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Judge Robert D. Drain
Chapter 11
Hearing Date: January 9, 2004
Hearing Time: 10:00 EST
Hearing Location: Manhattan
Response Due Date: January 8, 2004

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AT MANHATTAN

In re ALLEGIANCE TELECOM, INC, Debtor.	NO. 03-13057 STATE OF WASHINGTON OBJECTION TO §1146(c) EXEMPTION FOR PROPOSED SALE.

COMES NOW counsel for the State of Washington and STATES as follows:

1. State of Washington Not Served. The State was not served under Bankruptcy Rule 9014 and 7004(b)(6) and RCW 4.92.020. Had the State not been informed of the proposed transaction by an assistant attorney general for the State of Texas a non-binding order would have entered as to the State of Washington.[1]

2. Improper Expansion of Sec.1146(c) by FRCP 8 Rules. Debtor pleaded Sec.1146(c) at ¶¶46-47: pp.32-33 of their **Motion**. It is the position of every state that §1146(c) exemption is not applied without a then-confirmed plan of record on the court docket. There is no reference to whether debtor would time closing so as to only turn over possession after plan confirmation. It certainly is not stated in any pleading. Debtor didn't plead any right to apply Sec.1146(c) to "sales and use tax" but tries to make loose reference to being “exempt from paying transfer taxes”. This an impermissible expansion of §1146(c) and a less than candid way to bring the issue before the

[1] Compare **Motion**, ¶28, p.25 recitations about service upon all Attorneys General and taxing authorities with tax *nexus*. The fact that debtor fails in the instant motion to specifically plead or summarize tax *nexus* makes the declaration less than informative.

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court. The only way to establish with certainty that this is the debtor's intent is to read hundreds of pages of additional sales documents, which violates the clear dictates of FRCP 8(a) and FRCP 11. In the sales document, in **Article I**, "Definitions" (p.8) there is a paragraph that defines "transfer tax" to include sales, use and a whole slurry of taxes that were never intended to be subsumed within §1146(c). At ¶6.10(a) final sentence (p.49) such intentions are made clear. Finally, the **Proposed Order** lodged with the court at ¶29 attempts to confirm these indirect efforts by further acts of prestidigitation and obfuscation. The sentence injects "transfer" into the §1146(c) language that is in fact not there. Here is exactly what the statute does say:

> The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, *may not be taxed under any law imposing a stamp tax or similar tax*.

3. Proper Pleading of Tax Nexus. It is virtually impossible to ascertain what type of tax *nexus* debtor has with various states. This is important, because many states do not impose sales and/or use tax on sales of assets in bankruptcy, which could possibly moot this entire controversy.

4. Is This Case Ripe for Adjudication? Assuming the State of Washington position on sales and use tax is correct, it is still not clear there is a §1146(c) controversy, as most states only apply stamp tax on fee sales. It simply is not clear whether debtor is selling any such interest. If not, there might not even be a tax controversy.

5. Demand for FRCP 11 Retraction of §1146(c) Language. Attached hereto and incorporated herein by reference as **Exhibit 1** is an email dated December 23, 2003 demanding that any reference to §1146(c) be stricken. Should this matter have not been resolved by the time of hearing the State of Washington asks the court to consider appropriate FRCP 11 relief and to consider other recent conduct of the subject law firms in relation thereto.

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STATEMENT OF THE LAW

A. Procedural Due Process Has Been Disregarded.

Debtor apparently believes that it can effectively "bait the trap" by telling Washington and other taxing agencies "just enough" for them to find out on their own what they need to know about a proposed sale. This type of logic has been rejected by the courts:

> Reliable was put on notice of Olson's status as a potential creditor. Despite this, no formal notice of any kind regarding the reorganization proceedings, or the time and manner of filing a claim, was ever given to Olson prior to the confirmation hearing. . . . Although Olson's attorney was generally aware of Reliable's involvement in reorganization proceedings, Olson was essentially denied the opportunity to be heard at the confirmation hearing. Reliable Electric Co., Inc. v. Olson Construction Co., 726 F.2d 620, 622 (10th Cir. 1984).

