

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
Met-Coil Systems Corporation,)	
)	Case No. 03-12676 ()
Debtor.)	

**DEBTOR'S MOTION FOR ENTRY OF ORDER AUTHORIZING
PAYMENT OF PREPETITION SALES AND USE TAXES**

Met-Coil Systems Corporation, debtor and debtor in possession (the "**Debtor**" or "**Met-Coil**") in the above-captioned Chapter 11 case (the "**Case**"), hereby presents this motion (the "**Motion**") for entry of an Order authorizing payment of prepetition sales and use taxes ("**Sales and Use Taxes**"). In support of the Motion, the Debtor refers to and relies upon the Affidavit of Charles F. Kuoni III in Support of First Day Motions of Met-Coil Systems Corporation (the "**Kuoni Affidavit**"), filed contemporaneously herewith and incorporated herein by reference, and respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).
2. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicates for the relief requested herein are §§ 105(a) and 541 of title 11 of the United States Code (the "**Bankruptcy Code**").

INTRODUCTION

4. On August 26, 2003 (the "**Petition Date**"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. The Debtor is operating its business as a debtor in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee of unsecured creditors has been appointed.

SALES AND USE TAXES

6. The Debtor, in the ordinary course of its business, incurs various tax liabilities, including Sales and Use Taxes which it owes to various taxing authorities. Prior to the Petition Date, the Debtor paid the Sales and Use Taxes in accordance with and subject to applicable grace periods, if any. On average, the Debtor's monthly obligations for the Sales and Use Taxes for certain taxes and duties owed to the Iowa Department of Revenue and the Illinois Department of Revenue (the "**Taxing Authorities**"), were minimal.

7. The Debtor believes that it is substantially current with respect to the payment of the Sales and Use Taxes. To the extent that there are Sales and Use Taxes owed to the Taxing Authorities, the Debtor believes that such amounts will be minimal.

RELIEF REQUESTED

8. By this Motion, the Debtor respectfully requests that the Court enter an Order, pursuant to §§ 105 and 541 of the Bankruptcy Code, authorizing, but not directing, it to pay Sales and Use Taxes to the appropriate Taxing Authorities in the ordinary course of the Debtor's business,¹ regardless of whether the debts were incurred prior to or following the Petition Date. Such relief will be without prejudice to the Debtor's rights to contest the amounts of the Sales and Use Taxes on any grounds.

¹ Nothing contained in this Motion should be construed as impairing, or should be deemed to impair, the Debtor's right to contest the validity or amount of any Sales and Use Taxes that may be alleged to be due; and the Debtor expressly reserves all of its rights with respect thereto.

BASIS FOR RELIEF REQUESTED

9. The Sales and Use 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., In re Goetken, 843 F.2d 1007, 1011 (7th Cir. 1988) (retail sales and use taxes constitute "trust fund" taxes); Shank v. Washington State Dep't of Revenue, 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 (2^d Cir. 1985) (same); see also In re Columbia Gas Systems, Inc., 997 F.2d 1039 (3^d Cir. 1993) (refunds required to be collected by federal law created trust fund that was not property of the debtor's estate).

10. To the extent that any Sales and Use Taxes are "trust fund" taxes collected by the Debtor for remittance to Taxing Authorities, they are not property of the Debtor's estate under § 541(d) of the Bankruptcy Code. See Begier v. IRS, 496 U.S. 53, 67 (1990) (trust fund taxes derived from prepetition payments are not property of the estate); In re Cannon, 277 F.3d 838, 849 (6th Cir. 2002) (when debtor does not own an equitable interest in property held in trust for another, such interest is not property of the estate); In re Marrs-Winn Co., Inc., 103 F.3d 584, 589 (7th Cir. 1996) (funds held in trust for another do not constitute property of the estate); City of Farrell v. Shawn Steel Corp., 41 F.3d 92, 95 (3^d Cir. 1994) (debtors do not own equitable interest in property they hold in trust for another, therefore funds held in trust are not property of the estate); In re Al Copeland Enterprises, Inc., 133 B.R. 837, 841-42 (Bankr. W.D. Tex. 1991), aff'd, 991 F.2d 233 (5th Cir. 1993) (debtor obligated to pay Texas sales taxes plus interest because such taxes were "trust fund" taxes). The Debtor, therefore, arguably has no equitable interest at all in such Sales and Use

Taxes and is obligated to remit to the appropriate Taxing Authority all amounts collected from customers.

