UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS DEPARTMENT OF REVENUE,	)	Case No.: 19-CV-06427
Appellant,	)	Hon. Charles R. Norgle Jr.
v.	)	
TOTAL FINANCE INVESTMENT INC., *et al.*,	)	On appeal from the United States Bankruptcy Court for the Northern District of Illinois, Case No. 19-B-03734
Appellees.	)	Hon. Carol A. Doyle

REPLY BRIEF OF APPELLANT, ILLINOIS DEPARTMENT OF REVENUE

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In its brief, the Debtors dispute IDOR's contentions that the bankruptcy court lacked the authority to decide the Tax Credit Motion to the extent it involved CO's Claims for Credit. They likewise dispute IDOR's contentions that the Claims for Credit with respect to the Contracts sold to the Finance Companies are invalid as a matter of Illinois law. And they argue that with respect to the retained Contracts, IDOR fails to raise any factual disputes. IDOR's reply to each of their arguments follows.

I. The bankruptcy court lacked authority to decide the dispute between IDOR and CO on all three bases raised.

A. The bankruptcy court lacked jurisdiction under 28 U.S.C. § 1334.

Both IDOR and the Debtors agree that if jurisdiction exists, it is under the "related to" strand of 28 U.S.C. § 1334(b). In addition, both parties agree that the standard for "related to" jurisdiction is "whether resolution of the matter could conceivably have any effect on the bankruptcy estate." *See Bush v. United States*, 939 F.3d 839, 846 (7th Cir. 2019) (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n. 6 (1995)). The dispute between the parties turns on whether "related to" jurisdiction exists where a trustee or debtor-in-possession brings an action asserting the property rights of a non-debtor third party simply because a debtor has a lien or contractual claim against whatever property rights that the third party is determined to hold.

Before the bankruptcy court, IDOR made the following argument:

> The Debtors also argue that there is "related to" jurisdiction because one or more of the Debtors allegedly has a claim or encumbrance against any refunds or credits that [CO] may win if it prevails in this litigation. None of the cases that they cite, however, stand for the proposition that the bankruptcy court has jurisdiction to decide the contested property interests of a non-debtor third party simply because a debtor may have an encumbrance on that third party's property. And IDOR is unaware of any such authority.

(Doc. 299 at 17.) In its Memorandum Opinion, the bankruptcy court, after discussing the Debtors' contractual claim against CO and the Debtors' intention to use any proceeds from the eventual liquidation of any credit memos paid to CO to fund in part the plan, concluded that:

> [W]hile a bankruptcy court usually should not determine tax issues of parties who are not debtors, in this case, the court may determine Car Outlet's right to credit memos as assets of the bankruptcy estate that will be used to fund the plan.

(Doc. 440 at 29.) In its opening brief, IDOR demonstrated why the court's decision on this point, and in particular its conclusion that CO's right to credit memos was an asset of the estate, was wrong. (IDOR br. at 32-35.)

In response, the Debtors make several arguments. First, they claim that in arguing that CO's Claims for Credit were not property of the estate and therefore that "related to" jurisdiction did not exist, IDOR is improperly raising a new argument. (Debtors' br. at 20.) The Debtors are wrong. Throughout the pleadings filed with the bankruptcy court, IDOR took the position that jurisdiction would not exist if CO's Claims for Credit had not been assigned to TFII, and that if the bankruptcy court found that they had been assigned, TFII would have no right on the merits to receive any credit memos. In its Initial Objection, IDOR raised the question of whether CO owned its Claims for Credit or whether they had been

assigned. At pages 3-4 of its Initial Objection, IDOR explained why, in its view, CO was still the owner but noted that the Debtors had included a footnote in their Tax Credit Motion asserting that CO's Claims for Credit were assets of the bankruptcy estate. IDOR further stated:

> For purposes of this Objection, IDOR, based on its prior dealings with [CO] concerning the Claims for Credit, assumes that [CO]is the owner. If, however, in reply to this Objection or otherwise, a determination is made that the rights of [CO] to credit memoranda or sales tax refunds was transferred to one or more of the Debtors pursuant to the Marubeni Purchase Agreement in 2014, IDOR reserves the right to withdraw the portion of this Objection that addresses this Court's jurisdiction to decide [CO]'s Claims for Credit and take whatever other position is appropriate.