Reliable tried to argue that, given the attorney's expertise and ability to make inquiry, he should be bound by a discharge under § 1141(d) for not having taken effective action to file a claim and/or object to a plan. This argument was also rejected:

> As specifically applied to bankruptcy reorganization proceedings, the Court has held that a creditor, who has general knowledge of a debtor's reorganization proceeding, has no duty to inquire about further court action. The creditor has a "right to assume" that he will receive all of the notices required by statute before his claim is forever discharged. Reliable Electric, supra at 622.

In this case the Debtor has made misleading references to the tax relief sought and failed to adequately identify tax "nexus" with various states—causing considerable confusion. As the Ninth Circuit succinctly notes, "it is the debtor's knowledge of a creditor, not the creditor's knowledge of his claim, which controls whether the debtor has a duty to list that creditor [cite omitted]" and provide timely and complete notice. In re Maya Construction Co., 78 F.3d 1395, 1398-99 (9th Cir. 1996).

In Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 257 (3rd Cir. 2000), the debtor in a Delaware-filed Chapter 11 had obtained an order selling property free and clear of liens that included the following language:

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> Any and all creditors of the Debtors are permanently enjoined and restrained from seeking to obtain payment or satisfaction of their claims against the Debtors from the Purchaser or the Acquired Assets.

The purchaser then asserted that affirmative defenses to collection on accounts receivable had been "stripped" by the order. The court rejected this claim as a matter of law. Id. at 264.

The Motion to Sell violates procedural due process in failing to plead fairly so as to give appropriate notice and clearly attempts to obtain relief that the debtor would not have the court actually review or adjudicate. See: In re Automation Solutions Intl., LLC, 274 B.R. 527 (Bankr. N.D. Cal. 2003).

B. The Relief Sought by the Debtor in its Proposed Order Improperly Exceeds the Relief Requested in the Motion.

A court may not enter a judgment that goes beyond the claim asserted in the pleadings. Armstrong Cork Co. v. Lyons, 366 F.2d 206, 208 (8th Cir. 1966). It is the Debtor's responsibility to provide adequate notice that meets the requirements of procedural due process.

> Although the federal pleading requirements are not onerous, they do impose upon claimants the responsibility of giving defendants at least some measure of notice as to what the claim entails. See, e.g. Boston & Me. Corp. v. Hampton, 987 F.2d 855, 862, 863 (1st Cir. 1993); Roth v. United States, 952 F.2d 611, 613 (1st Cir. 1991). Tower v. Brown, 167 F. Supp.2d 399 (D.Me. 2001).

Giving a measure of notice does not mean that someone should have to "infer" something where it is not plainly stated.

> Courts are never bound by the specific labels a party attaches to its complaint, and parties cannot use artful pleading to circumvent the limitations of a statute or to suggest that they are seeking one thing when they are really seeking another. See, e.g., Brown v. GSA, 425 U.S. 820, 833, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). Tri-State Hospital Supply Corp. v. U.S., 142 F. Supp.2d 93 (D.D.C. 2001) (emphasis added).

The Debtor's request that the sale be exempt from taxation other than a stamp or similar tax must be denied as beyond the relief requested in the Notice/Motion.

C. 11 U.S.C. §1146(c) Does Not Provide An Exemption For Any Type of State Tax Other Than A Stamp Tax.

Section 1146(c) exempts from taxation a "stamp tax or similar tax." The expansive proposed order exempting the sale from sales, transfer and other taxes is not supported by the

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Bankruptcy Code or case law in any circuit. The Honorable Gregory M. Sleet, U.S. District Court Judge, has recently denied the same relief in almost identical circumstances in In re G.S.T., Inc., 39 BCD 75, 2002 WL 442233 (D.Del. 2002). It goes without saying that there is no confirmed plan in place at this time. That means the debtor has no right to invoke any provision of §1146(c). .In In re 995 Fifth Avenue Associates, L.P., 963 F.2d 503 (2nd Cir. 1992), the court considered whether the debtor's sale of its interest in a hotel pursuant to a Chapter 11 plan was exempt from a 10% tax imposed under New York State law on gains derived from transfer of real property. The court unequivocally stated that this tax was not exempted under rules of statutory construction, *stare decisis*, and was not a "stamp tax".

> The report of the House Judiciary Committee stated that '[s]ection 1146(c) broadens the exemption to any stamp or similar tax.' [cite omitted] We disagree with the district court to the extent it concluded that this statement reflects Congress' intent that the words 'stamp or similar tax' be read broadly to afford greater tax relief for debtors. Id. at 510 n.2 (emphasis added).

