

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
WEAVER POTATO CHIP CO., INC.,) CASE NO. BK96-41363
)
Debtor(s).) CH. 11

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on May 28, 2003, on a motion by the United States for an order to show cause why plan payments have not been made (Fil. #847) and resistance by the debtor (Fil. #853). Richard Garden, Jr., appeared for the debtor, and Joan Ulmer appeared for the United States. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(O).

The government's motion is granted.

The confirmed plan provides for the payment of tax claims as follows:

4.04 Tax Claims. All Tax Claims shall be paid by NewCo in full, in Cash, on the Effective Date or pursuant to their terms; provided, however, NewCo may elect to pay a Tax Claim in deferred Cash payments of a value as of the Effective Date equal to the allowed Amount of such Tax Claim payable over a period not exceeding six (6) years from the Effective Date or as the holder of such Tax Claim and NewCo may otherwise agree.

4.05 Disallowance of Certain Interest and Penalties on Tax Claims. Holder of Tax Claims shall not receive any payment on account of post-petition interest on, or penalties with respect to, or arising in connection with, such Tax Claims, except as allowed by a Final Order. The Plan and the Confirmation Order shall constitute a discharge of any such Claims for post-petition interest or penalties. Holders of Tax Claims shall not assess or attempt to collect such interest or penalties from the Debtor, the Estate, NewCo or from any of their respective officers, employees, affiliates, or properties.

Second Amended Plan (Fil. #593).

"NewCo" in the plan is the successor entity to the debtor. It is known as Weaver's Potato Chip & Snack Food Company, L.L.C., and all of the debtor's assets were transferred to it under the terms of the confirmed plan.

The plan's effective date was December 1, 1998. The Internal Revenue Service filed a proof of claim for \$82,326.51 in unsecured priority claims and \$7,033.38 in unsecured general claims, for a total of \$89,359.89. The debtor has paid \$80,785.90 on the claim, which it contends is now paid in full because it believes the claim was allowed as scheduled and not as filed. However, the IRS asserts that interest is due on the amount paid, because it was paid over time. The debtor points out that paragraph 4.05 of the plan disallows post-petition interest and penalties on the tax claim.

Section 1129(a)(9)(C) of the Bankruptcy Code permits tax claims to be paid in installments:

(9) [The plan shall be confirmed if, and except to the extent that the holder of a particular claim has agreed to a different treatment of such claim,] the plan provides that -

* * *

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

That language "is the Code's signal that the present value of the payment stream offered has to equal the allowed amount of the claim. This is typically done by providing a payment stream that will equal in principal payments the allowed amount of the claim[.]" Mississippi State Tax Comm'n v. Lambert (In re Lambert), 194 F.3d 679, 680-81 (5th Cir. 1999) (quoting 7 Collier on Bankruptcy ¶1129.03[9][c][i] at 1129-60 to -61 (15th ed. 1997)).

The Eighth Circuit Court of Appeals has made clear that when a plan of reorganization requires a governmental unit to receive a tax priority claim in deferred payments, the debtor must pay interest on the deferred payments at the "prevailing market rate" for loans with a term equal to the payout period in the

particular case, with due consideration to the existence and quality of any security and the risk of subsequent default. United States v. Neal Pharmacal Co., 789 F.2d 1283, 1289 (8th Cir. 1986).

The two sections of the plan raised by the parties deal with different concepts. Paragraph 4.04, as it states, gives the government the present value of its claim, and it is consistent with § 1129(a)(9)(C). Paragraph 4.05 addresses, and disallows, interest and penalties accruing from the petition date to the confirmation date, which is a separate issue from the time value of money. One paragraph cannot be interpreted to negate the other.

The debtor does not have the option of simply choosing to pay the amount of the claim over time rather than in a lump sum, with no corresponding protection or benefit to the creditor by way of interest to give the creditor the present value of its claim. The IRS has the right to receive the present value of its allowed claim and in order to do so, it must receive a market rate of interest. Therefore, the debtor is directed to pay the allowed amount of the IRS's claim plus interest at the Wichmann rate that would have been in effect in this district at the time of confirmation of the plan, so that the value of the flow of payments, as of the effective date of the plan, is equal to the allowed amount of the claim. If there remains a dispute over the allowed amount of the claim, that matter must be brought before the court by separate motion.

Separate order to be entered.

DATED: June 12, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

Richard Garden, Jr.

*Joan Ulmer

United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

Hearing was held in Lincoln, Nebraska, on May 28, 2003, on a motion by the United States for an order to show cause why plan payments have not been made (Fil. #847) and resistance by the debtor (Fil. #853). Richard Garden, Jr., appeared for the debtor, and Joan Ulmer appeared for the United States.

IT IS ORDERED: The motion by the United States for an order to show cause why plan payments have not been made (Fil. #847) is granted. The debtor shall pay the allowed amount of the IRS's claim plus interest at the Wichmann rate that would have been in effect in this district at the time of confirmation of the plan, so that the value of the flow of payments, as of the effective date of the plan, is equal to the allowed amount of the claim. If there remains a dispute over the allowed amount of the claim, that matter must be brought before the court by separate motion. See Memorandum entered this date.

DATED: June 12, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
Richard Garden, Jr.
*Joan Ulmer
United States Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.