

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

IN THE UNITED STATES BANKRUPTCY COURT FOR THE YEAR 24 1989
SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

MOLLIE C. JONES, CLERK

BY _____ DEPUTY

IN RE:

W. J. RUNYON & SON, INC.
W. J. RUNYON, JR.

CASE NO. 8600304WC
CASE NO. 8600888WC

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Edward Ellington, Bankruptcy Judge

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON "MOTION TO COMPEL PAYMENT OF REAL ESTATE
TAXES BY ESTATE, OR ALTERNATIVELY, TO ALLOW
PAYMENT OF THE TAX TO BE TREATED AS AN ADMINISTRATIVE
EXPENSE" FILED BY REPUBLIC BANK FOR SAVINGS, F.A.**

THIS MATTER came before the Court on Republic Bank for Savings, F.A.'s "Motion to Compel Payment of Real Estate Taxes by Estate, or Alternatively, to Allow Payment of the Tax to Be Treated as an Administrative Expense" and "Brief in Support of Motion by Republic Bank for Savings to Compel Payment of Real Estate Taxes on the Cudd Tract"; responses and a "letter brief" filed by W. J. Runyon & Son, Inc. and W. J. Runyon, Jr.

(Debtors). In addition, the parties submitted a "Stipulation of Fact Re: Motion to Compel Payment of Taxes on Cudd Tract." After considering all pleadings, briefs and the stipulation, the Court finds that the post-petition taxes assessed to the Cudd Tract are proper administrative expenses of W. J. Runyon and Son, Inc. within the meaning of §503(b)(1)(B)(i), and Republic Bank is entitled to an administrative priority under §507(a)(1) for the post-petition taxes it has paid on the Cudd Tract.

FINDINGS OF FACT

After consideration of the stipulation of facts, certain admissions and concessions made in the briefs, and information furnished to the Court by letter, the Court finds as follows:

W. J. Runyon and Son, Inc. filed a petition for relief under Chapter 11 of the Bankruptcy Code on February 18, 1986. An involuntary Chapter 7 petition was filed against W. J. Runyon, Jr. on May 6, 1986. W. J. Runyon, Jr. then converted the involuntary Chapter 7 to a voluntary Chapter 11 on May 27, 1986.

W. J. Runyon and Son, Inc. currently owns approximately 995 acres of real property located in Warren County, Mississippi, known as the Cudd Tract (hereafter the Cudd Tract).

W. J. Runyon & Son, Inc. (Runyon & Son) maintained settling ponds on the Cudd Tract as part of its

gravel washing operations. Since the filing of its petition, Runyon & Son has continued to utilize and to maintain the settling ponds on the Cudd Tract. These ponds are the subject of a license from the Mississippi Water Pollution Control Board. Post-petition, between February 18, 1986, and August 26, 1986, Runyon & Son sold 52,000 cubic yards of sand and gravel off the Cudd Tract.

Republic Bank and Newton County Bank both hold mortgages on the Cudd Tract. Republic Bank obtained an assignment of the mortgage executed by Runyon Equipment Company on May 4, 1983 to Frontier Federal Savings Bank. Republic Bank's mortgage secures an indebtedness on the Cudd Tract in the principal amount of \$858,500.00. Newton County Bank's mortgage secures an indebtedness on the Cudd Tract in the principal amount of \$360,000.00

W. J. Runyon and Son, Inc. (formerly Runyon Equipment Co.) was served by the Chancery Clerk of Warren County, Mississippi, with notices of forfeiture for non-payment of the 1985, 1986 and 1987 ad valorem taxes on the Cudd Tract. Republic Bank initially requested the Court to compel the Debtors to pay the past due ad valorem taxes on the Cudd Tract, or in the alternative, to allow Republic Bank to pay the taxes and penalties and to be entitled to reimbursement from the estate under §503 and §507(a)(1). However, Republic Bank has now paid the outstanding ad valorem

taxes on the Cudd Tract; therefore, the portion of its motion requesting that the Debtors be compelled to pay the ad valorem taxes is moot. Republic Bank is now simply seeking reimbursement from the Debtors' estates as a §503(b)(1)(B)(i) administrative expense with a §507(a)(1) priority.

The parties have stipulated that the amount owed for pre-petition ad valorem taxes on the Cudd Tract was \$2,302.76. The parties have also stipulated that \$3,713.53 was owed for the post-petition ad valorem taxes on the Cudd Tract. However, dollar figures subsequently provided to the Court do not correspond with the dollar figures agreed to by the parties in the stipulation. The subsequent information lists the dollar amounts paid by Republic Bank to the Tax Collector of Warren County, Mississippi. However, there appears to be an error in the mathematical calculations in this list. Consequently, the Court is unable to determine the exact amount of the pre-petition and post-petition ad valorem taxes paid by Republic Bank.

