UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JZMC ENTERPRISES, INC., CASE NO. 87-0l269

Debtor

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter comes before the Court on the motion of JZMC Enterprises, Inc. ("Debtor") to hold the New York State Department of Taxation and Finance ("NYS" or "the State") in civil contempt for violation of the automatic stay imposed under §362(a) of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 & Supp. 1988) ("Code") and for an award of attorney's fees and punitive damages pursuant to Code §362(h). At the close of the hearing on January 11, 1988 in Utica, New York, the Court ruled that the State's issuance of two documents, each entitled

"Notice of Determination and Demand For Payment of Sales and Use Taxes Due" ("Notice"), fell under Code §362(b)(9) provided that any affect they had within the meaning of Code §362(a)(6) would be invalidated. The Court then directed the Debtor to submit a proposed order on notice to NYS, who could object with respect to the language.

Soon afterward, NYS informally requested the Court to reconsider its decision. The Court restored the contested matter to the January 25, 1988 calendar in Utica, New York. After argument, the Court reserved decision and gave counsel the opportunity to file memoranda of law until February 9, 1988, at which date the matter would be submitted for decision. The case converted to Chapter 7 while this matter was sub judice and, thereafter, the appointed Trustee chose to proceed with the motion. Letter from Randy J. Schaal, Esq. to Hon. Stephen D. Gerling (June 24, 1988).

FACTS

The facts are not in dispute.

The Debtor filed a voluntary petition under Chapter 11 of the Code on September 10, 1987, listing $315,000.00 in total assets and $415,000.00 in total liabilities. NYS was listed as holding an disputed priority claim for $30,000.00. The Court issued a "form" Order on October 15, 1987, setting the meeting of creditors under Code §341(a), fixing the time for filing dischargeability complaints under Code §523(c) and giving notice of the automatic

stay pursuant to Code §362(a). NYS was included in the mailing matrix for said Order. In an amendment filed November 9, 1987, the Debtor disclosed $350,745.76 in total assets and $930,653.56 in total liabilities including a disputed claim of NYS in the amount of $251,485.81.

The day after filing the Chapter 11 petition, Debtor's counsel, Brett W. Martin ("Martin"), informed the NYS' Tax Compliance Bureau of that fact and the resultant automatic stay and advised that the filing of a proof of claim was the procedure to take in pursuit of alleged tax liabilities. Letter from Brett W. Martin, Esq. to Chester F. Baryla (Sept. 11, 1987).

Subsequent to Martin's contact, the Debtor received from NYS the two Notices, numbered S871029000U and S871029001U. Each document was dated October 29, 1987 and set out an aggregate tax liability of $251,485.81, including interest. In addition, the Notices instructed that, pursuant to §1138 of the New York Tax Law (McKinney 1987) ("NYTL"), the tax determination "shall be final unless an application for hearing is filed with the State Tax Commission within 90 days from the date of this notice or unless the Tax Commission shall redetermine the tax." A document entitled "Notification of Your Right to Protest An Action Taken by the New York State Department of Taxation and Finance" was appended to the Notices, explaining the availability of a conciliation conference as a second avenue of protest.

Upon re-contacting the Tax Compliance Bureau, Martin was referred to NYS' Utica District Office whom he apprised of his client's filing and that, in his opinion, the sending out of the

Notices containing tax assessments and demands for payments constituted a willful violation of the automatic stay. Letter from Brett W. Martin, Esq. to Elis J. DeLia, Esq., District Tax Attorney (Nov. 5, 1987). Martin requested that the assessment be declared null and void and that NYS follow the prescribed Code procedure of filing a proof of claim. Id. Martin also warned that unless NYS provided proof of Code compliance within ten days, he would move to hold all those involved in contempt of court.

