

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:

UBI LIQUIDATING CORP.,

Debtor

Chapter 11

Case No. 10-13005 (KJC)

Hearing Date: Sept. 27, 2012 10:00 a.m.

**RESPONSE OF CITY OF NEW YORK TO DEBTOR'S SEVENTH
OMNIBUS OBJECTION TO CLAIMS, WITH RESPECT TO CLAIM
NUMBER 729 OF THE NEW YORK CITY DEPARTMENT OF FINANCE**

The Department of Finance of the City of New York (the "City"), by its counsel, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, as and for its response to the seventh omnibus objection dated August 15, 2012 (the "Objection") of the UBI Liquidating Trust and its affiliated debtors (the "Debtors") and the Liquidating Trust Committee, the debtor in the above entitled case, to Claim Number 85 filed by the City, respectfully states as follows:

BACKGROUND

1. On or about February 10, 2011, prior to the expiration of the governmental bar date, the City filed Claim No. 729, as a priority tax claim against the Debtor in the amount of \$202,500.00 (the "Claim"), including the amount of \$40,500 for General Corporation Taxes ("GCT") for the period February 1, 2004 through the filing date of September 21, 2010, and \$162,000.00 for Commercial Rent Tax ("CRT"), for the period June 1, 2004 through September 21, 2010.

2. On or about August 15, 2012, the Debtors filed the Objection, including an Objection to the City's Claim as not being supported by sufficient documentation. Specifically, the City's Claim is listed as the 25th claim on Exhibit "D," purporting to be a list of claims with insufficient documentation. Under the column reasons for the proposed disallowance, the Debtors assert: "There is no basis for the claim in the Debtors' books and records and the claim includes insufficient documentation to support the validity and amount of the claim. The Debtors records reflect that there were no operations in the jurisdiction during the time for which the claim alleges amounts are owed." Objection Exhibit D, page 3.

3. The time for the City to respond to the Objection to its Claim has been extended by agreement among the parties through discussions between counsel for the City and counsel for the Debtors.

DISCUSSION

4. In the Objection, the Debtors asserted, as noted above, only that the Debtors' books and records "do not reflect" that the amounts set for in the Claim are owed to the City. Further, the Debtors state that the Claim lacks sufficient documentation and that the Debtors did not operate in the jurisdiction during the periods covered by the Claim. These mere assertions, however, are not sufficient.

5. The City's Claim is prima facie valid. See Fed. R. Bankr. P. 3001(f). Rule 3001(f) "commands that a properly filed proof of claim constitutes prima facie evidence of the claim's validity." In re St. Johnsbury Trucking Co., 206 B.R. 318, 323 (Bankr. S.D.N.Y. 1997), aff'd 221 B.R. 692 (S.D.N.Y. 1998), aff'd 173 F.3d 846 (2d Cir. 1999); In re Pinnacle Brands, Inc., 259 B.R. 46, 49-50 (Bankr. D. Del. 2001); In re Finova Capital Corp., 356 B.R. 609, 623 (Bankr. D.Del. 2006). Supporting documentation is not required since the City's Claim is based

on a statutory obligation for taxes. In re Los Angeles Int'l Airport Hotel Assocs., 196 B.R. 134 (9th Cir. BAP 1996) (failure to attach documentation to support a claim based on a statute does not deprive the claim of prima facie validity), aff'd, 106 F.3d 1479 (9th Cir. 1997); In re Pan, 209 B.R. 152, 156-57 (D. Mass. 1997) (a properly filed proof of claim constitutes prima facie evidence of the government's claim even though no documentary evidence of the claim is provided).

6. The City's Claim (consisting of unpaid GCT and unpaid CRT for the pre-Petition period) is accorded an unsecured priority status pursuant to Section 507(a)(8)(A) as an income tax for GCT and (507(a)(8)(E) of the Bankruptcy Code as excise taxes for CRT.

7. New York City imposes a GCT tax on domestic and foreign corporations that do business in New York City, or have a taxable connection with the City, unless they are specifically exempted. See New York City Administrative Code ("NYC Code") § 11-603(1); Allied-Signal, Inc. v. Commissioner of Finance, 79 N.Y.2d 73 (1991). Generally, the tax is based on the entire net income allocated to the City. However, if a higher payment will result, one of three alternative bases must be used: (1) business and investment capital; (2) income plus certain salaries; or (3) a flat-rate minimum. See NYC Code §11-604. GCT fits squarely within the ambits of § 507(a)(8)(A) of the Bankruptcy Code as a tax based on the business income or gross receipts of a corporation.

8. CRT is imposed on the rental of commercial real property and is measured by and calculated as a percentage of the consideration paid for the use of the premises, for which the tenant is liable. See NYC Code §§ 11-701 & 702. Thus, where the debtors fail to file the required NYC CRT tax returns but filed at least some NYC GCT tax returns and/or federal tax returns, DOF has no other way of attempting to determine the tax due for CRT except by using

the information and amounts disclosed in the GCT and/or the federal tax returns filed, if any. CRT is an excise tax on the use of property for consideration, not one on mere ownership. Ampco Print-Adv. Corp. v. City of New York, 14 N.Y.2d 11, 19-22 (1964). Consequently, CRT is an “excise tax on a transaction” under section 507(a)(8)(E) of the Bankruptcy Code.

