

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In re:

Warren Dean Stuart,

Debtor.

CASE NO. 96-20025

DECISION & ORDER

BACKGROUND

On January 5, 1996 when Warren Dean Stuart d/b/a Crystal Valley Farms ("Stuart") filed a petition initiating a Chapter 11 case, he had been engaged in a number of business enterprises, including trucking which made him liable to pay Motor Carriers Road Taxes ("Road Taxes") to the Commonwealth of Pennsylvania ("Pennsylvania"). Prior to the filing of his petition, Stuart had filed claims with Pennsylvania to obtain \$7,069.98 which he alleged he had overpaid in Road Taxes for various tax quarters ending September 30, 1992 through March 31, 1995 (the "Refund Claims").

On February 6, 1996, Stuart filed a motion (the "Refund Motion"), pursuant to Section 505(a)(2)(B)(ii)¹, which included copies of his Refund Claims. The Motion requested that the Court: (1) determine that Stuart was entitled to an aggregate refund of \$7,069.98; and (2) direct Pennsylvania to immediately pay the refund. On March 25, 1996, after Pennsylvania had failed to

¹ Section 505(a)(2)(B)(ii) provides:

(a)(2) The court may not so determine—

(B) any right of the estate to a tax refund, before the earlier of—

(ii) a determination by such governmental unit of such request.

interpose a response to the Refund Motion or appear at either an initial or an adjourned hearing date, the Court entered an Order (the "Refund Order") directing Pennsylvania to pay over the requested refund within ten days after it had been served with a copy of the Order.

In April, 1996: (1) Pennsylvania received the Refund Order and suggested that Stuart resubmit his Refund Claims; (2) Stuart resubmitted the Refund Claims, as suggested; and (3) Pennsylvania administratively rejected them. In rejecting the resubmitted Refund Claims, Pennsylvania alleged that Stuart: (1) had previously elected to apply that portion of the claimed refund which Pennsylvania agreed was due to offset other Road Taxes due; and (2) had failed to provide sufficient evidence that he had paid another state the Road Taxes he claimed should be refunded.

On June 13, 1996, Stuart filed a motion (the "Motion to Compel") which requested that the Court enter an order requiring Pennsylvania to pay over the refund in accordance with the Refund Order.

On July 18, 1996, Pennsylvania interposed a response to the Motion to Compel (the "Response"). The Response included an assertion that the Bankruptcy Court, when it entered the Refund Order, lacked subject matter jurisdiction to determine Stuart's claim for a refund of the Road Taxes because: (1) Pennsylvania had not waived its Eleventh Amendment sovereign immunity; and (2) any attempt by Congress in Section 106² of the Bankruptcy Code to abrogate that immunity was

² Section 106 provides:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to

the following:

- (1) Sections 105...505...of this title.
 - (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
 - (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for a costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.
 - (4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.
 - (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.
- (b) A governmental unit that has filed a proof of claim in the case is deemed to have

unconstitutional, in accordance with the decision of the United States Supreme Court in *Seminole Tribe of Florida v. Florida*, 134 L.Ed.2d 252 (1996) ("*Seminole Tribe*").

The Court conducted oral argument on the Motion to Compel, accepted submissions from Stuart, Pennsylvania and the United States of America, by the Attorney General, which was permitted to intervene in the matter since it required a determination of the constitutionality of Section 106, and held the matter in abeyance to see if Stuart could propose and have confirmed a plan of reorganization, since the issue would become moot if no plan were confirmed and the case were dismissed, the most likely result given that there were no free and clear non-exempt assets available to creditors in the event of a liquidation.

On December 10, 1997, the Court entered an order confirming a plan of reorganization proposed by Stuart. As a result, this matter is now before the Court for a decision on the issues of immunity and jurisdiction.

DISCUSSION

waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

- (c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

In the submissions filed with the Court: (1) Stuart asserted, and Pennsylvania denied, that the filing of a proof of claim by New York State for Highway Use Taxes, pursuant to Article 21 of the New York State Tax Law, and Pennsylvania's suggestion that Stuart resubmit his Refund Claims after it had received the Refund Order, were explicit waivers of Pennsylvania's sovereign immunity, or should at least be deemed to be the filing of a proof of claim by Pennsylvania for purposes of Section 106(b); and (2) Stuart and the United States asserted, and Pennsylvania denied, that the abrogation of Eleventh Amendment sovereign immunity in Section 106 was constitutional because it was validly abrogated by Congress pursuant to its powers under: (a) Article I of the Constitution; or (2) the Fourteenth Amendment generally, or Section 5, specifically.

Since the filing of the Motion to Compel in June, 1996, numerous courts have decided the constitutionality of Section 106 after *Seminole Tribe*. After reviewing this case law and the well-crafted submissions of the parties, I am persuaded by the decisions of the majority of the courts which have addressed this issue, and conclude, as they have, that the abrogation of Eleventh Amendment sovereign immunity contained in Section 106 of the Bankruptcy Code, whether enacted by Congress pursuant to its powers under Article I or the Fourteenth Amendment, is unconstitutional. *See Department of Transportation and Development v. PNL Asset Management Company LLC (In the Matter of the Estate of Fernandez)*, 123 F.3d 241 (5th Cir. 1997); *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140 (3rd Cir. 1997).

I also find that Pennsylvania has done nothing in this Chapter 11 case which would warrant a finding by this Court that it voluntarily and specifically waived its sovereign immunity so as to allow this Court, pursuant to Section 505(a)(2)(B)(ii), to make a determination of Stuart's Refund

Claims. *See In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140; *In re Koehler*, 204 B.R. 210 (Bankr. D.Minn. 1997). Specifically, neither the proof of claim filed by New York State to collect Highway Use Taxes, nor the actions of Pennsylvania in suggesting that Stuart refile his Refund Claims, constituted the filing of a proof of claim by Pennsylvania for purposes of Section 106(b), nor did they otherwise constitute a waiver of Pennsylvania's sovereign immunity.

CONCLUSION

The Motion to Compel is in all respects denied and the Refund Order is hereby vacated.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: March 23, 1998