The Debtors contend that the property is not needed for its effective reorganization. Runyon and Son's plan of reorganization provides for the abandonment of the Cudd Tract to the secured creditors. Since the Debtors will not retain the Cudd Tract or any

equitable interest therein, the Debtors contend that it would be unfair to the bankruptcy estates and to their unsecured creditors to assess post-petition ad valorem taxes to the estates.

Republic Bank argues that the ad valorem taxes are debts of the debtors' estates. Since the estates have received the benefit from the use of the property post-petition, Republic Bank contends that the estates should be charged with the payment of the ad valorem taxes on the property.

CONCLUSIONS OF LAW

At the outset it must be noted that although Republic Bank filed its "Motion to Compel Payment of Real Estate Taxes. . ." in both W. J. Runyon and Son and W. J. Runyon, Jr. bankruptcy cases, no evidence has been presented to the court which indicates that W. J. Runyon, Jr. (Case No. 8600888WC) in any way owned or used the Cudd Tract in his individual capacity. Therefore, the ad valorem taxes are not proper administrative expenses in the individual bankruptcy of W. J. Runyon, Jr.

Prior to determination of this adversary by the Court, Republic Bank paid to the Tax Collector of Warren County, Mississippi, the delinquent pre-petition and post-petition ad valorem taxes on the Cudd Tract.

Republic Bank initially sought an administrative claim with priority for both the pre-petition and post-petition ad valorem taxes. However, in its brief in support of its motion, "Republic (Bank) concedes that the estate is not liable for pre-petition taxes." Therefore, the issues as stated in Republic Bank's motion are not before the Court as originally pled. Rather, the single issue before the Court is the question of whether Republic Bank is entitled to a §503(b) administrative claim with a §507(a)(1) priority by virtue of its payment of the post-petition ad valorem taxes on the Cudd Tract.

The pertinent parts of Bankruptcy Code Sections 503 and 507 state:

§503. Allowance of administrative expenses.

(a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including --

(1) . . .

(B) any tax--

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title;
. . .

§507. Priorities.

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, . . .

(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for--

(A) . . .

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition.

In order for a claim to be an allowed administrative expense under §503(b)(1)(B)(i), it must be (1) a tax, and (2) incurred by the estate and not §507(a)(7) taxes. There is no dispute that the claim for which Republic is seeking reimbursement arose from its payment of ad valorem taxes. Therefore, §503(b)(1)(B) has been satisfied. Next, it must be determined if these ad valorem taxes were "incurred by the estate" and are not §507(a)(7) taxes.

In order for a tax to be an allowed administrative expense under §503(b)(1)(B)(i), the tax must be a §507(a)(1) tax and not a §507(a)(7) tax. "The essential difference between a . . . tax claim under §507

(a)(7) and a . . . tax claim under §503(b)(1)(B) and §507(a)(1) is that the former is for taxes incurred prior to the commencement of the bankruptcy case and the latter is for taxes incurred in the operation of the debtor's business after the filing of the petition." In re Spruill, 78 B.R. 766, 771 (Bankr. E.D.N.C. 1987).

Republic Bank has conceded that the estates are not liable for the pre-petition ad valorem taxes, and it has withdrawn its request for reimbursement of the pre-petition ad valorem taxes. Therefore, that portion of the ad valorem taxes which would be denied allowance as an administrative expense under §503(b)(1)(B)(i) and §507(a)(1) as pre-petition taxes under §507(a)(7) is not before the court. Having determined that the court is only addressing §507(a)(1) post-petition taxes, it must now be determined if the post-petition taxes were "incurred by the estate."

Upon the filing of a voluntary petition, §541 "creates" a bankruptcy estate. Section 541 defines "property of the estate", and it specifies what property becomes property of the estate. Real property owned by the debtor at the time of filing bankruptcy is one example of property which becomes property of the bankruptcy estate. Consequently, when W. J. Runyon and Son, Inc. filed its Chapter 11 petition on February 18,

1986, W. J. Runyon and Son, Inc.'s ownership interest in the Cudd Tract became property of the bankruptcy estate. Therefore, the ad valorem taxes were assessed to property which is property of the bankruptcy estate.

The Debtor denies that the taxes were "incurred by the estate." The Debtor cites the Mississippi Supreme Court case of Goosby v. Byrd, 13 So.2d 33 (Miss. 1943) to support its argument that the estate is not liable for the payment of the ad valorem taxes owed on the Cudd Tract.