On November 12, 1987, NYS filed a proof of claim in the amount of $293,428.17 for sales and withholding tax and interest accrued, pursuant to Articles 22, 28 and 29 of the NYTL. An attached sheet itemized the claim into eleven overdue tax payments. A warrant had been filed in Oneida County on September 4, 1987 for one of the three assessments for outstanding withholding taxes. Similarly, five of the eight taxes owing for sales tax had warrants filed pre-petition in Oneida County. Two sales tax assessments, bearing the same identification numbers that appeared on the notices in dispute, were identified as "field audit" and had no warrants filed.

In response to Martin's letter, the District Tax Attorney claimed that the Notices at issue were notices of tax deficiencies exempt from the automatic stay under Code §362(b)(9) and "the only way the department can communicate the deficiencies found pursuant to the audit involved . . .[and] also advise the taxpayer as to its rights to appeal the determinations made therein." Letter from Elis J. Delia, Esq., District Tax Attorney & Appraiser, Utica District Office, N.Y.S. Department of Taxation and Finance, to

Brett W. Martin, Esq. (Nov. 17, 1987).

Debtor's reply reiterated his position that the sending of the notice constituted more than a notice of tax deficiency in that it demanded payment or the filing of an appeal within ninety days. Letter from Brett W. Martin, Esq. to Elis J. Delia, Esq., District Tax Attorney, N.Y.S. Department of Taxation and Finance (Nov. 19, 1987). In support thereof, he enclosed In re Fasgo, Inc., 58 B.R. 99 (Bankr. E.D.Pa. 1986). Counsel suggested that NYS draft up a new form that did not include demands for payment or tax assessments if its sole purpose in sending the Notices was communication. Id. He also repeated his demand that unless the assessment was cancelled by November 27, 1987 an action for contempt and sanctions would be instituted.

Martin commenced the instant contested matter on December 7, 1987. NYS replied that the disputed Notices are required by NYTL §1138 and afford the taxpayer ninety days to contest before a final determination is made. Thus, they are exempt from the stay pursuant to Code §362(b)(9) since their issuance does not trigger a tax lien and are actually employed, where a taxpayer has filed bankruptcy, "as the equivalent of a 'notice of tax deficiency'". Reply Affirmation, para. 2 (Affidavit of Aniela J. Carl, Assistant Attorney General, N.Y.S. Department of Law, Jan.7, 1988). Recognizing the inappropriateness of the Notices' "demand for payment" phrase, NYS requests the Court to look at its actual treatment of the Notices and deny the Debtor's requested relief.

NYS affirmed that on October 15, 1987, a bankruptcy stop was placed on all assessments issued against Debtor, as is its

procedure upon the verification of a taxpayer's filing of a bankruptcy petition. "A 'bankruptcy stop' . . . indicates that no collection activity is to take place against this taxpayer as there is an ongoing bankruptcy proceeding." Id. at para. 4 (Affidavit of Elaine Wallace Braden, Senior Attorney, N.Y.S. Dep't of Taxation and Finance, Jan.6, 1988). It attested that no collection activity was made against the Debtor after the petition was filed.

In pursuit of Debtor's pre-petition tax liabilities, NYS stated that it had filed a proof of claim on November 12, 1987 and was monitoring the bankruptcy proceeding. The State maintains that the issuance of the Notices is necessary to establish and determine the exact amount of the tax liabilities, which are then asserted against the Debtor in the proof of claim, together with any post-petition administrative expenses. It further contends that if it were unable to issue these Notices post-petition, liability would not be substantiated and "[t]here would be no established amount to include on claims filed with the Bankruptcy Court. Because New York State Tax Law establishes time limits within which liability must be fixed (for the protection of taxpayers), the State's inability to fix liabilities during the pendency of a bankruptcy proceeding might preclude it from asserting actual liabilities against bankruptcy taxpayers, a result surely not intended by the Bankruptcy Code." Id. at para. 7.