(Doc. 299 at 4.) At the status hearing on April 23, 2019, the bankruptcy court asked if IDOR was withdrawing its argument to which IDOR answered no. IDOR then asked for clarification as to who held legal title to the Claims for Credit but was told that the court would figure it out. (Tr. 4/23/19 at 8-10.) So in its Supplemental Objection, IDOR set out as an alternative argument that if the bankruptcy court found that CO's Claims for Credit had been assigned, the assignee could not assert a valid claim for credit memos under the decision in *Citibank, N.A. v. Ill. Dep't of Revenue,* 2017 IL 121634 (2017). (Doc. 375-1 at 13.) Clearly the issue of who owned the Claims for Credit was raised, both as a jurisdictional issue and, alternatively, as a merits issue in the pleadings.

Furthermore, in its Memorandum Opinion, the bankruptcy court found that CO's Claims for Credit were assets of the estate while at the same time finding that they were not assigned to TFII, a position that IDOR believes to be inconsistent as

set forth in its opening brief. Clearly IDOR is not raising a new argument by addressing the error that it believes the court made.[1]

Second, the Debtors argue that "related to" jurisdiction exists because a determination of CO's rights to credit memos that are subject to TFII's claim under the Marubeni Agreement for turnover of any refunds that are realized by CO will be used to fund the plan. And in support of their argument, they cite a number of cases for the proposition that under "related to" jurisdiction, the bankruptcy court can decide suits between third parties, the resolution of which will have an effect on the bankruptcy estate. (Debtors' br. at 22-23.)

The cases cited by the Debtors, however, do not support the proposition that "related to" jurisdiction exists to allow a debtor or trustee to litigate the property rights of a non-debtor third party simply because the debtor has a claim against or encumbrance on the non-debtor's property. In *Celotex*, the Supreme Court found that "related to" jurisdiction existed to enjoin the action of a judgment creditor of the debtor to collect on a supersedeas bond from a third-party surety where such action would likely trigger a claim by the surety against property of the debtor. *Celotex*, 514 U.S. at 309. In *In re Mem'l Estates, Inc.*, 950 F.2d 1364 (7th Cir. 1991), the court found "related to" jurisdiction to exist to resolve a foreclosure case

[1] It is unclear why the Debtors are even raising this argument as case law is clear that the issue of subject matter jurisdiction cannot be waived even if it is not raised in a lower court. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

involving a cemetery owned by the debtor. *Id.* at 1368. In *Apex Inv. Assoc. v. TJX Cos.*, 121 B.R. 522 (Bankr. N.D. Ill. 1990) the court found that "related to" jurisdiction existed with respect to a suit between a creditor and a non-debtor guarantor of the debtor's obligations where the non-debtor guarantor had a right of indemnification against the debtor. *Id.* at 526-27. In *In re Glick*, 568 B.R. 634 (Bankr. N.D. Ill. 2017), "related to" jurisdiction existed with respect to an action by the trustee against individuals for aiding and abetting a fraudulent conveyance where any damages would go to the estate. *Id.* at 644. And in *Janazzo v. FleetBoston Fin. Corp.*, 2002 WL 54541 (N.D. Ill. Jan. 15, 2002), the court found that "related to" jurisdiction existed with respect to a purported class action brought by a merchant against a debtor's secured creditor because the litigation would necessarily determine the amount of the secured creditor's claim against the debtor. *Id.* at *2.

So while these cases recognize that "related to" jurisdiction can exist with respect to actions affecting the liability of the estate or claims owned by the estate, none of these cases hold that "related to" jurisdiction exists with respect to actions by a trustee or debtor to assert the property rights belonging to a non-debtor third party merely because the debtor has a claim against the non-debtor or its property. To the contrary, applicable case law recognizes that a trustee (or debtor-in-possession) lacks authority to enforce claims that are not property of the estate. *Steinberg v. Buczynski*, 40 F.3d 890, 892 (7th Cir. 1994). And if the Debtors did not

have the authority to assert CO's Claims for Credit, the bankruptcy court clearly did not have jurisdiction to decide the issue.

