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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
          ) 396-34880-elp13  
JERRY A. BRANNON, )  
MICHELLE C. BRANNON, ) MEMORANDUM OPINION  
                          ) )  
                          ) Debtors. )

The issue in this contested matter is whether a postpetition claim allowable under section 1305 of the Bankruptcy Code<sup>1</sup> is payable by the Chapter 13 trustee only if the debtor includes an explicit provision in the Chapter 13 plan providing for payment of postpetition claims. Debtors filed a motion to allow the postpetition claims of the Oregon Department of Revenue ("ODR") and the Internal Revenue Service ("IRS") pursuant to section 1305 and to pay the claims as priority claims under the confirmed plan. ODR objects to the debtors' motion; the IRS joins debtors in their motion. The trustee does not object to allowance of the section 1305 claims, but does object to the payment of the claims as

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<sup>1</sup> All statutory references in this opinion are to the Bankruptcy Code, 11 U.S.C. § 101 et seq.

1 proposed.

2 FACTS

3 Debtors filed Chapter 13 in July 1996. In May 1997 they  
4 sought allowance of postpetition claims for state and federal income  
5 taxes due for the 1996 tax year. Their Chapter 13 plan provides for  
6 payment of priority debts; it does not explicitly provide for  
7 payment of postpetition claims.

8 ISSUE

9 Must the trustee pay an allowed section 1305 claim for  
10 priority postpetition taxes pursuant to paragraph 2(d) of the  
11 confirmed plan, which deals generally with payment of priority  
12 claims?

13 DISCUSSION

14 As a general rule, a Chapter 13 bankruptcy does not affect  
15 postpetition claims. In re Hester, 63 B.R. 607, 609 (Bankr. E.D.  
16 Tenn. 1986). Chapter 13 makes an exception for certain types of  
17 postpetition claims, including postpetition tax claims. 11 U.S.C.  
18 §§ 1305(a)(1); 1322(b)(6).

19 It has been the practice in this district for a number of  
20 years to allow payment of section 1305 tax claims after payment of  
21 the other claims as provided by the confirmed plan, with the  
22 limitation that the plan payments cannot continue longer than sixty  
23 (60) months. In this case the IRS challenges the historical  
24 practice. Understanding the dimensions of the dispute requires  
25 knowledge of both the law and the form Chapter 13 plan that is used  
26 in this district.

1 A Chapter 13 plan must provide for payment in full of all  
2 priority claims unless the claimant agrees to other treatment.  
3 11 U.S.C. § 1322(a)(2). This district's form plan generally uses  
4 the "pot" plan approach.<sup>2</sup> The debtor creates a "pot" of money by  
5 making payments as specified by paragraph 1 of the plan. The  
6 trustee then distributes the "pot" in accordance with paragraph 2 of  
7 the plan. After the trustee pays the administrative expenses and  
8 the periodic payments specified for secured creditors, the trustee  
9 takes all available funds and distributes them to creditors entitled  
10 to priority under section 507(a)(3)-(8). Chapter 13 Plan ¶ 2(d).

11 The IRS and debtors argue that the IRS's postpetition claim  
12 should be allowed as a priority claim under section  
13 507(a)(8)(A)(iii)<sup>3</sup> and paid pursuant to paragraph 2(d) of the  
14 confirmed plan.<sup>4</sup> The trustee does not challenge the allowance of  
15 the claim as a priority under section 507(a)(8), but argues that

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17 <sup>2</sup> The "pot" plan approach is somewhat modified by earmarking the portion  
18 of the payments to be distributed to secured creditors under paragraph 2(b) of the  
19 plan. See P. Higdon, "More on the Changes in Chapter 13 Practice in Oregon," Vol.  
XV, Number 1, Oregon Debtor-Creditor Newsletter at p. 2 (Spring 1996). Because  
earmarking is not relevant to the issue before the court, I will not discuss it.

20 <sup>3</sup> Subsection 507(a)(8)(A)(iii) provides that a claim for income tax that  
21 is "not assessed before, but assessable under applicable law or by agreement,  
22 after, the commencement of the case" is entitled to eighth priority. The IRS  
recognizes that only taxes for 1996, the year the petition was filed, would be  
entitled to priority status under section 507(a)(8)(A)(iii).

