

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS**

In re:)	In Proceedings Under Chapter 11
)	
GATEWAY ETHANOL, L.L.C.)	Case No. 08-22579-DLS
)	
Debtor.)	

**MOTION FOR ORDER UNDER 11 U.S.C. §§ 105(a) AND 541
CONFIRMING AUTHORITY AND/OR AUTHORIZING DEBTOR
TO PAY VARIOUS FEDERAL, STATE AND LOCAL TAXES**

COMES NOW Gateway Ethanol, L.L.C., as Debtor and Debtor in Possession (“Debtor”), and submits its Motion for Order Under 11 U.S.C. §§ 105(a) and 541 Confirming Authority and/or Authorizing Debtor to Pay Various Federal, State and Local Taxes (the “Motion”). In support of this Motion, Debtor relies on the Affidavit of Frederick S. Loomis in Support of First Day Applications and Motions (the “Loomis Affidavit”). In further support of this Application, Debtor respectfully represents as follows:

INTRODUCTION

1. On even date herewith (the “Petition Date”), Debtor filed a voluntary petition in this Court for reorganization relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended (the “Bankruptcy Code”). Debtor continues to operate its business and manage its properties as debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. No trustee or examiner has been appointed, and no official committee of creditors or equity interest holders has yet been established.

3. Debtor has filed this Motion and an Emergency Motion for Expedited Hearings on Certain Motions and Applications (the “Hearing Motion”). Included within the Hearing Motion is this Motion.

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this case and motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND OF DEBTOR

5. The background of this case may be found in the Loomis Affidavit.

RELIEF REQUESTED

6. By this Motion, Debtor requests entry of an order pursuant to Sections 105(a) and 541 of the Bankruptcy Code confirming Debtor's authority and/or expressly authorizing it to pay the Taxes (as defined below) to the respective taxing authorities in the ordinary course of Debtor's business. Such relief will be without prejudice to Debtor's right to contest the amounts of any Taxes on ordinary, non-bankruptcy grounds.

BASIS FOR RELIEF

7. In the ordinary course of business, Debtor pays taxes to a number of different taxing authorities at the federal, state and local levels (the "Taxes").

8. Taxes accrue as wages are earned and are calculated based upon a statutorily mandated percentage of gross wages employees earn.

9. The Peoples Bank administers Debtor's payroll and disburses the withholding tax obligations to the taxing authorities from Debtor's main operating account.

10. The Internal Revenue Service ("IRS") asserts that Debtor owes withholding taxes related to pre-petition payroll in the amount of approximately \$3,000.00. Debtor believes this sum relates to employee moving expenses, and disputes the IRS's claim. Debtor has not paid certain state and local withholding taxes accruing pre-petition, but due and owing post-petition, and certain federal withholding taxes on pre-petition wages that are due and

payable post-petition. By this motion, Debtor seeks entry of an order confirming its authority and/or expressly authorizing it to pay in the ordinary course of business all Taxes that relate to post-petition payrolls covering, in part, wages and salaries earned prior to the Petition Date.

11. Debtor pays Taxes involving sales and use taxes to the State of Kansas, Pratt County, and City of Pratt, Kansas. Debtor routinely generates sales reports and then calculates the sales and use taxes and pays such taxes.

12. Debtor seeks authority from this Court to continue making such payments in the ordinary course of business for all pre-petition and post-petition sales and use taxes that are for the benefit of the taxing authorities.

13. Debtor pays income Taxes to the State of Kansas in the ordinary course of business. Such Taxes are calculated in the manner prescribed by the State of Kansas.

14. Debtor pays *ad valorem* taxes on its business properties which are owned and/or leased.

15. Debtor is also responsible for various miscellaneous taxes and fees incurred in the ordinary course of business, such as annual report fees, state registration fee, and privilege tax, as well as other taxes and fees levied under federal, State of Kansas, and local authorities.

16. Debtor seeks authority from this Court to continue making such tax payments in the ordinary course of business, which are for the benefit for each of the various taxing authorities.