The dispute in this case with respect to CO's Claims for Credit is a dispute between IDOR and CO. But CO is not a party to the case. If, as Debtors urge, "related to" jurisdiction is found to extend to the determination of a non-debtor's property rights in a case to which the non-debtor isn't even a party merely because that determination might somehow have some benefit to the bankruptcy estate, the scope of bankruptcy jurisdiction will grow exponentially and in a manner that is not recognized by current case law. IDOR submits that if the Debtors wanted to have CO's Claims for Credit decided by the bankruptcy court, the answer was to convince CO to also file for bankruptcy; not to invoke the bankruptcy court's "related to" jurisdiction to determine the property rights of CO in this proceeding to which CO is not a party.

IDOR therefore requests that the Court reverse the bankruptcy court's decision that it had jurisdiction to decide CO's Claims for Credit.

B. The bankruptcy court lacked the authority to resolve CO's Claims for Credit under § 505.

The Debtors raise two arguments in response to IDOR's argument that the bankruptcy court lacked authority because of the limitation of § 505(a)(2)(B) to determine the Debtors' Tax Credit Motion to the extent it sought to adjudicate the Claims for Credit filed by the non-debtor, CO. First, they argue that IDOR's

construction ignores the text and structure of § 505(a) and second, that it disregards governing precedent. (Debtors' br. at 23-27.)[2]

IDOR's construction does not ignore the text or structure of the statute. To the contrary, it is the Debtors' proposed construction that ignores the plain meaning of the statutory language and reads out of the statute requirements plainly listed in the limiting language of subsection (a)(2)(B).

Section 505(a) provides in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.
>
> (2) The court may not so determine—
>
> > (A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title;
> >
> > (B) any right of the estate to a tax refund, before the earlier of—
> >
> > (i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or
> >
> > (ii) a determination by such governmental unit of such request.

The Debtors commence their argument by stating that subsection (a)(1) contains a broad authorization for the bankruptcy court to decide the amount or

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[2] The Debtors incorrectly state that the bankruptcy court addressed IDOR's argument that the § 505(a)(2)(B) limitation applied to CO's Claims for Credit because CO was not a debtor or trustee. That is incorrect. The court only addressed this argument with respect to COAC (*see* Doc. 440 at 12-17) and IDOR is not appealing that part of the court's decision.

legality of any tax, including refunds. They further argue that to the extent that jurisdiction exists to determine tax disputes under 28 U.S.C. § 1334, subsection (a)(1) permits the bankruptcy court to decide it. (Debtors' br. at 23-25.) But this premise is incorrect. The grant of authority under (a)(1) is expressly limited by the introductory language "except as provided in subsection (a)(2)." And subsection (a)(2) in turn contains various limitations, some of which apply to litigation involving objections to tax claims; others to refund claims; and still others to the determination of *ad valorem* taxes on real and personal property. Where the limitation applies, there is no authority under subsection (a)(1) for the bankruptcy court to decide the issue even if, absent the limiting language of subsection (a)(2), such authority would exist. For example, if a debtor or trustee seeks to challenge a tax claim that has previously been adjudicated in a tribunal of competent jurisdiction, the bankruptcy court is precluded by the limitation of subsection (a)(2)(A) from redetermining the liability even if the right to a redetermination would otherwise fall within the scope of (a)(1). *See Northwest Beverage, Inc.*, 46 B.R. 631 (Bankr. N.D. Ill. 1985).

