No. _____

In The Supreme Court of the United States

LYNWOOD D. HALL and BRENDA A. HALL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

SUSAN M. FREEMAN
Counsel of Record
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 N. Central Avenue
Phoenix, Arizona 85004
(602) 262-5756
SFreeman@LRLaw.com

CLIFFORD B. ALTFELD
ALTFELD & BATTAILE P.C.
250 N. Meyer Avenue
Tucson, Arizona 85701
(520) 622-7733

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

After filing a Chapter 12 bankruptcy petition, Petitioners sold their family farm with the consent of their bankruptcy trustee and court approval, and with sale proceeds administered through the bankruptcy estate to pay creditors. Internal Revenue Code § 1399 provides that a bankruptcy filing other than an individual Chapter 7 or individual Chapter 11 does not give rise to a "separate taxable entity." Does that IRC provision mean that the capital gains income tax incurred due to the sale of the farm is not a Bankruptcy Code administrative expense owed by the bankruptcy estate and payable under a bankruptcy reorganization plan? If so, Bankruptcy Code § 1222(a)(2), enacted to provide special treatment of such family farmer administrative expenses, would not apply or permit Petitioners to satisfy the tax as an unsecured claim that is not required to be paid in full.

RULE 14.1 AND 29.6 STATEMENT

There are no corporate parties or parent corporations of parties in this case.

LIST OF PARTIES

Lynwood D. Hall and Brenda A. Hall are the petitioners. The United States of America is the respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PENDING CASES

RULES, REGULATIONS AND STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Lynwood D. Hall and Brenda A. Hall hereby petition for a writ of certiorari to review the published opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Hall*, Case No. 08-17267.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 617 F.3d 1161 (9th Cir. 2010) and attached in the Petition Appendix ("Pet. App.") 1. The August 6, 2008 order of the United States District Court for the District of Arizona in this case is reported at 393 B.R. 857 (D. Ariz. 2008), and set forth as Pet. App. 18. The October 7, 2007 memorandum decision of the United States Bankruptcy Court for the District of Arizona is reported at 376 B.R. 741 (Bankr. D. Ariz. 2007) and attached as Pet. App. 34.

JURISDICTION

The opinion of the Ninth Circuit was filed on August 16, 2010. Pet. App. 1. The Ninth Circuit denied rehearing en banc on October 1, 2010. Pet. App. 47. The Ninth Circuit stayed its mandate pending Petitioners' appeal to this Court. Pet. App. 48. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the bankruptcy court

and district court were invoked under 28 U.S.C. §§ 157, 158, and 1334.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S. CONST. art. I, § 8, cl. 1; 11 U.S.C. §§ 503(b)(1)(B)(i), 507(a)(2), 507(a)(8), 541(a), 1207(a), 1222(a)(2)(A), and 1305; and 26 U.S.C. §§ 1398 and 1399. The relevant provisions of the United States Bankruptcy Code and Internal Revenue Code are set forth in full in Pet. App. 49-55.

STATEMENT OF THE CASE

Family farmers may file for bankruptcy relief under Chapter 12 of the Bankruptcy Code, 11 U.S.C. §§ 1201-1231. In 2005, Congress modified 11 U.S.C. § 1222(a)(2)(A) to provide that a Chapter 12 plan of reorganization shall "provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 [of the Bankruptcy Code], unless . . . the claim is a claim owed to a governmental unit that arises as a result of the sale . . . of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507." Thus, when Section 1222(a)(2)(A) applies, a Chapter 12 debtor may pay less under a plan of reorganization than the full amount of a claim for

federal income taxes that arises from the sale of assets used in the debtor's farming operation.

The facts of this case are simple and typical. Petitioners are a husband and wife who operated a family farm. They filed a Chapter 12 bankruptcy petition on August 9, 2005. *See* Pet. App. 35. With the consent of their Chapter 12 trustee and the approval of the bankruptcy court, Petitioners sold their farm for $960,000. *Id.* The sale generated a postpetition capital gains tax of about $29,000. *Id.* The Petitioners subsequently filed their plan of reorganization, in which they proposed to recognize the capital gains tax as an administrative expense of their bankruptcy estate and treat it as an unsecured claim, which would be paid pro rata to the extent funds were available, with the balance discharged as permitted by Bankruptcy Code § 1222(a)(2)(A). *See* Pet. App. 35.

The Internal Revenue Service ("IRS") objected to the Debtor's plan based on Internal Revenue Code (26 U.S.C. or "IRC") § 1399. It provides that no "separate taxable entity" results from the commencement of a bankruptcy case under any Chapter of the Bankruptcy Code except for individual debtors' Chapter 7 liquidation and Chapter 11 reorganization cases. *See* 26 U.S.C. § 1399. Thus, no "separate taxable entity" exists in a Chapter 12 case, in a business Chapter 7 or Chapter 11 bankruptcy case, or in a Chapter 13 case.

The IRS argued that the postpetition capital gains tax was not an administrative expense under

Bankruptcy Code §§ 507(a)(2) and 503(b) because it was not "incurred by the estate" as required to qualify as an administrative expense, and was instead an obligation of Petitioners individually. *See* Pet. App. 35. Without administrative expense status, the IRS claimed, Bankruptcy Code § 1222(a)(2)(A) was inapplicable to postpetition tax claims. *See* Pet. App. 40.

The Bankruptcy Court agreed with the IRS and sustained the government's objection. *See* Pet. App. 46. On appeal, the District Court reversed the Bankruptcy Court, holding that the Petitioners were entitled to treat the capital gains tax as a dischargeable unsecured claim because Congress's clear intent in enacting Bankruptcy Code § 1222(a)(2)(A) was to permit family farmers to discharge in bankruptcy claims owed to governmental entities relating to the sale of farm assets, whether the sale occurred before or during the bankruptcy case. *See* Pet. App. 32-33.

