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Is the Abandoned Mine Reclamation Fee Discharged In Bankruptcy?

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INTRODUCTION

The Bankruptcy Code[1] offers relief to a debtor by delaying collection activities of creditors[2] and/or by discharging pre-bankruptcy indebtedness for debtors.[3] The policy objectives of the Bankruptcy Code (hereinafter the Code) are to give the debtor a "fresh start" and to provide equity among the creditors.[4] These objectives conflict with other provisions in the Code that do not discharge the debtor from government claims for unpaid taxes and interest.[5] As a result of this conflict, the debtor is not relieved from tax liability and the unsecured governmental claims are given priority.[6] Consequently, the federal government's need to collect revenue for its orderly operation and for the provision of public goods and services is a primary policy choice over the debtor's need for a "fresh start."[7]

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[1] 11 U.S.C. § 101-151326 (1982 & Supp. III). Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. Code Cong. & Admin. News (98 Stat.) 576, added a new subsection (a)(5) to Section 507 and redesignated existing subsections (a)(5) and (a)(6) as (a)(6) and (a)(7) respectively. Pub. L. No. 98-353 did not amend cross-references to Section 507 to reflect the redesignations made in that section. Throughout this Comment, cross-referenced sections are assumed to have been amended to reflect the redesignations by Pub. L. No. 98-353.

[2] 11 U.S.C. §§ 103, 362, 1301 (1982 & Supp. III).

[3] 11 U.S.C. § 727 (1982 & Supp. III) (discharge for individual debtor in Chapter 7 liquidation); 11 U.S.C. § 1328 (discharge for individual debtor upon completion of Chapter 13 Rehabilitation plan); 11 U.S.C. § 1141 (discharge for debtor upon confirmation of Chapter 11 Reorganization plan). *But see* 11 U.S.C. § 523 (1982 & Supp. III) (exceptions to discharge).

[4] COWANS, BANKRUPTCY LAW & PRACTICE § 13.1 (West 1983 Interim ed.); *see* S. REP. No. 95-989, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5793, 5799-800.

[5] 11 U.S.C. § 523(a)(1)(A) (1982 & Supp. III). Section 523(a)(1)(A) states:

> (a) A discharge under Section 727, 1141, or 1328
> (b) . . . does not discharge an individual debtor from any debt—
> (1) for a tax or a customs duty
> (A) of the kind and for the periods specified in Section 507(a)(2) or 507(a)([7]) of this title, whether or not a claim for such tax was filed . . . .

[6] *See generally* COWANS, *supra* note 4, at §§ 13.4, 13.5.

[7] *See also* Note, *Denying an Implied Tax Lien Exception to the Federal Priority*

Realizing this inherent conflict within the Code, this Comment will review the treatment of outstanding taxes in bankruptcy through an analysis of whether the abandoned mine reclamation fee, an obligation owing to the federal government by coal mining operations,[8] is discharged in bankruptcy proceedings. Liability for unpaid or delinquent abandoned mine reclamation fees to the Abandoned Mine Reclamation fund[9] is a consideration for a coal company bordering on insolvency and contemplating relief through bankruptcy. Since all coal mining operators[10] are required to pay this quarterly fee,[11] the characterization of these payments and the accruing interest, the purpose of the payments, the nature of the creditor, the location in the list of priorities,[12] and the nature of the conflicting policies apparent in the Code[13] are issues which must be resolved in order to provide some predictablity for the treatment of the operator's assets.

In 1984, in *U.S. v. River Coal Co.*,[14] the U.S. Court of

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in Insolvency: Nesbitt v. United States, 33 CATH. U.L. REV. 741, 748 (1984)(analyzing United States v. State Bank, 31 U.S. (6 Pet.) 29 (1832): priority of payment of debts due to the government is necessary to assure "adequate revenue to discharge the debts and obligations of the national government.").

[8] In order to rehabilitate abandoned mine lands, Congress established the Abandoned Mine Reclamation program in Title IV of the Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, § 101, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (1982 & Supp. I)) [hereinafter cited as SMCRA]. The abandoned mine reclamation fees are authorized at SMCRA § 403, 30 U.S.C. § 1232 (1982 & Supp. I).

[9] The purpose of the Abandoned Mine Reclamation Fund is to restore disturbed land to the pre-mining approximate original contour, to correct the adverse effects of past coal mining on land and water resources, and to protect society and the environment from the adverse effects of coal mine operation. SMCRA § 401, 30 U.S.C. § 1231 (1982 & Supp. I); *see also* SMCRA §§ 101, 102, 30 U.S.C. §§ 1201, 1202 (1982 & Supp. I) (detailing the policy objectives of the reclamation fund and fee).