With respect to tax refunds or claims for credit, subsection (a)(2)(B) requires that a claim for a tax refund or credit sought on behalf of a bankruptcy estate be filed by a trustee (or debtor), and that 120 days run from the time the refund request is filed unless the governmental unit rules on the request earlier. While the word "trustee" as used in the Bankruptcy Code is construed as including a debtor-in-possession, *see* § 1107(a), it clearly does not include a non-debtor third party such

as CO. Here the (a)(2)(B) limitation clearly applies as claims for refund or credit are being sought on behalf of the estate but the claims for credit were not filed by the trustee (or debtor). Given the unambiguous language of the statute, it should be applied according to its terms.

The Debtors cite *In re Luongo*, 259 F.3d 323 (5th Cir. 2001) for the proposition that the broad grant of jurisdiction found in subsection (a)(1) can overrule the (a)(2)(B) limitation. (Debtors' br. at 24). The *Luongo* decision does not represent good authority for several reasons.

Luongo involved a situation where the IRS set off a pre-petition refund owed to the debtor against a pre-petition tax liability that was discharged in the debtor's chapter 7. The debtor reopened her case, amended her schedules to show the refund as exempt, and then brought an action against the IRS to recover the refund on the basis that the setoff was improper under § 522. *Id.* at 327. In response, the IRS argued that the action was barred by § 505(a)(2)(B) because it did not involve an action by the trustee to recover property for the estate. *Id.* at 328. In rejecting the IRS' position, the court found that the legislative intent concerning § 505, as evidenced in the statements of the floor managers, Representative Edwards and Senator DeConcini, showed that the bankruptcy court had the authority to decide the merits of any tax claim involving the debtor or the estate. *Id.* at 328-29. It therefore concluded that the limitations of subsection (a)(2) did not apply without parsing its language. *Id.* at 336.

As is set forth in his dissent, Judge Garza showed that the court's decision was contrary to a number of prior Fifth Circuit decisions including *In re Armstrong,* 206 F.3d 465, 474 (5th Cir. 2000) (holding that the bankruptcy court lacked jurisdiction where the trustee failed to file a timely refund request as required by § 505(a)(2)(B)) and *Tex. Comptroller of Pub. Accounts v. Trans State Outdoor Adv. Co.*, 140 F.3d 618, 620 (5th Cir. 1998) (holding that bankruptcy court lacked jurisdiction under § 505(a)(2)(A) to hear a tax dispute that was previously adjudicated by a tribunal of competent jurisdiction). *Id.* at 337. In addition, after analyzing the specific requirements of § 505(a)(2)(B), the dissent showed why the debtor failed to demonstrate that the limitations of subsection (a)(2)(B) did not apply. *Id.* at 338-40.

In addition, it is questionable whether the authority of the bankruptcy court to hear the dispute in *Luongo* should have even been decided under § 505. Section 505(a) addresses the authority of the bankruptcy court to decide the "amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax…" But the issue in *Luongo* had nothing to do with whether the IRS owed the debtor a refund; it clearly did. The issue was whether the refund could be offset against exempt property which would implicate the debtor's exemption rights under § 522 and the IRS' setoff rights under § 553. Given these facts, IDOR submits that because the issue before the *Luongo* court did not raise any question concerning the "amount or legality" of any tax or refund, its decision based on an analysis of § 505 is of questionable import.

In a case with virtually identical facts as *Luongo* (a debtor likewise sought to recover a pre-petition refund offset by the IRS), the court in *United States v. Copley* concluded that because the debtor's cause of action to claim exemptions arose under § 522, the IRS' right to setoff was preserved by § 553 and no one was questioning the amount or legality of the refund, § 505 was simply not implicated. 591 B.R. 263, 273 n. 21 (E.D. Va. 2018) ("Because no party here disputes the amount or legality of the tax, the Bankruptcy Court rightly held § 505 inapplicable to the case at bar."). Because *Luongo* similarly did not involve any determination of the amount or legality of any tax and did not need to be brought under § 505, its construction of § 505 is of limited utility and should not apply to the facts of this case.

And the Debtors' reliance on in *In re Stoecker*, 179 F.3d 546 (7th Cir. 1999) for the proposition that the bankruptcy court has authority to decide a non-debtors tax liability under § 505(a)(1) is not well-taken as the issue in *Stoecker* had nothing to do with the limitations of subsection (a)(2).

