IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SGR WINDDOWN, INC., *et al.*	Case No. 19-11973 (MFW)
Debtors.	(Jointly Administered)

NEW YORK CITY DEPARTMENT OF FINANCE'S MEMORANDUM OF LAW IN OPPOSITION TO DEBTORS' MEMORANDUM OF LAW AND SECOND OMNIBUS OBJECTION TO DOF CLAIM NO. 205

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The New York City Department of Finance ("DOF"), by its counsel, JAMES E. JOHNSON, Corporation Counsel ("Counsel") of the City of New York ("City"), hereby files this Memorandum of Law in Opposition to Debtors' Memorandum of Law filed on October 23, 2020 (ecf # 743) in support of their Second Omnibus Objection dated September 3, 2020 (the "Objection") to DOF's Claim No. 205. In support thereof, DOF states as follows:

PRELIMINARY STATEMENT

Debtors' legal position that New York City's CRT is better interpreted as a "property tax" entitled to a one-year priority under 11 U.S.C. § 507(a)(8)(B), instead of an "excise tax" entitled to a three-year priority under 11 U.S.C. § 507(a)(8)(E), is flawed and should be rejected. Debtors' interpretation disregards both the plain meaning of § 507(a)(8)(E), which requires that the tax be imposed on a "transaction", in this case on the privilege of using the lease for commercial purposes; and the legislative history to § 507(a)(8)(E), which requires that the term "excise" be interpreted broadly. Debtors do not even mention, let alone analyze, the terms "transaction" in § 507(a)(8)(E) or "taxable premises" in Admin. Code § 11-701.5 as interpreted by New York's highest court in Ampco. Debtors' focus on the undisputed legal point that leaseholds are property interests is misplaced.

CRT is not a tax on "ownership", "rents" or "just any leasehold", and Debtors' failure to distinguish between residential and commercial leases (found clearly in the Bankruptcy Code, e.g., § 365) is fatal. CRT is a tax imposed on the Debtors' privilege of using their commercial leasehold for business, which constitutes one or more "transactions" for purposes of 11 U.S.C. § 507(a)(8)(E). The fact that the Debtors might not have been profitable for certain tax periods does not, and cannot, change the fact that they entered into a commercial lease (a "transaction" in and of itself) with the landlord of the premises for the purpose of using said

premises for business. Accordingly, the Court should overrule Debtors' Objection to DOF Claim No. 205 and allow said claim as asserted.

CRT IS AN EXCISE TAX ENTITLED TO A THREE-YEAR PRIORITY UNDER 11 U.S.C. § 507(a)(8)(E)

1. DOF contends that New York's CRT is an excise tax entitled to priority under 11 U.S.C. § 507(a)(8)(E), not a "property tax" under 11 U.S.C. § 507(a)(8)(B). The difference between the two subsections is significant because an excise tax under subsection (E) permits a look back period of three years, whereas a property tax under subsection (B) refers to a property tax which is "incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition." (emphasis added).

2. The Bankruptcy Code does not define the terms "property", "excise" or "tax". United States v. Reorganized Cf&I Fabricators of Utah, 518 U.S. 213, 116 S. Ct. 2106, 135 L.Ed.2d 506 (1996); In re Albert Lindley Lee Mem'l Hosp., 428 B.R. 283, 294 (Bankr. N.D.N.Y. 2010). The determination of whether an obligation is a tax entitled to priority under the Bankruptcy Code is a federal question. See New York v. Feiring, 313 U.S. 283, 61 S. Ct. 1028, 85 L.Ed.2d 1333 (1941), citing New Jersey v. Anderson, 203 U.S. 483, 491 (1901) (although a federal question, state court decisions are "entitled to great consideration" in determining the status of a tax claim in bankruptcy).

3. However, in addressing that question, bankruptcy courts properly look at the provisions of state law, and judicial decisions interpreting those provisions, in order to determine the characteristics of the underlying obligation. In re Groetken, 843 F.2d 1007, 1013 (7th Cir. 1988) ("In applying the various code provisions, the federal courts look to state law to determine the exact nature of a person's rights and obligations under state law"). As noted in New York v. Feiring:

> The particular demand for which the City now claims priority of payment as a tax is created and defined by state enactment. We turn to its provisions and to the decisions of the state courts in interpreting them, not to learn whether they have denominated the obligation a "tax" but to ascertain whether its incidents are such as to constitute a tax within the meaning of § 64.

