Dated: February 05, 2016
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
FAYE FOODS, INC.,
Debtor.

Case No. 05-23072-L
Chapter 11

ORDER DENYING MOTION FOR SANCTIONS AGAINST TENNESSEE DEPARTMENT OF REVENUE FOR VIOLATION OF DISCHARGE INJUNCTION

BEFORE THE COURT is the motion of Michael E. Collins, Chapter 11 Trustee and Post-Confirmation Distribution Agent under the confirmed Amended Plan of Reorganization (the "Trustee"), for sanctions against the Tennessee Department of Revenue ("TDOR") for knowingly and intentionally violating the discharge injunction when it levied upon the bank account of the reorganized debtor, resulting in the delivery of $38,965.06 to the TDOR, in payment of a post-petition tax claim. The Trustee asserts that as a result of the levy, the reorganized debtor was required to take out a short-term loan and struggled to meet its financial obligations. The Trustee asks that the TDOR reimburse his costs and that sanctions be imposed against the TDOR for

intentional breach of the confirmation order and violation of the discharge injunction. The TDOR responds that its post-petition claim was not paid in accordance with the confirmed plan and sought collection through levy as it is legally permitted to do.

At the heart of this dispute is the question of whether the TDOR, a governmental unit, was required to file a request for payment of its post-petition claim or whether it is barred from collecting its claim by the confirmed plan because it failed to timely file an application for administrative expense.

JURISDICTION

The bankruptcy court has jurisdiction of this dispute pursuant to Section IV of the confirmed plan which reserved to the bankruptcy court jurisdiction over "the resolution of any request for payment of any Administrative Claim."

FACTS

The following facts are not in dispute.

1. Faye Foods, Inc. (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on February 28, 2005.

2. Michael E. Collins was appointed Trustee on June 23, 2011.

3. On May 15, 2012, the Trustee filed Trustee's Amended Plan of Reorganization of Faye Foods, Inc. (the "Plan").

4. With respect to administrative expenses, the Plan provided that "[e]xcept as otherwise specifically provided above or elsewhere in this Plan, all allowed Administrative Claims shall be paid in full on the later of (1) the Effective Date, (2) ten (10) days after such claim is allowed by the

Bankruptcy Court, and (3) the date such claim is due and payable pursuant to the agreement or law under which the claim arises."

5. The Plan further provides that "[u]pon confirmation of the Plan, the Debtor shall be discharged from all debts or claims that arose before the date of confirmation except as specifically provided in the Plan or the Confirmation Order, to the fullest extent contemplated under 11 U.S.C. § 1141."

6. The Plan was confirmed by order entered September 21, 2012.

7. The order of confirmation set November 20, 2012, as the deadline for filing applications for allowance of administrative claims.

8. On October 4, 2012, after confirmation of the Plan but before the deadline for filing applications for allowance of administrative claims, the TDOR filed a "Post Petition Priority Tax Claim" in the amount of $34,821.97 arising out of unpaid post-petition taxes (the "Post-Petition Claim"). The claim was entered in the claims register and was not objected to by the Debtor or Trustee.

9. The TDOR did not file a motion or otherwise seek allowance of its Post-Petition Claim.

10. The TDOR took no action to collect its debt until July 21, 2015, when it sent a notice of default letter.

11. On September 14, 2015, the TDOR sent a notice of intent to levy.

12. According to the TDOR, on October 9, 2015, it discussed post-petition taxes with someone on behalf of the Debtor and sent an email detailing the outstanding liabilities.

13. On October 20, 2015, the TDOR issued a Levy Notification in the amount of $38,965.06, to BanCorp South, which holds the operating accounts for the reorganized Debtor.

14. BanCorp South froze the reorganized Debtor's operating account, leaving the Debtor without funds to conduct its business.

15. The Debtor contacted the Trustee, and obtained a short term loan in order to continue its operations.

16. Upon demand by the Trustee, the TDOR returned $7,000 to the reorganized Debtor as the result of the filing of an amended return by the Debtor.