The State claims that the "demand for payment" phrase will be deleted from new forms to be generated upon completion of its

current review and amendment of the existing forms. Given its own practice not to treat the Notice as a demand for payment and to comply with the Code, the State urges this Court to treat the labeling of the form as a "minor problem" that it is already attending to. Id. at para. 8.

At the first argument on January 11, 1988, counsel for the Debtor claimed that the State was attempting to remove the determination of claims from the bankruptcy court to its own system. Martin asserted that its reliance on state law in doing so was misplaced in the presence of the Supremacy Clause. He expressed concern as to the status of a debtor's tax liability where the determination was not contested within the ninety day period and, subsequently, the bankruptcy case was either dismissed or the reorganization failed.

The State asserted that the Notice did not in any way remove or attempt to remove the proceeding into its own administrative network since it recognized the superiority of the bankruptcy court's procedures. It acknowledged that any administrative determination would have to be made pursuant to court order and that the court was free to make its own determination regarding any liabilities owed to the State. NYS also pointed out that neither the Debtor nor his attorney were confused by the form and that its actual practice belied any contemptuous act with respect to the bankruptcy proceedings. It also stated that the determination in the Notices could be challenged by the Debtor in bankruptcy court at any time or in an administrative proceeding during the ninety day period.

At the close of the January 11, 1988 hearing, the Court denied the contempt sanctions and invalidated any assessment that the Notice triggered or any rights its service might have conferred upon the State. It directed the Debtor to submit an order, on five days notice to the State, treating the notice as a notice of tax deficiency under Code §362(b)(9) and nullifying any effect as an assessment or otherwise under Code §362(a)(6).

Shortly thereafter, the State asked the Court to reconsider the decision "vacating the tax notices" and enclosed in support In re Fasgo, Inc., No. 86-1995 (E.D.Pa. Sept. 30, 1986)(WESTLAW 10817, FBKR-CS), [rev'g, 58 B.R. 99 (Bankr. E.D.Pa. 1986] and H & H Beverage Distrib., Inc., v. Dep't. of Revenue of Pa., 79 B.R. 205 (E.D.Pa. 1987), [rev'd, 850 F.2d 165 (3d Cir. 1988)]. Letter from Aniela J. Carl, Assistant Attorney General in Charge to Hon. Stephen D. Gerling (Jan.13, 1988). On January 14, 1988, the Court received the Proposed Order from the Debtor. The next day the Court received a second letter from the State, which expressed confusion at the language of the submitted Order and requested clarification of its effect on the underlying liabilities. Letter from Aniela J. Carl, Assistant Attorney General in Charge to Honorable Stephen D. Gerling (Jan. 14, 1988).

The Debtor responded by first stating that to find that the governmental tax unit's assessment did not fall within the prohibition of Code §362(a)(6), the district court in Fasgo explicitly relied upon Pennsylvania law which required the tax authorities to initiate a separate state court procedure to enforce a lien for a tax deficiency so that the notice was purely

an alert to the taxpayer. In contrast, NYTL §1138(a)(1), is "a necessary step prior to utilization of the enforcement provisions of Section 1141" which authorizes a court action at the Attorney General's request or the filing of a warrant that then creates a lien upon real or personal property. Letter from Brett W. Martin to the Hon. Stephen D. Gerling, p. 1 (Jan. 14, 1988).

Martin further noted that the Commissioner of Taxation and Finance may estimate the amount of taxes due under NYTL §1138(a)(1) and include it in a notice which then must be sent to the person liable for the tax, constituting a final and irrevocable fixing unless an appeal is made within ninety days. He also indicated that since the accompanying Notification of Right to Protest explains that the time period may not be extended, NYTL §1141 appears to allow the issuance of warrants once the ninety days expires since it is silent on any restraining of said issuance.