Id., 313 U.S. at 285; In re Adams, 40 B.R. 545, 547 (E.D. Pa. 1984) ("Although federal law governs what constitutes a 'tax', how the state treats [a] charge may dictate the ultimate result.")

4. In Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 19, 120 S. Ct. 1951, 147 L.Ed.2d 13 (2000), the Supreme Court reaffirmed the principle that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code", citing Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L.Ed.2d 136 (1979). In Raleigh "the bankruptcy estate's obligation to the Illinois Department of Revenue [was] established by that State's tax code, which puts the burden of proof on the responsible officer of the taxpayer" (citation omitted).

5. Similarly here, the presumptions and burden of proof concerning CRT are on the taxpayer, as established by Admin. Code § 11-703a. ("it shall be presumed that all premises are taxable premises and that all rent paid or required to be paid by a tenant is base rent until the contrary is established, and the burden of proving that such presumptive base rent or any portion thereof is not included in the measure of the tax imposed by this chapter shall be on the tenant. (Emphasis added) See In re Standard Johnson Co., 67 B.R. 176, 178 (Bankr. E.D.N.Y. 1986) (leaving the burden of proof on the debtor and denying debtor's motion to reclassify priority tax claim as unsecured).

A. New York Courts Have Determined That CRT is a Use Tax, Not a Property Tax

6. The Debtors' obligation to pay CRT in this case stems from Admin. Code § 11-701 et seq. Looking at state law, as this Court is required to do, CRT is not imposed on real estate or even on the leasehold interest (personal property) as argued by Debtors, but on "taxable premises" defined as being premises "used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity even though it is used solely for the purpose of renting …" Admin. Code § 11-701.5 (emphasis added). CRT applies only to commercial leases at or below 96th Street in Manhattan (not in all boroughs of NYC) and is measured by a percentage of the base rent paid by the tenant for the commercial use of the premises. See Admin. Code §§ 11-701, 11-702. CRT is not paid on the rental of residential premises used for lodging because those premises are not "taxable premises". Id. § 11-701.7 (ii), (iv).

7. The key, therefore, is not the rental of the premises but the location and use of the rented premises for commercial purposes. See J.C. Penney Co. Inc. v. Lewisohn, 33 N.Y.2d 528, 347 N.Y.S.2d 433 (1973) ("statute clearly disclosed an intent to impose a tax on those carrying on commercial activities in leased premises, and not on those using such premises solely as living quarters"); Industrial Indem. Co. v. Cooper, 81 N.Y.2d 50, 595 N.Y.S.2d 726 (1993) (CRT was imposed (in addition to any insurance tax) because [insurers] conducted their businesses from premises located in New York City").[1] Accord Hunter v. Bd. of Supervisors, 21

[1] Debtors incorrectly assert at ¶ 12 of their Memo that Cooper stands for the proposition that CRT is not a tax for the privilege of doing business. The issue in Cooper was whether petitioner could get credit for its payment of CRT against the retaliatory tax imposed under the Insurance Law § 1112. The Court of Appeals merely held that CRT was not the type of tax for which credit could be given under Insurance Law § 1112 which was limited to taxes specifically paid Continued…

A.D.3d 622, 625, 800 N.Y.S.2d 231 (3d Dep't 2005) ("A tax on the use of real estate consistently has been found not to be a tax on the real estate itself", citing Ampco.

8. The Court of Appeals in Ampco Printing-Advertisers' Offset Corp. v. New York, 14 N.Y.2d 11, 20, 247 N.Y.S.2d 865 (1964), app. dismissed, 379 U.S. 55, 85 S. Ct. 47, 13 L.Ed.2d 21 (1964), addressed the issue whether CRT is a property tax and concluded that it was not. In Ampco, the plaintiffs[2] challenged the predecessor CRT as being an unconstitutional tax on real estate or an ad valorem tax on intangible personal property, as well as violating of due process. In rejecting all of these arguments, the Court of Appeals in Ampco stated as follows:

> The commercial rent or occupancy tax … is imposed on a tenant of taxable premises according to his base rent for the tax year, and "tenant" is defined as anyone who pays rent as lessee, sublessee, licensee or concessionaire … This is not a tax on real estate within the sense of the constitutional provision. It is imposed neither on real estate nor on owners of real estate. It is imposed on lessees of real estate or on those who acquire lesser rights to use someone else's real estate for business or other commercial activity.