[10] SMCRA § 701(13), 30 U.S.C. § 1291(13) (1982 & Supp. I); 30 C.F.R. § 870.11 (1985).

[11] SMCRA § 403(b), 30 U.S.C. § 1232(b) (requiring fees to be paid no later than thirty days after the end of each calendar quarter occurring after August 3, 1977, and ending fifteen years after August 3, 1977); *see also* SMCRA § 401, 30 U.S.C. § 1231 (establishing the fund).

[12] 11 U.S.C. §§ 726, 507 (1982 & Supp. III); *see infra* notes 25 and 26 and accompanying text.

[13] COWANS, *supra* note 4, at §§ 6.1, 6.2, 13.1. *See generally*, Scwartz, *Security Interests and Bankruptcy Priorities: A Review of Current Theories*, 10 J. LEGAL STUD. 1 (1981) (discussing the conflicting policy objectives provided in the Code for the debtor, the federal government, and secured creditors).

[14] 748 F.2d 1103 (6th Cir. 1984).

Appeals for the Sixth Circuit determined that courts should treat these fees as taxes under the Bankruptcy Code.[15] Treating the fees as taxes would permit the government to recover the underlying debt and any interest accruing on the unpaid amount.[16] In so holding, the court joined a trend among the other circuits to equate certain charges with taxes and to allow for the recovery of post-petition interest.[17]

The decision by the court in *River Coal Co.* is limited, however, because it applied a definition of a tax without functionally analyzing the characteristics of the abandoned mine reclamation fee. Furthermore, the Sixth Circuit considered neither the revenue raising objective nor the debtor "fresh start" policy in the context of the reclamation fee. The holding is also limited by the statutory law under which it was decided.[18]

This Comment analyzes whether the abandoned mine reclamation fee should be characterized as a tax in bankruptcy. Before entering the analysis, a brief review of the tax priority system created by the Bankruptcy Code is provided. Next, it examines whether the abandoned mine reclamation fee should be treated as a debt in bankruptcy. Finally, treatment of the fee as a priority tax in bankruptcy is illustrated. While this Comment agrees that the abandoned mine reclamation fee should be characterized as a tax, it disagrees with the *River Coal Co.* court's analysis and suggests an alternative. The Comment concludes by suggesting that the resolution to the conflicting policies in the Code with respect to the reclamation fee should be resolved in

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[15] *Id.* at 1106.

[16] *Id.* at 1107-08; *see also* U.S. v. King (*In re* King), 19 Bankr. 936, 938-39 (Bankr. E.D. Tenn. 1982).

[17] *River Coal Co.*, 748 F.2d at 1107; *see In re* Jaylaw Drug, Inc., 621 F.2d 524 (2d Cir. 1980); Hugh H. Eby Co. v. United States, 456 F.2d 923 (3rd Cir. 1972); *see also* Bruning v. United States, 376 U.S. 358 (1964), *aff'g*, 317 F.2d 229 (9th Cir. 1963); Schafer v. United States, 353 F. Supp. 677 (D. Kan. 1972) (post-petition interest is recoverable). *But see* City of New York v. Saper, 336 U.S. 328 (1949) (post-petition interest is not recoverable); *In re* Vaughn, 292 F. Supp. 731 (E.D. Ky. 1968) (post-petition interest is not recoverable).

[18] The proceedings in River Coal Co. were instituted before November 6, 1978, the date the Bankruptcy Reform Act of 1978 took effect. The case was governed by 11 U.S.C. § 35(a)(1) (1976) stating that discharge in bankruptcy does not release a debtor from "taxes which become legally due and owing by the bankrupt to the United States . . . within three years preceding bankruptcy." This statutory language is similar to the present policy in the Bankruptcy Code.

favor of the superiority of the federal government's need to maintain this type of revenue over the need for the debtor coal company to be given a "fresh start."

I. THE TAX PRIORITY SYSTEM

Actions in bankruptcy proceedings instituted by the government as an unsecured creditor of the debtor seek payment of delinquent taxes as well as any accrued interest.[19] Federal tax claims are given preferential treatment for payment out of the property of the bankruptcy estate.[20] They are non-dischargeable debts recoverable from the individual debtor irrespective of which chapter in the Code is utilized for relief.[21]

This policy of preferential treatment for governmental claims of unpaid taxes and interest conflicts with the general objectives of the Code: (1) to give the individual debtor a "fresh start" and (2) to provide equity among all the creditors.[22] Recently, the courts have adopted the government's position by allowing recovery of unpaid taxes plus pre-petition and post-petition interest.[23] Consequently, the need to maintain revenue collection takes precedence over the debtor's need to have the debt discharged. The Supreme Court gave one reason for this treatment in *New Jersey v. Anderson*, stating that "taxes are imposts levied for the support of government . . . operat[ing] in invitum"[24] and, therefore, are non-dischargeable.