However, the Court finds the cases cited by Republic Bank to be controlling in this particular set of facts. See: In re Spruill, 78 B.R. 766 (Bankr. E.D.N.C. 1987); In re Trowbridge, 74 B.R. 484 (Bankr. E.D.Pa. 1987); Perpetual American Bank, FSB v. District of Columbia (In re Carlisle Court, Inc.), 36 B.R. 209 (Bankr. D.D.C. 1983).

The pertinent issue before the court in In re Trowbridge, 74 B.R. 484, 486 (Bankr. E.D.Pa. 1987), was whether the estate had incurred the post-petition property taxes which had accrued on the debtor's real property. In Trowbridge the Chapter 7 trustee had abandoned the property in question from the bankruptcy estate as it was of no benefit to the estate. The debtor then sought to have the post-petition property taxes paid by the Chapter 7 estate.

The court began its analysis with the general principle that ". . . postpetition property taxes. . . are treated as an administrative expense liability of the estate under section 503(b)(1)(B) and allowed as a first distribution priority pursuant to 11 U.S.C. §507(a)(1)." (citations omitted). 74 B.R. at 485. The court stated that at least two related rationals underlie this conclusion. First, as administrator of the estate, the trustee ". . . has control of real property, postpetition, and this property has received all of the benefits and services provided by local government, for which local property taxes are intended as some recompense." (citation omitted). 74 B.R. at 485. Secondly, the §362(a) stay protects property of the estate by preventing ". . . taxing authorities from asserting liens against the property in order to insure or compel payment of postpetition taxes. In re Carlisle Court, Inc., 36 B.R. at 214." 74 B.R. at 485.

The Court then addressed the issue of whether the post-petition property taxes were "incurred by the estate." The court concluded that since the trustee had exclusive control over the property -- he had been free to use, sell, or lease the property for the benefit of the estate -- the post-petition property taxes assessed to property of the estate constituted taxes incurred by the estate, and therefore, the Court ordered that the post-petition taxes were to be paid by the estate.

The case of In re Spruill, 78 B.R. 766 (Bankr.E.D.N.C. 1987) involved Chapter 11 debtors who argued that due to the fact that the estate's interest in the property was zero, the estate was not liable for the post-petition property taxes. The court found that the debtors' estate was responsible for the post-petition property taxes. The debtors had resisted motions filed by the secured creditors to lift the stay on the property. The debtors were then given the opportunity to sell the property on their own. The debtors were the only parties to benefit from the arrangement. The court stated that the secured creditors "should not suffer a loss for unpaid taxes which accrued while the debtors pursued their unsuccessful sales program." In re Spruill, 78 B.R. at 772-73.

The same analyses can be applied to the case at bar. The debtor-in-possession, as trustee, had the exclusive use and control of the Cudd Tract at all times since the filing of the petition. The estate has benefited from the Debtor's continued use of the Cudd Tract as a gravel washing site. The Debtor has enjoyed "the benefits and services provided by local government, for which local property taxes are intended as some recompense." In re Trowbridge, 74 B.R. at 485. Consequently, the court finds that it is only equitable that the post-petition ad valorem taxes assessed to the Cudd Tract should be charged to the Debtor's estate.

Section 507(a)(1) states that first priority claims are those "administrative expenses allowed under §503(b). . . ." As stated above, the post-petition ad valorem taxes paid by Republic Bank are allowed administrative expenses under §503(b)(1)(B), therefore these ad valorem taxes are entitled to a first administrative priority under the distribution schedule of §507(a)(1).

This opinion should not be interpreted to mean that in all cases the bankruptcy estate is automatically liable for post-petition ad valorem taxes as administrative expenses. Each case must stand on its own as to whether the post petition ad valorem taxes were "incurred by the estate." In situations where the secured property has remained in the estate as an accommodation to or for the benefit of the secured party, a different result could flow. See: 11 U.S.C. §506(c); In re Spruill, 78 B.R. 766, 772 (Bankr. E.D.N.C. 1987).

CONCLUSION

Accordingly, based upon the evidence submitted to the court, the court concludes that the post-petition ad valorem property taxes assessed to the Cudd Tract were taxes incurred by the estate of W. J. Runyon and Son (Case No. 8600304WC), and thus are proper administrative expenses within the meaning of §503(b)(1)(B). These taxes are entitled to administrative priority under the distribution schedule of §507(a)(1).

IT IS ORDERED that the parties are to review the documents and determine the exact amount of post-petition ad valorem taxes which were assessed to the Cudd Tract after February 18, 1986.

IT IS FURTHER ORDERED that the attorney for Republic Bank shall prepare an appropriate separate judgment consistent with this opinion as required by Bankruptcy Rule 9021. He shall submit it to the attorney for the Debtor for signature indicating approval as to form.

SO ORDERED this the 24th day of March, 1989.


U. S. BANKRUPTCY JUDGE