Id., 247 N.Y.S.2d at 869. (Emphasis added).

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for the purpose of doing insurance business. Curiale, also cited by Debtors in the same paragraph similarly involved a challenge to New York's system of retaliatory taxation against foreign insurance companies and the issue in that case was whether the disallowance of the tax credit resulted in constitutionally impermissible discrimination against foreign insurers. This case has no relevance to the issue involved here.

[2] "The plaintiff Ampco is engaged in business on leased premises, the plaintiff Katz operates a public parking business on leased land and the plaintiff Georgian Press owns real property, portions of which it rents to others." Id.

9. Ampco held that CRT was not an ad valorem tax, nor a tax on intangible property, noting that "[a] leasehold has long been regarded in this State as a "chattel real" and as such is personal property. Ampco, 247 N.Y.S.2d at 869. The City thus agrees with the Debtors that the term "property" in Section 507(a)(8)(B) includes personal property. However, Ampco stated clearly that CRT "does not apply to mere ownership or possession" as argued by Debtors. "It applies only when the leased premises are used for commercial purposes …". Id., at 869-870. (Emphasis added).

10. Ampco has been followed and remains good law. See e.g., Burton v. New York State Dept. of Taxation, 25 N.Y. 3d 732, 739, 16 N.Y.S.3d 215, 2019 (2015) (In Ampco, "this Court declined to treat the New York City Commercial Rent or Occupancy Tax Law " as an ad valorem tax because CRT "had none of the characteristics of an ad valorem tax."); Hunter v. Bd. of Supervisors, 21 A.D.3d 622, 625, 800 N.Y.S.2d 231 (3d Dep't 2005) ("A tax on the use of real estate consistently has been found not to be a tax on the real estate itself", citing Ampco). Debtors cite but do not fully analyze Ampco.

11. The hallmark of an excise tax is that it is an indirect, transactional tax, not one directly imposed upon persons or property. See Quiroz v. Michigan Dep't of Treasury, 472 B.R. 434, 436 (E.D. Mich. 2012) (holding that Michigan's "single business tax" for which the Debtor's principal was liable qualified as a non-dischargeable excise tax because it was "an indirect tax based on business activity"); Boston Reg'l Med. Ctr., Inc. v. Mass. Div. of Health Care Fin. & Policy, 365 F.3d 51, 58 (1st Cir. 2004) (an "excise" has a "broad definition", essentially encompassing any tax that is "indirectly assessed"); In re Suburban Motor Freight, Inc. (Suburban I), 998 F.2d 338, 340 N. 3 (6th Cir. 1993).

12. An "excise tax" is "one that is imposed on the performance of an act, the engaging in any occupation, or the enjoyment of a privilege.'" Int'l Tobacco Partners, Ltd. v. United States Dep't of Agric. (In re Int'l Tobacco Partners, Ltd.), 468 B.R. 582, 590 (Bankr. E.D.N.Y. 2012), citing In re Albert Lindley Lee Mem'l Hosp., 428 B.R. 283, 294 (Bankr. N.D.N.Y. 2010) ("Debtor's reimbursement obligation was an excise tax imposed on the incident of conducting a business and a transactional cost arising from the act of employing workers") and New Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund, 886 F.2d 714, 719 (4th Cir. 1989). "Examples of excise taxes include sales taxes, estate and gift taxes, and fuel taxes". See 4 Collier on Bankruptcy ¶ 507.11[6] (Alan N. Resnick and Henry J. Sommer eds. Matthew Bender 2011).

