the term "incurred" means or what impact it will have on various state statutory schemes for assessment and collection of taxes. It is not defined in § 101 of the Code.

For example, in Oregon, property taxes are assessed on January 1 of each tax year. The lien attachment date is July 1 and payments are due in one-thirds on November 15, February 15, and May 15. See, ORS 311.405; 311.505. The Oregon statutes generally do not use the term "incurred." However, under *Reliable Transfer Co. v. Multnomah County Assessor,* OTC-MD No. 000724F, WL 33244282 (Sept. 29, 2000), "incurred" likely means the assessment date.

7. 11 U.S.C. § 511—Rate of Interest On Tax Claims.

a) The Amendments.

§ 511. Rate of interest on tax claims

(a) If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.

(b) In the case of taxes paid under a confirmed plan under this title, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.

b) Analysis.

Prior to the enactment of new § 511, the Bankruptcy Code did not specify the interest rate for tax claims. In the Ninth Circuit and most other jurisdictions, courts held that the rate is to be determined by the "market rate." See, *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F2d 1503 (9th Cir 1987). State statutory rates of interest were not considered binding in determining the applicable rate of interest on a tax claim in bankruptcy cases.

New section 511 eliminates costly litigation over determination of the "market rate" of interest on a tax claim and hardship to state and local governments by specifically requiring payment of interest on tax claims at the rate determined under applicable non-bankruptcy law, i.e. state law. Under ORS 311.505, the rate of interest for *ad valorem* taxes is 1 1/3 % per month, or, 16% per annum.

8. <u>11 USC § 545(2) Statutory Lien Avoidance</u>.

a) The Amendments.

11 USC § 545. Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien
…

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, *except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law….*

b) Analysis.

The effect of this amendment is to except from "bona fide purchaser" status any purchaser described in Internal Rev. Code §6323 or other similar provision of state or local law so that the Trustee in bankruptcy, as a hypothetical bona fide purchaser, is unable to avoid a statutory tax lien.

ORS 311.235 provides in relevant part that "no ad valorem taxes imposed on real property…purchased by a bona fide purchaser shall be a lien on the real property… unless at the time of purchase the taxes were a matter of public record.." Under the new amendment to § 545, the trustee could not utilize the "bona fide purchaser" provisions of ORS 311.235 to avoid the statutory lien securing an *ad valorem* tax claim on real property.

9. <u>11 USC § 724(b) Subordination of Tax Liens in Chapter 7 Cases</u>.

a) The Amendments.

§ 724. Treatment of certain liens

(a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title (*other than to the extent that there is a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate)* and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in section 507(a)(1) *(except that such expenses, other than claims for wages, salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under chapter 7 of this title and shall not include expenses incurred under chapter 11 of this title)*, 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

…

(e) Before subordinating a tax lien on real or personal property of the estate, the trustee shall

(1) exhaust the unencumbered assets of the estate; and

(2) in a manner consistent with section 506(c), recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property.

…

(f) Notwithstanding the exclusion of ad valorem tax liens under this section and subject to the requirements of subsection (e), the following may be paid from property of the estate which secures a tax lien, or the proceeds of such property:

(1) Claims for wages, salaries, and commissions that are entitled to priority under section 507(a)(4).

(2) Claims for contributions to an employee benefit plan entitled to priority under section 507(a)(5).

b) Analysis.

The amendments to § 724 eliminate the ability of the Trustee to subordinate tax liens arising from *ad valorem* taxes to pay administrative expenses in Chapter 7. The only requirement is that the lien is a properly perfected unavoidable tax lien on property of the estate.

In Oregon and in many other jurisdictions, perfection of *ad valorem* tax liens is automatic. See, ORS 311.405. Moreover, under 11 USC § 362 (b) (18), the automatic stay does not prevent the post-petition creation or perfection of a statutory lien for *ad valorem* property taxes. Thus, at least in jurisdictions where perfection is automatic, it appears that an *ad valorem* tax lien cannot be subordinated to pay administrative expenses.

Compare: With respect to all other types of tax liens, subordination is permitted to pay §507(a)(1) expenses during Chapter 7, only, and wages, salaries and commissions arising after the petition date in converted Chapter 11 cases.

The new amendments represent a significant change of policy by Congress. Subordination of statutory tax liens for *ad valorem* taxes was a hardship on cities and counties that depend upon the taxes to fund basic services. The amendments also remove the obstacles tax creditors previously encountered in determining whether to move to convert a Chapter 11 case to a Chapter 7 case when appropriate.

Congress did not amend § 724(a) with respect to the ability of the Trustee in a Chapter 7 case to avoid a lien that secures a claim specified in § 726(a)(4) i.e.) a penalty. This avoidance power is preserved to the extent that the penalty is not "compensation for actual pecuniary loss".

10. 11 U.S.C. § 726—Late filed Claims.

a) The Amendments.