Furthermore, the courts in this district that have decided cases involving the limitations of subsection (a)(2) have applied its limitations according to its express terms. *See In re Enesco Group, Inc.*, 2013 W.L. 4045756 (Bankr. N.D. Ill., Aug. 8, 2013); *In re Northwest Beverage, Inc., supra.* For these reasons, IDOR submits that there is no valid basis to disregard the express terms of subsection (a)(2).

C. The Tax Injunction Act applies to the Debtors' request for the bankruptcy court to decide the Claims for Credit owned by non-debtor CO.

The principal dispute between IDOR and the Debtors concerning the applicability of the Tax Injunction Act[3] ("TIA") in this case turns on how the exception recognized in *In re Stoecker*, 179 F.3d 546 (7th Cir. 1999) is found to apply. The Debtors take the position that any dispute cognizable under § 505(a) is an exception to the TIA for which they cite *Stoecker* and *City Vending of Muskogee, Inc. v. Okla. Tax Comm'n*, 899 F.2d 122 (10th Cir. 1990) as authority. (Debtors' br. at 27-28.) *City Vending of Muskogee,* however, involved a tax dispute between the debtor and the tax commission and therefore does not decide the issue whether the TIA is implicated when the tax dispute involves a non-debtor. Obviously, *Stoecker* does.

In *Stoecker*, IDOR filed a claim against the debtor as a responsible officer of Chandler Corporation, a non-debtor, and the trustee, in objecting to IDOR's claim, asked the bankruptcy court to find that Chandler did not owe the tax in the first place and therefore that the debtor could not be derivatively liable. *Stoecker*, 179 F.3d at 548. In finding that the TIA did not bar the bankruptcy court from deciding Chandler's tax liability, the court stated that "[t]he Act [TIA] is anyway addressed only to injunctive remedies (or a declaratory judgment viewed as a preliminary to an injunction, (citation omitted), and no one is seeking an injunction against the

[3] 28 U.S.C. § 1341.

state's going after Chandler for the taxes that the state believes Chandler owes it." *Id.* at 549.

In this case, the relief that the Debtors seek falls squarely within the type of activity that the TIA is designed to prevent. Here, the Debtors seek to use the Tax Credit Motion as a vehicle to force IDOR to issue credit memos to the non-debtor, CO. They attempt to depict their action in different terms where they state that "[d]ebtors seek no such injunction here, but instead request what is effectively a return of taxes erroneously paid to IDOR." (Debtors' br. at 29.) The reality is that what they seek is a mandatory injunction requiring IDOR to issue tax credit memos to a non-debtor. This clearly falls outside the exception to the TIA recognized by *Stoecker* and should not be allowed.

For these reasons, IDOR requests that this Court find that the TIA bars the relief requested in the Tax Credit Motion with respect to CO's Claims for Credit.

II. The bankruptcy court erred when it found that CO and COAC had valid claims for credit memos under Illinois law with respect to the Contracts sold to the Finance Companies.

In its opening brief, IDOR set out two arguments addressing why neither CO nor COAC had valid claims for credit under Illinois law. The first explained why a retailer selling its Contracts to a finance company without recourse does not bear the burden of uncollected sales taxes and the second explained why, assuming that a retailer can contract with a finance company to retain the burden of unpaid sales, the contract between CO, COAC and the finance companies in this case did not effectively provide for them to retain the burden. This reply addresses the Debtors' responses to these arguments.

A. The bankruptcy court erred in finding that CO and COAC bore the burden of the unpaid sales taxes where the Contracts, including the sales tax component, were sold to the Finance Companies without recourse.

In its opening brief, IDOR explained that because CO and COAC sold the Contracts including the sales tax component to the Finance Companies without recourse for an agreed consideration, they were precluded from claiming that they bore the burden of the unpaid sales taxes when purchasers defaulted on the Contracts then owned by the Finance Companies. (IDOR br. at 37-40.) In response, the Debtors argue that because nothing in the applicable statutes or regulations requires that a retailer such as CO or COAC retain the Contracts, or the right to collect the sales taxes, as a condition to claiming a credit and because, under the MDA, they retained the burden of the uncollected sales taxes, they "bore the burden." (Debtors' br. at 32-33.)