13. "Courts in the Second Circuit have held that assessments to fund employee retirement and health plans and unemployment insurance constitute excise taxes." Int'l Tobacco Partners, Ltd., 468 B.R. at 590, citing In re Chateaugay Corp., 53 F.3d 478 (2d Cir. 1995) and In re Chateaugay Corp., 177 B.R. 176 (S.D.N.Y. 1995). In re Standard Johnson Co., 67 B.R. 176 (Bankr. E.D.N.Y. 1986), noted that an excise tax has been defined as "a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership", citing Mount Tivy Winery v. Lewis, 134 F.2d 120, 124 (9th Cir. 1943). It also pointed out that an excise tax has also been referred to as being " … practically any tax which is not an ad valorem tax … imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege …", citing In re Payne, 27 B.R. 809, 813 (Bankr. D. Kan. 1983). See In re Standard Johnson, Co., 67 B.R. at 178. See also In re Martin Lawrence Limited Edition, Ch. 11, Case No. SV 96-24875-KL, Los Angeles Division (July 15, 1998) (ruling in

favor of DOF and holding that that NYC CRT was "an excise tax for using the property for commercial purposes" and a "priority tax under 507(a)(8)(E)).[3]

B. Debtors' Erroneous Interpretation of CRT

14. Any statutory interpretation must commence with the plain language of the statute, which must be read "in the light of what it was intended to accomplish." Matter of Guardian Life, 302 N.Y. 226, 233 (N.Y. 1951). Admin. Code § 11-701.5 and the cases interpreting it make clear that CRT is imposed when a leasehold is entered into and used for the purpose of conducting business, defined as "taxable premises". Thus, the tax is on a commercial lessee's privilege of conducting business from the premises located at or below 96th Street in Manhattan. The tax is not imposed on the rent itself, although it is a percentage of the rent paid, nor on the leasehold interest, which is personal property, as noted in Ampco. The method of calculating CRT, based on the rental income, cannot be confused with the type of tax involved. See In re Appugliese, 210 B.R. 890, 897 (Bankr. D. Mass. 1997) (the fact that the tax was on the basis of the automobile's value did not deprive the tax of its essential character as an excise tax.) As shown below, the entry itself into a commercial lease with the landlord is sufficient to constitute a "transaction" for excise tax purposes under Section 507(a)(8)(E).

15. Debtors' argument that CRT is a tax levied on a property interest or on "rents" is flawed for many reasons. First, Debtors ignore the statutory definition of "taxable premises" as premises "used or intended to be occupied or used for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity even though it is used solely for the purpose of renting …" Admin. Code § 11-701.5 (emphasis added). This is

[3] DOF had an internal record of this case but the decision has not been published.

precisely the type of tax that has been defined as an "excise tax". See Debtors' Memo at ¶ 9. Second, Debtors' argument that CRT is a tax on the leasehold itself, which is personal property, would make such tax a direct tax, which CRT is not. Debtors incorrectly assert in ¶ 14: "If a tax on a leasehold interest qualifies as an excise tax, virtually any tax could be characterized that way." Thus, the Debtors fail to make the key distinction found in the Bankruptcy Code between residential and commercial leaseholds. See e.g., 11 U.S.C. § 365(b)(1)(A), (b)(1)(3), (d)(2), (d)(3), etc. CRT does not apply to residential leases. Furthermore, it is limited to those commercial leases located at or below 96th Street in Manhattan (where, commercial activity is highest) and does not apply in other boroughs of NYC. Therefore, clearly, CRT is contingent on the type of leasehold involved, its location within NYC and within Manhattan and the value of the commercial use conducted therein.

16. Debtors' argument that CRT is a tax on "ownership" of a "leasehold interest" is contradicted by the statutory language itself, as shown above. Nowhere is Debtors' misapprehension of the nature of CRT more evident than in ¶ 14 of their Memo, where the Debtors assert: "For example, just as the CRT is now argued to be *a tax on the privilege of operating a business*, the same characterization could easily apply towards *any tax on any other form of property*. A tax on real property could be characterized as a tax on the "privilege" of owning property. A tax on equipment could be characterized as a tax on the "privilege" of owning the equipment." Id. (Emphasis added). It is apparent that the Debtors are confusing an activity, i.e., operating a business, with property ownership. Furthermore, other taxes apply in New York to real property ownership and transfers of personal property.

