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The Attempted Expansion of Section 1146(c) Of The Bankruptcy Code And Its Status In Light Of The Current Economic Times

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While the total number of bankruptcy cases filed in the year 2004 decreased, Chapter 11 filings increased by over 2.2% percent.¹ With interest rates rising, and acquisitions and refinancing of real properties occurring at an ever-increasing rate, the possibility that real estate based bankruptcies will multiply over the next few years is more than likely. The availability of the Section 1146(c) exemption provided for in the Bankruptcy Code should therefore be of great interest to secured creditors. Several states, counties, and municipalities impose significant transfer taxes in connection with conveyances of real property, which is of concern to secured lenders who plan to take title, either voluntarily or involuntarily, to real property collateral from delinquent borrowers. These taxes often can be eliminated if the transfer occurs as part of a borrower's consensual or "pre-packaged" Chapter 11 bankruptcy reorganization plan. Thus, the interpretation of the provisions of subsection (c) of Section 1146 of the Bankruptcy Code over the past few years is of current importance.

HISTORICAL BACKGROUND OF SECTION 1146(c)

In an effort to ensure that the bankruptcy process was not unduly hindered by the exclusive effect of other laws, Congress created certain exceptions to aid the implementation of plans of reorganization; one example is providing that transfers of real property would be free from certain taxes.² According to one bankruptcy court, Congress enacted Section 1146(c) of the Bankruptcy Code to facilitate reorganizations by giving debtors tax relief

from stamp or similar tax, such as transfer taxes, for transfers of property pursuant to an instrument of transfer under a confirmed plan.³ By exempting certain transactions from taxes, Section 1146(c) of the Bankruptcy Code reduces the obligations encumbering the property, thereby making a greater portion of the sale proceeds available to creditors and affording debtors a quick and efficient means of distributing and discharging obligations under a plan.

Specifically, Section 1146(c) of the Bankruptcy Code provides that the issuance, transfer, or exchange of a security, as well as the making or delivery of an instrument of transfer, is exempt from any law imposing a stamp tax or similar tax, if such transactions arise under a plan confirmed by the court under 11 U.S.C. §1129.⁴ In order for the tax exemption provided for in 11 U.S.C. §1146(c) of the Bankruptcy Code to apply three requirements must be met. First, the tax in question must be a "stamp tax or similar tax." (Taxes held to be "stamp taxes" for purposes of Section 1146(c) include gains taxes, mortgage-recording taxes, and real-estate transfer taxes or "deed taxes".)⁵

Second, the tax must be imposed upon the "making or delivery of an instrument of transfer."⁶ (Deeds, deeds of trust, and mortgages have all been held to constitute "instruments of transfer" under Section 1146(c).)⁷

Third, the transfer must be under a plan confirmed under 11 U.S.C. §1129.

Although some detail will be given on the first two requirements, this article concentrates primarily on the interpretation of the third requirement.⁸

THE FIRST TWO REQUIREMENTS OF 11 U.S.C. § 1146(c)

The Bankruptcy Code does not define what constitutes a stamp or similar tax for purposes of applying the exemption provided for in 11 U.S.C. §1146(c), as a result in order to inter-

pret this Section we must look to case law.⁹ Courts have held that a tax falls within the definition of a "stamp or similar tax" if it contains certain elements:

- (1) the tax is imposed only at the time of transfer or sale of the item at issue;
- (2) the amount due is determined by the consideration for, par value of, or value of the item being transferred;
- (3) the tax rate is relatively low, often about 1% or less of the consideration, par value or value of the property;
- (4) the tax is imposed irrespective of whether the transferor enjoyed gain or suffered loss on the underlying sale or transfer; and
- (5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording.¹⁰

Courts have held that gains taxes are included in this definition as:

- (1) the tax is imposed on a transaction-by-transaction basis, payable on transfer, and without regard for other transfers made over a given time;
- (2) the consideration recited in the deed, and paid to the transferor, plays an essential role in assessing the amount of tax due, with the primary elements being the acquisition cost and the sale cost; and
- (3) the gains tax is a prerequisite to recording.¹¹

By way of example, in the case of *In re 995 Fifth Ave.*¹² the court found that the gains tax was actually assessed on the transfer of real property rather than on the income generated thereby, because the gains tax was not based on the transferor's accrued wealth; the original purchase price was not adjusted to reflect depreciation cost deductions originally allowed in the operation of commercial real estate nor was the tax assessed against all profitable transactions. Further, the court found that unlike income tax liability, the

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transferee was secondarily liable for the amount owed if the transferor did not pay the gains tax.