The Ninth Circuit, in a 2-1 decision, agreed with the Bankruptcy Court, and reversed the District Court. *See* Pet. App. 6, 16. Under the Ninth Circuit's ruling "the tax is payable in full because it is incurred and owed by the debtor outside the plan." *See* Pet. App. 7 n.2. The opinion below was not based on Bankruptcy Code § 1222(a)(2)(A), but rather almost entirely on the Ninth Circuit's conclusion that a Chapter 12 bankruptcy estate cannot incur taxes under IRC § 1399. *See* Pet. App. 7-8. Because IRC § 1399 applies to business bankruptcies and Chapter

13 bankruptcies, its rationale applies in those contexts as well. *See* Pet. App. 10 n.4.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's published decision is directly in conflict with a published Eighth Circuit opinion and several lower court decisions, and the issue is pending in two cases before the Tenth Circuit. The circuit split is irreconcilable and can only be resolved by this Court. It is causing inconsistency in the administration of the Bankruptcy Code and the Internal Revenue Code, and is of significant importance to the agricultural community. In the Ninth Circuit, family farmers who sell any farm assets postpetition must pay the capital gains taxes on those sales in full from non-estate assets, effectively making postpetition tax liabilities into debts that are not discharged and are payable individually even as the farmers are required to use the proceeds of their estate asset sales and their income to pay creditors under their Chapter 12 plans – the very thing Congress intended to prevent by enacting Bankruptcy Code § 1222(a)(2)(A). It obliges family farmers to have the foresight to sell their farms in the tax year before bankruptcy if they are to deal with resulting taxes under their plans, leaving creditors without court oversight of the sales. In the Eighth Circuit, family farmers are able to discharge these taxes under their plans of reorganization. This lack of uniformity should be rectified.

The Ninth Circuit's rationale for its ruling and conclusion that taxes incurred during a bankruptcy case are not administrative expense claims of the bankruptcy estate when there is no separate IRC taxable entity is flatly inconsistent with this Court's authority that taxes incurred during the existence of a bankruptcy estate are payable by the bankruptcy estate as administrative expenses. Notably, the logic of the opinion below is not limited to Chapter 12 bankruptcy cases. Because IRC § 1399 applies to all cases other than individual Chapter 7 and Chapter 11 bankruptcies, the Ninth Circuit's decision encompasses the much larger category of corporate Chapter 11 bankruptcies. The rationale of the opinion below is in direct conflict with settled law in other circuits regarding the treatment of postpetition tax claims in corporate Chapter 11 bankruptcies. The Ninth Circuit's ruling impairs the coherent and consistent interpretation of the IRC and Bankruptcy Code in multiple contexts.

The opinion is especially problematic for farmers. Congress determined that family farmers are important enough to warrant their own Chapter of the Bankruptcy Code, and added § 1222(a)(2)(A) to that Code in 2005 to increase the protections provided to farmers by Chapter 12. The decision below eviscerates that extra protection at a time when family farmers are increasingly turning to Chapter 12 for relief. There has been a flurry of reported cases on this issue in the last few years because today's difficult economy has made this issue one of increasing

importance. The number of unreported decisions is likely significant as well. The Court should step in to provide a definitive resolution to this important legal issue to enable family farmers to receive fair and uniform treatment by federal bankruptcy courts throughout the country, and to implement Congressional intent.

I. The Circuits Are Divided.

A. The Circuits Are Split Over the Treatment of Postpetition Income Taxes in Chapter 12 Bankruptcy Cases.

The dissenting judge in the decision below pointed out that the majority had created a split with the Eighth Circuit. *See* Pet. App. 17. The Eighth Circuit held in *In re Knudsen*, 581 F.3d 696 (8th Cir. 2009), that under Bankruptcy Code § 1222(a)(2)(A), a family farmer who files a petition under Chapter 12 may treat a federal income tax that arises from the postpetition sale of farm assets as an unsecured claim in the debtor's plan of reorganization. *Knudsen* concluded that the administrative expense claim definition of "any tax incurred by the estate" in Bankruptcy Code § 503(b)(1)(B)(i) means any tax "incurred postpetition." 581 F.3d at 703 (citing *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146 (8th Cir. 1995)). Because income tax from a postpetition asset sale is incurred POST petition, the Eighth Circuit concluded that it was incurred "by the estate" and qualified as an administrative expense under § 503(b)(1)(B)(i). *Knudsen*, 581 F.3d at 708-09. The court noted that even though no "separate taxable

entity" under the IRC is created by the filing of a Chapter 12 petition, a bankruptcy estate exists nonetheless, and the farm assets are property of that estate. *Id.* at 709. Because the federal income tax was an administrative expense, the tax was entitled to priority under Bankruptcy Code § 507(a)(2), and the Debtor could therefore take advantage of Bankruptcy Code § 1222(a)(2)(A). *Id.*