Debtor's counsel found support for his position in H & H, supra, 79 B.R. at 205, where the district court found violations of Code §§362(a)(4)-(6). He likened the facts before the H & H court - where a "final assessment" notice sent to the Chapter 11 debtor corporation triggered the filing of a lien certificate unless the taxes were paid or an appeal was filed within thirty days - to his client's situation. Martin claimed that both cases shared identical concerns since the issuance of both notices interfered with the breathing spell from creditors which the Code offered to debtors, and fell within the prohibition against all collection

efforts and those acts towards the creation of a lien. He maintained that the Notices "demand payment of the pre-petition liability or require the debtor to file an appeal within ninety days and, by virtue of Section 1141(b), enable the Tax Department to issue and file a warrant creating a lien - all without judicial authorization, if it so chose." Letter from Brett W. Martin to the Hon. Stephen D. Gerling, supra, at p.2. In sum, Martin asserted that the State's issuance of the Notices violated Code §362(a)(4)-(6).

At the re-argument on January 25, 1988, Debtor recapitulated his two-pronged view that the stay was violated: (1) in letting the assessment stand he was deprived of the right, available to all taxpayers, to seek an administrative review within ninety days of the assessment since the stay's function was to protect the debtor from having to "jump to retain its rights" and (2) the issuance of the assessment was a stepping stone in the State's collection procedures. The State maintained that the force and effect of the notice of determination equalled a notice of deficiency under Code §362(b)(9) and noted that the applicable statute, NYTL §1138, carried no enforcement provision, which was contained in a separate section of the New York Tax Law. Furthermore, while having no difficulty relying on its proof of claim if the disputed notice acted as a notice, the State held the belief that the Debtor wanted to void the entire liability which would divest it of nothing upon which to file a notice of claim.

The Court reserved decision.

On February 5, 1988, Debtor's attorney submitted an affidavit

and itemization for $984.00 of attorney's fees incurred in prosecuting the instant motion, pursuant to Code §362(h).

In an Order dated May 20, 1988, the Court granted the U.S. Trustee's motion to convert the case to one pursuant to Chapter 7, and a trustee in the converted case was thereafter appointed as indicated.

ISSUE

I Whether the post-petition issuance of a "Notice Of Determination And Demand For Payment of Sales And Use Taxes Due" is an exception to the automatic stay provision of Code §362(a) under Code §362(b)(9)?

II If not, was the violation willful within the meaning of Code §362(h) so as to entitle the Debtor to an award of attorney's fees and punitive damages, and an order of civil contempt?

JURISDICTIONAL STATEMENT

The Court has jurisdiction of the instant contested matter pursuant to 28 U.S.C.A. §§1334(b) and 157(a) and (b) (West 1976 & Supp. 1988). This core proceeding, 28 U.S.C. §157(b)(1) and (b)(2)(A),(B),(G) and (O),[1] is rendered in accordance with Rules 9014 and 7052 of the Federal Rules of Bankruptcy Procedure

[1] See Better Home of Va. v. Budget Serv. Co., 804 F.2d 289, 292 (4th CIr. 1986).

("Fed.R.Bankr.P.").

DISCUSSION

> Statutory construction . . . is a holistic ende
> used elsewhere in a context that makes its mean

United Sav. Ass'n v. Timbers of Inwood Forest, 108 S.Ct. 626, 630 (1988)(citations omitted). Thus, if at all possible, every part of an act should be given effect. See In re Hall, 752 F.2d 582, 586 (11th Cir. 1985)(citing Administrator, Fed. Aviation Admin. v. Robertson, 422 U.S. 255, 261 (1975) and Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973)).

