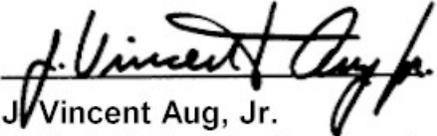


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: May 31, 2005


J. Vincent Aug, Jr.
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re :
:
:
DINING CONCEPTS, INC. dba : Case No. 01-18965
BURBANK’S REAL BAR-B-QUE : Judge Aug
: Chapter 11
:
Debtor :

**ORDER SUSTAINING OBJECTION TO CLAIM,
DISALLOWING CLAIM AS FILED AND
PERMITTING FILING OF AMENDED CLAIM**

This matter is before the Court on the Omnibus Objection of Reorganized Debtor to Claims of Department of Treasury and Ohio Department of Taxation (Doc. 272), the response of the Ohio Department of Taxation (“ODOT”) (Doc. 273) and the Reorganized Debtor’s brief (Doc. 296) filed in response to the Court’s specific order that the parties submit briefs on the legal issues (Doc. 293). It is noted that ODOT failed to submit a pretrial brief in compliance with this order of the Court. An evidentiary hearing was held on May 24, 2005.

This Court has jurisdiction over this matter under 28 U.S.C. § 1334. An objection to claim is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

On April 15, 2002, ODOT filed a proof of claim (Claim No. 40) for sales and withholding taxes it asserts are owed by the debtor in the total amount of \$171,130.18.

On November 6, 2003, Dining Concepts, Inc., d/b/a Burbank's Real Bar-B-Que (the "Reorganized Debtor") filed its objection to the proof of claim filed by ODOT.

Federal Rules of Bankruptcy Procedure provide that a properly filed proof of claim "constitute[s] prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). A claim filed under 11 U.S.C. § 501 is deemed allowed absent an objection to the claim. 11 U.S.C. § 502(a).

The debtor has the initial burden of establishing a colorable challenge to a properly filed proof of claim; but once the debtor has met that burden, the burden of going forward shifts back to the creditor, and the creditor bears the ultimate burden of persuasion.

Morton v. Morton (In re Morton), 299 B.R. 301, 307 (B.A.P. 6th Cir. 2003). The debtor must present some evidence to establish a colorable challenge and cannot "stand on a mere formal objection." *Garner v. Shier (In re Garner)*, 246 B.R. 617, 624 (B.A.P. 9th Cir. 2000). In our opinion, the Reorganized Debtor presented sufficient evidence to establish a colorable challenge to the proof of claim filed by ODOT.

First the Reorganized Debtor asserts that the proof of claim includes taxes, interest and penalties that are owed by two different taxpayers who operated under different vendors' licenses. One of those entities is the Reorganized Debtor which operates under Federal Tax I.D. No. 31-246482. The Reorganized Debtor is the entity operating the Burbank's restaurant in Sharonville, Ohio. The other entity whose taxes are itemized in ODOT's proof of claim is Burbank's Beaver creek, Inc. which operated a restaurant in Beaver creek, Ohio, under Federal Tax I.D. No. 29-030464. The Reorganized Debtor asserts and ODOT concedes that those entities were two separate corporations and therefore separate legal entities. Reorganized Debtor objects to the

proof of claim because it asserts that it is not liable for the taxes owed by Burbank's Beaver creek, Inc. In statements from its counsel, but without any evidentiary proof being offered, ODOT contends that the Reorganized Debtor is the parent of Burbank's Beaver creek, Inc. and is, therefore, responsible for the tax assessments owed by Burbank's Beaver creek, Inc. ODOT further contends, again without any evidence, that the Reorganized Debtor and Burbank's Beaver creek, Inc. "submitted the tax returns together and they were filed on one return and so everything was calculated together." Counsel further indicated that ODOT had not had the opportunity to separate out the amounts owed by the individual entities.

J. Mark Mullen, CPA and Chief Financial Officer of Queensgate Food Service since December 2001, testified on behalf of the Reorganized Debtor. Since May 2003, Mr. Mullen has also served as the Treasurer of the Reorganized Debtor. Queensgate supplied food services to the Burbank's restaurants operated by both the debtor and Burbank's Beaver creek, Inc. In his capacity as CFO of Queensgate, Mr. Mullen testified that from a creditor's perspective the restaurants were operated as separate entities with no integration of management. The entities placed separate orders, separate deliveries were made, separate invoices were prepared and the invoices were paid by the separate entities.

Mr. Mullen also had experience with the debtor in the capacity as chairman of the unsecured creditor's committee and in that capacity there was nothing of which he was aware that provided notice of any investment in Burbank's Beaver creek, Inc. by the debtor. In his capacity as a certified public accountant, Mr. Mullen indicated it would be expected that if the debtor were the parent of Burbank's Beaver creek, Inc., then the entities would have filed consolidated federal tax returns which, as far as he could tell, was not done. We found Mr. Mullen to be a credible witness.