Courts have also held that a tax levied upon the recording of a mortgage is a "stamp tax or similar tax" for purposes of exemption therefrom pursuant to 11 U.S.C. §1146(c). For example, in the case of *In re Baldwin League of Independent Schools*,¹³ the Court found that the mortgage-recording tax fell under the Section 1146(c) exemption because:

- (1) the amount of the tax was determined by the consideration cited in the mortgage document;
- (2) payment was a pre-requisite to recordation; and
- (3) the tax was imposed on a written instrument.

Courts have also held that a tax levied upon an instrument transferring an interest in real property, commonly characterized as either a "real-estate transfer" tax or a "deed" tax, is a "stamp tax or similar tax" for purposes of applying the exemption provided by 11 U.S.C. §1146(c). In the case of *In re Jacoby-Bender, Inc.*¹⁴ the court held that state and city real-estate transfer taxes were similar to stamp taxes, and allowed the exemption. The court focused on the two primary characteristics of stamp taxes: (1) the amount of the tax is usually determined by the consideration recited in the document; and (2) the taxes must be paid as a pre-requisite to a deed's recordation. Because real estate transfer taxes are levied at a rate determined by the consideration or value of the property conveyed, and their payment is required before a deed would be recorded, they were found to be within the meaning of the exemption.¹⁵ The court also found that these types of taxes unmistakably possessed two technical characteristics of stamp taxes: (1) they are charged on written instruments; and (2) the written instruments subject to stamp taxes are recognized in law as important evidence of the enforcement of legal rights.¹⁶

Courts have also held that mortgages were "instruments of transfer" for purposes of the tax exemption allowed under 11 U.S.C. §1146(c). For example in the case of *In re Baldwin League of Independent Schools*,¹⁷ the court ruled that a convertible mortgage which transferred the debtor's principal asset could not be characterized as anything other than an "instrument of transfer" for purposes of exemption under 11 U.S.C. §1146(c). Although the city in that case argued that a transfer only includes documents such as a deed, which transfers title to property absolutely, the court found the term "transfer",

as defined in the Bankruptcy Code 11 U.S.C. §101(54), to encompass a broad definition of transfer including "every mode, direct or indirect, absolute or conditional, voluntary or involuntary of disposing of or parting with property or an interest in property."¹⁸

THE THIRD REQUIREMENT: WHEN IS A TRANSFER MADE "UNDER A PLAN"

There is of course no doubt that where the transfer actually occurs under the plan and, the plan contemplates and provides for the same, then provided the other requirements discussed above are met, the exemption applies. Because confirmation of a plan is a lengthy process subject to court approval, debtors often look to sell off assets at an early stage, in order to generate funds to disburse if and when a plan is approved. In an effort to facilitate and encourage this process some courts began to apply the exemption with a great deal of latitude which in turn started to dilute what many believe to be the limited purpose and proper application of 11 U.S.C. §1146(c). Several bankruptcy courts have examined the language in Section 1146(c) of the Bankruptcy Code in a variety of contexts with differing results.

The concept behind the expansion of application of the exemption and the adoption of a very broad reading of the statute was predicted on a belief that "[g]iven the reality of business and bankruptcy practice, adopting a rule that requires all bankruptcy transfers to occur post-confirmation would seem to frustrate Section 1146(c)'s stated purpose of facilitating reorganization in a large number of cases."¹⁹ Although a narrow application of the exemption may not facilitate reorganization, too broad of an interpretation may go beyond Congressional intent in this area. Unfortunately the court decisions in this area have not been consistent. In fact, for a time it seemed that as long as the sale was around the time of confirmation or could in some way be tied into confirmation of a plan, that was all that the courts were going to require in order to allow the exemption to be applied.