Moreover, the Code's two main purposes - equitable asset distribution to creditors and providing the debtor with a fresh start - "must ultimately govern" the ascertainment of a particular term's scope and limitations. See Kokoszka v. Belford, 417 U.S. 642, 645-646 (quoting Lines v. Frederick, 400 U.S. 18 (1970) and Local Loan Co. v. Hunt, 292 U.S. 234 (1934)). Therefore, any analysis of the automatic stay provision's treatment of a governmental unit's conduct concerning delinquent taxes must consider Code §505, which speaks to the determination of tax liability in a bankruptcy case. See, e.g., Brandt-Airflex Corp. v. Long Island Trust Co., N.A. (In re Brandt-Airflex, Corp), 843 F.2d 90 (2d Cir. 1988); H & H, supra, 850 F.2d at 165; In re Ribs-R-Us, 828 F.2d 199, 202 (3d Cir. 1987). See also Code §502; Fed.R.Bankr.P. 3007.[2]

[2] The issues, as framed by the parties, invoked only Code

I. The automatic stay of Code §362 provides both debtor and creditor protection in that "it gives the debtor a breathing spell from his creditors" and ensures "an orderly liquidation procedure under which all creditors are treated equally." See H.R. REP.NO. 595, 95th Cong., 1st Sess. 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6296-6297; S.REP.NO. 989, 95th Cong., 2d. Sess. 54-55, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5835, 5840. Its scope is expansively delineated in eight categories under Code §362(a) that are limited by eleven specific exceptions under Code §362(b). "Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly to secure the broad grant of relief to the debtor." Stringer v. Huet (In re Stringer), 847 F.2d 549, 552 (9th Cir. 1988)(footnotes omitted)(quoting 2 L. King, COLLIER ON BANKRUPTCY §362.04 15th ed. 1988)). Actions taken in violation of the automatic stay are void. Id. at 551. See also Kalb v. Feuerstein, 308 U.S. 433 (1940); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 940 (6th Cir. 1986); Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1986); 2 COLLIER, supra, at §362.03.

With respect to the actions prohibited by the stay and relevant to the instant matter, the Court notes the use of the adjective "any" to qualify the term "act" in subsections four,

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§362 and NYTL §§1138 and 1141. However, for reasons set forth below, this matter will be decided on the interplay between Code §§362 and 505 and New York Tax Law §§1138 and 1141.

five and six of Code §362(a). A less than broad construction of either of these subsections would dilute the automatic stay, which is fundamental to a bankruptcy filing, and controvert the statute's plain meaning. See generally id. at §362.04. That the State's actual practice is allegedly in compliance with the Code, stopping short of any collection procedures by the institution of an internal "bankruptcy stop", that it acknowledges the problematic wording of the Notices and is addressing this "minor problem" by revising existing forms, and that it claims neither the Debtor nor his counsel were confused by the Notices is unavailing. The Code is clear that the stay prohibits "any act" to create any lien against property of the estate or against property of the debtor to secure a pre-petition claim or to assess a pre-petition claim against the debtor. This includes the assessment of pre-petition tax claims. See In re Ribs-R-Us, supra, 828 F.2d at 303; In re Carter, 74 B.R. 613, 617 (Bankr. E.D.Pa. 1987); In re Greene, 50 B.R. 785, 787 (Bankr. S.D.N.Y. 1985); United States v. Coleman Am. Co., Inc. (In re Coleman Am. Co., Inc.), 26 B.R. 825, 831 (Bankr. D.Kan. 1983). The Court does not find Martin's attempt to distinguish the Pennsylvania statute in Fasgo from the NYTL at issue here persuasive. However, inasmuch as the district court in Fasgo narrowly read the term "assess" in its construction of Code §362(a)(6) and appeared to focus on the term "enforce" to the exclusion of the term "create" in Code §362(a)(4) and (5), this Court respectfully disagrees. The Court also observes that where the issuance of an assessment

sets in motion an irrevocable determination that initiates a court proceeding or the creation of a lien unless an appeal is lodged within a certain period of time, as here, it acts to more than "merely alert[ ] the taxpayer of a deficiency or discrepancy." In re Fasgo, supra, WL 10817 at 5. Thus, such an act is prohibited by Code §362(a)(4), (5) and (6). While the facts at bar might arguably reveal a statutory grey area between the calculation of a tax and a levy of that tax liability with respect to the term "assess", the Court will not allow semantics to contravene the broad scope of the Code's stay.