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed *on or* before the *earlier of*

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) *the* date on which the trustee commences *final* distribution under this section;

….

b) Analysis.

These amendments are largely self-explanatory. They allow a late proof of claim for priority taxes under §507(a)(8)(B) if the claim is filed before the earlier of (A) 10 days after the Summary of Trustee's final report is mailed to creditors, or (B) the date on which the Trustee commences final distribution.

11. 11 U.S.C. § 1112, 1116, and 1307 -- Expanded Grounds for Conversion or Dismissal.

a) The Amendments.

§ 1112. Conversion or dismissal

…

(b)*(1)* Except as provided in *paragraph (2) of this subsection*, subsection (c) of this section, *and section 1104(a)(3)*, on request of a party in interest ~~or the United States trustee or bankruptcy administrator~~, and after notice and a hearing, ~~the court may~~ *absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall* convert a case under this chapter to a case under chapter 7 ~~of this title~~ or ~~may~~ dismiss a case under this chapter, whichever is in the best ~~interest~~ *interests* of creditors and the estate, ~~for~~ *if the movant establishes* cause~~, including~~.

…

(4) *For purposes of this subsection, the term "cause" includes*

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(I) *failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief,*

….

§ 1307. Conversion or dismissal

(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a

hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

b) Analysis.

The amendments impose consequences for the Debtor's failure to file prepetition tax returns or to pay post-petition taxes.

Section 1112(b)(4) expands "cause" for conversion or dismissal in a Chapter 11 case to include:

- failure to satisfy any "filing" requirement under the Bankruptcy Code; §1112(b)(4)(F)
- failure to "timely pay" post-petition taxes or to file post-petition tax returns. §1112(b)(4)(I).

New section 1116, applicable in small business cases, requires timely filing of tax returns and payment of administrative priority taxes.

Section 1307 arguably goes even further in that failure to file returns or to pay post-petition taxes is not merely "cause" for dismissal or conversion, but mandates dismissal or conversion after notice and hearing.

Thus, the Debtor's failure to pay prepetition taxes is not a basis for dismissal or conversion, but a continuing failure to file pre-petition tax returns or to file post-petition tax returns or to pay post-petition taxes is a basis for dismissal or conversion in Chapter 11 and Chapter 13 cases.

12. 11 U.S.C. § 1129 – Regular Installment Payments of Recent Taxes Required For Confirmation of Chapter 11 Plan.

a) The Amendments.

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

…

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that

…

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim ~~deferred cash~~

~~payments, over a period not exceeding six years after the date of assessment of such claim~~, *regular installment payments in cash*

(*i*) of a *total* value, as of the effective date of the plan, equal to the allowed amount of such claim~~.~~;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

b) Analysis.

These amendments require new treatment of §507(a)(8) unsecured priority tax claims to confirm a Chapter 11 Plan. Holders of such claims must receive "regular installment payments in cash", including interest, over a period ending not later than 5 years after the order for relief. They must also receive treatment not less favorable than the most favored general unsecured claim.

The same treatment is required for <u>secured</u> tax claims, to the extent that they would otherwise meet the description of an unsecured priority tax claim, but for the security.

The pre-2005 Code required only "deferred" cash payments over 6 years from the date of assessment. There was no special "installment payment" required for secured claims.

13. <u>11 U.S.C. § 1141 – No Discharge of Tax Debts Based Upon Fraudulent Returns.</u>

a) **The Amendments**.

§ 1141. Effect of confirmation

…

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan

…

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt

…

(B) for a tax or customs duty with respect to which the debtor

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

….

b) Analysis.

This amendment probably will have limited application to *ad valorem* tax claims and is self-explanatory.

14. <u>11 USC § § 1308; 1325 -- Requirement to File Tax Returns in Chapter 13 Cases</u>.

a) The Amendments.

§ 1308. Filing of prepetition tax returns

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond

(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

(B) for any return that is not past due as of the date of the filing of the petition, the later of

(i) the date that is 120 days after the date of that meeting; or

(ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under this subsection, if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under this subsection for

(A) a period of not more than 30 days for returns described in paragraph (1); and

(B) a period not to extend after the applicable extended due date for a return described in paragraph (2).

(c) For purposes of this section, the term "return" includes a return prepared pursuant to subsection (a) or (b) of section 6020 of the Internal Revenue Code of 1986, or a similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.

…..

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if

…

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

b) Analysis.

New section 1308 requires the Debtor to file any unfiled tax returns that were required within 4 years prior to the petition by federal, state, or local law. The Trustee may hold open the 341(a) creditors meeting to permit filing of tax returns; if returns are not filed within the time frames and extensions permitted by the Code, however, the court must dismiss or convert the case.

Under §1325, the filing of all such returns (4 years worth) is a prerequisite to confirmation of a chapter 13 Plan.