The case which is considered by many to have been the starting point of an expansion in the interpretation of this Section, is the Second Circuit's decision in *In re Jacoby-Bender, Inc.*²⁰ This case, and its progeny, hold that where a transfer is necessary or intended to facilitate the confirmation of a plan then it is "under a plan" within the meaning of 11 U.S.C. §1146(c). In this case, the debtor originally sought to transfer its property pursuant to an order under 11 U.S.C. §363, but the court denied at that time the request to exempt taxes

associated with the sale under 11 U.S.C. §1146(c) as a plan had not yet been confirmed.²¹ However, once the plan was confirmed, the court granted a renewed motion to exempt the taxes under 11 U.S.C. §1146(c). The Second Circuit affirmed the decision finding that the sale was necessary to consummation of the plan (as the proceeds of the sale funded the plan's distribution),²² and therefore the application of the exemption met the intent of Section 267 of the Bankruptcy Act as reconstituted in Section 1146 of the Bankruptcy Code.²³

The case of in *In re Amsterdam Ave. Dev. Associates*,²⁴ followed wherein the court held that the sale of an apartment building had been under a plan within the meaning of 11 U.S.C. §1146(c), and granted a motion exempting the debtor from payment of state and city real-estate transfer taxes.²⁵ The court considered it immaterial that the plan had not mentioned the delivery of the deed,²⁶ and found the case of *Jacoby-Bender* to be binding precedent holding that since consummation of the plan depended upon the sale, 11 U.S.C. §1146(c) could properly be applied.²⁷

In the case of *In re 995 Fifth Ave. Assoc.*,²⁸ the court held that 11 U.S.C. §1146(c) exempted a debtor from liability under a state gains tax. However, the Court glossed over the requirement in 11 U.S.C. §1146(c) that the transfer be under a confirmed plan, instead finding that all of the plans filed by the debtor (and there were several) contemplated the sale and thus, even though the sale occurred prior to confirmation, the transfer was deemed to be "in connection with confirmation of a plan."²⁹ In doing so the court effectively added language into the statute, i.e. the words "in connection with", to make the exemption fit. No determination was made as to whether this interpretation was even proper nor for some reason did the taxing authorities even raise this as an issue.³⁰

After these cases it seemed there were an influx of cases with anticipatory sale motions under 11 U.S.C. §363 including provisions exempting the taxes associated with the transfers under 11 U.S.C. §1146(c).³¹ For a time it seemed to be that things were going far a field, although a few courts did put some limitations on the use of the exemption.³²

Up until 2003 only the Fourth Circuit decision of *In re NVR Homes, Inc.*,³³ had tried to put a stop to the expansion of this language. In *NVR Homes, Inc.* the debtor had made almost 6,800 transfers of real property post petition in the year and a half it was in bankruptcy. (The debtor was in the business of building homes). Eventually the debtor filed a

plan and thereafter sought to recapture the real estate taxes that had been paid during the entire post-petition period. The lower courts found that all of the property transfers that occurred during the bankruptcy case were necessary to, or in furtherance of, a plan and allowed the exemption to be applied.³⁴ These courts, relying on the Second Circuit decision of *Jacoby-Bender*, and taking a very broad reading of the statute, found that since all of these transfers allowed the debtor to remain a viable operation during the bankruptcy process, they were related to the successful emergence from bankruptcy under a plan.³⁵