APPLICABLE AUTHORITY

17. Debtor submits that most, if not all, of the Taxes likely constitute so called “trust fund” taxes which are required to be collected from third parties and held in trust for

payment to the taxing authorities. *See, e.g., Shank v. Washington State Dep't of Revenue (In re Shank)*, 792 F.2d 829, 830 (9th Cir. 1986) (sales tax required by state law to be collected by sellers from their customers is “trust fund” tax); *DeChiaro v. New York State Tax Comm'n*, 760 F.2d 432, 433-34 (2d Cir. 1985) (same); *In re Tap, Inc.*, 52 B.R. 271, 272 (Bankr. D. Mass. 1985) (withholding taxes). *See also In re Columbia Gas Sys. Inc.*, 997 F.2d 1039 (3d Cir. 1993) (refunds required to be collected by federal law created trust fund that was not property of the debtors' estates).

18. To the extent these “trust fund” taxes are collected, they are not property of the estate under Bankruptcy Code section 541(d). *Begier v. I.R.S.*, 496 U.S. 53 (1990) (trust fund taxes are not property of the estate); *Mitsui Mfrs. Bank v. Unicom Computer Corp. (In re Unicom Computer Corp.)*, 13 F.3d 321, 324 (9th Cir. 1994) (funds held in constructive trust not estate property); *In re Al Copeland Enterprises, Inc.*, 133 B.R. 837 (Bankr. W.D. Tex. 1991), *aff'd*, 991 F.2d 233 (5th Cir. 1993) (debtor obligated to pay Texas sales taxes plus interest, as such taxes were “trust fund” taxes). *See also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92 (3d Cir. 1994) (state law requiring debtor to withhold city income tax from employees, wages established trust fund relationship between debtor and city for payment of withheld taxes). Debtor, therefore, arguably has no equitable interest in the Taxes and is obligated to make payment.^{1/}

19. Even if the Taxes are not “trust fund” taxes, the payments to the taxing authorities should be authorized pursuant to Bankruptcy Code Section 105. Section 105(a) provides that “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The purpose of Section

^{1/} Moreover, a withholding of the payment of the Taxes likely would cause the taxing authorities to take precipitous action, and create significant administrative problems. Prompt and regular payment of the Taxes will avoid this unnecessary governmental action.

105(a) is to “assure the bankruptcy courts [have] power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction.” 2 Collier on Bankruptcy ¶ 105.01, at 105-6 (15th ed. rev. 2008). Thus, Section 105(a) essentially codifies the bankruptcy court’s inherent equitable powers. See Management Technology Corp. v. Pardo, 56 B.R. 337, 339 (Bankr. D.N.J. 1985) (court’s equitable power derived from section 105).

20. Numerous courts have used their Section 105 equitable powers under the necessity of payment doctrine, first enunciated by the Supreme Court in Miltenberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286 (1882). Under that rule, a bankruptcy court will permit a reorganizing debtor to make post-bankruptcy payments on pre-bankruptcy claims when payment is necessary to effectuate a successful reorganization. See also In re Adams Apple, Inc., 829 F.2d 1484, 1490 (9th Cir. 1987) (noting caselaw permits unequal treatment of pre-petition debts when necessary for debtor rehabilitation, including payment of pre-petition wages); In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) (necessity of payment doctrine “teaches no more than, if payment of a claim which arose prior to reorganization is essential to the continued operation of the [business] during the reorganization, payment may be authorized even if it is made out of corpus”).^{2/} Without question, the payment of the Taxes to the taxing authorities is necessary here. It is in the best interest of Debtor’s estate that the Taxes be paid on time so as to avoid administrative difficulties.

21. Moreover, because the Taxes, at a minimum, will enjoy priority status under Section 507(a)(8) of the Bankruptcy Code, and therefore must be paid in full before general unsecured creditors receive any distributions, payment of the Taxes at this time will only

^{2/} But see In re B & W Enters., Inc., 713 F.2d 534, 537 (9th Cir. 1983). In B & W Enterprises, the Ninth Circuit declined to extend the necessity of payment doctrine beyond the realm of railroad reorganizations out of concern for altering the bankruptcy priority scheme. This concern should not control here because all of the claims are priority claims and will ultimately be paid in full under any plan of reorganization.

affect the timing of such payment and will not prejudice the rights of general unsecured creditors.

22. For all of the foregoing reasons, Debtor believes that granting the relief requested herein is appropriate and in the best interest of all parties in interest.

WHEREFORE, Debtor respectfully requests that this Court enter an order confirming the authority of Debtor and/or expressly authorizing it, pursuant to Sections 105(a) and 541 of the Bankruptcy Code, to pay pre-petition Taxes to the appropriate taxing authorities, and granting such other and further relief as is just and proper.

Respectfully submitted,

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