ANALYSIS

The Trustee maintains that the TDOR's levy was foreclosed by the passage of time, the confirmation of the Plan, and the failure of the TDOR to timely seek allowance of its Post-Petition Claim. The Trustee advances two theories in support of his motion. First, he says that the claims of the TDOR are barred by the applicable six-year statute of limitations for bringing a civil action to collect a tax claim. Second, he says that the claim is barred by the confirmed Plan. The TDOR maintains that the statute of limitations was tolled during the pendency of the bankruptcy case, and that it, as a governmental unit, is not required to file a request for payment of its administrative expense claim as a condition of its claim being allowed as an administrative expense.

Statute of Limitations

According to the proof of claim filed by the TDOR, the unpaid taxes relate to tax periods falling in 2005, 2006, 2007, and 2009. The parties agree that the applicable statute provides for a period of six years from assessment, without reference to finality, to collect taxes:

> (a) LENGTH OF PERIOD
>
> (1) Where the assessment of any tax imposed by this or any other title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun:

(A) Within six (6) years after assessment of the tax.

Tenn. Code Ann. § 67-1-1429(a)(1)(A) (2005-2014).[1]

An assessment occurred when the liability was entered into the TDOR's records:

> An assessment of any tax by the commissioner shall be deemed to be made by recording the liability of the taxpayer in the office of the department in accordance with existing procedures of the department or as such may be established by rules and regulations prescribed by the commissioner.

Tenn. Code Ann. § 67-1-1438(b) (2005-2014). The assessments were presumed accurate unless the taxpayer submitted evidence proving otherwise. *See* Tenn. Code Ann. § 67-1-1438(a) (2005-2014).

With respect to the Debtor, the TDOR asserts that liabilities of the Debtor were recorded as follows:

Tax Period	Tax Type	Amount	Date Liability Recorded
10/1/05-10/31/05	Sales and Use	$11,979.32	12/2/05
11/1/05-11/30/15	Sales and Use	$630.79	12/20/05
3/1/06-3/31/06	Sales and Use	$447.38	4/26/06
3/1/06-3/31/06	Sales and Use	$378.75	4/26/06
7/1/06-7/31/06	Sales and Use	$590.82	8/25/06
1/1/07-12/31/07	Franchise and Excise	$18,688.59	9/26/12
9/1/07-9/30/07	Sales and Use	$500	10/24/07
9/1/07-9/30/07	Sales and Use	$948.19	10/24/07
10/1/07-10/31/07	Sales and Use	$448.01	11/27/07
1/1/09-12/31/09	Franchise and Excise	$210.12	4/21/10
		$34,821.97	

[1] The law was amended in 2015 so that the six-year period now runs from the time the assessment becomes final rather than the time that the assessment is made. *See* Tenn. Code Ann. § 67-1-1429(a)(1)(A) (2015).

The TDOR asserts that the six-year period for each of these tax claims began to run at the date specified in the last column. The Trustee asserts that, with the exception of the Franchise and Excise Taxes for 2007 and 2009, the tax claims were recorded in the office of the TDOR before the end of 2007. The Trustee asserts that the Franchise and Excise taxes for 2007 were recorded some time in 2008. The TDOR's records apparently reflect that this claim was recorded September 26, 2012. The Trustee does not address the recording of the Franchise and Excise Taxes for 2009. For reasons that follow, it is not necessary to resolve this factual dispute.