On appeal the Fourth Circuit discussed the *Jacoby-Bender* decision in detail, noting that in that case the Second Circuit had faced "a succinct issue . . . [of] whether the confirmed reorganization plan encompassed [a] property sale, thereby making it part of a 'plan confirmed' under §1146(c)".³⁶ The court in *In re NVR Homes, Inc.* found the Second Circuit had applied its test solely to interpret the extent and scope of a confirmed reorganization plan,³⁷ pointing out that "*Jacoby-Bender* did not deal with a pre-confirmation transfer, but a post-confirmation transfer that, although not specifically authorized by the plan, was clearly necessary to the confirmed plan's consummation."³⁸ (This distinction often missed and misinterpreted by successive courts). The Fourth Circuit noted that subsequent courts, "have extended the Second Circuit's language and altered *Jacoby-Bender's* holding, changing the test from 'necessary to the consummation of a plan', to necessary to the 'confirmation of a plan',³⁹ . . . (citations omitted). . . and [have] applied it to the interpretation of the scope of §1146(c) itself, rather than just a plan's provisions."⁴⁰ The Fourth Circuit pointed out "[t]he fundamental difference between the consummation of a plan and the confirmation of a plan is the timing of the events within the bankruptcy process. Consummation or execution of a reorganization plan cannot take place until the bankruptcy court first confirms a plan."⁴¹ The Fourth Circuit found that "every transfer 'essential' to a plan's confirmation is by definition 'under a plan confirmed' is fundamentally flawed."⁴² Thus the circuit held that only those transfers "reviewed and confirmed by the court" in a plan warranted application of the exemption.⁴³

Although the facts of *In re NVR Homes, Inc.* would have allowed application of the exemption only under an incredibly broad reading of Section 1146(c) of the Bankruptcy Code, more recent decisions have come down denying application of the exemptions even under a more restricted set of facts.

In 2003, the Third Circuit decided *In re Hechinger*,⁴⁴ with the majority of the Circuit Courts holding that Section 1146(c) of the Bankruptcy Code may not be applied to any pre-confirmation transfers under any circumstances. The Third Circuit specifically relied on the "natural" reading of Section 11 U.S.C. §1146(c) of the Bankruptcy Code and deemed the words "under a plan confirmed" as used in the statute to mean, "pursuant to a plan confirmed."⁴⁵ In addition, the Third Circuit pointed to two other justifications for interpreting the phrase "under a plan confirmed" to mean "authorized by" such plan.⁴⁶ The first were the general rules of statutory construction that hold that "identical words used in different parts of the code are intended to have the same meanings."⁴⁷ The second was the premise that tax exemption provisions should be narrowly construed.⁴⁸

Unlike some of the earlier cases, such as *In re NVR Homes, Inc.* where the sale was not done in direct connection with the plan, in *In re Hechinger* the debtor had filed a liquidating plan and disclosure statement contemporaneously with an order approving the proposed sale and bidding procedures for the property. Although the disclosure statement and bidding were approved contemporaneously, the auction was situated to be held just prior to the confirmation hearing on the plan. Nevertheless the Third Circuit held that because the transaction was not made under the terms of a previously confirmed plan 11 U.S.C. §1146(c) did not apply.⁴⁹

Only a short time after the Third Circuit issued its ruling in *In re Hechinger*, the case of *In re National Steel Corp.*⁵⁰ was decided in the Northern District of Illinois and, more recently, the case of *In re Webster Classic Auctions, Inc.*⁵¹ was decided in the Middle District of Florida. In *National Steel Corp.*, the district court reversed the Bankruptcy Court on the grounds of plain meaning (as espoused by *In re Hechinger*) finding that a sale of real property prior to confirmation was not subject to the exemption even though the goal was to facilitate a successful reorganization. Like *In re NVR Homes, Inc.*, the debtor in *National Steel Corp.* sought to sell its assets early on, well prior to the formation and filing of a Chapter 11 plan. The court in this case held that the word "confirmed" in the subsection (c) of Section 1146 of the Bankruptcy Code makes explicit Congress' intent that a plan must be officially confirmed before 11 U.S.C. §1146(c) will take effect.⁵²

In a more recent case, although the request to apply the exemption was denied, the court seemed to once again broaden the application

of the exemption. In a case of first impression in the Eleventh Circuit, the Florida bankruptcy court ruled in *In re Webster Classic Auctions, Inc.*, that reimbursement of a stamp tax paid by a debtor at a real estate closing does not require that the property be transferred after confirmation of a reorganization plan. However, the court held that a pre-confirmation transfer must be "contemplated" by a filed plan if the debtor intends to seek tax relief.⁵³ In *Webster Classic Auctions, Inc.*, at the time of the sale there was no plan or even a disclosure statement on file. Moreover the sale motion did not seek the exemption nor did the plan once filed. Instead by separate subsequent motion the debtor sought the exemption. These facts, similar to those of *In re NVR Homes, Inc.*, warranted a denial of the request.

