

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:
JSENT, INC.

In Proceedings
Under Chapter 11

Case No. 02-32101

Debtor(s).

OPINION

Jsent, Inc. ("debtor") owns and operates a florist shop in Belleville, Illinois. On June 5, 2002, debtor filed the instant chapter 11 proceeding. Debtor's plan provides that regular monthly payments to secured creditors will commence upon confirmation; that payments to priority unsecured tax claimants will begin in the second year after confirmation, with final payment in the sixth year; and that payments to general unsecured creditors will be made in the sixth and seventh years after confirmation.

The Illinois Department of Revenue ("IDOR") filed a proof of claim in the amount of \$4,408.18 for withholding taxes, of which \$2,604.53 is listed as a priority claim. IDOR also filed a proof of claim in the amount of \$35,971.53 for retailer's occupation taxes, of which \$10,405.21 is listed as a priority claim. IDOR objects to debtor's plan for two reasons. First, IDOR contends that the plan circumvents the priority scheme of 11 U.S.C. § 507(a) by paying secured creditors before IDOR's priority tax claims. Second, IDOR argues that the plan violates 11 U.S.C. § 1129(a) by not providing for regular monthly

payments to IDOR upon confirmation.

Pursuant to section 5.01(a) of debtor's plan, IDOR would be paid as follows:

Allowed Claims for debts owed to the Illinois Department of Revenue will be paid in full all sums due and owing within six (6) years of the date of assessment with interest as provided by the Uniform Penalty and Interest Act. The first payment will be made two (2) years after Confirmation for taxes incurred for tax year 1999. The second payment will be due three (3) years after Confirmation for taxes incurred for tax year 2000. The third payment will be due four (4) years after Confirmation for one-half ($\frac{1}{2}$) of the taxes incurred for tax year 2001. The fourth payment will be due five (5) years after Confirmation for the remaining one-half of the taxes incurred for tax year 2001. The fifth payment will be due six (6) years after Confirmation for the taxes incurred for tax year 2002.

Debtor apparently does not owe IDOR for the 1999 tax year,¹ and thus, under the plan provision cited above, IDOR will not receive its first payment until three years after confirmation. According to debtor, IDOR will be paid 24% of its claim in the third year following confirmation, 32% in the fourth year, 32% in the fifth year, and 12% in the sixth year.²

Section 507(a), applicable in chapter 11 proceedings, sets forth nine categories of claims that are entitled to priority status, including specific types of tax obligations. The parties do not dispute that the taxes in question are entitled to priority treatment

¹ It is not clear why the plan states that the "first payment" is for taxes incurred in 1999, since both sides agree that no taxes are owed for that year.

² IDOR has not disputed these percentages.

under section 507(a)(8).³ Rather, IDOR contends that debtor's plan circumvents the priority scheme of 11 U.S.C. § 507(a) by paying secured creditors before its tax claims. The Court disagrees.

IDOR apparently believes that as a priority creditor, it is entitled to be paid either before or at the same time as secured creditors. Nothing in section 507(a) or in the Bankruptcy Code supports this position. Priority creditors are subject to the rights of holders of liens against property, and "[t]he right to priority does not grant or imply any right to affect the rights of holders of secured claims...." 4 *Collier on Bankruptcy* ¶ 507.02[4][a] at 507-18 (15th ed. 2002). The priorities established by section 507(a) are, instead, "priorities as against holders of *unsecured* claims only." *Id.* (emphasis added). See also *In re Sanders Coal & Trucking, Inc.*, 129 B.R. 516, 520 (Bankr. E.D. Tenn. 1991) (government's tax claim does not have priority over secured claims); *In re Gregory Boat Co.*, 144 B.R. 361, 365 (Bankr. E.D. Mi. 1992) (nothing in Chapter 11 requires that a plan propose to pay secured or unsecured claims in any particular time order in relation to tax claims). Therefore, contrary to IDOR's argument, debtor's proposal to pay secured creditors first does not circumvent the priority scheme of section 507(a). In fact, debtor's

³ Section 507(a)(8) lists seven categories of tax obligations that are entitled to priority. Those are (A) taxes measured by income or gross receipts; (B) property taxes; (C) trust fund taxes; (D) employment taxes; (E) excise taxes; (F) customs duties; and (G) penalties related to any of the foregoing. 11 U.S.C. § 508(a)(8). The tax claims of IDOR (for retailer's occupation taxes and withholding taxes) constitute either gross receipts taxes under section 507(a)(8)(A) and/or trust fund taxes under 507(a)(8)(C).

plan complies with section 507(a) by paying IDOR's priority claim before paying general unsecured creditors.