The TDOR takes the position that the statute of limitations was tolled during the pendency of the automatic stay by virtue of Tennessee Code Annotated § 28-1-109, made applicable in bankruptcy by 11 U.S.C. § 108(c). The Trustee disagrees. Tennessee Code Annotated § 28-1-109 provides: "When the commencement of an action is stayed by injunction, the time of the continuance of the injunction is not to be counted." Section 28-1-113, however, provides: "The provisions of this title do not apply to actions brought by the state of Tennessee, unless otherwise expressly provided." The Trustee suggests that this excludes section 28-1-109 from operation against the government with the result that there is no tolling of the statute of limitations with respect to the State of Tennessee. To the contrary, the "title" referred to by section 28-1-113 is Title 28 of the Tennessee Code in its entirety, which is devoted to various statutes of limitations. Cases interpreting this section make clear that it is the statutes of limitations themselves which do not apply to the state unless expressly provided otherwise. This is a codification of the common law rule *nullum tempus occurrit regi* ("no time runs against the king."). *See, e.g., Dunn v. W.F. Jameson and Sons, Inc.*, 569 S.W.2d 799, 801 (Tenn. 1978); *In re Estate of Darwin,* 503 S.W.2d 511, 513

(Tenn. 1973) ("This Court has consistently held that the State is not barred by any statute of limitations unless the particular statute expressly so provides.").

The particular limitation in question occurs in a different title of the Tennessee Code, title 67, which is concerned with taxes and licenses, and thus explicitly with the State as sovereign. As a tax, it is governed by the six-year statute of limitations set out above. Federal bankruptcy law intervenes, however, upon the filing of a bankruptcy petition and prevents a creditor from commencing or continuing an action to collect a debt. *See* 11 U.S.C. § 108(c); 362(a). Section 108(c) provides:

> (c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, ..., and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of–
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362 ... of this title, ..., with respect to such claim.

That section has the effect of extending the period of time during which an action can be taken which is otherwise prevented by the automatic stay. *See The Tolling of Statutes of Limitations in Tennessee*. 14 MEM. ST. L. REV. 375, 401 (1984). The present dispute is concerned with post-petition taxes. No part of the six-year period for levy could have elapsed prior to the filing of the bankruptcy petition.

When the bankruptcy petition for Faye Foods was filed on February 28, 2005, the automatic stay came into effect preventing "any act to obtain possession of property of the estate or of property

from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The property of the Debtor's estate consisted of all legal and equitable interests of the Debtor in property as of the commencement of the case, together with all proceeds, product, offspring, rents, or profit of or from property of the estate, and any interest in property that the estate acquired after the commencement of the case. 11 U.S.C. § 541(a)(1), (6), and (7). Property of the estate remained property of the estate until the Effective Date of the Plan, October 1, 2012. Plan, I.I; and V.H. On that date, the automatic stay ceased to apply to the former property of the estate. 11 U.S.C. § 362(c)(1). As a result, the TDOR was no longer prevented from levying upon the former assets of the bankruptcy estate upon the Effective Date. Pursuant to section 108(c), the period of limitations applicable to the TDOR ended thirty days after the Effective Date (i.e., October 31, 2012), or at the end of the limitations period, including the suspension of the period during the pendency of the bankruptcy case, whichever was later. Pursuant to the Tennessee Code, the six-year period for effecting a levy was suspended during the continuance of the injunction. Tenn. Code Ann. § 28-1-109. Thus, the period for the TDOR to levy or commence an action to collect the taxes owed by Faye Foods commenced on October 1, 2012, and will not end until October 1, 2018. The levy was not barred by the statute of limitations.

The Confirmed Plan

In the alternative, the Trustee argues that the levy was barred by the confirmed Plan. The Trustee points to Section II.A.3 of the Plan, which provides:

> Except as otherwise provided above or elsewhere in the Plan, all allowed Administrative Claims shall be paid in full on the later of (1) the Effective Date, (2) ten (10) days after such claim is allowed by the Bankruptcy Court, and (3) the date such claim is due and payable pursuant to the agreement or law under which the claim arises.