However, in rendering its decision the court held that interpretation of the term "under a plan confirmed" looks not to the timing of the transfers, but to the necessity of the transfers to a proposed plan of reorganization.⁵⁴ The court adopted and extended the reasoning first articulated in the *Jacoby-Bender* case, which explicitly recognized "Congress's apparent purpose in enacting Section 1146(c) was to facilitate reorganizations through giving tax relief, a purpose served equally well when the reorganization plan leave details to be settled in the future."⁵⁵ Although denying the request in the case before it, the court in *Webster Classic Auctions, Inc.*, adopted the following criteria for determining the applicability of Section 1146(c) of the Bankruptcy Code in the future:

There must be a plan of reorganization specifically contemplating a sale of property, and the plan must ultimately be confirmed in order for a debtor to take advantage of Section 1146(c)'s safe harbor. Any sale of property contemplated in the plan which is sought to be sold prior to confirmation must set out the requirements of Section 1146(c), and must be served on all relevant taxing authorities. The notice to taxing authorities will be included in the required Section 363(b) sale motion. Assuming all of these criteria are met, a Court must still determine whether the sale meets all the other requirements found in Section 363 and Section 1146(c).

In so deciding, the district court effectively broadened the *Hechinger* decision, by again providing for pre-confirmation motion transfers to be subject to application of the exemption pursuant to confirmation of a plan.

CONCLUSION

Notwithstanding the original liberal approach by courts to interpreting 11 U.S.C. §1146(c), the recent trend in the circuits, if not some of the district courts, has been to narrowly construe the exemption. The impact of this has as of yet to be determined. However, one thing is clear, a key incentive originally used to encourage purchasers to buy real estate in bankruptcy cannot be presumed to be in effect. Rather, application of 11 U.S.C. §1146(c) will not be applied in an unfettered fashion, and depending upon the court, the exemption may be narrowly applied.

Assuming more circuits adopt the narrow approach of *In re Hechinger* and *In re NVR Homes, Inc.*, the question of course is will that truly matter. In smaller cases the dollar loss may not be that significant, and at worst may result in a slightly reduced purchase price to trade off for the loss of the exemption. In larger real estate based cases the impact may be far more significant, and in light of the increase in filings this may be where the concern truly arises.⁵⁶ Yet, one can surmise that if in these larger cases the need to protect and preserve the use of the exemption is that critical to an effective reorganization, debtors may simply be forced to expedite the reorganization process in order to avail themselves of the same. The result would be a benefit to creditors who will reap the windfall not just of the increased purchase price, but a short road to confirmation as well. This of course remains to be seen.⁵⁷

NOTES

¹ Chapter 11 Filings Rise in 2004, 1 No. 18 Andrews Bankr. Litig. Rep. 2 (December 31, 2004); but see, *Personal Bankruptcies in the U.S. Predicted to Rise 11% by 2007*, available at <http://sevp.pnwswire.com/banking-financial-services/20050407/NEW02306042005-1.html>, whereby an economic consulting firm, Global Insight, Inc. has predicted that personal bankruptcies will rise over eleven (11.3%) between 2001 and 2007 to reach over 1.74 million in 2007. The study relies upon "rising interest rates and inflation combined with lower income growth and housing appreciation". *Id.*

² See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 274 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6283; see also *In re Baldwin League of Indep. Schools*, 110 B.R. 125, 127 (S.D.N.Y. 1990) (citing *In re Jacoby-Bender*, 40 B.R. 10, 16 (Bankr. E.D.N.Y. 1984)).

³ See *In re Kerner Printing Co.*, 188 B.R. 121, 124 (Bankr. S.D.N.Y. 1995).

⁴ 11 U.S.C. Section 1146(c). This section derives from former Section 267 of the Bankruptcy Act of 1898. However, Section 267 of the Bankruptcy Code was more limited in some respects than Section 1146 of the Bankruptcy Code and broader in others. For example Section 1146 of the Bankruptcy Code is not limited to corporations only, but it is limited to reorganization cases under Chapter 11 and the types of taxes it covers. (The rule does not apply in a Chapter 7 case even if it was converted from a Chapter 11). In contrast, Section 267 of the Bankruptcy Act was limited only to corporations, but related to all taxes not just state and local. See generally 8 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, 1146 L.H. [1][2] (15th rev. ed. 2005).