By applying the plain meaning of the statute, the court concludes that an essential characteristic of §1146(c) taxes is that they are calculated using a low tax rate—typically one percent or less. Id. at 511. A sales or use tax, which Washington law imposes on the sale of personal property, is intended to tax a sale at approximately 8% and has nothing to do with a recording or stamp tax.

> Black's Law Dictionary 1259 (5th Ed.1979) defines "stamp tax" as the "cost of stamps which are required to be affixed to legal documents such as deeds, certificates, and the like."…
>
> This definition indicates that there are least two attributes to a stamp tax, as that term is commonly understood: the tax must be paid prior to recordation and the amount due is generally governed by the consideration provided in the instrument. In re 995 Fifth Avenue Assoc., 963 F.2d 503, 511 (2nd Cir. 1992).

In In re GST, Inc., supra, Judge Sleet held that the State's sales or use tax is not a stamp tax. Under applicable state law the sales/use tax may be collected against either the buyer or seller. The Debtor's request that the sale be exempt from taxes other than a stamp tax is not supported by §1146(c) or case law and should be denied.

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A careful review of legislative history demonstrates repeated reference under §1146(c) to only stamp tax. In turn, the legislative history makes it clear this language is historically tied to bankruptcy statutes back to The Chandler Act of 1938 and before that §77B of the Bankruptcy Act of 1934.

HISTORICAL AND REVISION NOTES LEGISLATIVE STATEMENTS

> Section 1146 of the House amendment represents a compromise between the House bill and Senate amendment….The House bill also exempted from State or local stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan. …
> ….
> SENATE REPORT NO. 95-989
> ….
> Subsection (c) exempts from Federal, State, or local stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan. This subsection is derived from section 267 of the present Bankruptcy Act (section 667 of former title 11).
> ….

As noted, §1146(c) is a statutory "lineal descendant" of a stamp tax exemption provided for under the Chandler Act. Neither section 267 nor section 4382 (of the IRS parallel code) applied to pre-confirmation transfers. *See: 6A Collier on Bankruptcy* ¶15.08 at 840 (14th ed.1977). Whoever had the idea of foisting new language in notices, motions, and proposed orders that would "bootstrap" sales, use and/or excise tax into §1146(c) was fighting clear statutory language and almost seventy years of statutory history to the contrary. And, it goes without saying that nothing in the legislative history indicates the need nor intent to override any case law to the contrary—because there never has been any case law to the contrary.

D. A Sale of Real Property is Not Exempt from a Stamp Tax under §1146(c) Unless There Was a Confirmed Plan At The Time the Property Was Sold.

Under Washington law, a real estate excise tax is imposed on the sale of real estate. RCW 82.45.060. Under state law, the sale is exempt from taxation if the sale is done in a bankruptcy

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1 after the plan of reorganization is confirmed:

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3 (1) The real estate excise tax does not apply to conveyances of real property by a trustee in bankruptcy or debtor in possession made under either a chapter 11 plan or chapter 12 plan after the bankruptcy plan is confirmed. (2) The date when the bankruptcy plan was confirmed, the court case cause number, and the bankruptcy chapter number must be cited on the affidavit when claiming this exemption. Wash. Admin. Code 458-61-230 (emphasis added).

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6 If the Debtor wishes to avoid taxation of the sales transaction in this case, the Debtor must

7 identify a basis for the exemption. The statute relied on by the Debtor is 11 U.S.C. §1146(c), which

8 reads as follows:

9 The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

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11 Washington's real estate excise tax can be considered a "stamp tax".[2] However, to qualify for the

12 exemption, the Debtor must establish that the sale is "under a plan confirmed under section 1129 of

13 this title." Id.

14 1. Under Rules of Statutory Construction, Exemptions from Taxation are Narrowly Construed and the Plain Meaning of the Statute Controls.

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16 Tax exemptions are narrowly construed under federal and state tax law. United States v.

17 Centennial Savings Bank FSB, 499 U.S. 573, 583-84, 111 S.Ct. 1512, 113 L.Ed.2d 608 (1991);

18 Group Health Cooperative of Puget Sound, Inc. v. Washington State Tax Commission, 72 Wn.2d

19 422, 429, 433 P.2d 201 (1967). As discussed in Sacred Heart v. Department of Revenue, 88 Wn.