C. The Debtors' Leasing and Using of Premises For Commercial Purposes Constitutes A Transaction Within § 507(a)(8)(E) Whether Or Not Debtors Are Profitable

17. 11 U.S.C. § 507(a)(8)(E) gives an eighth priority to an excise tax on –

> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(Emphasis added.)

18. Debtors' argument that CRT is a tax on personal property totally disregards the meaning of the term "transaction" used twice in 11 U.S.C. § 507(a)(8)(E). The courts that have interpreted the term "transaction" for purposes of the priority excise tax provision of 11 U.S.C. § 507(a)(8)(E) have construed such term very broadly, consistently with the statute's legislative history. Furthermore, the verb "occurring" modifies the noun "transaction" making clear that Congress intended to include within the ambit of "excise" taxes, taxes on an activity, not on ownership. Similarly, § 507(a)(8)(F)applies not to a "customs duty" per se, but to a "customs duty arising out of the importation of merchandise". The "importation of merchandise", like the "transaction occurring" referred to in 507(a)(8)(E), reflect activities for which excise taxes are imposed.

19. In In re Nat'l Steel Corp., 321 B.R. 901 (Bankr. N.D. Ill. 2005), the bankruptcy court for the Northern District of Illinois found that a franchise tax, imposed on all domestic and foreign corporations for the privilege of doing business in Texas, was an excise tax within 11 U.S.C. § 507(a)(8)(E) despite the debtor's claim that the tax was not an excise tax "*on*

a transaction." In rejecting the debtor's interpretation, the court reviewed precedent and also looked at Black's Law Dictionary in adopting a broad definition of the term "transaction." The court noted that "Black's Law Dictionary defines a "transaction" as:

1. The act or an instance of conducting business or other dealings.
2. Something performed or carried out; a business agreement or exchange.
3. Any activity involving two or more persons.
4. *Civil law*. An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.

Black's Law Dictionary 1503 (7th Ed, 1999)." In re Nat'l Steel Corp. 321 B.R. 901, 911 (Bankr. N.D. Ill. 2005).

20. Nat'l Steel reviewed the legislative history of § 507 and concluded that it bolstered "a panoptic interpretation with respect to the meaning of the word 'transaction'":

> Congress intended the term "transaction" to be defined broadly. The Joint Statement of the floor leaders, Senator DeConcini and Representative Edwards, stated that: "*all* Federal, State or local taxes generally considered or expressly treated as excises are covered by this category, including sales, taxes, estate and gift taxes, gasoline and special fuel taxes, and wagering and truck taxes."

Id., 321 B.R. at 911, citing Groetken, 843 F.2d at 104, which in turn cited 124 Cong. Rec. 34,016 (Senate), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6567; 124 Cong. Rec. 32,416 (House), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6436, 6498 (emphasis added).

21. The Seventh Circuit in In re Groetken, 843 F.2d 1007, 1013 (7th Cir. 1988) similarly referred to the legislative history to Section 507(a)(8)(E), which indicated that Congress intended the term "transaction" to be defined broadly, and to include "all" Federal, State or local taxes "generally considered or expressly treated as excises" including sales taxes,

estate and gift taxes, gasoline and special fuel taxes, and wagering and truck taxes." Id. It concluded: "Thus, whether the Occupation Tax is viewed as a sales tax or a tax on the occupation of retailing, it would appear that it falls within Section E's scope" as an excise tax. Id. Indeed, under New York State Tax Law § 1101(b)(5), the term "sale" is defined to include "rental, lease or license to use or consume". Also, as noted above, since a leasehold has been held to be personal property, a tax on the rental of real property for commercial use is akin to a retail sale. See Ampco, supra; Matter of Grumman Aircraft Eng. Corp. v. Board of Assessors, 2 N.Y.2d 500, 161 N.Y.S. 393 (1957).