Thus, the State's act in sending the Notices went beyond merely communicating the existence of a tax deficiency in that it served to finally fix the amount of the tax liability and trigger a ninety-day appeal period. As such, this conduct violated the automatic stay. The State urges the Court to look beyond the form to the substance of its procedure. Yet resort to this rationale is not advantageous since the "substance-procedure distinction" has demonstrated that all too often the lines between form and substance become blurred and substantive rights are trampled. See Hanna v. Plumer, 380 U.S. 467, 465-466 (1965)(service of process); Guaranty Trust Co. of New York v. New York, 326 U.S. 99, 107-110 (1956)(statute of limitations). The Court will not allow the Debtor to risk losing the right to appeal an irrevocable tax determination, especially where the State has the resources to comply with this apparently "minor problem" created by Code §362(a) and has represented that it is in the process of doing so.

Code §362(b)(9) excepts from the stay the very action

the State claims was the actual objective of its Notices - communication to the Debtor of the existence of a deficiency. The issuance of a notice of tax deficiency and the suspension of the 90 day appeal period, coupled with the filing of the proof of claim, would appear to not run afoul of the Code and effectuate its stated purpose to "communicate the deficiencies found pursuant to the audit involved herein." See Letter from Elis J. DeLia, Esq. to Brett W. Martin, Esq. (Nov. 17, 1987). With regard to its concern about informing the Debtor of his rights to appeal the determinations, that would not be necessary until such an "explanatory" notice was actually sent, which could not occur until the Court made the requisite determination under Code §505(c).

The State's apprehension about the effect on the underlying liabilities if the Notices are simply treated as exempt notices of tax deficiencies is unfounded. When an administrative device serving the function of a court judgment, like a tax assessment, is set aside, "[it] does not determine a taxpayer's liability for unpaid taxes, for the assessment does not create the liability." In re Carter, supra, 74 B.R. at 615 (citations omitted). It is the State's filing of a proof of claim, rather than the issuance of a notice of tax deficiency, which establishes the debtor's tax liability for the purposes of a reorganization or liquidation under the Code, absent the debtor's objection pursuant to Fed.R.Bankr.P. 3007 or a request for a judicial determination under Code §505.

Additionally, NYTL §1138(a)(1) does not provide any time

frame within which the commissioner of taxation and finance must determine the amount of tax due. Nor does NYTL §1141 state when the attorney general must bring the action to enforce the payment on the behalf of the State or, in the alternative, when the tax commission itself may issue a warrant. Furthermore, NYTL §1141(a) authorizes the attorney general's action to enforce payment to be brought "in any court of the state of New York or of any other state or of the United States." (emphasis added). As a unit of the district court, the bankruptcy court is a court of the United States. See 28 U.S.C.A. §§151, 451 (West Supp. 1988. Thus, NYTL §1141 empowers the attorney general to institute a proceeding in bankruptcy court, see Code §§501, 502(a), 505, 506; Fed.R.Bankr.P. 3007, and the Supremacy Clause need not be invoked.[3]

For the reasons discussed above, the Court stands firm on its earlier ruling on January 11, 1988 that the State's sending of the Notices can only fall within the purview of Code §362(b)(9) if it functions solely as a notice of tax deficiency and does not trigger either a final assessment determination and a corresponding ninety day period within which to lodge a challenge or set in motion the filing of a warrant. Indeed, the result reached by the Third Circuit in H & H is not at odds with this holding. The Third Circuit reversed the bankruptcy and district courts which both held, under different theories, that the state's

[3] The Court also notes that the priority claim of NYS as listed by the Debtor in its amended petition, while disputed, is in the exact amount set out in the Notices, although it is less than the amount set out in NYS proof of claim.