⁵ See 995 Fifth Ave. Associates, L.P. v. N.Y. State Dep't. of Taxation and Fin. (In re 995 Fifth Ave. Assoc., L.P.), 127 B.R. 533, 542 (S.D.N.Y. 1991) (holding a state gains tax occurring from the transfer of real property to be a stamp or similar tax); *In re Amsterdam Ave. Dev. Associates*, 103 B.R. 454 (Bankr. S.D.N.Y. 1989) (holding that state and city mortgage taxes imposed upon the recording of a mortgage constituted "stamp taxes or similar taxes" for purposes of exemption under 11 U.S.C. Section 1146(c)). See generally 8 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, 1146 L.H. [1][2] (15th rev. ed. 2005).

⁶ 11 U.S.C. §1146.

⁷ See *In re Jacoby-Bender, Inc.*, 34 B.R. 60, 62 (Bankr. E.D.N.Y. 1983) (holding that a deed is an instrument of transfer), *aff'd*, *City of New York v. Jacoby-*

Bender, Inc. (In re Jacoby-Bender), 758 F.2d 840, 842 (2d Cir. 1985); *Mensch v. Eastern Stainless Corp. (In the matter of Eastmet Corp.)*, 109 B.R. 694, 695 (D. Md. 1989), *rev'd on other grounds*, *Mensch v. Eastern Stainless Corp. (In the case of Eastmet Corp.)*, 907 F.2d 1487, 1489 (4th Cir. 1990); *In re Baldwin League of Indep. Schools*, 110 B.R. at 126 (finding a mortgage to be an instrument of transfer).

⁸ Although not discussed herein, we make passing reference to an ancillary issue in this analysis, sovereign immunity. Generally in many of these cases the taxing authorities assert that the Eleventh Amendment bars litigation of the issue of tax liability. "The Supreme Court has stated that where a defendant successfully demonstrates that the Eleventh Amendment precluded a suit, the court in which the plaintiff filed the action lacks subject matter jurisdiction over that action." *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 249 (3d Cir. 2003); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 64, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (stating that the Eleventh Amendment stands "for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III"). "When subject matter jurisdiction is at issue, a federal court is generally required to reach the jurisdictional question before turning to the merits." *In re Hechinger*, 335 F.3d at 249. Although "no action of the parties can confer subject-matter jurisdiction upon a federal court," *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), "a state may waive its Eleventh Amendment immunity". See *In re Hechinger*, 335 F.3d at 249 (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (holding that "[i]f a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action"). "Similarly, while a federal court is obligated to consider whether it possesses subject-matter jurisdiction even if the issue is not raised by the parties, see *Insurance Corp.*, 456 U.S. 702, 102 S.Ct. 2099, a federal court need not address the issue of sovereign immunity if neither party brings it to the attention of the court." *In re Hechinger*, 335 F.3d at 249.

Two courts of appeals have concluded that where a defendant argues that an action is barred by sovereign immunity, a federal court is not required to resolve that issue before adjudicating the merits of action. See *United States v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 891 (D.C. Cir. 1999); *Parella v. Ret. Bd. Of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 53-57 (1st Cir. 1999). Two courts of appeals have bypassed the Eleventh Amendment question and decided the appeals on other grounds pursuant to the doctrine that courts should avoid deciding constitutional questions whenever possible. See *Tyler v. Douglas*, 280 F.3d 116, 121 (2d Cir. 2001); *Floyd v. Thompson*, 227 F.3d 1029, 1034-35 (7th Cir. 2000). Finally a few courts of appeals have held that questions of sovereign immunity must be decided before reaching the merits of an appeal. See *United States v. Texas Tech Univ.*, 171 F.3d 279, 287 (5th Cir. 1999); *Seaborn v. State of Florida, Dept. of Corrections*, 143 F.3d 1405, 1407 (11th Cir. 1998). Thus anyone dealing with this issue is well served to spend time reviewing the implications and intricacies of the Eleventh Amendment.

