

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Case No. 17-bk-12560-KJC
)	Chapter 11
WOODBRIIDGE GROUP OF COMPANIES,)	Judge Kevin J. Carey
LLC, <i>et al.</i> ,)	
)	
)	
Debtors.)	Hearing date: 10/24/18 at 10:00 am
_____)	Objection date: 10/8/18

LIMITED OBJECTION TO CONFIRMATION OF PLAN

The United States, on behalf of its agency, the Internal Revenue Service, makes the foregoing limited objections to confirmation of the Debtors' First Amended Joint Chapter 11 Plan of Liquidation. [D.E. 2397.]

A. The Plan Cannot Prematurely Release the Priority Tax Claims.

1. Plan section 3.1.3 provides that the promise of future payments of Priority Tax Claims constitutes "full satisfaction," and "release" of such respective Claims. The United States' priority tax claims cannot be satisfied except through lawful payment. *See In re Conston*, 181 B.R. 769, 777-779 (D. Del. 1995) (holding that a tax liability does not lose its status as a "tax" because its payment was allowed for in a prior plan).

2. **Proposed Language.** The United States proposes that the Plan provide after section 3.1.3 that "Nothing in this Plan shall release or change the character of any Priority Tax Claim except for its payment in full as required under this paragraph."

B. The Plan Should Preserve The United States' Rights to Setoff and Recoupment.

3. Under 11 U.S.C. § 553, the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that

arose before the commencement of the case.” 11 U.S.C. § 553(a). Although the Debtors preserve their own right to setoff, the Plan does not preserve the United States’ right to setoff. [D.I. 2379, § 7.15.] This provision violates the mandate in section 553 to leave the United States’ right to setoff unaffected, and the Plan should not be confirmed unless the United States’ rights of setoff and recoupment are expressly preserved. *See* 11 U.S.C. § 1129(a)(1).

4. **Proposed Cure:** The United States proposes the following provision be added: “Notwithstanding any other provision of the Plan or Confirmation Order, the United States’ right to setoff and recoupment are preserved.”

C. The Plan Contains Impermissible Releases.

5. The Plan also contains impermissible releases and exculpations. Plan section 5.4.6 limits the liability of the Liquidating Trustee. Similarly, Plan sections 11.11 and 11.12 provides releases and exculpations to the so-called “Released Parties and “Exculpated Parties.”

6. These provisions improperly restrict the United States from assessing or collecting federal taxes from any non-debtor person or entity that may be liable directly or indirectly for the Debtors’ taxes. These non-debtors may become liable based on a variety of theories. *E.g.*, 26 U.S.C. § 6672 (imposing personal liability when withholdings held in special trust are not collected, truthfully accounted for, and paid over). These restrictions on assessment and collection violate the Anti-Injunction Act, which provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. § 7421(a); *In re Becker’s Motor Transp.*, 632 F.2d 242, 246 (3d Cir. 1980) (Anti-Injunction Act applies in bankruptcy cases); *United States v. Plainwell*, 2004 WL 2345717, *2 (D. Del. Oct. 7, 2004) (denying release of officers and directors from potential tax claims).

7. **Proposed Language.** The United States proposes that a new section be added as follows: “Notwithstanding any provision herein to the contrary or an abstention from voting on the Plan, no provision of the Plan, or any order confirming the Plan, (i) releases or exculpates any non-debtor Person from claims of the United States related to the violation of any federal tax laws; or (ii) enjoins, limits, impairs, or delays the United States from commencing or continuing any actions, proceedings, or investigations against any non-debtor Person in any forum for claims related to the violation of any federal tax laws.”

**D. The Plan Should Not Provide Declaratory Relief About
How the Liquidating Trust Will Qualify For Tax Purposes.**

8. Plan section 5.4.2 seeks a prospective declaration that the Liquidating Trust shall qualify as a liquidating trust for federal income tax purposes. *See* 26 C.F.R. § 301.7701-4(d) (setting forth requirements to qualify as a liquidating trust). Such a ruling would be an improper advisory ruling.

9. **Proposed Language.** The United States proposes a statement in be added to any amended plan or order of confirmation stating that: “Nothing in the Plan or Confirmation Order shall constitute a declaratory judgment as to whether the proposed Liquidating Trust qualifies under 26 C.F.R. § 301.7701-4(d).”

WHEREFORE, the United States respectfully asks that confirmation be denied unless the proposed language is accepted.

DATE: October 5, 2018

Respectfully submitted,

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/s/ Ari D. Kunofsky
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CERTIFICATE OF SERVICE

I certify that this Limited Objection to Confirmation was filed with the clerk of the court on October 5, 2018, using the CM/ECF system, which will send notification of such filing to all parties appearing in said system.

DATE: October 5, 2018

/s/ Ari D. Kunofsky
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