

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA**

_____)	
In re:)	Chapter 11
)	
OCA, INC., et al,)	Case No. 06-10179(B)
)	(Jointly Administered)
Debtors)	
_____)	

**RESPONSE BY COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF
REVENUE DEBTORS' OBJECTION TO TAX CLAIMS**

TO THE HONORABLE JERRY A. BROWN, UNITED STATES BANKRUPTCY JUDGE:

NOW COMES Alan LeBovidge, as he is Commissioner of Revenue for the Commonwealth of Massachusetts ("MDOR"), who hereby responds in opposition to the *Debtors' Objection to Tax Claims* (hereinafter, the "Objection"). In support of this opposition, MDOR states as follows:

I. RESPONSES TO DEBTOR'S ALLEGATIONS

1. MDOR admits the allegations contained in paragraph 1 of the Objection.
2. MDOR admits the allegations contained in paragraph 2 of the Objection, but only to the extent that the relief requested by the Objection or the means for achieving any such relief does not involve the determination of the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously asserted.
3. MDOR admits the allegations contained in paragraphs 3 through 6 of the Objection.
4. The allegations contained in paragraph 7 of the Objection consist of the Debtors' summary of the Objection and do not require a response by MDOR.

5. As the substance of the allegations contained in paragraph 8 of the Objection may be directed towards the two claims by MDOR, MDOR denies the same.

6. MDOR denies the substance of the allegations contained in paragraph 9 of the Objection, as further explained in the next section of this response.

7. MDOR lacks sufficient knowledge and information so as to form a belief in the veracity of the allegations contained in paragraph 10 of the Objection, and therefore deny them.

8. As the substance of the allegations contained in paragraph 8 of the Objection may be directed towards the two claims by MDOR, MDOR denies the allegations and relief requested in paragraph 11 of the Objection.

9. The substance of paragraphs 12 and 13 of the Objection do not require a response by MDOR.

II. MDOR STATEMENT OF POSITION

10. A claim is presumptively allowed upon the filing of a proof of claim. The burdens of proof and persuasion for a claim for a tax do not depart from the applicable the standards set under non-bankruptcy law because the claim is raised in a bankruptcy setting. *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 120 S.Ct. 1951 (2000), *aff'd sub nom. In re Stoecker*, 179 F.2d 546 (C.A. 7 1999). Under the applicable non-bankruptcy Massachusetts law, the burdens are clearly imposed upon the taxpayer to prove that MDOR's determinations are entirely incorrect. *M & T Charters, Inc. v. Commissioner of Revenue*, 404 Mass. 137, 140 (1988), and *Towle v. Commissioner of Revenue*, 397 Mass. 599, 603 (1986)¹. In those instances in the present Objection in which the claim includes an estimate for the liability – since the particular debtor had not filed the legally required tax return - the burden on the objecting party would include the

making of the return or clear proof that one was not required under applicable non-bankruptcy law.

11. The debtor, Orthodontic Centers of Massachusetts, Inc. (Case No. 06-10195)(hereinafter, “OCM”), is upon information and belief a corporation organized under the laws of the State of Delaware. Since 1995, OCM has been registered to and has done business in Massachusetts as a qualified foreign corporation.

12. In conjunction with its business activities in Massachusetts, OCM registered and is required to file and pay certain Massachusetts taxes. These taxes include Massachusetts corporate taxes and Massachusetts use taxes.

13. Under the provisions of Chapter 63 of its General Laws, Massachusetts imposes a tax on all domestic corporations and all foreign corporations qualified to do business in the state. The assessed tax is the greater of the tax measured by income, the tax measured by property, or a minimum tax of \$456.

14. As a companion to its sales tax, Massachusetts impose under Chapter 64I, Massachusetts imposes a tax on the “upon the storage, use or other consumption in the commonwealth of tangible personal property or services purchased from any vendor or manufactured, fabricated or assembled from materials acquired either within or outside the commonwealth for storage, use or other consumption within the commonwealth at the rate of five percent of the sales price of the property or services”, which is more commonly referred to as the “use tax”.