sales tax audit, tax assessment and issuance of the tax assessment notice to the debtor were willful violations of the automatic stay. The higher court found that the audit alone did not violate the stay, that audits are often necessary to the filing of proofs of claim and that their prohibition would render the exercise of Code §362(b)(9) "meaningless." H & H, supra, 850 F.2d at ___, WL at 10. The court also found that the notice at issue was the functional equivalent of a notice of tax deficiency under Code §362(b)(9). See id. at ___, WL at 11-16. The Third Circuit explicitly noted that the stay prohibited any other steps toward the creation of a lien that might have been triggered by the notice and affirmed that part of the district court's judgment which voided the tax lien created by the State.[4]

By its very terms, the NYTL contemplates the result reached here for the requirement to send a notice under NYTL §1138(a)(1) or the proceedings to recover the tax under NYTL §1141 are not activated until the determination is made, on which, as indicated above, both sections are silent. Code §505(c) also supports this conclusion, as it authorizes the assessment by the applicable governmental unit "notwithstanding section 362, after determination by the court of a tax. . . subject to any otherwise applicable law." (emphasis added). "[O]nce a bankruptcy proceeding is instituted, and a §362(b)(9) notice of tax

[4] In contrast to the Debtor here, the Debtor in H & H had initiated, post-petition, an administrative appeal to obtain a re-determination of the audit findings and its state appeal was pending in state court.

deficiency has been issued for pre-petition taxes, the bankruptcy court has the option of referring the tax issue to the Tax Court or making its own determination." Id. at ___, WL at 9.

The State's assertion that without the establishment of the amount due on the Notices it would have had no figure to include on the proof of claim is similarly unavailing. The appended itemization to the proof of claim indicates that the two Notices covered the periods June 1, 1983 through February 29, 1984 and March 1, 1984 through August 31, 1987 and arose from "field audits" on an undisclosed date. The record is silent when such field audit was conducted and NYTL §1138(a)(1) allows the commissioner to determine the amount of tax due from "such information as may be available." Presumably, NYS has obtained the figure on the proof of claim by resorting to its internal pre-petition records. There is also no provision in the Code, other than an implied good faith obligation, requiring a creditor to substantiate his proof of claim. Moreover, the State has failed to direct the Court to any other section of the NYTL mandating the tax assessment determination as a condition precedent to filing a proof of claim, which, even if it existed, could not stand as against the Code.

II. Having answered the first question in the negative, it now becomes necessary to address the relief requested by the Debtor for the State's violation of the stay. At the outset, the Court notes that the enactment in 1984 of Code §362(h) supplemented, rather than replaced, the civil contempt remedy. See Wagner v. Ivory (In re Wagner), 74 B.R. 898, 902, 903 (Bankr.

E.D.Pa. 1987)(quoting remarks of Rep. Rodino in Congressional Record, daily ed. March 26, 1984). Furthermore, the Court is of the belief that it has the authority to issue an order of civil contempt. See Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448 (1932); Fidelity Mortg. Investors v. Camelia Builders, Inc., 550 F.2d 47 (2d Cir. 1976), cert. denied, 429 U.S. 1093 (1977)(contempt action under former Bankruptcy Act and Bankruptcy Rules); Kellogg v. Chester, 71 B.R. 36 (N.D.Tex. 1986); Miller v. Mayer (In re Miller), 81 B.R. 669 (Bankr. M.D.Fla. 1987); In re Haddad, 68 B.R. 944 (Bankr. D.Mass. 1987); see also Code §105(a), Fed.R.Bankr.P. 9020; contra In re Sequoia Auto Brokers, Ltd., Inc., 827 F.2d 1281 (9th Cir. 1987); In re Continental Air Lines, 61 B.R. 758 (S.D.Tex. 1986); In re Omega Corp., 51 B.R. 569 (D.D.C. 1985) However, it does not find this to be an appropiate situation to do so based upon the evidence put forth by the Debtor.