In the opinion below, the Ninth Circuit came to the opposite conclusion, finding that an IRC provision determined the meaning of the Bankruptcy Code provision. It conflated the bankruptcy concept of an "administrative expense" with IRC § 1399, which provides that "no separate taxable entity shall result from the commencement of a case under [the Bankruptcy Code] except in any case to which [IRC §] 1398 applies." Because IRC § 1398 does not apply to Chapter 12 cases, the Ninth Circuit concluded that the filing of a bankruptcy petition does not give rise to a bankruptcy estate capable of incurring taxes. *See* Pet. App. at 6, 12. Accordingly, it held that a tax arising from the sale of bankruptcy estate assets was not "incurred by the estate" under Bankruptcy Code § 503(b)(1)(B)(i), so it did not qualify as an administrative expense. *Id.* at 5-7. And because the tax did not qualify as an administrative expense, it was not entitled to priority under Bankruptcy Code § 507, and Bankruptcy Code § 1222(a)(2)(A) therefore did not apply. The result of the Ninth Circuit's opinion is that such tax claims must be treated outside Chapter 12 plans, and must somehow be paid by family

farmer-debtors individually even though the proceeds of their asset sales and their income is property of their bankruptcy estates and is to be devoted to payment of their creditors and administrative expense claimants under their Chapter 12 plans. Many of them lack sufficient income to pay both their plan obligations and their farm sale taxes. *See* 11 U.S.C. § 1207(a) (postpetition income is property of Chapter 12 estate); 11 U.S.C. § 1222(a) (plan shall provide for submission of future earnings as necessary for execution of the plan); 11 U.S.C. § 1222(c) (plan lasts 3-5 years).

The holdings in *Knudsen* and the opinion below are diametrically opposed. The Ninth Circuit's holding is also directly contradicted by every other court to consider the issue, with the exception of the bankruptcy court's ruling in Petitioners' case. *See, e.g.*, *Knudsen*, 581 F.3d at 710; *In re Ficken*, 430 B.R. 663 (B.A.P. 10th Cir. 2010); *In re Dawes*, 415 B.R. 815 (D. Kan. 2009); *In re Hall*, 393 B.R. 857 (D. Ariz. 2008); *In re Knudsen*, 389 B.R. 643 (Bankr. N.D. Iowa 2008); *In re Schilke*, Nos. 4:07CV3283, 0641813, 2008 WL 4224279 (D. Neb. Sept. 9, 2008); *In re Uhrenholdt*, No. BK06-40787-TLS, 2009 WL 198966 (Bankr. D. Neb. Jan. 26, 2009); *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008); *In re Gartner*, No. BK06-40422-TLS, 2008 WL 5401665 (Bankr. D. Neb. Dec. 29, 2008); *In re Rickert*, No. BK06-40253-TLS, 2008 WL 5401663 (Bankr. D. Neb. Dec. 29, 2008); *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007); *see also* 4 Alan N. Resnick and Henry J. Sommer, *Collier on Bankruptcy* ¶ 503.07[2][a][i] at 503-62 (16th ed. 2010) ("The

majority view . . . appears to be that a debtor may utilize section 1222(a)(2)(A) to treat taxes generated from the postpetition sale of farming assets as unsecured claims, and that these claims are subject to discharge in the chapter 12 case."); Arthur Boelter, *Merstens Law of Federal Income Taxation* § 54:61 (Updated Dec. 2010) ("This exception applies to strip the priority of tax on gains realized both before and after the petition date. . . ."); David A. Lander, et al., *Business Workouts Manual* § 15:73 (updated Oct. 2010) (noting that most courts have rejected the IRS's argument); Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 AM. BANKR. L.J. 729, 738 (2005) ("Certainly any dispositions made after the bankruptcy filing under the terms of the Chapter 12 plan qualify under section 1222(a)(2)."). Two cases dealing with this issue are pending before the Tenth Circuit. *See In re Dawes*, Case No. 09-3129; *In re Ficken*, Case No. 10-1276.

A leading treatise on bankruptcy law has noted that this issue is ripe for review by this Court due to the circuit split. *See* 15 Alan N. Resnick and Henry J. Sommer *Collier on Bankruptcy* ¶ TX2.03[2][a][iii] (online Lexis version).

B. The Ninth Circuit's Failure to Apply Fundamental Bankruptcy Taxation Principles Conflicts With Many Other Cases, Including Those Involving Different Chapters of the Bankruptcy Code.

The Ninth Circuit's decision is much more far-reaching than it appears. IRC § 1399 applies to all bankruptcy cases other than those involving individual debtors under Chapter 7 and Chapter 11. *Compare* 28 U.S.C. § 1399 (noting that § 1399 applies to all bankruptcy cases except those to which § 1398 applies), *with* 28 U.S.C. § 1398 ("[T]his section shall apply to any case under chapter 7 . . . or chapter 11 . . . of [the Bankruptcy] Code in which the debtor is an individual."); *see also Knudsen*, 581 F.3d at 708 n.2 (noting that IRC § 1399 applies to Chapter 11 corporate cases). Bankruptcy Code § 1222(a)(2)(A) specifies treatment for a particular kind of administrative expense tax claim, that of a family farmer selling farm assets. Because IRC § 1399 applies in all cases other than individual Chapter 7 and 11 cases, however, the Ninth Circuit's logic creates circuit divisions and inconsistent treatment when applied to other tax claims, including tax claims incurred during corporate Chapter 11 bankruptcy cases. The opinion below implicates taxation in all cases other than individual Chapter 7 and 11 cases. *See Dawes*, 382 B.R. at 518.

The Bankruptcy Code accords second priority distribution status to administrative expenses. 11 U.S.C. §§ 507(a)(2), 503(b). Administrative expenses

include taxes "incurred by the estate except a tax of a kind specified in 507(a)(8) of this title" (a section which provides for lower priority treatment but still ahead of general unsecured creditors). This Court has recognized in the context of the Bankruptcy Act, the predecessor to today's Bankruptcy Code, that taxes incurred during the period of bankruptcy administration are obligations of the bankruptcy estate entitled to administrative priority. *See Nicholas v. United States*, 384 U.S. 678, 687-88 (1966) ("[T]axes incurred during the arrangement period are expenses of the Chapter XI proceedings and are therefore technically a part of the first priority under s 64a(1)."); *see also In re Colortex Indus., Inc.*, 19 F.3d 1371, 1381-82 (11th Cir. 1994) (noting that the Code mirrors the priority scheme for tax claims under the Act and that *Nicholas* remains good law).