11. Even if the Sales and Use Taxes were not considered "trust fund" taxes, the payments to the Taxing Authorities should be authorized under § 105(a) of the Bankruptcy Code, which 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 § 105(a) is to "assure the Bankruptcy Court's power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction." 2 COLLIER ON BANKRUPTCY § 105.01 (15th ed. 1996). Thus, § 105(a) essentially codifies the Bankruptcy Court's inherent equitable powers. See Celotex v. Edwards, 514 U.S. 300, 305 (1995) (court's equitable power derived from section 105); In re Autostyle Plastics, Inc., 269 F.3d 726, 748 (6th Cir. 2001) (same); Mgmt. Tech. Corp. v. Pardo, 56 B.R. 337, 339 (Bankr. D. N.J. 1985) (same).

12. Payment of the Sales and Use Taxes to the Taxing Authorities in full and on a timely basis is both necessary and in the estate's best interest. Failure to timely pay, or precautionary withholding by the Debtor of payment of, the Sales and Use Taxes likely would cause Taxing Authorities to take aggressive actions, such as the filing of multiple liens and a marked increase in audits which would unnecessarily divert the Debtor's attention from the reorganization process. Prompt and regular payment of the Sales and Use Taxes would avoid any such unwarranted governmental action. Thus, it is in the best interests of the Debtor's estate that the Sales and Use Taxes are paid on time so as to avoid the administrative difficulties that certainly will result from the non-payment of such taxes.

13. Most, if not all, of the Sales and Use Taxes would be entitled to priority status under § 507(a)(8) of the Bankruptcy Code and payment in full (either immediately or over time) under any reorganization plan. The Debtor's payment of the Sales and Use Taxes in the ordinary course of business, thus, at most will affect only the timing of the payments – although, in some cases, prepayment of such Sales and Use Taxes may actually reduce the amounts ultimately paid – to the Taxing Authorities. The rights of other unsecured creditors and parties-in-interest consequently would not be prejudiced if the requested relief is granted, and the Court's exercise of its equitable powers under § 105(a) will not be in derogation of any other provision of the Bankruptcy Code.

14. Moreover, relief similar to that requested herein has been granted by this Court in other cases. See, e.g., In re Warehouse Entm't, Inc., Case No. 03-10224 (PJW) (Bankr. D. Del. 2003); In re FAO, Inc., Case No. 03-10119 (LK) (Bankr. D. Del. 2003); In re Kaiser Aluminum Corp., et al., Case No. 02-10429 (EIK) (Bankr. D. Del. 2002); In re McLeod USA Incorporated, Case No. 02-10288 (EIK) (Bankr. D. Del. 2002); In re Zany Brainy, Inc., et al., Case No. 01-1749 (SLR) (Bankr. D. Del. 2001); In re Genesis Health Ventures, Inc., Case No. 00-02692 (PJW) (Bankr. D. Del. 2000).

15. Finally, in many states which have laws providing that the Sales and Use Taxes constitute "trust fund" taxes, officers and directors of the collecting entity may be held personally liable in certain circumstances for the non-payment of such funds to the Taxing Authorities. To the extent these taxes were unpaid in such jurisdictions as of the Petition Date, the Debtor's officers and directors could be subject to lawsuits during the pendency of these cases. Such potential lawsuits would prove extremely distracting for the Debtor, for the named officers and directors whose attention to the Debtor's bankruptcy is required, and

for this Court, which might be asked to entertain various motions seeking injunctions of potential state court actions. It is, therefore, in the best interest of the Debtor's estate and consistent with the goals of Chapter 11 of the Bankruptcy Code that the relief requested herein be granted, thereby eliminating the possibility of this potential distraction.

NOTICE AND PRIOR APPLICATION

16. Notice of this Motion has been given to (a) the Office of the United States Trustee for the District of Delaware; (b) counsel for the Debtor's prepetition and postpetition secured lenders; (c) the Debtor's twenty (20) largest unsecured creditors; (d) the United States Environmental Protection Agency; (e) the Attorney General of the State of Illinois; (f) the DuPage County State's Attorney; (g) counsel to the plaintiffs in the environmental litigation matters pending before the United States District Court for the Northern District of Illinois and the Circuit Court for the Eighteenth Judicial District, DuPage County (collectively, the "Core Group"); and (h) the Taxing Authorities. As this Motion is seeking "first day" relief, notice of this Motion and any order entered respecting this Motion will be served as required by Del. Bankr. LR 9013-2(d). The Debtor submits that under the circumstances no other or further notice need be given.

17. No previous motion for the relief sought herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that this Court enter an Order in substantially the form annexed hereto, (i) authorizing the Debtor to pay the Sales and Use Taxes described herein to the appropriate Taxing Authorities in the ordinary course

of the Debtor's business, and (ii) granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: August 26, 2003

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