20 App. 632, 946 P.2d 409 (1997), a tax exemption statute that creates "doubt or ambiguity" must "be

21 construed strictly, though fairly and in keeping with the ordinary meaning of [its] language,

22 against the taxpayer." Id. at 637 (quoting from Group Health Coop. of Puget Sound, Inc. v.

23 Washington State Tax Comm., 72 Wn.2d 422, 429, 433 P.2d 201 (1967).

24 The Supreme Court has recognized that a narrow or restrictive statutory construction is

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26 [2] See in particular RCW 82.45.090 making specific reference to "stamps" being affixed to pertinent documents filed with the auditor.

1 appropriate in those situations where it is argued that Congress sought to immunize various
2 transactions from state or local taxation in the bankruptcy context. See California State Board of
3 Equalization v. Sierra Summit, Inc., 490 U.S. 844, 851-52, 109 S.Ct. 2228, 104 L.Ed.2d 910
4 (1989)("Although Congress can confer an immunity from state taxation, …a court must proceed
5 carefully when asked to recognize an exemption from state taxation that Congress has not clearly
6 expressed). Indeed, the Court noted that "[i]t is evident that whatever immunity the bankruptcy
7 estate once enjoyed from taxation on its operations has long since eroded . . ." Id. at 849.
8
9 2. This Court Should Adopt the Analysis Set Forth in In Re N.V.R and In re Hechinger That Requires a Confirmed Plan Prior to the Sale.
10 Section 1146(c) exempts a sale "under a plan confirmed under section 1129 of this title" from
11 taxation. The Fourth Circuit in In re NVR, L.P., 189 F.3d 442 (4th Cir. 1999) focused on this
12 language and held that a sale is exempt from taxation only if it takes place after the plan has been
13 confirmed. The Fourth Circuit lays out the appropriate path to effectively determining the §1146(c)
14 exemption:
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> We must conclude that Congress, by its plain language, intended to provide exemptions only to those transfers reviewed and confirmed by the court. Congress struck a most reasonable balance. If a debtor is able to develop a Chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference. Reasonable or not, however, we are bound to implement the statute as it is written, and, therefore, hold that the tax exemptions contained in §1146(c) may apply only to transfers under the Plan occurring after the date of confirmation. In Re N.VR, supra at 458 (emphasis added).

That this approach to statutory construction in the bankruptcy context is the correct approach
21 is evident from the opinions of Justice Scalia, who recently took to task those who would read more
22 into the Bankruptcy Code than what is written:
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> In answering this question, we begin with the understanding that Congress "says in a statute what it means and means in a statute what it says there," Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). As we have previously noted in construing another provision of §506, when "the statute's language is plain, 'the sole function of the courts' "-- at least where the disposition required by the text is not absurd -- " 'is to enforce it according to its terms.' " United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d

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290 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)). Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 147 L.Ed.2d 1, 120 S.Ct. 1942 (2000).

Section 1146(c) literally requires that the sale be "under a plan confirmed under section 1129 of this title." No plan has been confirmed in this case. Debtor's sale of property cannot be exempted from taxation under §1146(c). See also: In re Hechinger Inv.Co.., 335 F.3d 243 (3rd Cir. 2003); In re National Steel Co., 2003 WL 22089881 [03C3932] (N.D. Ill. 2003).

> We are mindful that the word "under" does not appear in the statute standing alone, but in the context of the phrase "under a plan *confirmed."* The word "confirmed" in that phrase makes explicit Congress' intent that a plan must be officially confirmed before § 1146(c)'s tax exemption will take effect. National Steel's alternative definition would have us read the word "confirmed" out of the statute entirely, something which we clearly cannot do. In short, National Steel has failed to present an alternative definition of the word "under" that would *not* imply a temporal element. We thus find that under the plain meaning of § 1146(c), a plan must be established before the provision's tax exemption applies. Supra, p.2.