Indeed, it is a fundamental principle of income taxation "that income is taxed to the party who earns it." *See United States v. Bayse*, 410 U.S. 441, 447 (1973). "It is command of income and its benefits which marks the real owner of property." *Higgins v. Smith*, 308 U.S. 473, 478 (1940). A serious flaw in the Ninth Circuit's reasoning is that by viewing the Debtor and the Chapter 12 estate as distinct entities for income tax purposes, it reaches a result that is directly at odds with this principle. Petitioners' bankruptcy estate commanded the income derived from the sale of their farm, and the estate reaped its benefits. The estate owned the farm by virtue of Bankruptcy Code § 541(a)(6), and owned the sale proceeds

by virtue of that section and Bankruptcy Code § 1207(a). Petitioners individually received nothing from the sale of their farm; all of the proceeds went to pay the Petitioners' creditors under their plan. The Ninth Circuit's opinion does not tax the party that earned the income (the estate), but rather a party that received no benefit from the income, and that did not even own the property at the time it was sold (the individual).

In multiple contexts, courts of appeals have followed that principle, holding that administrative expense priority for taxes "incurred by the estate" applies to taxes incurred due to postpetition actions, when a bankruptcy "estate" comes into being. *In re L.J. O'Neill Shoe Co.*, 64 F.3d 1146, 1148 (8th Cir. 1995) (corporate income tax relating to income earned during bankruptcy case is entitled to administrative expense treatment); *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1301 (9th Cir. 1995) ("Because the estate was in existence on [the date the tax was incurred], we conclude that the corporate income taxes . . . were 'incurred by the estate.'"); *In re Columbia Gas Transmission Corp.*, 37 F.3d 982, 986 (3d Cir. 1994) ("the event giving rise to the property tax . . . occurred before the petition for bankruptcy had been filed" so were seventh priority, not administrative); *United States v. Friendship College, Inc.*, 737 F.2d 430, 432 (4th Cir. 1984) (administrative expense claim for income tax withheld from wages during Chapter 11 operations). As explained by the Fourth Circuit in *Friendship College*, "incurred by the estate" in the

bankruptcy tax context means postpetition tax liabilities, "since by definition there can be no bankruptcy estate until the petition in bankruptcy is filed." 737 F.2d at 431; *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447-48 (2004) (noting that the bankruptcy "estate" is the fundamental *res* underlying bankruptcy *in rem* jurisdiction). Because the Ninth Circuit's opinion concludes that Chapter 12 estates cannot incur taxes under IRC § 1399, and IRC § 1399 applies to Chapter 11 cases, all of these cases directly conflict with the opinion below.

II. Bankruptcy Taxation is Important, Especially in Farm Bankruptcy Cases.

A. The Constitution Requires Uniform Application of the Internal Revenue Code With the Bankruptcy Code.

The Bankruptcy Code should be interpreted uniformly across the country, without variance by circuit. *See New York v. Saper*, 336 U.S. 328, 328 (1949) (granting certiorari to resolve conflict between courts of appeals regarding an "issue of considerable practical importance in the administration of the Bankruptcy Act"). So should the Internal Revenue Code. *See Dobson v. Comm'r*, 320 U.S. 489, 492 (1943) (granting certiorari where issue was "important to tax administration" and split of authority existed). With the advent of the circuit split at issue here, neither Code is being interpreted uniformly, which creates significant problems in the administration of both. The IRS must apply different rules in different circuits, and so

must bankruptcy courts. This is not only unfair to debtors in various circuits, but gives rise to substantial litigation as bankruptcy courts and appellate courts around the country guess which interpretation this Court will adopt, and apply the Ninth Circuit's reasoning to other types of bankruptcy cases. Until this split is resolved, bankruptcy courts and debtors, especially family farmer-debtors, face difficulty and uncertainty in planning the reorganization of their farming operations and other businesses. In circuits without decisions, the significant litigation burden can also be an impediment to the reorganization process.

The disparate treatment of family farmers in America due to the circuit split is not only of serious practical importance, it is an issue of constitutional magnitude. The framers of the Constitution believed that uniform taxation was of such critical importance that they enshrined it in the Nation's charter. *See* U.S. CONST. art. I, § 8, cl. 1 (taxes must be "uniform throughout the United States"); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24 (1916) (noting that Uniformity Clause applies to income taxes); Jeffrey S. Kinsler, *Circuit-Specific Application of the Internal Revenue Code: An Unconstitutional Tax*, 81 DENV. U. L. REV. 113 (2003) (arguing that when circuit courts interpret federal tax statutes such that the IRS must impose different taxes on the residents of different states, the Uniformity Clause of the Constitution is violated).

If the Ninth Circuit's ruling is permitted to stand, the IRS must apply different rules in different states.

A family farmer in Montana who seeks the protection of Chapter 12 of the Bankruptcy Code and then sells livestock, a tractor, or the entire family farm will have to pay taxes incurred as a result of the sale in full while trying to meet obligations of the Chapter 12 plan. But a family farmer in South Dakota who sells the very same kinds of assets as the Montana farmer would be able to pay less than the full amount of the taxes arising from the sale under his reorganization plan, even though the two farms might be only a few miles apart. Likewise, a family farmer in a circuit without a circuit ruling cannot divine whether post-petition transactions will qualify for treatment under Section 1222(a)(2)(A). And again, this disparate treatment is not limited to Chapter 12 bankruptcies. As Ninth Circuit courts follow the opinion below in other non-individual Chapter 7 and 11 cases, the constitutionally-prohibited disparity will widen.