Their argument fails to recognize that under § 6 of the Retailers' Occupation Tax Act, "no credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears that the claimant bore the burden of such amount and has not been relieved thereof *nor reimbursed therefor*…" 35 ILCS 120/6 (emphasis added). As IDOR explained in its opening brief, the sale of the Contracts was for an agreed contractual consideration consisting of the initial discounted payment and a possible contingent payment conditioned on the purchaser's full performance of the Contract. In exchange, CO and COAC conveyed all rights under the Contracts without recourse including the right to collect sales taxes. It follows then that because all rights to the Contracts including rights to

sales taxes were irrevocably conveyed to the Finance Companies in exchange for the agreed consideration, CO and COAC were reimbursed and the Finance Companies assumed the burden of all uncollected Contract amounts including any uncollected sales taxes upon a default by the purchaser.

The Debtors argue, however, that because, under the MDA, no sales taxes will be reimbursed until the Contracts have been fully performed at which time the contingent "sales tax" payment will be made, CO and COAC continue to bear the burden of the sales taxes on defaulted Contracts and have not been reimbursed for them. (Debtors' br. at 33-34.) In essence, what they are arguing is that by operation of the MDA, a private contract between CO, COAC and the Finance Companies, no consideration is payable for the sales tax component of the Contracts unless the purchaser fully performs and the contingent payment is made. But that analysis is flawed. Even if the purchaser does not fully perform under the Contract and therefore the contingent payment is not made, the consideration paid consisting solely of the discounted payment is nevertheless full consideration for the sale of the Contract including the sales tax component as the sale was without recourse. Because the discounted payment constitutes full consideration for all Contract rights transferred in situations involving defaulted Contracts, it follows that the so-called contingent "sales tax" receivable cannot represent unreimbursed sales taxes for purposes of determining reimbursement under § 6 of the Retailers' Occupation Tax Act. Instead, because this payment is contingent on the purchaser's full

performance of the Contract, it really is in the nature of an additional performance payment.

As IDOR explained in its opening brief, because CO and COAC assigned all interests in the Contracts to the Finance Companies without recourse in exchange for the initial discounted price and a contingent receivable that is tied to the purchaser's performance under the Contract, it is clear that the contingent receivable is not properly labeled as a "sales tax" receivable. It is a contingent receivable based on loan performance and constitutes nothing more than additional consideration for the assignment. Whether they receive this contingent payment or not, they have received the bargained-for consideration for the sale of their Contracts including the sale tax component and therefore have no valid basis to make a claim for a sales tax credit.

B. Assuming *arguendo* that a retailer that sells its installment contracts to a finance company without recourse can nevertheless contract to retain the burden of any sales taxes that are not collected by the finance company from the purchaser, the Master Dealer Agreement and the way it was implemented failed to accomplish this result.

In its opening brief, IDOR explained why the bankruptcy court's conclusion that CO and COAC bore the burden of the sales taxes based on its finding that the amount of sales taxes was subtracted from the discounted price was in error. (IDOR br. at 40-45.) As even the Debtors conceded, no such separate deduction of sales tax was taken. And because this erroneous factual finding was central to the court's conclusion, IDOR asserted that a reversal of this part of the court's final order was

appropriate. In addition, IDOR explained why it had not waived the issue. (IDOR br. at 44.)