IDOR also contends that debtor's plan violates section 1129(a) of the Bankruptcy Code by not providing for regular monthly payments to IDOR upon confirmation. Section 1129(a)(9)(C) provides:

(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, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

11 U.S.C. § 1129(a)(9)(C) (emphasis added). IDOR contends that the phrase "deferred cash payments" means regular periodic payments over the life of the plan. According to IDOR, section 1129(a)(9)(C) does not allow debtor to delay payment to a priority tax creditor for three years.⁴

In support of this argument, IDOR relies on *In re Mason and Dixon Lines, Inc.*, 71 B.R. 300 (Bankr. M.D.N.C. 1987). In that case, the debtor's plan provided that priority tax claimants would be paid only interest during the six years of the plan, followed by payment of the

⁴ IDOR does not argue that debtor's plan fails to satisfy the "present value" requirement of section 1129(a)(9)(C), nor does it dispute that debtor's plan otherwise complies with section 1129. The only issue IDOR asks this Court to resolve is whether section 1129(a)(9)(C) requires debtor to make regular periodic payments to IDOR over the life of the plan.

entire principal at the end of the sixth year. The court sustained the objections to confirmation, holding that under section 1129(a)(9)(C), debtor was required to make installment payments over six years with seventy-two equal monthly payments of principal and interest. *Id.* at 302.

Other courts have rejected this reasoning and instead, have adopted a more flexible interpretation of section 1129(a)(9)(C). For example, in *In re Gregory Boat Co.*, 144 B.R. 361 (Bankr. E.D.Mi. 1992), the court approved a plan that proposed a one year delay in payments to the tax claimants, finding that "nothing in the language of § 1129(a)(9)(C) requires that a Chapter 11 plan must propose equal monthly payments on priority tax claims." *Id.* at 363. In *In re Snowden's Landscaping Co.*, 110 B.R. 56 (Bankr. S.D. Al. 1990), debtor proposed paying state and federal priority tax claims over a five year period as follows: 5% in the first year following confirmation, 15% in the second year, 26.66% in the third year, and 26.67% in the fourth and fifth years. That court also found no basis for a restrictive interpretation of section 1129(a)(9)(C). *Id.* at 61. Noting that nowhere in the Bankruptcy Code is the term "deferred cash payments" defined, the court held that the question of whether a proposed plan complies with section 1129(a)(9)(C) must be determined on a case by case basis. *Id.* See also *In re Volle Electric, Inc.*, 139 B.R. 451, 455-56 (C.D. Ill. 1992) (affirming bankruptcy court's holding that section 1129(a)(9)(C) does not require payments to be made in equal

monthly installments over the life of the plan).

This Court, too, declines to follow the holding of *Mason and Dixon Lines, Inc.* The language of section 1129(a)(9)(C) clearly permits "deferred cash payments" within six years of assessment. As stated in *Sanders Coal & Trucking, Inc.*, "deferred" simply means delayed. 129 B.R. at 520. Nothing in the statute requires that payments to priority tax creditors must be either periodic or equal. In the absence of such a requirement, the Court finds it inappropriate to impose any limitation upon the flexibility allowed by the statutory language. *In re Gregory Boat Co.*, 144 B.R. at 364. Instead, the Court adopts the approach suggested in *Snowden's Landscaping* and *Volle Electric, i.e.*, the question of whether a chapter 11 plan satisfies section 1129(a)(9)(C) must be resolved on a case by case basis, giving "due consideration to the interrelated objectives of reorganization--business preservation and creditor satisfaction." *In re Volle Electric*, 139 B.R. at 455.

In the instant case, debtor's disclosure statement⁵ indicates that its chapter 11 petition was prompted by IDOR's enforcement action on the delinquent taxes. Debtor contends that forcing it to begin payments to IDOR in the first year following confirmation would place debtor in the same position as it was prior to this bankruptcy. According to debtor, it has limited excess cash and needs to postpone

⁵ An order approving the disclosure statement was entered on November 20, 2002.

payments to unsecured creditors to build up a cash reserve, in the early years, for working capital. Additionally, the disclosure statement provides that in a chapter 7 liquidation, only \$4,650 would be paid to unsecured creditors, resulting in a payment to IDOR of approximately \$1,400.00, or 3% of its claim. Based on debtor's estimates, which IDOR does not dispute, IDOR will receive 24% of its claim with the first payment, 32% with the second payment, 32% with the third payment, and 12% with the fourth payment. Thus after payment of the 2000 taxes, IDOR will be significantly better off than it would in a liquidation. Under these facts, the Court finds that debtor's plan complies with section 1129(a)(9)(C), and that IDOR's objection to confirmation should be overruled.

SEE WRITTEN ORDER.

ENTERED: March 25, 2003

/s/ Kenneth J. Meyers
UNITED STATES BANKRUPTCY JUDGE