23 <sup>4</sup> At the hearing, debtors' counsel raised a question whether 11 U.S.C.  
24 § 502(i) had any bearing on my determination of this motion. The trustee argued  
25 that section 502(i) is not relevant to the treatment of claims filed under section  
26 1305. I allowed time for the parties to brief the issue. The IRS has responded  
that section 502(i) is not relevant to this matter, and the trustee and debtors  
did not file a reply. I agree with the IRS and the trustee that subsection (i) is  
not relevant.

1 allowance of a postpetition priority claim does not transform it  
2 into a prepetition claim payable under paragraph 2(d) of the plan.  
3 The trustee further argues that postpetition claims are payable  
4 under the plan only if the plan expressly provides for payment of  
5 postpetition claims.

6 Bankruptcy Code section 1305(a) provides, in part:

7 "A proof of claim may be filed by any entity that holds a  
8 claim against the debtor --

9 "(1) for taxes that become payable to a governmental  
unit while the case is pending[.]"

10 Unlike prepetition claims, only the postpetition claim holder may  
11 file a proof of claim for that debt; postpetition claims may not be  
12 filed by the debtor on the creditor's behalf. In re Glover, 107  
13 B.R. 579, 581 (Bankr. E.D. Ohio 1989); 2 Lundin, Chapter 13  
14 Bankruptcy § 7.25 at 7-46 (2d ed. 1994). The IRS has filed a  
15 section 1305 claim. ODR decided not to file a claim for  
16 postpetition taxes, nor to consent to having debtors file a claim  
17 for it. Therefore, the ODR's objection will be sustained.

18 The statutory scheme leaves a postpetition creditor such as  
19 the IRS with two options. It can decide not to file a claim under  
20 section 1305, in which case it does not participate in the  
21 distributions under the plan, and it is free to pursue collection of  
22 postpetition debts. In re Mason, 45 B.R. 498 (Bankr. D. Or. 1984).  
23 Such collection efforts by postpetition creditors can jeopardize the  
24 debtor's completion of the plan.

25 Alternatively, the creditor can file a claim under section  
26 1305, and participate in distributions under the plan, so long as

1 the plan provides for claims allowed under section 1305. This  
2 option benefits the postpetition creditor, because payments through  
3 the plan provide a less expensive means of collection than do  
4 seizure or garnishment. The creditor may also want to obtain  
5 payment from the financially distressed debtor through the plan,  
6 which stabilizes the debtor's financial situation.

7 The creditor's choice to file a proof of a postpetition claim  
8 is not necessarily without its drawbacks, however. Section  
9 502(b)(2), which is applicable to section 1305 claims pursuant to  
10 11 U.S.C. § 1305(b), prohibits recovery of interest on the claim,  
11 and may also preclude assertion of late-payment tax penalties.

12 The issue to be resolved in this matter is whether a  
13 provision in a confirmed plan for payment of priority claims  
14 constitutes a provision for payment of a claim allowed under section  
15 1305.

16 The IRS argues that an allowed postpetition claim should be  
17 treated for distribution purposes as a prepetition claim, so that it  
18 would be paid under a plan provision for payment of priority claims.  
19 It relies on the fact that a section 1305(a) claim will be allowed  
20 or disallowed under section 502(a)-(e) "the same as if such claim  
21 had arisen before the date of the filing of the petition."  
22 11 U.S.C. § 1305(b)<sup>5</sup>.

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24 <sup>5</sup> Section 1305(b) provides:

25 "shall be allowed or disallowed under section 502 of this title, but shall  
26 be determined as of the date such claim arises, and shall be allowed under  
section 502(a), 502(b), or 502(c) of this title, or disallowed under section  
(continued...)