⁹ The determination of what constitutes a tax under 11 U.S.C. §1146(c) is a federal question to be decided by defining the scope of federal law. Federal courts are neither bound by nor permitted solely to look to state labels in determining the nature of a state tax impacting upon a federal right, but instead are free to look at the nature of the tax and its effect upon a federal right. *In re Amsterdam Ave. Dev. Associates*, 103 B.R. 454, 458 (Bankr. S.D.N.Y. 1989). See *In re 995 Fifth Ave. Associates L.P.*, 963 F.2d at 511.

¹⁰ *Id.* at 512.

¹¹ *Id.* at 512.

¹² 110 B.R. at 127.

¹³ 40 B.R. 10 (Bankr. E.D.N.Y. 1984), *aff'd*, 758 F.2d 840 (2d Cir.).

¹⁴ *Id.* at 13.

¹⁵ *Id.* at 14.

¹⁶ 110 B.R. 127.

¹⁷ See also *In re Jacoby-Bender, Inc.*, 758 F.2d at 842; *First Federal Savings & Loans v. Hulm*, 738 F.2d 323 (8th Cir. 1989).

¹⁸ *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243, 250 (3d Cir. 2003).

¹⁹ 758 F.2d 840.

²⁰ *In re Jacoby-Bender, Inc.*, 34 B.R. at 62.

²¹ 40 B.R. at 11.

²² The Second Circuit stated that "[o] ld section 267, as is made clear by its statutory derivations, 6A Collier on Bankruptcy 15.08, at §836-40 (14th ed. 1977) related to transactions, in the treaties words, "which serve to execute or make effective plan confirmed under Chapter X. . . . A sale in general following on confirmation of a plan serves to make the plan effective." 758 F.2d at 842.

²³ *In re Amsterdam Ave.*, 103 B.R. at 460 (holding a "transfer under a plan connotes a transfer over which the bankruptcy courts have jurisdiction", (citing *In re United States v. Huckabee Auto*, 783 F.2d 1546 (11th Cir. 1986)).

²⁴ The court granted the request only insofar as it pertained to a transfer by the debtor and denied the application of the exemption as pertained to third party non-debtors. 103 B.R. at 461.

²⁵ 103 B.R. at 457; see also *City of N.Y. v. Smoss Enterprises Corp. (In re Smoss Enterprises Corp.)*, 54 B.R. 950, 952 (E.D.N.Y. 1985) (holding that a transfer of a parcel of real estate had been under a plan within the meaning of 11 U.S.C. §1146(c), and affirming the exemption from state and city real-property transfer taxes where the transfer occurred prior to confirmation of the liquidating plan, but the Court found that transfer was key to confirmation of the plan and its implementation as the sale proceeds were used to fund the plan).

²⁶ 103 B.R. at 457.

²⁷ 116 B.R. 384.

²⁸ *Id.* at 386.

²⁹ *Id.* at 390.

³⁰ Cases also allowing the Section 1146(c) tax exemption for transfers occurring prior to the confirmation of the plan include *In re Baldwin League of Independence Schools*, 110 B.R. 125; *In re 995 Fifth Ave. Assoc., L.P.*, 127 B.R. 533; *In re Permar Provisions, Inc.*, 79 B.R. 530 (Bankr. E.D.N.Y. 1987); *In re Amsterdam Ave.*, 103 B.R. 454; *In the Matter of CCA Partnership (CCA Partnership v. Director of Revenue, State of Delaware)*, 70 B.R. 696 (Bankr. Del. 1987), *aff'd*, *In the Matter of CCA Partnership (Director of Revenue, State of Delaware v. CCA Partnership)*, 72 B.R. 765 (D. Del. 1987).

