

SUPREME COURT RULES SECTION 1146(A) EXEMPTION APPLIES ONLY TO POST-CONFIRMATION TRANSFERS

On June 16, 2008, the Supreme Court of the United States, in the *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.* case, 554 U.S. ____ (2008), held that the exemption from a stamp tax or similar tax in connection with an asset transfer provided in section 1146(a) of the Bankruptcy Code applies only with respect to transfers that are made pursuant to a plan of reorganization or liquidation that has been confirmed by the Bankruptcy Court.

In the *Piccadilly* case, the debtor sold substantially all of its assets under section 363(b) of the Bankruptcy Code prior to filing its plan of liquidation. Simultaneously with approving the sale, the Bankruptcy Court approved a global settlement agreement among the debtor and the committees of senior secured noteholders and unsecured creditors that provided for the allocation of the sale proceeds among the creditor constituencies. The order approving the sale provided for an exemption from the Florida stamp tax. The sale closed and the assets were transferred to the buyer prior to the filing and confirmation of the plan of liquidation.

The State of Florida filed an objection to confirmation and sought a declaration that the stamp taxes assessed by the State (\$39,200) were not exempt under section 1146(a) because the transfer did not take place "under a plan confirmed" under Chapter 11 insofar as the sale closed prior to the plan having been filed and confirmed.

The Bankruptcy Court rejected the State's argument and held that the sale was exempted from the Florida stamp tax under section 1146(a). The district court (*In re Piccadilly Cafeterias, Inc.*, 379 B.R. 215 (S.D. Fla. 2006)) and the Court of Appeals for the Eleventh Circuit (*In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299 (11th Cir. 2007) (*per curiam*)) upheld the Bankruptcy Court's decision.

Section 1146(a) provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument **under a plan confirmed** under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." (emphasis added)

The Supreme Court focused on the words "under a plan confirmed." The debtor argued that based on canons of construction and the dictionary meaning of "under," the phrase "under a plan confirmed" must be interpreted to mean "in accordance with a plan confirmed." Florida, relying on certain canons of construction, the dictionary meaning of "under" and the decisions of the Courts of Appeal for the Third and Fourth Circuits, argued that this phrase must be interpreted to mean "subject to a plan that has been confirmed." The Supreme Court held that the applicable substantive canons of construction and the fact that section 1146 is found in the subchapter entitled "Postconfirmation Matters," supported the conclusion that the exemption found in section 1146 only applies to a transfer that is made pursuant to a plan which was confirmed prior to the transfer.

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As a result of this decision, debtors and creditor constituencies will now have to consider whether asset values will be maximized by waiting to close asset sales until after a plan has been confirmed in order to utilize the section 1146(a) exemption. The more likely outcome will be that where assets need to be sold quickly, such sales will occur prior to confirmation of a plan and the purchase price paid by the buyer will take into account the unavailability of the section 1146(a) exemption.

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