22. "The obvious meaning of transaction in Section (a)(8)(E) is some act by the taxpayer, not some act by the taxing authority." Bliemeister v. Indus. Comm'n of Arizona (In re Bliemeister), 251 B.R. 383, 394 (Bankr. D. Ariz. 2000) (holding that the "transaction subject to tax [was] the act of employing a worker who [was] injured while the employer [was] without workers' compensation insurance" and noting, for illustration purposes, that "if we were considering an excise tax on a sale, the transaction would be the sale itself, not the date on which the tax becomes due to the state after the report of sale is filed"); DeRoche v. Arizona Indus. Comm'n, 287 F.3d 751, 755 (9th Cir. 2002) (holding that the act of employing a worker without carrying required insurance is a transaction); Trustees of the Trism Liquidating Trust v. IRS (In re Trism, Inc.), 311 B.R. 509, 516 (8th Cir. App. Panel 2004), aff'd, 126 Fed. Appx. 339 (8th Cir. 2005) ("[t]he operation of the vehicle for 5,000 miles is an act or a series of acts whereby the right to collect payment of the heavy vehicle tax arises"); Fagan v. Collection Div. Mich. Dep't of Revenue (In re Fagan), 465 B.R. 472 (Bankr. E.D. Mich. 2012) (the "transaction" was "the operation of a commercial motor carrier on state roads and highways, and the consumption of fuel through that operation.").

23. Thus, the term "transaction" can involve "one or a series of acts" and does not have to be limited to one discrete act or to the actual payment of the tax. See Trism (holding that the obligation imposed by federal statute on the operation of heavy trucks on the highways in excess of 5,000 miles per year constituted a "transaction" and the tax imposed constituted an "excise tax" entitled to priority treatment under Section (a)(8)(E)); In re Fagan (holding that an international fuel tax assessed based on the amount of fuel consumed by commercial motor carriers traveling on Michigan public roads and highways was an excise tax within the meaning of Section (a)(8)(E)); Robert M. Hallmark & Assocs. v. Athens/Alpha Gas Corp. (In re Athens/Alpha Gas Corp.), 332 B.R. 578, 580 (B.A.P. 8th Cir. 2005) (The term "transaction" is broadly defined and in that case it referred to "debtor's post-petition act of exercising control of all the profits, thereby depriving the appellants of their revenue").

24. "Distilled to its essence, it is an act between the parties which alters their legal relationship, as is stated in the legal definition adopted previously by this court:

> [A transaction is] an act of transacting or conducting any business; between two or more persons; negotiation; that which is done; an affair. An act, agreement, or several acts or agreements between or among parties whereby a cause of action or acceleration of legal rights occur. It may involve selling, leasing, borrowing, mortgaging or lending. Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. It is a broader term than "contract". Trs. Of the Trism Liquidating Trust v. IRS (In re Trism, Inc.), 311 B.R. 509, 516-17 (B.A.P. 8th Cir. 2004) (quoting Black's Law Dictionary 1496 (6th ed. Rev. 1990), *aff'd*, 126 Fed. Appx. 339 (8th Cir. 2005).

Id., 332 B.R. at 580.

25. Accord, Nat'l Steel, where the court stated:

> However, transactions are not limited to separate and distinct acts or specific taxable events … Courts have found that various activities constitute transactions in connection with excise taxes, including operating an automobile, *see e.g., Appugliese*, 210 B.R. at 898; driving a large truck on a public highways, *see e.g. Trism*, 311 B.R. at 517; or employing a worker, *see e.g., Suburban I*, 998 F.2d at 340 n. 3; *New Neighborhoods*, 886 F.2d at 719; *United Healthcare Sys.*, 282 B.R. at 341; *Payne*, 27 B.R. at 814, 817.

321 B.R. at 911. Thus, the court held that the Texas franchise tax was "an excise tax on a transaction or a series of transactions that were necessarily required in the carrying on of a business." Id. at 912 ("Whether a transaction consists of hiring a worker, executing a contract, operating a vehicle on Texas roadways, renting office space, or selling goods, any single transaction requires the corporation to pay state franchise tax for that calendar year. The Trust does not dispute that [the debtor] conducted business in Texas during calendar year 2002, thereby exercising a privilege that confers upon corporations various economic benefits, as well as the opportunity to invoke the protection of Texas law.") (Emphasis added).[4]