³¹ Even as far as these courts were going some limitations still applied. For example, courts would not extend the exemption to transfers from a debtor to

"unrelated third parties". Thus mortgages secured by a non-debtor in order to facilitate a loan to buy the debtor's property was not subject to the exemption. See *In re Amsterdam*, 103 B.R. 454; see also *Holland Industries, Inc. v. United States of America (In re Holland Industries, Inc.)*, 103 B.R. 461, 470 (Bankr. S.D.N.Y. 1989); see also *Mensch v. Stainless Steel Corp. (In the case of Eastmet Corp.)*, 907 F.2d 1487, 1491 (4th Cir. 1990) (holding that a deed of trust transaction between the nondebtor purchaser of the property and third-party lenders had not been "under a plan"); *In re CCA Partnership*, 70 B.R. 696; *In re Cantrup*, 53 B.R. 104 (Bankr. Colo. 1985); *N.Y. City Dep't of Finance v. 310 Associates, L.P. (In re 310 Associates, L.P.)*, 282 B.R. 295 (S.D.N.Y. 2002) (holding transfer not under plan since at the time of transfer debtor had not even drafted a plan).

³² *NVR Homes, Inc. v. Clerks of the Circuit Courts et. al. (In re NVR Homes, Inc.)*, 189 F.3d 442 (4th Cir. 1999).

³³ *Id.* at 455.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 456 (citing *In re Smoss Enters. Corp.*, 54 B.R. at 951 (finding that a sale was under a plan because "the transfer of property was essential to the confirmation of the plan").

⁴⁰ *Id.*

⁴¹ *Id.* (citing Fed. R. Bankr.P. 3020, 3022 and stating "By changing and applying *Jacoby-Bender's* holding to new and different circumstances, courts used this altered analysis to not only to determine what transfers were 'under a plan', but also what transfers were 'under a plan confirmed'").

⁴² *Id.* at 456.

⁴³ *Id.* at 458.

⁴⁴ 335 F.3d 243 (3rd Cir. 2003).

⁴⁵ *Id.* at 252.

⁴⁶ *Id.* at 253.

⁴⁷ *Id.* at 253.

⁴⁸ *Id.* at 254 (citing *United States v. Centennial Savings Bank FSB*, 499 U.S. 573, 583, 111 S.Ct. 1512, 113 L.Ed.2d 608 (1991) (stating that "[t]ax-exemption and deferral provisions are to be construed narrowly."); *United States v. Wells Fargo Bank*, 485 U.S. 351, 354, 108 S.Ct. 1179, 99 L.Ed.2d 368 (1988) ("[e]xemptions from taxation . . . must be unambiguously proved."); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60, 59 S.Ct. 692, 83 L.Ed. 1104 (1939) (finding "[e]xemptions from taxation do not rest upon implication."); see also *Natl Private Truck Council v. Oklahoma Tax Comm'n.*, 515 U.S. 582, 590, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995) (noting the "strong background presumption against [federal] interference with state taxation").

⁴⁹ 335 F.3d at 257.

⁵⁰ *State of Illinois and Washington v. National Steel Corp. (In re National Steel Corp.)*, 2003 WL 22089881 (N.D. Ill. 2003).

⁵¹ 318 B.R. 216 (Bankr. M.D. Fla. 2004).

⁵² *Id.* at 219.

⁵³ *Id.*

⁵⁴ *In re Hechinger*, 335 F.3d at 261 (Nygaard, J., dissenting).

⁵⁵ *Id.* at 216 (citing *In re Jacoby-Bender*, 758 F.2d 840, 841 (2d Cir. 1985)).

⁵⁶ In the case of *In re NVR Homes, Inc.*, 189 F.3d at 448, recordation and transfer taxes totaled over \$8.3 million; the Debtor having made 5,571 transfers of real property during the post petition period.

⁵⁷ Of course debtors must still be careful to avoid an objection to a plan under 11 U.S.C. §1129(d). Section 1129(c) states: "Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issuance of avoidance". See *In re Rath Packing Co.*, 55 B.R. 528 (Bankr. N.D. Iowa 1985) (holding that Section 1129(d) should be strictly construed to impose on the governmental unit an obligation to prove that the most important purpose of the plan is tax avoidance). Compare *In re Lopez Dev., Inc.* 154 B.R. 607 (Bankr. S.D. Fla. 1993) (finding that use of a plan to sell property and secure exemption was not thwarted by subsequent dismissal of the case to substantially consummate the terms of the plan).



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