The Trustee argues that if this section does not apply to the post-petition taxes owed to the TDOR, then the taxes were discharged by operation of 11 U.S.C. § 1141(d)(1), which provides: "confirmation of [the] plan discharges the debtor from any debt that arose before the date of such confirmation." The Trustee argues that the TDOR was entitled to payment only upon the occurrence of three events: the Effective Date of the Plan, the allowance of the claim, and the date that the claim was due. Because the Bankruptcy Court never allowed the claim of the TDOR, he says, TDOR is not entitled to payment of the post-petition taxes. The bar date for application for allowance of administrative claims was set at sixty days after the entry of the order of confirmation. The order of confirmation was entered September 21, 2012, thus the bar date for filing claims for allowance of administrative expenses was November 20, 2012. Because the TDOR did not file an application for allowance of the post-petition taxes as an administrative expense, the Trustee concludes that the taxes were discharged by operation of the Plan and order of confirmation.

The TDOR argues that it filed a proof of claim within the administrative claims bar date based primarily upon returns filed by the Debtor. TDOR says that, pursuant to Federal Rule of Bankruptcy Procedure 3001(f), its claim should be treated as prima facie evidence of the validity and amount of the claim. Since no one filed an objection to the claim, and the Court did not *sua sponte* disallow the claim, TDOR says that its claim is deemed allowed. The TDOR argues that as a governmental unit, it is not required to file an application for allowance of its administrative expense claim by virtue of section 503(b)(1)(D) of the Bankruptcy Code which provides "a governmental unit shall not be required to file a request for payment of an expense ... as a condition of its being allowed." 11 U.S.C. § 503(b)(1)(D). That section clearly provides:

> [N]otwithstanding the requirements of section (a) [related to the filing of a timely request for payment of an administrative expense],

> a governmental unit shall not be required to file a request for payment of an expense described in subparagraph (B) or (C), as a condition of its being allowed an administrative expense.

It would be an odd result indeed if a reorganizing debtor could wipe out its post-petition tax liability through its plan. This is so because a debtor or trustee operating a business is "subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." 28 U.S.C. § 960(a). Moreover, a tax under that subsection is to be "paid on or before the due date of the tax under applicable nonbankruptcy law." 28 U.S.C. § 960(b). In this case, tax returns were filed by the Debtor, but taxes was not paid. The Debtor, through its president Faye Stiles, was fully aware of the unpaid tax liability. Mr. Collins was not appointed Trustee until June 23, 2011, well after the applicable returns were filed (with the possible exception of the return for 2007 Franchise and Excise Tax).

The Trustee argues that section 503(b)(1)(D) exempts a governmental unit from filing an application for payment of an administrative expense claim under section 503(a), but does not exempt it from filing an application for allowance of an administrative expense claim under section 503(b). In support of this contention, the Trustee relies upon *In re Plastech Engineered Prods., Inc.*, 394 B.R. 147, 152 (Bankr. E.D. Mich. 2008). The issue in that case, however, was not whether a governmental unit must file an application for allowance of its post-petition tax claim, but whether section 502(d) of the Bankruptcy Code may be used to disallow an administrative expense under section 503(b)(9). As Bankruptcy Judge Shefferly explains, section 503(b)(9) is a section added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which has the effect of converting a prepetition claim for the value of goods delivered to the debtor within 20 days prior to the commencement of its bankruptcy case into an administrative expense of the

bankruptcy estate. *Plastech* does not address the question before this court at all. It does distinguish a request for *immediate* payment of an allowed administrative expense from the allowance of the claim, but not in the way that the Trustee's brief suggests. The question discussed in *Plastech* was *when* an allowed section 503(b)(9) claim should be paid: immediately (i.e., during the administrative phase of the case) or upon confirmation of a plan. This discussion was included to highlight the unique nature of a section 503(b)(9) claim, a prepetition claim that is given administrative priority. None of these issues are present in the Faye Foods case.

The Trustee's argument that section 503(b)(1)(D) exempts the government from seeking payment of its claim but not allowance of its claim is simply mistaken. The filing of a separate request for payment is not a condition for the allowance of an administrative expense. Rather, the request for payment is a request for allowance of the administrative expense. That is what is permitted by section 503(a). The request for allowance may, but need not, include a request that the claim be paid upon allowance rather than at confirmation. If a request for immediate payment is made, it is clear that the timing of the payment is left to the discretion of the bankruptcy judge. *See, e.g., In re Global Home Products, LLC,* No. 06-10340(KG), 2006 WL 3791955 (Bankr. D. Del. Dec. 21, 2006). If a request for immediate payment is not made, the allowed administrative expense will be paid as provided in a confirmed plan or further order of the court.

