

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK
CHAMBERS OF THE BANKRUPTCY JUDGE

144

HON. STEPHEN D. GERLING
CHIEF U.S. BANKRUPTCY JUDGE

220 U.S. COURTHOUSE
UTICA, NEW YORK 13501
(315) 193-8111
FAX: 293-8292

John G. Stone, Esq.
300 City Hall
Syracuse, NY 13202

Stefan D. Berg, Esq.
309 Arnold Avenue
Syracuse, NY 13210

Re: Northeast Management Services, Inc.
Chapter 11 Case No. 95-60292

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LETTER DECISION AND ORDER

Counsellors:

At its motion term in Syracuse, New York, on September 17, 1996, the Court reserved decision on the issue of whether Northeast Management Services, Inc. ("Debtor") was entitled to seek review of assessments on five parcels of real property it owns in the City of Syracuse ("City") for the years 1990/91, 1991/92, 1992/93 and 1993/94. Although the Debtor had sought review by the Board of Assessment and Review for the years 1994/95, 1995/96 and 1996/97, it had not done so for the four prior years, alleging that it had lacked the financial resources to do so.

Argument was made on behalf of the City that the Debtor has the burden to establish that it did not have the financial ability to grieve the assessments for those four years. In support of its argument, the City cites to *In re Northwest Beverage, Inc.*, 46 B.R. 631 (Bankr. N.D.Ill. 1985), for the premise that §505 of the Bankruptcy Code is intended to protect not the Debtor but the creditors from the "dissipation of the estate's assets which could result if the creditors were bound by a tax judgment which the debtor, due to his ailing financial condition, did not contest." *Id.* at 635 (citations omitted). The court in *Northwest Beverage* quoting from COLLIER ON BANKRUPTCY, stated that §505 was enacted "to protect[s] the estate from the negligence or indifference of a debtor who has defaulted in tax assessment

proceedings . . .". 3 COLLIER ON BANKRUPTCY, 505-23 (15th ed. 1979). In *Northwest Beverage*, the debtor had protested the notices of tax liability issued by the Illinois Department of Revenue prepetition and had sought review in the state circuit court. The circuit court dismissed the complaint for administrative review due to the debtor's inability to post a bond. *Id.* at 633. In the midst of the litigation, the debtor filed for reorganization under Chapter 11 of the Bankruptcy Code. In addressing the debtor's request for review of tax liability pursuant to Code §505, the bankruptcy court concluded that the debtor had "pursued available avenues of relief" and was not the "'indifferent' debtor which §505 was enacted to protect creditors against." *Id.* at 635. Therefore, the court concluded that it would not consider reviewing the assessment for which there had already been full hearings before the state taxing authority despite the fact that the debtor had been unable to obtain review in the state courts due to its inability to post a bond.

Northwest Beverage does not set forth any requirement that a debtor must establish that its failure to seek review was due to a lack of financial resources. In fact, as noted above, Code §505 is intended to remedy inaction of a debtor whether it be due to negligence, indifference or an ailing financial condition. There is no requirement in the statute or in the caselaw that the debtor establish that it was financially incapable of contesting the assessments in a timely fashion under state law in order to seek relief pursuant to Code §505.

The City takes the position that allowing the Debtor to proceed in this Court pursuant to Code §505 will inure to the benefit of the Debtor. The statement is made in its memorandum of law that "[t]here are no unsecured creditors in the case at bar to benefit from a review of the taxes and any successful litigation will inure solely to the benefit of the debtor . . .". According to the Debtor's schedules attached to its petition, filed on January 31, 1995, \$499,191.30 was listed in unsecured claims, including \$240,000 allegedly owed to Debtor's president, Florine Basile, Jr., and \$93,592.60 was listed in priority claims of the City of Syracuse and the County of Onondaga. Contrary to assertions by the City, it would appear that there are unsecured creditors that would stand to benefit from any reduction

in the tax assessments on Debtor's real property.

Chapter 11 is intended to provide the Debtor with an opportunity to reorganize and to propose a plan which will provide payment to its creditors of all or a portion of the obligations owed them. In order to do that, the Debtor has a fiduciary duty to maximize the assets of the estate. If the Debtor is successful in obtaining a reduction in the assessments on the five parcels, his ability to propose a feasible plan which will benefit all creditors is likely to be enhanced.

In *Inre Galvano*, 116 B.R. 367 (Bankr. E.D.N.Y. 1990), another case cited by the City, the court pointed out that the debtor's §505 motion did not "appear to comport with the policy of protecting creditors against the inaction of disinterested debtor." *Id.* at 372. In *Galvano* the debtor had very few creditors other than the tax authorities. In the view of the court, the debtor's impetus for the motion was not the preservation of the estate but merely dissatisfaction with the decision of the Tax Bureau. As noted above, the Debtor herein has significant unsecured debt in addition to the debt to the taxing authorities, including the City.

Based on the foregoing analysis, the Court concludes that the Debtor is entitled to proceed with a determination of the tax assessments for the tax years 1990/91 through 1993/94 since there has been no adjudication by the board of Assessment and Review. Debtor need not establish its lack of financial resources at the time when the debtor could have sought review of the assessments for those years but failed to do so.

IT IS SO ORDERED.

Dated at Utica, New York

this 20th day of November 1996


STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge