

11 U.S.C. § 507(a) (7) (C)
11 U.S.C. § 101(27)
O.R.S. 576.044 et seq.

In re Belozer Farms, Inc., Case No. 394-31786-dds7

12/22/95 DDS Unpublished

The trustee objected to priority claim of the Oregon Fryer Commission ("OFC"). OFC is a commodity commission with statutory authority to levy an assessment against the first purchaser of commodity sales. Debtor was a fryer producer and a first purchaser of fryers. Debtor failed to pay pre-petition assessments and the OFC filed a claim asserting the assessments were entitled to priority status as a tax pursuant to 11 U.S.C. § 507(a) (7).

Applying In re Lorber Industries of California, Inc., 675 F.2d 1062 (9th Cir. 1982) the court held that the assessments were "non-tax fees." Under the statutory scheme the OFC is a voluntary entity and thus the assessments were also "voluntary." Further, the assessments were not imposed for public purposes, but rather to advance the marketing interests of fryer producers. The court also held that the OFC is not a governmental unit for purposes of the Bankruptcy Code. It is instead an entity created to further the interests of fryer producers. Accordingly, the assessments were not entitled to priority status.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 394-31786-dds7
BELOZER FARMS, INC.,)
) MEMORANDUM OPINION DENYING
Debtor.) PRIORITY STATUS TO CLAIM 126

The trustee's objection to Claim No. 126 is sustained because the assessments which form the basis of the claim are not taxes and, alternatively, because the Oregon Fryer Commission ("OFC") is not a governmental unit for purposes of priority.

Debtor was a fryer producer. The OFC is a commodity commission created pursuant to ORS 576.044 et seq. Pursuant to ORS 576.325, OFC is authorized to levy an assessment on commodity sales. The assessment is chargeable against the first purchaser of the commodity. Debtor was a first purchaser of fryers. Debtor failed to pay assessments due for the period October 1993 through February 1994 in the

amount of \$42,822.78. OFC filed Claim No. 126 asserting that the assessments¹ are entitled to priority status pursuant to 11 U.S.C. §507(a)(7)². Section 507(a)(7)(C) accords priority status to allowed unsecured claims of "governmental units" to the extent such claims are "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity."

I find that the assessments reflected in Claim No. 126 are not taxes and that for the limited purpose of applying federal priority law, the OFC is not a governmental unit. Accordingly, \$42,822.78 of Claim No. 126 is allowed as a general unsecured claim eligible for distribution pursuant to 11 U.S.C. §726(a)(2). My reasons follow.

The assessments are "non-tax fees" under the federal priority statute "because of the characteristics of the charge" within the rules of In re Lorber Industries of California, Inc., 675 F.2d 1062 (9th Cir. 1982) and In re Camilli, (9th Cir BAP, 1995). In order for the assessment to

¹Claim No. 126 was filed in the amount of \$87,629.79. The court by oral ruling sustained the trustee's objection with respect to the penalty portion of the claim, which is an unsecured claim subordinate to other claims pursuant to 11 U.S.C. §726(a)(4). The instant dispute involves OFC's entitlement to priority status for the original amount of the assessments.

²Now 11 U.S.C. §507(a)(8); however, because this case was filed prior to the effective date of the 1994 amendments to the Bankruptcy Code, governmental units retain seventh priority status.

constitute a tax, the assessment must be:

- "(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property;
- (b) Imposed by, or under authority of the legislature;
- (c) For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;
- (d) Under the police or taxing power of the state."

Lorber, at 1066.

Under the statutory scheme the OFC is a voluntary entity which was created and which continues because the fryer producers want it to. If a sufficient number of fryer producers were to decide they did not want the OFC to continue, the OFC could be terminated and with it any requirement for the payment of the assessments. Because it is within the power of fryer producers to end the assessments, I find that the assessments are voluntary to the fryer producers as a group. Further, based upon the statutory analysis below, the assessments are not imposed for public purposes, but to further the marketing interests of the fryer producers. Because the assessments are voluntary and are not imposed for public purposes, they do not constitute taxes. Finally, under the "duck test" in Camilli, the charges in this case have a far less justification to claim status under federal law as a tax than workers compensation assessments.

The OFC is not a governmental unit. 11 U.S.C.

§101(27) defines "governmental unit" for purposes of the Bankruptcy Code. The definition includes a "department, agency or instrumentality of a State." To be a governmental unit, an entity must actually be carrying out some governmental function. Wade v. State Bar of Arizona, 115 B.R. 222, 227 (9th Cir. BAP 1990), aff'd 948 F.2d 1122 (9th Cir. 1991).

Title 47 of the Oregon Revised Statutes contain the provisions relating to agricultural marketing and warehousing. It is evident from the construction of Title 47 as a whole that the legislature recognized that certain commodities affected the general welfare and specifically created commissions to protect those public interests.³ The OFC was not a specific statutory creation, but was established through general legislation authorizing the creation of commodities commissions in appropriate circumstances when requested by producers of the commodity. ORS 576.044 et seq.

It is clear from ORS 576.044 et seq. that commodity commissions such as the OFC are not established for a

³ORS 577.120 (Beef Council created to protect and further public health and welfare); ORS 577.705 (Sheep Commission created because the sheep industry is affected with a public interest); ORS 578.020 (Wheat Commission created to promote public health and welfare); ORS 579.020 (Potato Commission created for the protection of the potato industry and the potato consumer).

governmental purpose, but to further the interests of the commodity producers. When reviewing a petition from producers to establish a commodity commission, the Department of Agriculture must determine "whether or not there is need for the creation of a commission in the interest of the general welfare of the producers of the commodity." ORS 576.085(1). In making this determination the Department considers the factors enumerated in ORS 576.085(3), all of which relate to commodity marketing.

Priority is denied to Claim No. 126. \$42,822.78 of Claim No. 126 of the OFC is allowed as a general unsecured claim subject to distribution pursuant to 11 U.S.C. §726(a)(2). The court will enter a separate order consistent with the foregoing.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Jon R. Summers
Robert K. Morrow
Frederick M. Boss
John C. Caldwell
U. S. Trustee