In their response, the Debtors assert for the first time (they did not raise this argument in their response to IDOR's Motion to Reconsider) that IDOR's argument is a new argument that was waived. According to the Debtors, IDOR's statement in its Supplemental Objection (cited in its opening brief at pages 41-42) that the initial payment included sales taxes was only made in the context of IDOR's argument concerning non-recourse assignments. (Debtors' br. at 36.) They are incorrect as in the cited language, IDOR addressed both the Debtors' argument that the sales tax component of the Contracts was not sold when the Contracts were sold, and the fact that sales taxes were included in the initial purchase price paid to CO and COAC. Furthermore, it is clear that the Debtors understood IDOR's statement as addressing this factual question. In their response to IDOR's Supplemental Objection, they stated:

> The IDOR appears to argue that the amount paid by Total Finance to Car Outlet (calculated as the total amount financed by Car Outlet to the customer, less a discount) somehow amounts to a payment of the sales tax because the amount of the discount is measured by the total "Amount Financed" and the Amount Financed includes sales tax.

(Doc. 398, ¶17.) And IDOR made its position clear to the bankruptcy court at oral argument when, in discussing the structure of the MDA, it explained:

> MR. NEWBOLD: … Now, they're trying to structure this or argue that they have structured this in a way where they didn't really assign the sales tax rights or the rights to collect that. I think that that is factually incorrect because they assigned all rights under the contract.

> Then the question becomes did they pay for it? Frankly, I don't think it matters. If they have assigned it without recourse, then the retailer is not in the shoes of the finance company and is not bearing that burden. But, in addition, in this situation, they paid the finance company when it bought the paper, paid for -- let me put it this way, the sales tax was included in the price that was then discounted…
>
> THE COURT: Right. I know. I read -- I read the contract. And I know it's the purchase price you're taking, less, less, less, less, less, and then if you --
>
> MR. NEWBOLD: But they didn't do less. So as a factual matter, the contract price that they paid -- that the discount is based on includes sales tax.

(Tr. 5/27/2019 at 8-9.)

Given these circumstances, IDOR submits that it did not waive the argument or the right to challenge the bankruptcy court's finding that CO and COAC bore the burden of the uncollected sales taxes based on an incorrect finding of fact that was material to its conclusion. And if waiver does not apply, it is apparent that the bankruptcy court's decision must be reversed as it is based on a material erroneous factual finding.

The Debtors' second argument is that if waiver does not apply, the bankruptcy court's finding that CO and COAC bore the burden of the sales tax can be justified based on an alternative construction of the MDA. This alternative construction is set out in the Debtors' brief at pages 38-40 but can be summarized as follows. According to the Debtors, the initial amount to be paid CO and COAC is calculated by taking the amount financed less the 31% or 32% discount. Although sales taxes are included in the amount financed, no separate deduction of sales taxes is required to be taken because the deduction for sales tax is deemed to be included in the 31% or 32% discount. (Debtors' br. at 40.) According to the Debtors,

this alternative construction is mandated by the language of the MDA that the Finance Companies "will not reimburse Dealer for these amounts [sales taxes] until the Contract is fully paid off by Customer." (*Id*. at 38.)

The argument must be rejected for multiple reasons. First, it is not consistent with the accounting entries for calculating the amount of the initial payment to be paid to CO and COAC. As a review of the Debtors' Standard Journal Entry for the ML sale shows, the sales taxes were included in—not deducted from—the account receivable of $16,889.45 which was then discounted at 32% leaving a balance of $11,491.69 which was the amount paid. (Doc. 23-5 at 2.) The construction that the Debtors are now advocating is that the sales taxes were both included (as sales taxes were included in the amount financed) and also excluded (because they supposedly are included in the discount factor) at the same time; a conclusion that is simply illogical.

In addition, the manner in which the MDA purportedly works under this revised construction is completely different from the manner described in the Tax Credit Motion. In the Tax Credit Motion, the Debtors state that the Finance Company will pay "the amount that COAC financed to the customer, less the 31% discount, the amount of sales and use tax remitted at the time of sale, and any insurance premiums …" (Doc. 23 at ¶ 6.) The bankruptcy court agreed with this construction but its finding that, as a factual matter, the sales taxes were deducted was clearly erroneous. Now the Debtors argue that the sales taxes were deducted as part of the 31% discount while the Sale Motion makes clear that the amount of the

sales taxes was to be deducted in addition to the 31% discount. Where, as here, the Debtors' revised construction of the MDA clearly contradicts their initial explanation of how the MDA worked, this Court should reject their argument on grounds of judicial estoppel. The Seventh Circuit has stated that:

> Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process. *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, 599 (6th Cir. 1982). It is to be applied where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum designed for suitors seeking justice," *Scarano v. Central R. Co.,* 203 F.2d 510, 513 (3d Cir. 1953), to prevent litigants from "playing fast and loose with the courts." *Id.* "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position." *Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895).