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[19] *See, e.g., River Coal Co.*, 748 F.2d at 1103.

[20] 11 U.S.C. §§ 726, 507 (1982 & Supp. III); *see infra* notes 25 and 26. *See generally* Eckloff, *Priority in Bankruptcy*, 58 DEN. L.J. 279 (1981); Haines, *Employers' Workmen's Compensation Obligations and the Bankruptcy Tax Priority*, 85 W. VA. L. REV. 97 (1982).

[21] A discharge under sections 727, 1141 or 1328(b) does not discharge an individual debtor from any debt for a tax. . . of the kind. . . in section 507(a)(2) or 507(a)(7). 11 U.S.C. § 523(a) (1982 & Supp. III); *see infra* notes 25, 26 and 47 and accompanying text. *See generally* Sheinfeld & Caldwell, *Taxes: An Analysis of the Tax Provisions of the Bankruptcy Code and Bankruptcy Tax Act of 1980*, 55 AM. BANKR. L.J. 97, 121-22 (1981).

[22] *See supra* notes 4, 7, and 13.

[23] *See supra* note 16.

[24] 203 U.S. 483, 492 (1906).

Sections 726[25] and 507[26] are the operative sections of the Code dealing with delinquent taxes. Section 726 requires that the assets of the debtor's estate be distributed for payment of

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[25] 11 U.S.C. § 726(a) (1982 & Supp. III). Section 726(a) states:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such a claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

[26] 11 U.S.C. § 507(a) (1982 & Supp. III). Section 507 states:

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assesssed against the estate . . .

(7) Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(c) of this title, not assessed before, but assessable, under

the claims as follows: (1) "priority claims" under Section 507;[27] (2) any timely filed or excusably late claim; (3) any tardily filed claim; (4) a claim for a fine, penalty, or punitive damages;[28] (5) post-petition interest payments on any claim previously paid;[29] and (6) payment to the debtor.[30]

"Priority claims," the first class of claims to be paid from the debtor's estate[31] include seven kinds of claims which qualify, in descending entitlement, for priority in distribution.[32] First priority is granted to administrative expenses and to "any fees and charges assessed against the estate."[33] Administrative expenses include the cost of preserving the estate, expenses of the creditors, and any tax not specified as an unsecured governmen-

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applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission . . . earned from the debtor before the date of the filing of the petition . . . after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return . . . after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise . . .

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

[27] 11 U.S.C. § 726(a)(1) (directs the payments out of the debtor's estate to the various creditors). The first group of creditors' claims which are to be satisfied are those listed under Section 507. *See supra* note 26.

[28] 11 U.S.C. § 726(a)(2-4); *see supra* note 25.

[29] 11 U.S.C. § 726(a)(5); *see supra* note 25. Post-petition interest is allowed to be paid out of the debtor's estate if the debtor remains solvent after all the creditors' claims have been satisfied. *Cf.* 11 U.S.C. § 502(b)(2) (1982 & Supp. III) (disallowing unmatured interest on claims). *Compare* 11 U.S.C. § 523(a)(1)(A) (1982 & Supp. III) (debtor's continuing liability for priority taxes) *and Bruning*, 376 U.S. 358 (requiring individual debtor liability for pre-petition and post-petition interest).

[30] 11 U.S.C. § 726(a)(b); *see supra* note 25.

[31] *See* Scheinfeld & Caldwell, *supra* note 21, at 119-20.

[32] 11 U.S.C. § 726(a)(1-6).

[33] 11 U.S.C. § 726(a)(1); *see supra* note 25.

tal tax claim.[34] Unsecured claims of governmental units occupy seventh priority.[35] These claims include the tax measured by income on gross receipts,[36] property taxes,[37] taxes required to be withheld or collected by the debtor and for which the debtor is liable in whatever capacity,[38] employment taxes,[39] excise taxes,[40] customs duties[41] and penalties.[42] Depending on the nature of the governmental obligation, the court will differentiate between a first priority and a seventh priority allowance for taxes and treat the obligation accordingly for payment from the remaining assets of the debtor.

The cases that have analyzed what constitutes a tax for purposes of the bankruptcy priority have relied on the *pro bono publico* characteristic of the exaction.[43] These courts have determined whether a particular governmental levy is a "tax" for purposes of bankruptcy by examining its function, not by the label which it is given.[44] The Supreme Court has taken a broad view of what constitutes a tax for purposes of the Code and has concluded that "a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government

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[34] 11 U.S.C. § 503(b)(1)(A)-(B) (any tax incurred by the estate, except a claim under § 507(a)(6) is allowed as an administrative expense).