Subsection (b) of section 503 does not set out another requirement for allowance of an administrative expense. Instead it is the subsection that *describes* various exemplary categories of administrative expense. That this is so is indicated by use of the word "including" at the end of subsection (b)(1). According to the rules of construction, "includes" and "including" are not limiting. 11 U.S.C. § 102(3). Section 503(b) says in effect that "administrative expenses are these

and other similar claims." Among the list of possible administrative expenses are taxes incurred by the estate. Taxes can only be owed to governmental units. Taxes are administrative expenses (subsection (b) tells us that they are), but governmental units need not file a request for payment of taxes (this is the effect of subsection (b)(1)(D)). Among the reasons for this exception is the fact that the debtor or trustee is responsible for filing the returns and paying the taxes owed by a bankruptcy estate as they come due under nonbankruptcy tax law. 28 U.S.C. § 960(b).

The Trustee argues that the post-petition taxes owed by the bankruptcy estate of the Debtor were discharged because the TDOR failed to file an application for allowance of the taxes before the deadline for allowance of administrative expenses. We have already seen that no request for allowance was required. The cases relied upon by the Trustee in support of a contrary position do not in fact support the position for which they were offered. For example, *In re U.S. Energy Systems, Inc.*, 2013 WL 5204010 (S.D. N.Y. 2013) did not "affirm[] bankruptcy court determination that Illinois Department of Revenue was subject to court order setting administrative claim bar date" as suggested by the Trustee. Rather, it affirmed the bankruptcy court's denial of the Department's Rules 59 and 60(b) motion as untimely. *U.S. Energy Systems* at *3-5. *In re BH S&B Holdings, LLC*, 435 B.R. 153 (Bankr. S.D. N.Y. 2010) concerned *ad valorem* taxes secured by property abandoned under section 554 of the Bankruptcy Code. These are taxes specifically exempted from the reach of 28 U.S.C. § 960(b) by section 960(b)(1), which exempts a debtor from paying "property tax secured by a lien against property that is abandoned under section 554 of title 11, within a reasonable period of time after the lien attached, by the trustee in a case under title 11." Bankruptcy Judge Glenn explained that the question in *BH S&B Holdings* "turn[ed] on how claimants are to be paid for post-petition *ad valorem* taxes on property abandoned under section 554 of the Bankruptcy

Code." *Id.* at 162. For those types of taxes, a request for administrative expense payments must be made. As Judge Glenn explained:

> The section 503(b)(1)(D) exception to the section 503(a) request for payment procedures came about as the result of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") amendments to the Bankruptcy Code. The 2005 Legislative History of section 960 after BAPCPA, however, clarifies that claimants for "property tax[es] secured by a lien against property that is abandoned under section 554 within a reasonable time after the lien attaches" may not take advantage of the section 503(b)(1)(D) exception and must file a request for administrative payments:
>
> > Although current law generally requires trustees and receivers to pay taxes in the ordinary course of the debtor's business, the payment of administrative expenses must first be authorized by the court. Section 712(a) of the [2005] Act amends section 960 of title 28 of the United States Code to clarify that postpetition taxes in the ordinary course of business must be paid on or before when such tax is due under applicable nonbankruptcy law, with certain exceptions. This requirement does not apply if the obligation is a property tax secured by a lien against property that is abandoned under section 554 within a reasonable time after the lien attaches.
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> H.R. Rep No. 109-31, pt. 1, at 102-03 (2005), U.S. Code Cong. & Admin. News 2005, pp. 88, 166-67.