Matter of Cassidy, 895 F.2d 637, 641 (7th Cir. 1990).

Here, where the Debtors never sought to amend their Tax Credit Motion, have failed to provide an explanation why their initial construction was in error and have only raised their revised construction in response to IDOR showing that the sales taxes were not subtracted but were included in the initial payments, this Court should reject their attempt.

III. The bankruptcy court erred when it found that IDOR did not raise a material factual issue with respect to the retained Contracts.

In their response, the Debtors argue that IDOR failed to identify any factual disputes concerning the retained Contracts and attempts to cast the issue as a discovery dispute or, alternatively, as an attempt by IDOR to introduce new evidence. (Debtors' br. at 41-42.)

Their argument fails as it miscasts the argument as a discovery dispute when it really is a burden of proof issue. As IDOR set out in its Supplemental Objection, the burden of establishing the necessary elements to qualify for a tax credit based on uncollected sales taxes is on the taxpayer. (Doc. 375-1 at 9.) *See also* 35 ILCS 120/6b (determination by IDOR concerning validity of a claim for credit is prima facie correct). The central element at issue in this proceeding is, of course, whether CO and COAC bore the burden of the uncollected sales taxes and, with respect to retained Contracts, it is clear that they would have. The problem is that the Tax Credit Motion merely states that they retained certain Contracts (Doc. 23 at ¶ 30) and provides a dollar value of the asserted retained Contracts. (Doc. 23-2 at 2.) CO and COAC never gave the auditors documentation to establish that fact. Furthermore, nowhere in the Tax Credit Motion do the Debtors provide any documentation to establish which Contracts were retained and whether CO and COAC actually repossessed the vehicles sold pursuant to those Contracts. Given that the burden was on the Debtors to establish that CO and COAC bore the burden, it is clear that there is a factual issue.

It should be noted that CO and COAC provided IDOR with additional information concerning the retained Contracts. (Doc. 609.) That submission identified all of the allegedly retained Contracts but failed to include documentation to establish that the CO and COAC actually retained the Contracts and repossessed the vehicles upon default. (*Id.*) IDOR subsequently requested such documentation with respect to a small sampling of the Contracts listed in the submission but has

been advised that the Debtors do not deem it appropriate to provide further documentation while this appeal is pending. Therefore, the issue remains open.

The Debtors make a last argument—that there is no reason why they should have to establish that they retained any of the Contracts and repossessed the vehicles if the Court finds that CO and COAC bore the burden with respect to Contracts sold to the Finance Companies. On this point they are correct. If this Court upholds the bankruptcy court's decision on the Contracts sold to the Finance Companies, the factual issue whether CO and COAC actually retained these Contracts and repossessed the vehicles becomes moot. But, as IDOR has demonstrated in its opening brief and above, the bankruptcy court's decision with respect to the Contracts sold to the Finance Companies must be reversed in which case the issue whether CO and COAC actually retained the Contracts and repossessed the vehicles remains relevant and must be decided.

IV. Conclusion

For the reasons discussed above and in its opening brief, IDOR requests that the Court grant the relief requested in its opening brief.

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/s/ James D. Newbold
Attorney for Appellant

Dated: February 28, 2020

CERTIFICATE OF SERVICE

It is hereby certified that, on this 28th day of February, 2020, the foregoing was filed with the Clerk of the United States District Court for the Northern District of Illinois by using the CM/ECF system. Each participant was served electronically by the Notice of Docket Activity transmitted by the CM/ECF system.

Signature /s/ James D. Newbold
Attorney for Appellant