B. Chapter 12 Cases Are Increasing.

This Court has previously recognized that certiorari is justified in cases involving matters of importance to the agricultural community. *See Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978). Over the past three years, Chapter 12 bankruptcy filings have more than doubled, increasing from 332 in the twelve-month period ending September 30, 2008 to 707 in the twelve-month period ending September 30, 2010. *See* Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of

the Bankruptcy Code, During the Twelve Month Period Ended Sep. 30, 2010, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/0910_f2.pdf; Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the Twelve Month Period Ended Sep. 30, 2008, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2008/0908_f2.pdf.

Given the state of the national economy, family farmers are increasingly turning to Chapter 12 for relief, and the issue in this case will continue to recur. *See* Roger A. McEowen, *Agricultural Law Developments Shaping the Sector and Legal Practice*, 14 DRAKE J. AGRIC. L. 1, 17 (2009) ("[C]urrent indications are that bankruptcy practice will rise in significance for agricultural lawyers."). Indeed, the issue in this case is already creating substantial litigation in areas of the country where family farms are concentrated. *See In re Knudsen*, 389 B.R. 643 (Bankr. N.D. Iowa 2008); *In re Dawes*, 415 B.R. 815 (D. Kan. 2009); *In re Dawes*, 382 B.R. 509 (Bankr. D. Kan. 2008); *In re Gartner*, 2008 WL 5401665 (Bankr. D. Neb. Dec. 29, 2008); *In re Rickert*, 2008 WL 5401663 (Bankr. D. Neb. Dec. 29, 2008); *In re Uhrenholdt*, 2009 WL 198966 (Bankr. D. Neb. 2009); *In re Schilke*, 379 B.R. 899 (Bankr. D. Neb. 2007); *In re Schilke*, 2008 WL 4224279 (D. Neb. 2008); USDA, America's Diverse Family Farms: Assorted Sizes, Types, and Situations,

at 6, http://www.ers.usda.gov/publications/aib769/aib769.pdf (showing high concentration of farms around the midsection of the country).

A decision by this Court is the only way to resolve the circuit split, and is needed sooner rather than later, given the rapidly increasing significance of the issue to the agricultural community. There is no reason for this issue to percolate in the courts below because the split is irreconcilable. The issue has already been thoroughly considered by the Eighth and Ninth Circuits, and the other courts of appeals will merely line up behind *Knudsen* or the opinion below. The Court should grant review now. *See Laing v. United States*, 423 U.S. 161, 167 (1976) (granting certiorari to resolve issue where circuit split was irreconcilable and issue was recurring).

III. The Opinion Below Is Wrong.

A. The Ninth Circuit's Ruling Eviscerates Bankruptcy Code § 1222.

Chapter 12 was enacted to aid family farmers in successfully reorganizing their affairs. *See* H.R. Conf. Rep. No. 958, 99th Cong., 2d Sess. 48 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5246, 5249 ("[Chapter 12] is designed to give family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land."); *Flores v. Rios*, 36 F.3d 507, 510 (6th Cir. 1994) (noting that Chapter 12 represents federal policy intended to "benefit the oft-beleaguered family farmer").

Bankruptcy Code § 1222(a)(2)(A) is a particular application of that general policy. *Schilke*, 2008 WL 4224279, at *4 (D. Neb. 2008); 7 William L. Norton, *Norton Bankruptcy Law & Practice* § 122:10 (3d ed. 2010) ("This provision is designed to allow the farmer to modify the farming operation without regard to the tax consequences of the dispositions of farm assets."); Arthur Boelter, *Merstens Law of Federal Income Taxation* § 54:61 (Updated Dec. 2010) (noting that § 1222(a)(2)(A) is intended to "facilitate farmers' use of Chapter 12"). Prior to the enactment of Bankruptcy Code § 1222(a)(2)(A), the IRS would often have a veto over a debtor's plan of reorganization, because taxes owed to the IRS from bankruptcy estate asset sales qualify as administrative expenses entitled to full payment. Since many Chapter 12 debtors were unable to pay the taxes in full, Congress added Bankruptcy Code § 1222(a)(2)(A) to permit payment in less than full, which would allow family farmers to confirm plans of reorganization and sometimes even retain their farms. *See Dawes*, 415 B.R. at 820 ("In adopting this section, Congress was concerned that if the debtor/farmer could not pay the I.R.S. in full, the I.R.S. was likely to veto the plan, and the farmer would likely lose the farm."); *Dawes*, 382 B.R. at 519 ("The entire purpose of Chapter 12 is to allow a farmer to reorganize, and the specific purpose of the amendment to § 1222 was to remove a major impediment to reorganization."); 7 *Norton Bankruptcy Law & Practice* § 133:6 n.2 (3d ed. 2010).

Thus, the entire purpose of enacting Bankruptcy Code § 1222(a)(2)(A) was to deal with problems resulting from the fact that tax claims are normally entitled to priority. Yet the IRS now argues that these kinds of claims were never entitled to priority in the first place. In agreeing with the IRS, the Ninth Circuit effectively bestowed nondischargeable status upon postpetition tax claims by concluding that they must be paid outside the plan of reorganization. The opinion below therefore accomplishes the exact opposite effect of what was intended by Bankruptcy Code § 1222(a)(2)(A). In fact, the IRS now has even more leverage over Chapter 12 debtors than it did before Congress enacted § 1222(a)(2)(A) because its tax claim may not even be dealt with through the bankruptcy plan.