[35] 11 U.S.C. § 507(a)(7); *see supra* note 26; Otte v. United States, 419 U.S. 43 (1974).

[36] 11 U.S.C. § 507(a)(7)(A); *see supra* note 26.

[37] 11 U.S.C. § 507(a)(7)(B); *see supra* note 26.

[38] 11 U.S.C. § 507(a)(7)(C) (a tax for which the debtor is liable in whatever capacity, a "trust fund" tax, is recoverable as an unsecured governmental claim); *see supra* note 26. *See generally* S. REP. No. 95-989, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5854-59.

[39] 11 U.S.C. § 507(a)(7)(D); *see supra* note 26.

[40] 11 U.S.C. § 507(a)(7)(E) (an excise tax which is due within three years to filing of petition is recoverable as a governmental unsecured claim); *see supra* note 26.

[41] 11 U.S.C. § 507(a)(7)(F); *see supra* note 26.

[42] 11 U.S.C. § 507(a)(7)(G); *see supra* note 26.

[43] *See* U.S. v. Sotelo, 436 U.S. 268 (1977); United States v. New York, 315 U.S. 510 (1942); *In re* Pan American Paper Mills, 618 F.2d 159 (1st Cir. 1980); *see also In re* Otto F. Lange Co., 159 F. 586, 588 (N.D. Iowa 1908) ("Many taxes are imposed under the name of license fees, franchise taxes, or taxes for special purposes under some other name, . . . they are nevertheless taxes imposed for a public purpose, no matter what the name under which they are levied or imposed, and are clearly within the meaning of the term 'tax' as used in the bankruptcy act.") *See generally In re* Sunset Enterprises, Inc., 49 Bankr. 296 (Bankr. W.D. Va. 1985); *In the Matter of* C.M. & C. Coal Co., 33 Bankr. 358 (Bankr. N.D. Ala. 1983).

[44] *See supra* note 43.

. . . or for a special purpose authorized by it."[45] Therefore, any pecuniary obligation, regardless of the name it may be called, is a tax for purposes of bankruptcy if it actually possesses the characteristics of a tax.[46] An assessment is non-dischargeable by the individual debtor if it is in the nature of a tax.[47] Accordingly, the importance of the policy to raise revenues to maintain the government and its activities is clearly evident in the judicial opinions.

II. CHARACTERIZING THE ABANDONED MINE RECLAMATION FEE

A. The U.S. v. River Coal Co. Approach

In *U.S. v. River Coal Co.*, the Sixth Circuit labeled the abandoned mine reclamation fee a tax.[48] This court was not the first to determine that the fees were taxes.[49] Each court, including the Sixth Circuit, confronted with the characterization analyzed and categorized the abandoned mine reclamation fee in terms of the definitions of a true fee obligation and a true tax obligation.[50] This distinction resurrected the definitions of fees and taxes provided by the Supreme Court in *National Cable Television Assn. v. United States.*[51] In that case, the Court concluded that

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[45] New Jersey v. Anderson, 203 U.S. 483, 492 (1906); *see also* City of New York v. Feiring, 313 U.S. 283, 284-85 (1941); *In re* Beaman, 9 Bankr. 539, 540 (Bankr. D. Or. 1980) (a tax for bankruptcy priority is a pecuniary burden for the purpose of defraying the expenses of government or of undertakings authorized by it). *See generally* Federal Power Comm'n v. New England Power Co., 415 U.S. 345 (1974); *In re* Ayala, 35 Bankr. 651 (Bankr. D. Utah 1983).

[46] *See supra* notes 43 and 45.

[47] *See supra* note 5 (for text of statute). Although this section refers to individual debtors, corporations and partnerships are not entitled to any discharge in liquidation proceedings. *See* S. REP. No. 95-989, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5793, 5884-86. *See generally* Coogan, *A Debtor's Choice of A "Chapter" Rehabilitation Proceeding Under the "Bankruptcy Act"*, 1 VT. L. REV. 117 (1976); 4 COLLIER ON BANKRUPTCY ¶ 727.01 (15th ed. 1985) (discharges granted to individuals only negatively imply that partnerships and corporations do not receive discharge of this indebtedness).

[48] 748 F.2d 1103, 1106 (6th Cir. 1984).

[49] *See In re* C.M. & C. Coal Co., 33 Bankr. 358 (Bankr. N.D. Ala. 1983); U.S. v. King (*In re* King), 19 Bankr. 936 (Bankr. E.D. Tenn. 1982).

[50] *See supra* note 49.