26. Applying the above reasoning to the case at hand, it can logically be concluded that the Debtors' entry into a commercial lease with the intent of using such "taxable premises" for commercial purposes, qualifies as a "transaction" for purposes of 11 U.S.C. § 507(a)(8)(E), regardless of whether or not the Debtors have been profitable. As these cases make clear, this Court does not have to take an either/or approach among multiple "acts" that are

[4] The court distinguished In re Templar, 170 B.R. 562 (Bankr. M.D.Pa. 1994) which, after quoting Black's dictionary for the definition of the term "transaction", went on to note "enigmatically" that the occupation tax in that case was not an excise tax. 321 B.R. at 912.

involved in conducting a commercial activity from leased premises under the CRT statute because each separate act, as well as all of the acts taken together, can constitute a "transaction" for the purposes of 11 U.S.C. § 507(a)(8)(E). See In re George, 95 B.R. 718 (9th Cir. App. Panel 1989) (holding that shareholders' and officers' personal liability under California law arising from their failure to pay the applicable sales tax on the gross receipts reported by the corporation was itself an excise tax within § 507(a)(8)(E) excepted from discharge in Chapter 7 case. Under California law, such personal liability was imposed on multiple types of acts relating to the non-payment of tax); Rizzo v. Mich. Dep't of Treasury (In re Rizzo), 741 F.3d 703 (6th Cir. 2014) (corporate officer's personal liability for the failure to pay corporate taxes was itself an excise tax under § 507(a)(8)(E) not dischargeable in the officer's bankruptcy).

27. A broad interpretation of the term "transaction" is consistent with the Black's Law Dictionary definition of "excise tax" advanced by the Debtors since entering into a commercial lease agreement for the conduct of business certainly represents "the performance of one or more acts", "the engaging in an occupation", and/or the "enjoyment of a privilege", the privilege of being able to use the premises for commercial purposes pursuant to a lease. See also, In re Appugliese, 210 B.R. 890, 897 (Bankr. D. Mass. 1997) (a state tax imposed by the Registry of Motor Vehicles was owed for the privilege of operating an automobile in the state and was thus an excise tax); In re Groetken, 843 F.2d 1007, 1014 (7th Cir. 1988) (a tax on the occupation of retailing was an excise tax).

28. DOF disagrees with the Debtors' characterization of how DOF's Corporation Taxes and CRT should be treated and the "chart" set forth in paragraph 15 of the Debtors' Memo. Debtors argue that DOF should have a priority claim for unpaid Corporation Taxes (principal and interest) in the amount of $2,139.03 and an unsecured claim for unpaid

CRT (principal and interest), as well as the penalties on all the taxes, for a total amount of $33,129.68.

29. DOF, on the other hand, contends that it should be allowed a priority claim of $2,139.03 for Corporation Taxes and a priority claim of $26,532.14 for CRT principal and interest for a total of $28,671.17. DOF is willing to have the penalties for both types of taxes reclassified as unsecured for a total unsecured claim of $6,597.54 ($901.23 for Corporation Taxes and $5,696.31 for CRT). As reflected in the DOF Amended Claim No. 205 filed on August 18, 2020, DOF is not seeking priority treatment for the penalties on both types of taxes, which can be reclassified as total unsecured.

CONCLUSION

The Debtors' leasing and use of premises in New York City for the commercial purposes constitute one or more "transactions" within the meaning of the priority excise tax provision set forth at 11 U.S.C. § 507(a)(8)(E), whether or not Debtors were profitable or actually paid all the rent. Thus, DOF was entitled to assert a priority excise tax claim under § 507(a)(8)(E) for CRT. DOF's Claim No. 205 (as amended) should be allowed as set forth above and Debtors' Objection should be overruled.

Dated: New York, New York
November 6, 2020

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CERTIFICATE OF SERVICE

We, Gabriela P. Cacuci and Samantha J. Chu, both attorneys admitted to practice before the courts of the State of New York, do hereby certify that on November 6, 2020, we served true copies of the foregoing New York City Department Of Finance's Memorandum Of Law In Opposition To Debtors' Memorandum Of Law And Second Omnibus Objection To DOF Claim No. 205 dated November 6, 2020, by facsimile and/or electronic transmission on the persons listed below:

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