Given the latest thoughtful and thorough statutory analysis that adds to the "mix" the word "confirmed" in the past tense, there is no room for creativity in applying §1146(c). See also: In re Automation Solutions Intl., LLC, 274 B.R. 527, 528 (Bankr. N.D. Cal. 2003) rejecting broad efforts under §363 sales and first day orders to pave the way to §1146(c) exemptions.:

> Even after culling out the patently improper provisions, such as injunctive relief without benefit of an adversary proceeding, or an attempt to have the order trump an order confirming a plan, or an order that the transfer is tax exempt under **1146(c)** of the **Bankruptcy** Code even though it is not being sold as part of a plan of reorganization, or an order that the purchaser can have no successor liability under any circumstances whatsoever, the remaining order is still an imposing tome. While the court has decided to sign it with modifications, the court feels compelled to comment on its utility and effectiveness. Supra, p.528.

It is apparent that courts around the country are not prepared to employ a stealth means of applying §1146(c) exemptions to purely §363 sales that predate plan confirmation under norms of due process.

3. Section 1146(c) Case Law Previously Applied By Lower Courts in the Third Circuit Is Neither Persuasive Nor Binding

To begin, it is clear that lower courts within the Third Circuit until Hechinger's operated under the assumption that numerous lower court decisions from the Second Circuit were persuasive.

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1 The Third Circuit has roundly rejected each and every case now but those cases still warrant
2 "revisiting". In In re Permar Provisions, Inc., 79 B.R. 530 (Bankr. E.D.N.Y. 1987),[3] a pre-
3 confirmation sale yielded what ultimately proved to be about 75% of the estate's funds. The sale
4 preceded confirmation of a liquidation plan by more than one year. On the theory that absent a sale a
5 plan would not have been confirmed, the court concluded that the sale was under a plan. Clearly, any
6 trustee in a Chapter 7 could have effectuated such a result.[4] The court, other than in accepting self-
7 serving conclusions in the Disclosure Statement to the contrary, never had evidence that the Chapter
8 11 liquidation yielded more to creditors than a Chapter 7. Any such inquiry would have been neither
9 relevant nor material given the clear language of 11 U.S.C. §1146(c). The California Bd. of
10 Equalization case that followed two years later made it clear that such exemptions should only be
11 granted in specifically enumerated circumstances.
12 Were the Second Circuit now called upon to review these referenced lower court decisions, it
13 is questionable whether it would support the interpretation set forth in Permar. In In re 995 Fifth Ave.
14 Associates, L.P., 963 F.2d 503, 510 (2nd Cir. 1992), the court was called upon to determine whether a
15 New York "gains tax" was in reality a stamp tax exempt under 11 U.S.C. §1146(c). The court clearly
16 noted that an exemption issued only as to transfers "pursuant to a plan of reorganization." Id. at 510.
17 Many of the lower court decisions of the Second Circuit also issued before California Bd. of
18 Equalization. That must be factored into their continued relevance. The California Bd. of
19 Equalization case has been duly noted in In re Amsterdam Ave. Development Assoc., 103 B.R. 454,
20 459-60 (Bankr. S.D.N.Y. 1989), for the proposition that any exemptions should issue under a plan[5]
21 and should be narrowly construed. Other courts, including Florida courts, when considering
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23 [3] See also a "survey" of New York and Florida cases in the now overturned decision of Anne Arundel County
Md v. NVR Homes, Inc., 222 B.R. 514 (Bankr. E.D.Va. 1998). This case and, inexplicably, the reversed lower court
24 decision of Jacoby-Bender, are often cited to by Delaware courts.

25 [4] However, the sale in Chapter 7 would not be tax-exempt!

26 [5] Supra at 459.

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§1146(c), have first considered whether the transfer is under a confirmed plan. See, In re Bel-Aire Investments, Inc., 142 B.R. 992, 996 (Bankr. M.D.Fla. 1992).

Lower court rulings in Delaware resting upon lower court Second Circuit missed the most important factual element and underpinning of In re Jacoby-Bender, Inc., 758 F.2d 840, 842 (2nd Cir. 1985). That court gave its blessing to a §1146(c) exemption because of this critical fact[6]: "a sale in general, following on confirmation of a plan, serves to make the plan effective."