Even the Ninth Circuit acknowledged in the opinion below that its decision was contrary to the purpose of Bankruptcy Code § 1222(a)(2)(A). Pet App. 15-16. When an interpretation of a statute is "demonstrably at odds with the intentions of its drafters," then the court should give effect to congressional intent. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 243 (1989). The legislative history surrounding the enactment of § 503(b)(1)(B)(i) is consistent with *Knudsen* and contrary to the Opinion below. The bankruptcy court in *Dawes* canvassed the relevant history, and noted that the Senate Reports relating to Bankruptcy Code § 503(b)(1)(B)(i) referred to taxes incurred "during the administration of the estate" or "in administering the debtor's estate," as constituting

administrative expenses under § 503(b)(2), which supports the *Knudsen* view of Bankruptcy Code § 1122(a)(2)(A). *See Dawes*, 382 B.R. at 515-16; *Knudsen*, 581 F.3d at 708-09.

The Internal Revenue Code determines what taxes are to be assessed and Bankruptcy Code § 503 determines the priority treatment of taxes and other claims in bankruptcy cases. The IRS is given priority treatment under Bankruptcy Code § 503 for nearly all taxes because it "cannot choose its debtors or take advance security on tax debts." *See In re Flo-Lizer, Inc.*, 916 F.2d 363, 366 (6th Cir. 1990). Taxes incurred during administration of the bankruptcy estate have senior priority along with other costs of administration. The policy underlying the Bankruptcy Code's treatment of administrative expenses is that "a debtor's efforts to reorganize shall be financed by the debtor, not the debtor's post-petition creditors." *See In re Allied Mech. Servs.*, 885 F.2d 837, 839 (11th Cir. 1989). The opinion below applied the Internal Revenue Code without giving due regard to these fundamental principles and the finely wrought structure of the Bankruptcy Code, an error which is particularly manifest given Congress's later enactment of Bankruptcy Code § 1222(a)(2)(A).

Congress enacted IRC § 1399 in 1980, and enacted Bankruptcy Code § 1222(a)(2)(A) in 2005. Section 1222(a)(2)(A) is more recent, more specific, and provides the exclusive method for treatment of claims owed to government entities relating to the sale of farm assets. "[A] specific policy embodied in a later

federal statute should control [the] construction of the [earlier] statute, even though it ha[s] not been expressly amended." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). "The 'judicial task of reconciling many laws enacted over time, and getting the laws to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.'" *Id.* (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988). Congress intended to permit the discharge of federal tax claims from the sale of farm assets and make it easier for family farmers to confirm a plan of reorganization and keep their farms. The Ninth Circuit failed to effectuate the policy clearly embodied in Bankruptcy Code § 1222(a)(2)(A), and accorded undue weight to IRC § 1399.

B. The Ninth Circuit's Analysis Does Not Support its Distinction from Other Bankruptcy Tax Cases, or the Divisions it Creates.

Notably, and contrary to what the Ninth Circuit held, IRC § 1399 does not say that a Chapter 12 (and a non-individual Chapter 11 and Chapter 7) bankruptcy estate is not a taxable entity – it says that the filing of a Chapter 12 petition does not create a *separate* taxable entity. And IRC § 1399 never even uses the word "estate." The Ninth Circuit rewrote the statute, replacing the word "entity" with "estate,"

despite the fact that the two words are entirely different. *See Abbott v. Abbott*, ___ U.S. ___, ___, 130 S. Ct. 1983, 2003 (2010) ("In interpreting statutory text, we ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning.").

The Eighth Circuit in *O'Neill* recognized that under the IRC, no separate taxable entity results from commencement of a corporate bankruptcy. *Id.* at 1151. But it explained that the debtor is taxed as a continuous corporate entity, and the Bankruptcy Code determines the status as an administrative expense or lower priority depending on whether the taxes were incurred before or after the petition was filed. *Id.* at 1152. The Eleventh Circuit agreed in *United States v. Hillsborough Holdings Corp.*, 116 F.3d 1391, 1396 (11th Cir. 1997); *see also In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1301 (9th Cir. 1995) (same); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("[I]t is sensible to view the debtor-in-possession as the same 'entity' which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing"). In other words, under IRC § 1399, the Debtor and the estate are *identical* for taxation purposes in Chapter 12 and most other contexts.

The Ninth Circuit referenced several Chapter 13 cases to support its conclusion. Chapter 13 cases are not analogous because Bankruptcy Code § 1305

provides a specific method for treating a postpetition tax claim in a plan of reorganization. The IRS has previously recognized this very point. *See* Internal Revenue Service Litigation Bulletin No. 448, January 1998, 1998 WL 1756362 ("Our position is that filing a post-petition claim under [Bankruptcy Code] § 1305 is the exclusive method of including a post-petition tax year in the plan. *Pacific-Atlantic*, *O'Neill Shoe*, and *Hillsborough Holdings* are, thus, distinguishable since section 1305 is inapplicable to those chapters."). The same rationale applies to Chapter 12, which likewise does not have a provision like § 1305. Instead, Bankruptcy Code § 1222(a)(2)(A) governs how both pre- and postpetition tax claims from farm asset sales are treated in a Chapter 12 plan of reorganization. *See* 4 *Collier on Bankruptcy* ¶ 503.07[2][a], at 503-62 (16th ed. 2010) (noting that like § 1305 in Chapter 13, Chapter 12 "has a unique provision that affects the treatment of certain postpetition tax claims, specifically section 1222(a)(2)(A)"). Consistent and coherent administration of tax claims arising in bankruptcy cases would accord administrative expense status to taxes arising from postpetition actions, and special treatment to the extent of special Bankruptcy Code provisions.