15. On or about May 30, 2006, MDOR filed a proof of claim concerning the outstanding Massachusetts tax obligations of OCM. Specifically, MDOR presented a priority

¹ See also *Adams v. Tashjian*, Docket No. 96-40063-RCL (D. Mass. July 30, 1997))Young, D.J.). “[I]t was the burden of the taxpayer, Tashjian, to convince the Bankruptcy Judge that the tax assessments made by the

unsecured claim in the amount of \$67,459.98 and a general unsecured claim in the amount of \$2,700.00 (hereinafter, the “OCM Claim”). This claim is based upon OCM’s corporate taxes for the years ending December 31, 2004 and December 31, 2005, and for OCM’s use taxes for the year ending December 31, 2005 and for the pre-petition portion of 2006. For the periods prior to those, OCM and the Debtors consistently filed and paid these taxes². In all four instances, MDOR had no alternative but to make its own estimates as to what the liabilities might be, as OCM and the Debtors failed – and continue to fail – to file with MDOR the legally required tax returns. The estimates made by MDOR were based in the main upon the actual amount of the taxes assessed by OCM and the Debtors on the returns they filed for prior periods. A copy of the proof for the OCM Claim is annexed hereto as Exhibit 1 and is expressly incorporated herein by this reference.

16. The debtor, OrthAlliance, Inc. (Case No. 06-10229)(hereinafter, “Orth”), is upon information and belief a corporation organized under the laws of the State of Delaware. Since 1998, Orth has been registered to and has done business in Massachusetts as a qualified foreign corporation.

17. Similar to OCM, in conjunction with its business activities in Massachusetts, Orth registered and is required to file and pay certain Massachusetts taxes. Pertinent to the present proceeding, Orth was and is required to file corporate tax returns and to pay the resultant taxes.

18. On or about May 31, 2006, MDOR filed a proof of claim concerning the outstanding Massachusetts tax obligations of Orth. Specifically, MDOR presented a priority unsecured claim in the amount of \$945.78 and a general unsecured claim in the amount of

[Massachusetts] Department [of Revenue] were erroneous, arbitrary, or capricious.” At p. 4.

² Based upon the information contained in the Debtors’ disclosure statements in this case, MDOR understands that the Debtors had some financial reporting issues in the times prior to these voluntary petitions, and may have been a contributing factor in the decision to seek Chapter 11 relief. While bankruptcy can enable a debtor to address certain

\$82.08 (hereinafter, the “Orth Claim”). This claim is based upon Orth’s corporate taxes for the years ending December 31, 2004 and December 31, 2005. For the periods prior to those, OCM and the Debtors consistently filed and paid these taxes. For these two periods, MDOR had no alternative but to make its own estimates as to what the liabilities might be, as Orth and the Debtors failed – and continue to fail – to file with MDOR the legally required tax returns. The estimates made by MDOR were based in the main upon the actual amount of the taxes assessed by Orth and the Debtors on the returns they filed for prior periods. A copy of the proof for the Orth Claim is annexed hereto as Exhibit 2 and is expressly incorporated herein by this reference.

19. The Debtors in the Objection do not specify which of the multiplicity of grounds asserted in general support for the Objection apply in particular to MDOR’s OCM and Orth Claims. Although this is purely speculative, the objection to these claims may be based upon the fact that due to the actions of the Debtors the claims are estimated.

20. When a taxpayer has failed to file its returns, MDOR is expressly authorized to assess a tax based upon its best information and belief. M. G. L. ch. 62C, §26(d). The assertion that MDOR’s estimates are incorrect or that the claim itself is based upon estimates does not defeat the validity of the claim. FBRP 3001(f) and *In re White*, 168 B.R. 825, 829 (Bankr. D. Conn. 1994).

21. To the extent that the Debtors may believe that these liabilities are less than presented, the Debtors have not merely the right but the continuing legal obligation to file the tax

business problems, it does not relieve a debtor if its obligations to file its tax returns, and in appropriate circumstances such a continued failure can be cause to dismiss a case.

returns upon which the appropriate tax can be assessed and then paid in accordance with its Chapter plan³.

WHEREFORE, Alan LeBovidge, as he is Commissioner of Revenue for the Commonwealth of Massachusetts, respectfully requests that this Honorable Court deny the *Debtors' Objection to Tax Claims*, and to grant to him such other and further relief as may be just and meet.

Respectfully submitted,

Dated: October 13, 2006

**ALAN LeBOVIDGE
COMMISSIONER
MASSACHUSETTS DEPARTMENT OF
REVENUE**

By his attorneys,

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³ Upon information and belief, any plan that may be confirmed in this case would provide for the payment of allowed claims, but not for payments on disallowed claims. Thus, to disallow the OCM and the Orth Claims on the basis that the Debtors have not filed their tax returns would reward what the law otherwise condemns.