[51] 415 U.S. 336, 340-43 (1974).

an assessment for a *public purpose* is a tax which can only be authorized by Congress.[52] According to the Court, if a public agency extracts a charge which not only bestows a benefit on the payor but also serves a public interest or policy, it is a tax.[53] Payment of a fee, by contrast, is no more than a "voluntary act" or "a request that a public agency permit an applicant to practice law or medicine or construct a house. . . ."[54] Accordingly, the Court surmised that a fee bestows an individual benefit on the applicant, not on all of society.[55] Therefore, if there is only a value to the recipient, the charge is not a tax, it is a fee. If the charge confers a benefit that serves the public good, it is a tax.

By relying solely on an analysis of what constitutes a fee and ignoring the tax policy and revenue policy apparent in the bankruptcy tax priority cases, the Sixth Circuit in *River Coal Co.* concluded that the abandoned mine reclamation fee is a tax.[56] The court's method of categorizing the abandoned mine reclamation charge poses four problems. First, in basing their characterization on the analysis in *National Cable Television Assn.*, the Sixth Circuit failed to recognize that the distinction in that case was made in order to clarify the powers of public agencies and to ensure that the taxation power is not broadly delegated by Congress to agencies.[57] In *National Cable Television Assn.*, the issue centered on a congressionally *unauthorized* charge which possessed the essential characteristics of a tax.[58] The abandoned mine reclamation fee is a congressionally *authorized* assessment enacted as part of Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA).[59] Therefore, the issue should be whether Congress intended for the fee to be a tax.

Second, this approach does not provide a useful classification scheme because many fees do confer benefits on society. For

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[52] *Id.* at 341.

[53] *Id.* at 340-42.

[54] *Id.* at 340.

[55] *Id.* at 341.

[56] *River Coal Co.*, 748 F.2d at 1106. *See Sunset Enterprises*, 49 Bankr. 296; *C.M. & C. Coal Co.*, 33 Bankr. at 359; *King*, 19 Bankr. at 938.

[57] *National Cable Television Ass'n.*, 415 U.S. at 336.

[58] *Id.*

[59] *See supra* notes 8 and 9.

example, permits to practice law and medicine and to mine coal[60] not only bestow benefits on the applicant, but serve the public interest by informing the public that the lawyer, physician and coal operator have met the regulatory requirements. When, for example, mining permit fees are paid, a registry of approved coal operators is created.[61] Since these fees serve the public interest, they could be classified as taxes under the analysis employed by the *River Coal Co.* court even though they clearly are not taxes. Therefore, a more limited definition of taxes is necessary in order to exclude such assessments from being characterized as taxes.

Third, the Sixth Circuit fee approach in characterizing a government assessment is problematic because of the attention given the label for the assessment. Only after consideration of the label did the Sixth Circuit determine whether the reclamation fee is or is not a tax.[62] The Sixth Circuit ignored previous judicial rulings that, for purposes of bankruptcy, the label given the charge is unimportant.[63] The characteristics and the purposes of the assessment should be determinative in characterizing a tax. If it looks like a tax, it probably is a tax. Any discussion of the definitions of fees or premiums[64] and how they differ from taxes borders on metaphysical rhetoric or, at least, arguments in semantics when the subject is the discharge in bankruptcy of a congressionally authorized assessment.

Fourth, the Sixth Circuit did not consider the conflicting policies in the Code. A balancing approach is necessary to determine whether the reclamation fee is the type of judicially recognized and congressionally authorized revenue that takes priority over the need for the debtor to have a "fresh start."

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[60] Every coal mine operator who seeks to extract coal from the earth must acquire a permit and submit a detailed application with maps of the proposed site. *See* SMCRA § 507, 30 U.S.C. § 1257 (1982 & Supp. I); *see also* 30 C.F.R. § 870.11 (1985); *infra* note 73.

[61] *See* SMCRA § 507, 30 U.S.C. § 1257 (1982 & Supp. I).

[62] *River Coal Co.*, 748 F.2d at 1106.

[63] *See supra* notes 43 and 45 and accompanying text.

[64] *In re Pan American*, 618 F.2d 159 (holding that unpaid premiums to a state workmen's compensation fund are "taxes" not discharged by bankruptcy in the meaning of tax priority); *see also In re* International Automated Machines, Inc., 9 Bankr. 575 (Bankr. N.D. Ohio 1981); State Industrial Accident Commission v. Aebi, 162 P.2d 513 (Or. 1945).

B. An Alternative Approach

Since the analysis in *River Coal Co.* does not provide a framework which adequately distinguishes between government assessments which are taxes and those which are not for purposes of the Code, an alternative approach is warranted. The following approach disregards the label and reviews the congressional intent and the characteristics of the assessment to determine whether or not it is a non-dischargeable tax. The first step in this analysis is to determine whether or not Congress intended to create a tax when it authorized the assessment. The second step, in the event of an ambiguous Congressional intent, is to evaluate the assessment in terms of the essential characteristics of taxes. Only by studying the purpose, use, and authority for the charge can a determination be made as to whether it is or is not a tax.[65]

First, when Congress established the abandoned mine reclamation fee, it noted that a number of states have similar "reclamation fees or taxes on coal."[66] Cognizant of the similarity, Congress equated the abandoned mine reclamation fee with taxes and structured the assessment similarly.[67] These Congressional determinations suggest that Congress intended to create a tax when it established the abandoned mine land reclamation fee.