ODOT conceded that the two entities involved are separate legal entities. The proof of claim filed by ODOT included tax assessments owed by at least two, if not four, entities.¹ Therefore, we find that the Reorganized Debtor has submitted evidence sufficient to establish a colorable challenge to the proof of claim in that it includes tax assessments owed by at least one entity other than the Reorganized Debtor. As such,

¹Adding to the confusion, it should be noted that the proof of claim also includes tax assessments under two other i.d. numbers which were not identified by ODOT. Those numbers are 89-035761 and 52-291394.

the burden of proof shifted to ODOT to establish that the Reorganized Debtor was responsible for the tax debts of entities other than itself. ODOT failed to meet its ultimate burden of persuasion. It utterly failed to present or be prepared to present any evidence to support its contention that the entities operated as one so as to justify one being responsible for the taxes of the other(s).² ODOT's counsel indicated that the two entities "submitted the tax returns together and they were filed on one return and so everything was calculated together" and that ODOT had not had an opportunity to separate out of the taxes. However, the proofs of claim provide separate amounts owed per entity and the monthly tax assessment forms that ODOT submitted into evidence through cross examination of Mr. Mullen do not reflect a joint filing but that each entity filed separate monthly forms according to their Federal Tax I.D. numbers.

Based on the foregoing, we find that the Reorganized Debtor is not responsible for the tax assessments set forth in ODOT's proof of claim related to Burbank's Beaver Creek, Inc. or the other entities operating under i.d. numbers 89-035761 or 52-291394.

Mr. Mullen concedes that the Reorganized Debtor probably does owe some sales taxes to ODOT. The figure for sales taxes (exclusive of penalties and interest) in the proof of claim that is connected with the Federal I.D. number of the Reorganized Debtor is \$111,567.05 for the tax period of July 1, 2000 through March 31, 2001. The Reorganized Debtor contests the amount of that claim and again presents a colorable challenge as to the amount ODOT asserts is due in the proof of claim.

Mr. Mullen testified that he has been unable to reconcile how ODOT calculated the amount owed because the copies of the sales tax assessments provided to him by ODOT and entered as Creditor's Exhibit A do not total \$111,567.05 for the period in question. In the Court's own calculation, we find that Mr. Mullen is correct. In fact each of the tax forms contains two figures for "tax liability on sales reported." One figure is crossed out and a second figure is written above the deleted figure. Upon

²ODOT failed to establish any connection between the debtor and Burbank's Beaver Creek, Inc. Therefore it is not necessary and we do not make any conclusions of law relating to whether an entity that is the parent of another entity is responsible for the sales tax assessments of its subsidiary or whether entities whose operations are intertwined are responsible for the sales tax assessments of each other.

totaling either the original figures or the amended figures, the Court did not come up with \$111,567.05. The calculations are as follows:

Monthly Tax Period	Original Tax Amount	Amended Tax Amount
July 2000	\$ 14,308.37	\$ 11,923.63
August 2000	14,075.21	11,729.34
September 2000	13,016.47	10,847.05
October 2000	12,657.52	10,547.92
November 2000	11,327.82	9,489.84
December 2000	13,033.57	10,861.30
January 2001	11,666.15	9,721.78
February 2001	12,645.03	10,537.53
March 2001	14,311.23	11,926.02
Totals	\$117,041.37	\$97,584.41

In our opinion, the above discrepancies are sufficient to establish a colorable challenge to the amount of sales taxes ODOT asserts are owed by the Reorganized Debtor. However, Mr. Mullen also testified that the Reorganized Debtor received a letter of nonrenewal from the Department of Liquor Control (“DLC”) advising that the Reorganized Debtor’s liquor license would not be renewed because of the failure to pay sales taxes. The Reorganized Debtor did not enter into evidence the DLC letter itemizing sales taxes due but we find Mr. Mullen’s testimony to be credible that the amounts owed were yet again different and ODOT did not introduce any evidence to the contrary. Therefore, we have a possibility of at least three different figures submitted by ODOT for sales taxes owed by the Reorganized Debtor: (1) the figure in the proof of claim; (2) the two sets of figures in the tax returns themselves and (3) the amount set forth in the letter from DLC which ODOT did not contest was different from the other sets of figures.

Based on the foregoing, we SUSTAIN the objection of the Reorganized Debtor to ODOT's proof of claim No. 40. Since the Reorganized Debtor concedes that it owes some sales taxes to ODOT, it is ordered that ODOT shall have 10 days from the date of entry of this Order to file an amended claim with a detailed accounting of all sales taxes it asserts are owed by the Reorganized Debtor doing business under Federal I.D. No. 31-246482. Such proof of claim and accounting shall cover the time period of July 1, 2000 through March 31, 2001 and shall itemize both taxes owed and all payments³ made by or on behalf of the debtor and/or Reorganized Debtor relating to sales tax assessments for that time period. In the event ODOT does not timely file an amended proof of claim, it's claim against the Reorganized Debtor shall be \$0.00.

IT IS SO ORDERED:

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³Mr. Mullen also referred to checks written on the debtor's PNC bank account that may have reflected some payments on the debtor's sales taxes. The parties are encouraged to amicably resolve the issue of whether all payments made on the account were properly credited.