Farm assets are property of a farmer-debtor's bankruptcy estate. *See* 11 U.S.C. §§ 541(a), 1207. The income received from the sale of those assets is also property of the estate. *See* 11 U.S.C. § 541(a)(6), and § 1207(a). Under the opinion below, the Chapter

12 estate owns the farm assets and reaps the benefits of the sale of those assets to pay other creditors, while the debtor individually is burdened with the tax consequences of the sale. Yet Chapter 12 requires that debtor to "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1222(a)(1). How, then, is the Debtor to pay the tax claim? The Ninth Circuit's ruling effectively grants a postpetition tax claim from the sale of farm assets nondischargeable status, which is directly contrary to legislative intent. It forces family farmers to liquidate their assets during the tax year before bankruptcy, without creditor and court oversight, if they are to satisfy their taxes incurred as a result of such an asset sale under their plans.

The Ninth Circuit's notion that postpetition farm asset sales should receive less favorable treatment than prepetition sales is just as troubling. There is no logical reason why Congress would have made the petition filing date the cut-off for the applicability of Bankruptcy Code § 1222(a)(2)(A), and it is not found in the statutory language. On its face, Section 1222(a)(2)(A) does not distinguish between pre-petition and postpetition claims. *See Knudsen*, 581 F.3d at 709. Rather, the plain meaning of Section 1222(a)(2)(A) is that it relieves the burdens of taxation relating to the sales of farm assets by altering the priority status such claims would otherwise enjoy

in the bankruptcy case, regardless of the time the tax was incurred. The Opinion below assumes that Congress intended the statute to apply only to farmers who were prescient enough to sell their farms before their creditors and the Bankruptcy Court could supervise the sale, and renders Bankruptcy Code § 1222(a)(2)(A) meaningless for most Chapter 12 debtors. Encouraging farmers to liquidate assets before filing bankruptcy petitions is inconsistent with the broader notion embodied in the Bankruptcy Code that orderly disposition of the bankruptcy estate under court supervision is in the best interests of all parties. Prepetition sales and prepetition disposition of sale proceeds often results in less money for creditors and gives rise to preferential transfer and fraudulent transfer issues, and sales are conducted without being held at public bankruptcy auctions that generate higher prices. *See* 3 *Collier on Bankruptcy* ¶ 363.02 (16th ed. 2010) ("[A] trustee normally would be expected to sell to the highest bidder at an auction. . . .").

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN M. FREEMAN
Counsel of Record
JUSTIN J. HENDERSON
LEWIS AND ROCA LLP
40 N. Central Avenue
Phoenix, Arizona 85004
(602) 262-5756

CLIFFORD B. ALTFELD
ALTFELD & BATTAILE P.C.
250 N. Meyer Avenue
Tucson, Arizona 85701
(520) 622-7733

Counsel for Petitioners

617 F.3d 1161

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Appellant,
v.
Brenda HALL; Lynwood D. Hall, Appellees.
No. 08-17267.

Argued and Submitted Feb. 10, 2010.
Filed Aug. 16, 2010.

Patrick J. Urda, Tax Division, Department of Justice, filed the briefs and argued the cause for the appellant. John A. DiCicco, Acting Assistant Attorney General, and Bruce R. Ellisen, Tax Division, Department of Justice, were on the briefs. Diane J. Humetewa, United States Attorney, served as Of Counsel.

Clifford B. Altfeld, Altfeld Battaile & Goldman, P.C., Tuscon, AZ, filed the brief and argued the cause for the appellees. Eugene Vamos, Altfeld Battaile & Goldman, P.C., Tuscon, AZ, was on the brief.

Appeal from the United States District Court for the District of Arizona, David C. Bury, District Judge, Presiding. D.C. No. 4:07-cv-00679-DCB.

Before DIARMUID F. O'SCANNLAIN, STEPHEN S. TROTT and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge O'SCANNLAIN; Dissent by Judge PAEZ.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether and to what extent debtors must pay federal income tax on the gain from the sale of their farm during bankruptcy proceedings.

I

A

Lynwood and Brenda Hall filed a petition under chapter 12 of the Bankruptcy Code, which governs family farmer bankruptcies, in August 2005. Shortly thereafter, the Halls moved to sell their farm for $960,000, which the bankruptcy court approved.

In December 2005, the Halls proposed a plan of reorganization, under which they sought to pay off their outstanding liabilities using the proceeds from the sale. The Internal Revenue Service ("IRS") objected to the proposed plan, asserting a federal income tax of $29,000 on the capital gain from the sale. The Halls then amended their proposed plan to treat the $29,000 tax as an unsecured claim to be paid "to the extent funds are available," with "the balance discharged." The IRS again objected.

B

The bankruptcy court sustained the IRS's objection. *In re Hall,* 376 B.R. 741 (Bankr.D.Ariz.2007). The district court reversed. *Hall v. United States* (*In*

re Hall), 393 B.R. 857 (D.Ariz.2008). The United States timely appealed.

II

The United States contends that the district court erred by reversing the bankruptcy court's decision to sustain the IRS's objection, asserting that the tax on the gain from the sale of a farm during bankruptcy is not dischargeable.

A

We begin, as always, with the text of the applicable statute. Chapter 12 of the Bankruptcy Code, 11 U.S.C. §§ 1201-31, allows family farmers and fishermen to reorganize their business affairs while keeping creditors at bay. But the benefits of this arrangement come with responsibilities. In chapter 12 bankruptcy cases, the debtor must file a plan of reorganization, *id.* § 1221, and the contents of that plan are prescribed in section 1222(a)(1)-(4). In particular, section 1222(a)(2)(A) states:

> The plan shall . . .
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 unless
>
> (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the

> debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge. . . .

Thus debtors may well treat certain claims owed to a governmental unit arising from the sale of farm realty as payable in less than full, and dischargeable.