BH S&B Holdings, at 162-163. The taxes at issue in the present case are not property taxes secured by abandoned property. Therefore the Debtor (and later the Trustee) was required to pay them as they became due under Tennessee law. The Debtor's failure to do so does not take the post-petition taxes out of the exception provided at section 503(b)(1)(D). The TDOR was not required to file a request for allowance of the taxes owed by the Debtor.

Conceding that his reading of section 503 might be wrong, the Trustee argues that the terms of the confirmed Plan and order of confirmation overrode the statutory provisions requiring the

Debtor or Trustee to timely pay taxes and exempting the TDOR from filing a request to encourage them to do so. The terms of a confirmed plan, which is in effect a contract by and among a debtor and its creditors (*see* 11 U.S.C. § 1141) simply cannot override the laws of the United States. *See, e.g., Irving Tanning Co. v. Marine Superintendent of Ins. (In re Irving Tanning Co.),* 496 B.R. 644, 660 (B.A.P. 1st Cir. 2013) ("A plan must comply with those applicable nonbankruptcy laws that are not preempted by the Bankruptcy Code."). The Trustee has offered no authority suggesting otherwise. The cases included by the TDOR in its brief that suggest that a governmental unit entitled to the exception of section 503(b)(1)(D) might be included within the class of administrative claimants required by a plan to file a request for allowance of their administrative claims are distinguishable upon the basis of the taxes involved and other reasons. *In re Northern New England Telephone Operations, LLC*, 504 B.R. 372, 375 (Bankr. S.D. N.Y. 2014), was concerned with prepetition taxes, and thus not taxes "incurred by the estate" as required for the section 503(b)(1)(D) exemption to apply. *In re Energy Systems*, as we have seen, did not reach the merits of the bankruptcy court's order imposing an administrative claims bar date upon governmental units. *In re BH S&B Holdings* concerned taxes excepted from the reach of 28 U.S.C § 960(b). *In re Baltimore Marine Indus., Inc.*, 344 B.R. 407 (Bankr. D. Md. 2006), a case filed before the effective date of BAPCPA, was a case in which the taxing authority raised only "excusable neglect" in support of its late filed claim, because the section 503(b)(1)(D) exception had not been enacted when its motion was filed in 2004. None of these cases support the proposition that the section 503(b)(1)(D) exception can be overridden by the terms of a confirmed plan. Post-petition taxes owed by a bankruptcy estate are not subject to discharge.

Even if the TDOR *were* required to file a request for payment of the taxes the Debtor and Trustee were statutorily bound to pay, it in fact *did* file a proof of claim within the deadline for filing applications for allowance of administrative expense claims specified in the order of confirmation. That date was sixty days after the entry of the order, which was November 20, 2012. The TDOR filed its Proof of Claim on October 4, 2012. The claim is clearly labeled "POST PETITION PRIORITY TAX CLAIM." It sets out the aggregate amount of taxes owed, $34,821.97, and the section of the Tennessee Code that authorizes the assessment of the taxes, Tennessee Code Annotated § 67-6-101 et seq. Attached to the Proof of Claim is an itemization of the taxes owed. The Bankruptcy Code specifies no particular form for the "request for payment of an administrative expense." The Proof of Claim filed by the TDOR was more than adequate for that purpose. The Trustee's failure to consult the claims register does not change this conclusion. When the reorganized Debtor failed to pay its post-petition taxes on the Effective Date as provided in section II.A.3 of the Plan, the TDOR was entitled to pursue collection of the taxes as provided under applicable state law.

CONCLUSION

For the foregoing reasons, the court concludes:

1. The levy upon the bank account of Faye Foods did not fall outside the applicable statute of limitations.
2. The post-petition taxes owed by Faye Foods were not discharged as the result of the confirmation of its Plan.
3. The levy was proper and in accord with applicable law.
4. Therefore, the motion for sanctions is **DENIED**.

cc: Debtor
Attorneys for Debtor
Chapter 11 Trustee
Tennessee Department of Revenue
Attorney for Tennessee Department of Revenue
United States Trustee