Second, Article I, section 8, clause 1 of the U.S. Constitution grants Congress the "Power to lay and collect taxes . . . and to provide for the . . . general Welfare of the United States."[68] By including the "general welfare" as a legitimate objective of federal taxation, the drafters of the Constitution established one criterion for determining whether or not an assessment is a tax. The Supreme Court in *National Cable Television Assn.* recognized that a tax is an exaction for public purposes, a charge for the public benefit.[69] The Supreme Court recognized other characteristics of taxes in *New Jersey v. Anderson*.[70] In that case, the Court stated that the characteristics to be considered in determining that an assessment is a tax include whether the

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[65] *C.M. & C. Coal*, 33 Bankr. at 359.

[66] *See* H.R. REP. No. 95-218, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 593, 668.

[67] *Id.* at 668-69, 676-77, 730-32.

[68] U.S. CONST. art. I, § 8, cl. 1.

[69] *National Cable Television Ass'n*, 415 U.S. at 341.

[70] 203 U.S. 483, 492-93 (1906).

charge is based on ability to pay, whether the amount is fixed by statute, whether it is non-discriminatory and whether the amount is capable of being enforced by a civil or criminal action against the taxpayer.[71]

The dominant objective of the Abandoned Mine Reclamation Fund is "the protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal mining practices. . . ."[72] The benefits of reclamation are for the general public. When compared to the foremost quality of a tax, an assessment for the general welfare, this mandatory contribution to the fund appears to be a tax. The reclamation fee is a source of revenue for a federal government activity that restores the physical environment which was damaged by past mining operations.

The reclamation fee is not a static charge, nor does it discriminate. It is levied on every coal mining operation[73] and is assessed according to the tonnage of coal mined during a quarter.[74] The more coal mined, the greater the fee. An "acces-

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[71] *Id.*; *see also* Yosemite Park and Curry Co. v. United States, 686 F.2d 925, 930 (Ct. Cl. 1982); *In re* Smith Atlantic Packers Ass'n, 28 Bankr. 80 (Bankr. D.C. S.C. 1983) (elements characterizing "tax" are (l) involuntary pecuniary obligations regardless of name, laid upon individuals or property, (2) imposed by, or under authority of legislature, (3) for purposes including defraying government expenses or undertakings, and (4) under police or taxing power of state).

[72] SMCRA § 403(1), 30 U.S.C. § 1233(1) (1982 & Supp. I); *see also* SMCRA § 401(c)(1), 30 U.S.C. § 1231(c)(1) (1982 & Supp. I). *See generally* 30 C.F.R. § 870 (1985); H.R. REP. No. 95-218, 95th Cong., lst Sess. *reprinted in* 1977 U.S. CODE CONG. & AD NEWS 593, 700.

[73] 30 C.F.R. § 870.11 (1985) states:

> *The regulations . . . apply to all surface and underground coal mining operations except*—(emphasis added)—
>
> (a) The extraction of coal by a landowner for his own noncommercial use from land owned or leased by him;
>
> (b) The extraction of coal for commercial purposes by surface coal mining oerations which affects two acres or less during the life of the mine;
>
> (c) The extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction;
>
> (d) The extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 percent of the mineral tonnage removed for commercial use or sale in any twelve consecutive months; and
>
> (e) The extraction of less than 250 tons of coal within 12 consecutive months.

[74] *See* SMCRA § 402(a)-(b), 30 U.S.C. § 1232(a)-(b) (1982 & Supp. I) (requiring

sion to coal" necessitates a higher assessed fee much like an "accession to wealth"[75] necessitates the imposition of greater income taxes. This is probably the most distinguishing characteristic of a tax. At this point, for example, permit fees fail to qualify as taxes. Moreover, if the coal company fails to pay the reclamation fee, interest accumulates on the unpaid amount.[76] The coal company that fails to make payments is subject to a civil suit for the payments and interest[77] whereas an attempt to evade an income tax necessitates criminal proceedings.[78]

There is some judicial support for this method of analysis. In *In re James E. King*, the first case to address whether the reclamation fee is a tax for purposes of bankruptcy, the fee was analyzed in terms of whether or not the assessment was a tax.[79] Nomenclature was not at issue; the tax characteristics of the abandoned mine reclamation fee were the deciding factors and the *National Cable Television Assn.* decision was used to distinguish taxes.[80] The court concluded that the abandoned mine reclamation fee was designed to be a pecuniary burden for the purposes of defraying governmental expenses, and for funding a special land reclamation program, authorized by Title II of SMCRA.[81] The *King* court determined that the reclamation fee is a tax by relying on the broad definitions and characteristics of taxes traditionally used by the courts to define a tax in bankruptcy.[82]

If Congressional intent and the structure of the assessment indicate that the reclamation fee is a tax, it should be treated as

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a varying fee to be assessed on the tonnage of coal mined depending on whether it is produced above ground or underground, with an exception for lignite).