1           The trustee argues that, although the postpetition tax claim  
2 is allowed or disallowed the same as if the claim had been a  
3 prepetition claim, it still retains its status as a postpetition  
4 claim, which cannot be paid unless the plan explicitly provides for  
5 payment of postpetition claims. The trustee points out that, under  
6 section 1322(b)(6), a Chapter 13 plan may provide for the payment of  
7 all or part of a claim allowed under section 1305. Thus, the debtor  
8 is given the option whether to include such claims in the Chapter 13  
9 plan.

10           I conclude for several reasons that a plan must provide  
11 explicitly for allowed postpetition claims in order for those claims  
12 to be paid through the plan. First, to reach a contrary conclusion  
13 would make section 1322(b)(6) superfluous. If all allowed  
14 postpetition claims were transformed into prepetition claims for all  
15 purposes, there would be no reason to include a provision in the  
16 plan relating to postpetition claims.

17           Second, treating allowed postpetition claims as prepetition  
18 claims would also upset the voluntary nature of the treatment of  
19 postpetition claims in a Chapter 13 plan.

20           "[W]hether or not a post-petition claimant will participate  
21 in a distribution under a Chapter 13 plan must be the product  
22 of mutual, voluntary decisions on the part of both debtor and  
23 creditor that it will do so. The debtor must exercise the  
option it has under § 1322(b)(6) to provide for the payment  
of post-petition claims and the claimant must exercise its

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24           <sup>5</sup>(...continued)

25           502(d) or 502(e) of this title, the same as if such claim had arisen before  
26           the date of the filing of the petition."

1 option under § 1305 to file its claim in the proceeding.  
2 Unless both options are exercised, no payment can occur;  
3 there will either be a plan provision for which no claims are  
filed or a claim for which there is no provision in the  
plan."

4 In re Fletcher, 1990 WL 305558, \*3 (Bankr. N.D. Ind. 1990).

5 All Chapter 13 plans must provide for payment in full of  
6 priority claims, unless such claimants agree to other treatment.  
7 11 U.S.C. § 1322(a)(2). Chapter 13 plans also provide for unsecured  
8 creditors (otherwise the unsecured claims will not be discharged  
9 under section 1328(a)). Because most postpetition claims will fall  
10 into one of those two categories, treating allowed postpetition  
11 claims as prepetition claims would deprive the debtor of the choice  
12 whether to include postpetition claims in the plan. Instead of  
13 having the participation of postpetition claimants result from  
14 mutual, voluntary choices of the debtor and the creditor, the  
15 creditor would be able to force its way into the debtor's plan. I  
16 do not think that Congress intended to give the postpetition  
17 creditors that type of power.

18 Third, to hold to the contrary would make it far more  
19 difficult to determine whether a proposed plan is feasible. In  
20 order to determine feasibility, the court must determine whether the  
21 plan funding is sufficient to pay the amounts required to be paid  
22 under the plan. Making such a determination requires that the court  
23 know the amount of the claims. Claims that do not yet exist are  
24 difficult, if not impossible, to determine.

25 Fourth, treating allowed postpetition claims as prepetition  
26 claims introduces the possibility of plan manipulation after

1 confirmation. The nature of the "pot" plan used in many cases  
2 before this court is that the debtor is required to pay a fixed  
3 amount into the pot. Sometimes the amount in the pot is established  
4 by the minimum the debtor must pay to meet the "best interests test"  
5 of section 1325(a)(4), which requires that creditors receive not  
6 less than they would receive in a Chapter 7 case. If the IRS and  
7 the debtors prevail in their arguments, a debtor who is required to  
8 pay money to the general unsecured creditors in order to meet the  
9 "best interests test" could avoid having the money go to the  
10 unsecured creditors by underpaying their taxes and having the tax  
11 claimant file a postpetition priority claim. Underpayment of taxes  
12 frequently results in the debtor incurring less tax expense than  
13 shown in their Schedules I and J, thus leaving the debtor with more  
14 disposable income than indicated on their budget.<sup>6</sup> Requiring the  
15 debtor to file a modified plan to pay section 1305 claims also  
16 insures that the trustee and the creditors can determine whether the  
17 debtor still meets the good faith requirement of section 1325(a)(3).