The remedy of civil contempt is primarily designed for an injured suitor and to coerce compliance with a court order. See 17 Am.Jur.2d Contempt §4 (1964); see also United States v. Stewart, 571 F.2d 958, 963 (5th CIr. 1978). In an action for civil contempt, the moving party must prove his case by clear and convincing evidence. See In re Wagner, supra, 74 B.R. at 902. The record does not demonstrate that Debtor has done so with respect to injury.

Moreover, the Court agrees with the Third Circuit that "[a] party should not be held in contempt unless a court first gives fair warning that certain acts are forbidden; any ambiguity

in the law should be resolved in favor of the party charged with contempt." United States On Behalf of I.R.S. v. Norton, 717 F.2d 767, 774 (3d Cir. 1983). The Court does not regard the "341 form Order" sent to NYS to embody the requisite preciseness or specificity needed to give "fair warning" and trigger the civil contempt remedy, notwithstanding the perhaps problematic relationship between Code §§362(a)(4()-(6) and (b)(9) that the instant motion has highlighted.

Turning to Code §362(h), the Court notes its applicability to entities, although it uses the word "individual." See Budget Service Co. v. Better Homes of Virginia, supra, 804 F.2d at 292. The Court finds that the State's action was willful within the meaning of that provision since the sending of the Notices was intentional, deliberate and voluntary and the State had formal and actual notice of the filing. See In re Tel-A-Communications Consultants, Inc. v. Auto-Use (In re Tel-A-Communications Consultants, Inc.), 50 B.R. 250, 254 (Bankr. D.Ct. 1985).

However, the State was well aware of the Code, as evidenced by its instituting the bankruptcy stop, and so was not acting in "flagrant disregard" of the bankruptcy laws. See Nash Phillips/Copus, Inc. v. El Paso Floor, Inc. (In re Nash Phillips/Copus, Inc., 78 B.R. 798, 803 (Bankr. W.D.Tex. 1987); In re Elegant Concepts, Ltd, 67 B.R. 914 (Bankr. E.D.N.Y. 1986). This is so even though the wiser course of action would have been to have moved for relief from the stay upon being made aware of the Debtor's position with respect to the Notices. Hence, the

Court does not find this to be an appropriate situation to award punitive damages, especially as the applicability of the automatic stay was not "so clear" from the start. See Gonzales v. Parks, 830 F.2d 1033, 1037 (9th Cir. 1987).

With respect to the Debtor's request for attorney's fees, the Court finds that the Debtor is entitled to the fees as set out in Martin's affidavit since the Debtor had to commence this action to enforce its rights under the Code. See H & H Beverage Distributors, Inc., supra, 79 B.R. at 208 (citing Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F. 2d 47 (2d Cir. 1976). This litigation and the award of attorney's fees to the Debtor is also necessary to restore the status quo in existence prior to the State's violation of the automatic stay. See Superior Propane v. Zartun (In re Zartun), 30 B.R. 543, 546 (Bankr. 9th Cir. 1983); Dubin v. Jakolowski (In re Stephen W. Grosse, P.C.), 84 B.R. 377, 388 (Bankr. E.D.Pa. 1988); Stucka v. United States (In re Stucka), 77 B.R. 777, 783 (Bankr. C.D.Cal. 1987); In re Davis, 74 B.R. 406, 410 (Bankr. N.D.Ohio 1987). In closing, the Court finds the requested attorney's fees reasonable.

Accordingly, it is hereby

ORDERED:

1. That the sending of the Notices by NYS to the Debtor, pursuant to NYTL Article 28, violated the automatic stay imposed under Code §362(a).

2. That Debtor's motion for an order of contempt for violation of the automatic stay imposed under Code § 362(a) is

denied.

3. That Debtor's request for attorney's fees in the amount of $984.00 pursuant to Code §362(h) is granted.

4. That Debtor's request for punitive damages under Code §362(h) is denied.

Dated at Utica, New York
this day of August l988

STEPHEN D. GERLING
U.S. Bankruptcy Judge