[75] Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), *reh'g denied* 349 U.S. 925 (1955).

[76] *River Coal Co.*, 748 F.2d 1106-08.

[77] SMCRA § 402(e), 30 U.S.C. § 1232(e) (1982 & Supp. 1).

[78] *See* 26 U.S.C. § 7201 (1982 & Supp. III).

[79] *King*, 19 Bankr. 936.

[80] *Id.* at 938-39.

[81] *Id.* at 939; *see also Feiring*, 313 U.S. at 284-85; *Beaman*, 9 Bankr. 539.

[82] *King* at 939. *See generally supra* notes 35, 36 & 63 and accompanying text. The court in *King* and *River Coal Co.* apparently disregarded any significance attached to the fact that the reclamation fee is paid to the Secretary of the Interior for distribution to the abandoned mine reclamation program rather than being paid to the Internal Revenue Service as are most taxes. This characteristic of taxes presumably is insignificant. *See generally* SMCRA §§ 401, 402, 11 U.S.C. §§ 1231, 1232.

a tax for purposes of bankruptcy and no other question should be entertained. This line of reasoning is far more streamlined and sensible than the *River Coal Co.* approach and has judicial support as it recognizes the necessity to maintain revenues to fund government activities.[83]

III. TAX PRIORITY FOR THE FEE

In each case characterizing the reclamation fee, the discussion and subsequent characterization of the fee was prompted because the fee was unpaid at the time the bankruptcy petition was filed and because the government wanted to collect fees past due.[84] In each case, the courts held that the fee was a non-dischargeable debt and was to be paid by the debtor to the government. Consequently, revenue raising for the general welfare, for the environment, and for the restoration of mined lands was a superior objective to those of giving the debtor a "fresh start" and maintaining equity among creditors. The priority of revenue raising is also evident when reviewing the issues of whether pre-petition interest on unpaid abandoned mine reclamation fees can be recovered by the federal government and whether the post-petition interest can be collected on pre-petition fees.

A. Recovery of Pre-Petition Fees and Interest

As a federal tax which remains unpaid and owing prior to filing a petition in bankruptcy, the abandoned mine reclamation fee becomes a part of the bankruptcy tax priority scheme as an unsecured governmental claim.[85] In *King*, the unpaid abandoned mine reclamation fee which remained unpaid prior to filing the bankruptcy petition was characterized as an excise tax.[86] In so characterizing, the Bankruptcy Court recognized the broad definition that historically has been given excise taxes.[87] The Su-

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[83] *See supra* note 71 and accompanying text.

[84] *River Coal Co.*, 748 F.2d 1103; *Sunset Enterprises*, 49 Bankr. 296; *C.M. & C. Coal Co.*, 33 Bankr. 358; *King* 19 Bankr. 936.

[85] 11 U.S.C. § 507(a)(7) (1982 & Supp. III); *see supra* notes 26, 35-42 and accompanying text.

[86] *King*, 19 Bankr. at 939; *see also* 11 U.S.C. § 507(a)(7)(E); *supra* note 40.

[87] *King*, 19 Bankr. at 939; *see also* Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (an excise tax is not a direct tax); Bromley v. McCaughn, 280 U.S. 124, 136 (1929); *Beaman*, 9 Bankr. 539, 541; American Life and Accident Ins. v. Love, 431 S.W.2d 177, 181 (Mo. 1968).

preme Court in *Bromley v. McCaughn* held that "[a] tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise (tax)."[88] In *King* the court determined that the removal of coal from the land is a tax on a particular use of property and that the "fee may reasonably be regarded as a tax for . . . mining coal."[89] Since it is characterized as an excise tax, the pre-petition debt as a priority tax is non-dischargeable.[90]

Debtors remain liable for pre-petition, non-dischargeable taxes *and interest* not paid by the bankruptcy estate.[91] In *Bruning v. United States*, the Supreme Court stated that interest is an integral part of the tax debt.[92] Later, in *United States v. Friendship College*, the Fourth Circuit decided that the interest on a tax should not be treated differently than the tax.[93] This court concluded that "[t]o treat interest inconsistently from taxes . . . would require proof that such different treatment was intended by the Code."[94] Therefore, bankruptcy tax priority claims do include any interest that accrued on the claim before the bankruptcy petition was filed. To the extent the underlying claim for the reclamation fee is allowed, interest that has matured pre-petition is a proper part of the claim.