18 The IRS argues that its position is supported by In re

19 \_\_\_\_\_  
20 <sup>6</sup> That is what happened in this case. On debtors' schedule I, they  
21 estimated that, between the two of them, they would withhold \$550 per month for  
22 taxes and social security. In fact, they withheld only a total of \$373 for  
23 federal taxes for all of 1996. As a result, they incurred a federal tax liability  
24 of \$2,465 for the 1996 tax year.

25 Debtors had \$2,480 total withheld for social security and Medicare, or \$206  
26 per month. That left \$344 of their estimated monthly withholding for state and  
federal taxes. Their total tax liability, state and federal, was \$4,565, or \$380  
per month; their total withholding for both state and federal taxes was \$1,146, or  
\$95 per month.

Debtors provide an explanation for the variation between their Schedule I  
estimate and their actual withholding. Whether the explanation is sufficient to  
meet the good faith requirement will await confirmation of a modified plan that  
proposes to pay the section 1305 claim.

1 Wright, 66 B.R. 125, 127 (Bankr. D. Kan. 1984), in which the court  
2 concluded that a postpetition tax claim should be "allowed and  
3 treated as a priority claim to be paid pursuant to the plan[.]" The  
4 court reached that conclusion without any analysis. I do not find  
5 the case persuasive.

6 The IRS also relies on the legislative history of section  
7 1305. The House Judiciary report says:

8 "The effect of [the provision in section 1305(a)(2) regarding  
9 the allowance of postpetition consumer debts that are  
10 necessary for a debtor's plan performance], is to treat  
11 postpetition credit extended to a chapter 13 debtor as a  
prepetition claim for purposes of allowance, distribution,  
and so on."

12 H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 428 (1977) (reprinted  
13 in App. C, Collier on Bankruptcy at pt. 4(d)(i) (15th ed. rev.  
14 1997)). Because the committee referred to distribution as well as  
15 allowance, the IRS asserts that Congress intended that section 1305  
16 claims "should be treated globally as prepetition claims."

17 I disagree. First, section 1305 does not refer to the  
18 priority statute, section 507, but only to the claim allowance  
19 statute, section 502. That is an indication that treatment as a  
20 prepetition claim is limited to allowance or disallowance. Second,  
21 Congress has provided for treatment of postpetition claims "globally  
22 as prepetition claims" in section 348(d), which provides that, in a  
23 case converted under section 1307,

24 "a claim that arises after the order for relief but before  
25 conversion . . . shall be treated for all purposes as if such  
26 claim has arisen immediately before the date of the filing of  
the petition."

1 (Emphasis supplied.) If Congress had intended that all postpetition  
2 claims allowed under section 1305 should be treated for all purposes  
3 as prepetition claims, it knew how to make such an intent explicit.  
4 It did not do that.

5 I conclude that a postpetition claim is not transformed into  
6 a prepetition claim by allowance. Accord 1 Lundin, Chapter 13  
7 Bankruptcy § 4.96 at 4-200 (2d ed. 1994); In re Smith, 192 B.R. 712  
8 (Bankr. E.D. Tenn. 1996). Therefore, I will allow this claim as a  
9 postpetition, unsecured priority claim.

10 CONCLUSION

11 ODR's objection to debtors' motion to allow section 1305  
12 claim is sustained. The IRS's claim is allowed as a postpetition  
13 unsecured priority claim. If debtors desire to pay the IRS through  
14 their plan, they must file a modified plan to provide for payment of  
15 the postpetition claim.<sup>7</sup> If they do not modify, the IRS's claim  
16 will not be paid through this plan.<sup>8</sup>

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ELIZABETH L. PERRIS  
Bankruptcy Judge

20 cc: M. Caroline Cantrell  
21 Jeffrey Wong  
22 J. Vincent Cameron  
Mary Lou Haas

23  
24 <sup>7</sup> I do not address in this opinion whether such a modification is  
allowable under section 1329(a). See 2 Lundin, Chapter 13 Bankruptcy § 6.51 at  
25 6-156-157 (2d ed. 1994).

26 <sup>8</sup> Of course, an allowed postpetition claim will not be discharged unless  
it is provided for in the plan. 11 U.S.C. § 1328(a).