9. Since the City has established its prima facie case, the burden of going forward shifts to the Debtors to produce evidence sufficient to negate the prima facie validity of the filed claim. See In re Make Meat Corp., 1999 U.S. Dist. LEXIS 3974 (S.D.N.Y. 1999); Johnsbury, supra, 206 B.R. 318 at **15; In re Finova Capital Corp., 356 B.R. at 623; In re Mariner Post-Acute Network, Inc., 2005 U.S. Dist. LEXIS 13673, 4-5 (D.Del. 2005); In re Touch America Holdings, Inc., 2007 Bankr. LEXIS 4167 (Bankr. Del. 2007). “To overcome this prima facie evidence, the objecting party must come forth with evidence which, if believed, would refute at least one of the allegations essential to the claim” In re Minbatiwalla, 424 B.R. 104, 111 (Bankr. S.D.N.Y. 2010) citing Sherman v. Novak (In re Reilly), 245 B.R. 768, 773 (2d Cir. B.A.P. 2000) (citations omitted).

10. The Debtors’ assertion that the City’s Claim is not reflected in the Debtors’ “books and records”, has been rejected by courts as being insufficient to rebut the presumption of a claim’s validity. See In re Allegheny Int’l, Inc., 954 F.2d 167, 173-174 (3rd Cir. 1992) (objector must produce evidence equal in force to the prima facie case); In re King Street Investments, Inc., 219 B.R. 848 (9th Cir. BAP 1998) (objector must produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves). See Johnsbury, supra, 206 B.R. 318, 323 (Bankr. S.D.N.Y. 1997), aff’d 221 B.R. 692 (S.D.N.Y. 1998), aff’d 173 F.3d 846 (2d Cir. 1999), where despite a similar assertion made by the debtors, the trial proved the correctness of the taxing authority’s

deficiency claim against the debtors; In re Minbatiwalla, 424 B.R. 104, 111 (Bankr. S.D.N.Y. 2010).

11. Thus, the Debtors have failed to overcome the prima facie validity of the proof of claim. The mere assertion that the Debtors' books and records do not reflect the Claim does not rebut the prima facie validity of the claim.

12. The Debtors also claim that they did not do business in the City during the time period covered by the Claim. The City notes that two of the Debtors are named 100% Girls of New York, Inc. and Large Apparel of New York, Inc., and indeed filed City corporate tax returns indicate that some of the Debtors did have business locations inside the City during the claims period, including some which may be subject to the CRT, for which the Debtors did not file returns. The City needs to review the leases to determine if the Debtors' assertions are correct.

13. Upon receiving the Objection, the City communicated with the Debtors' counsel in an attempt to try to reach a resolution through an informal exchange of information and negotiation. Attached is a copy of the Information Document Request ("IDR") sent by City auditor Nahed Iskander to Debtors' counsel on August 22, 2012. Ms. Iskander advises the undersigned that she has not yet received any response to such IDR. The City hopes to be able to consensually resolve any dispute with respect to the Claim, but pending receipt of requested information the Claim as filed is prima facie valid based on the information the City has available to it.

14. Taxes are self-reporting, and absent further information from the Debtors the Claim as filed stands.

15. Because certain of the GCT amounts were subject to pre-petition audit, these amounts in the Claim are likewise entitled to priority under Bankruptcy Code §507(a)(8)(A)(iii). See Fein v United States (In re Fein), 22 F.3d 631, 632 (5th Cir. 1994).

16. Also, partial years are also subject to priority, such as the year during which the Debtor filed through the filing date. See 4-507 Collier on Bankruptcy-15th Edition Rev ¶507.10[2][c]. See In re L.J. O'Neill Shoe Co., 64 F.3d 1146 (8th Cir. 1995) and In re Hillsborough Holding Corp. 16 F.3d 1391 (11th Cir. 1997).

17. A determination of the Claim after documents have been provided and the City has been able to review them is the appropriate way to proceed here. The City has cooperated with the Debtor and hopes that this matter can be resolved by the parties; to the extent that issues remain, they will be narrowed.

18. The City reserves its right to assert any further defenses it may have with respect to the claim Objection.

WHEREFORE, the City respectfully requests that the City's Claim (both CRT and GCT) be allowed in full as filed, and that the Court grant to the City such other and further relief as the Court determines to be just.

Dated: New York, New York
September 13, 2012

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Not Admitted in Delaware

CERTIFICATE OF SERVICE

The undersigned, an attorney duly admitted to practice in the United States District Courts for the Southern and Eastern Districts of New York certifies that a copy of the foregoing **Response of City of New York to Debtors Seventh Omnibus Objection to Claims With Respect to Claim Number 729 of the City of New York Department of Finance** was served via electronic mail on September 13, 2012, upon L. Katherine Good of Richards Layton & Finger, P.A., counsel for the Liquidating Trustee.

This is the 13th day of September, 2012

/s/ Hugh Shull

Hugh H. Shull III