B. Recovery of Post-Petition Interest on Pre-Petition Fees

In *River Coal Co.*, the court concluded that interest which accrued after the date of filing the petition was recoverable from

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[88] *Bromley*, 280 U.S. at 136.

[89] *King*, 19 Bankr. at 939.

[90] *See* S. REP. No. 95-989, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5854-5859 (Section 507(a)(7)(B) captures "trust fund" taxes, income taxes . . . which are required to be withheld from an employee); *see also* 11 U.S.C. § 523(a)(1)(A) (1982 & Supp. III); *supra* note 5. *But cf. Sunset Enterprises*, 49 Bankr. at 297 (determining the reclamation fee to be a tax "required to be collected or witheld and for which the debtor is liable for in whatever capacity" under 11 U.S.C. § 507(a)(7)(B)).

[91] Bruning v. United States, 376 U.S. 358 (1964), *aff'g* 317 F.2d 229 (9th Cir. 1963).

[92] *Id.* at 360. *See generally* COWANS, *supra* note 4, at § 13.5.

[93] 737 F.2d 430, 431 (4th Cir. 1984).

[94] *Id.* at 433; *see also In re* Coleman American Cos., 26 Bankr. 825 (Bankr. D. Kan. 1983). *See generally* S. REP. No. 95-989, 95th Cong., 2d Sess. reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5859 (legislative history suggests that interest is inseparable from the underlying debt in Section 507(a)(7)).

the coal company debtor.[95] This decision followed a long line of cases which held that debtors are liable for post-petition interest on non-dischargeable tax claims.[96] Debtors become personally liable for pre-petition interest only if the interest cannot be paid out of the bankruptcy estate.[97]

Any interest which matures on the underlying debt post-petition is incurred by the estate and is characterized as administrative expenses.[98] In *In re Jartran Inc.*, the Seventh Circuit demonstrated that the timing of an obligation, whether it occurs pre-petition or post-petition, is crucial in prioritizing it.[99] Consequently, a post-petition interest claim is a first priority administrative debt[100] whereas a pre-petition interest claim is a seventh priority debt,[101] and both are non-dischargeable.[102] Some courts have characterized the post-petition interest which accrues on a pre-petition debt as non-dischargeable because of the underlying obligation.[103] The abandoned mine reclamation fee is a non-dischargeable debt and any interest accruing pre-petition or post-petition on that debt is non-dischargeable.

CONCLUSION

Once the reclamation fee is correctly analyzed as a tax, its treatment under the Code is predictable. The individual debtors are not discharged from tax claims of the federal government. The abandoned mine reclamation fee, being characterized as this type of priority tax, is not discharged in bankruptcy. The courts also have taken the position of the government in allowing recovery of the interest on the fee, pre-petition and post-petition.

Although the characterization of the reclamation fee as a tax

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[95] *River Coal Co.*, 748 F.2d at 1108. *See generally* Note, *Post-Petition Interest on Tax Claims in Bankruptcy Proceedings*, 36 TAX LAWYER 793 (1982-83).

[96] *See supra* note 17 and accompanying text.

[97] 11 U.S.C. § 726(a)(5) (1982 & Supp. III); *see supra* notes 25, 29 and accompanying text.

[98] 11 U.S.C. § 503(b)(1)(B) (1982 & Supp. III); *see also supra* notes 33, 34 and accompanying text.

[99] 732 F.2d 584 (7th Cir. 1984).

[100] 11 U.S.C. § 507(a)(1) (1982 & Supp. III).

[101] *Id.*

[102] 11 U.S.C. § 523(a)(1)(A); *see also* 11 U.S.C. § 507(a)(7)(G).

[103] *Sunset Enterprises*, 49 Bankr. at 296; *see also Friendship College*, 737 F.2d 430 (interest on priority taxes should receive first priority treatment); *supra* note 17.

for purposes of bankruptcy is proper, the analysis employed in *River Coal Co.*, does not clarify whether or not the fee is a tax. This Comment has offered an alternative two-pronged analysis. The first step is to review the legislative intent for the fee and to determine whether or not Congress intended to create a tax. The second step is to review the constitutionally created and judicially recognized characteristics of taxes to determine whether or not the fee is a tax. Finally, any analysis must acknowledge the superiority of the revenue-producing objective of the Code to the policies of "fresh start" and equity among creditors. In this case, a revenue and expenditure policy choice is made: raising revenue to restore the environment is more important than giving the debtor a "fresh start."

ANN M. CATINO