This is the reason why the exemption is given, if at all. Unless and until there is an order of confirmation, any sale that occurs before confirmation is taxable. It is incumbent upon this court to disregard criticized cases referenced herein as having been wrongly decided or having no further precedent under the doctrine of *stare decisis*. The position of the State of Washington is mirrored and further elaborated in In re NVR, L.P., 189 F.3d 442, 455, 456 (4th Cir. 1999). In this decision, substantial analysis was made of Second Circuit rulings:

> Lower courts, however, have extended the Second Circuit's language and altered Jacoby-Bender's holding, changing the test from "necessary to the consummation of a plan," to "necessary to the confirmation of a plan." See City of New York v. Smoss Enters. Corp., 54 B.R. 950, 951 (Bankr. E.D.N.Y. 1985) (finding that a sale was under a plan because "the transfer of property was essential to the confirmation of the plan" (emphasis added)). Courts began using this seemingly slight alteration of the Second Circuit's language—"confirmation" for "consummation"--and applied it to the interpretation of the scope of §1146(c) itself, rather than just a plan's provisions.
>
> The fundamental difference between the consummation of a plan and the confirmation of a plan is the timing of the events within the bankruptcy process. Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan. See Fed. R. Bankr. Pro. 3020, 3022. By changing and applying Jacoby-Bender's holding to new and different circumstances, courts used this altered analysis not only to determine what transfers were "under a plan," but also what transfers were "under a plan confirmed." These decisions embraced the belief that if a transfer was "essential to the confirmation of the plan," then it was "under a plan confirmed." See In re Permar Provisions, Inc., 79 B.R. 530, 534 (Bankr.E.D.N.Y.1987). Naturally, many preconfirmation transfers then were held to fall under §1146(c), something that the Second Circuit never held. See Smoss Enters. Corp., 54 B.R. at 951; In re Lopez Dev., Inc., 154 B.R. 607, 609

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[6] This case is not otherwise entirely in point, but this is a clear factual finding that the court takes note of and it is implicit in the ruling that absent the order of confirmation, the later sale would not be entitled to exemption from tax.

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> (Bankr.S.D.Fla.1993); In re Permar Provisions, Inc., 79 B.R. at 534. We think it is error to twist the Second Circuit's language to the defeasance of §1146(c)'s own terms.
>
> Although §1146(c) relies upon the interpretation of a reorganization plan to determine which transfers fall within the scope of the plan itself, §1146(c) determines the ultimate extent of its operation. Therefore, holding that every transfer "essential" to a plan's confirmation is by definition "under a plan confirmed" is fundamentally flawed. Such a holding makes a plan's terms the master of §1146(c), instead of deferring to the statute itself. Accordingly, we believe the proposition that every transfer necessary to the confirmation of a plan is "under a plan confirmed" to be without basis in §1146(c). In re NVR, supra at 456 (emphasis added).

It is a complete fiction to say that years later a pre-confirmation act supported by a court order can be "blessed" as having always been part of a confirmed plan.

> Logically reading these definitions in the context of §1146(c), we cannot say that a transfer made prior to the date of plan confirmation could be subordinate to, or authorized by, something that did not exist at the date of transfer--a plan confirmed by the court. In re NVR, supra at 457.

The underlying thesis of lower court decisions within the Second Circuit is that §1146(c) allows application without a confirmed plan based upon the facts of each case. This assumption is wrong, because it is not the facts that drive §1146(c) but a simple fact—is a confirmed plan in place at the time the proposed transaction is to take place? As Justice Scalia noted in the context of argument urging the court to broadly apply and make available rights under §506(c), "had Congress intended the provision to be broadly available, it could simply have said so." Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. at 7.

The states have been given the right under 28 U.S.C. §959(b)[7] to expect full compliance with all laws of the state and there is no stated exception as to any particular chapter proceeding. As the United States Supreme Court noted in California Bd. of Equalization, supra at 850 n.5, there are numerous state tax reporting functions and payments imposed by §346(c) and by implication §1107. In short, 11 U.S.C. §1146(c) is in direct contravention of several Bankruptcy Code provisions and any exception to state law compliance must be strictly construed. California Bd. of Equalization, supra at 851-52.

[7] See also the California Bd. of Equalization reference to 28 U.S.C. §960 at pp .850-51 n.7.

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CONCLUSION

The proposed order confirming the sale of property exceeds the relief sought in the motion and is not permissible under §1146(c)—specifically, the State of Washington has the unfettered right to impose sales and/or use tax against buyer or seller.

An *ad hoc* process of granting tax exemptions causes the State substantial loss of critical tax revenue. Congress did not intend this result. No §1146(c) exemption can be granted for a sale of real estate without a confirmed plan in place.

DATED this ____ day of December, 2003.

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