But, by its terms, subsection (2)(A) applies only to "claims entitled to priority under section 507 [of the Bankruptcy Code]." Section 507, in turn, lists numerous categories of claims that receive special treatment in bankruptcy. *Id.* § 507(a)(1)-(10). Two of the categories include taxes. The first such category, section 507(a)(8), includes various taxes incurred "on or before the date of the filing of the petition," *i.e.*, "prepetition." *E.g.*, *id.* § 507(a)(8)(A) (involving prepetition income taxes).[1] Indeed, there is no dispute

---

[1] The other types of taxes enumerated in section 507(a)(8) also clearly are taxes incurred prepetition, *id.* § 507(a)(8)(B) ("property tax incurred before the commencement of the case"); *id.* § 507(a)(8)(D) ("employment tax on a wage . . . earned from the debtor before the date of the filing of the petition"); *id.* § 507(a)(8)(E)(i)-(ii) ("excise tax on . . . a transaction occurring before the date of the filing of the petition"); *id.* § 507(a)(8)(F)(i)-(iii) ("customs duty arising out of the importation of merchandise . . . before the date of the filing of the petition"); *id.* § 507(a)(8)(G) ("a penalty . . . for actual pecuniary loss" related to claims in (A) through (F)), with the exception of § 507(a)(8)(C)-involving so-called "trust fund taxes," *i.e.*, taxes withheld from employees-which does not include clear language

(Continued on following page)

that section 1222(a)(2)(A) allows chapter 12 debtors to treat *taxes* incurred by selling farm assets *before* the filing of a bankruptcy petition as payable in less than full and dischargeable: a tax incurred prepetition is a claim "entitled to priority under section 507" by way of section 507(a)(8). Here, by contrast, the tax was incurred *after* the filing of the petition, *i.e.*, "post-petition."

The second category that includes taxes, section 507(a)(2), consists of "administrative expenses allowed under section 503(b)." *Id.* § 507(a)(2). This provision arguably includes the tax on the gain from the sale of the farm because section 503(b), which is cross-referenced by section 507(a)(2), allows for "administrative expenses . . . including . . . any *tax* . . . incurred by the estate." *Id.* § 503(b)(1)(B)(i) (emphasis added).

---

limiting its reach to prepetition taxes. That absence has been interpreted, however, as indicating that "trust fund taxes" receive priority regardless of the amount of time that they predate the petition, unlike the other types of taxes listed in § 507(a)(8), *e.g.*, *Shank v. Wash. State Dep't of Revenue* (*In re Shank*), 792 F.2d 829, 831 (9th Cir.1986); *In re Official Comm. of Unsecured Creditors of White Farm Equip. Co.*, 943 F.2d 752, 756 (7th Cir.1991), and not as indicating that § 507(a)(8)(C) applies to postpetition taxes. *Collier on Bankruptcy* ¶ 507.11[1] (15th ed. 2009) ("An eighth priority is granted under section 507(a)(8) to . . . certain kinds of prepetition taxes [including] trust fund taxes."); *id.* ¶ 507.11[4] ("[I]n contrast to all of the other portions of section 507(a)(8), there is no time limit applicable to trust fund taxes."). In any event, this case does not involve "trust fund taxes."

Which, of course, raises the question whether the post-petition tax on the sale of the farm at issue in this case was "incurred by the estate." We are satisfied that the answer is no. The Internal Revenue Code provides that a chapter 12 estate cannot incur taxes. Title 26 U.S.C. § 1399 states that "no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code" – the bankruptcy title – "[e]xcept in any case to which section 1398 applies." Section 1398 applies only to "any case under chapter 7 (relating to liquidations) or chapter 11 (relation to reorganizations) of title 11 of the United States Code in which the debtor is an individual." 26 U.S.C. § 1398. It follows that a chapter 12 estate is not a taxable entity.

Since the chapter 12 estate is not a taxable entity, the chapter 12 estate cannot "incur" a tax. We agree with those courts that have reached the same conclusion for the same reason with respect to chapter 13 estates, which are treated identically to chapter 12 estates by sections 1398 and 1399. *In re Whall,* 391 B.R. 1, 5-6 (Bankr.D.Mass.2008); *In re Brown,* 2006 WL 3370867, *3 (Bankr.D.Mass. Nov.20, 2006); *In re Gyulafia,* 65 B.R. 913, 916 (Bankr.D.Kan.1986). Because a chapter 12 estate cannot "incur" a tax, it cannot get the benefit of section 1222(a)(2)(A), which provides that the tax on the gain from the sale of a farm during bankruptcy is dischargeable and payable in less than full.

We recognize that our conclusion that the chapter 12 estate cannot "incur" a tax necessarily implies that

the debtor is responsible for any taxes incurred after the bankruptcy petition is filed in a chapter 12 case because the chapter 12 trustee, the only other potentially responsible party, is not liable for the tax. Section 1398 provides that in chapter 7 and individual chapter 11 cases, where there can be "taxable income of the estate," any "tax . . . shall be paid by the trustee." 26 U.S.C. § 1398(c)(1). The omission of any provision in the U.S.Code requiring the trustee to pay taxes in cases to which section 1398 does not apply, such as chapter 12 cases, implies that the trustee does not pay taxes in such cases. *In re Lindsey,* 142 B.R. 447, 448 (Bankr.D.Okla.1992) ("It is clear that, pursuant to 26 U.S.C. § 1398 and 1399, the standing Chapter 12 trustee neither files a return nor pays federal income tax. . . ."). That makes sense: since the chapter 12 estate is not a taxable entity and thus there cannot be "taxable income of the estate," 26 U.S.C. § 1398(c)(1), and the debtor remains in possession in chapter 12 bankruptcy absent extraordinary circumstances, 11 U.S.C. § 1203, the trustee is not associated with any taxes. *See Holywell Corp. v. Smith,* 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992) (shifting tax burden to trustee in corporate chapter 11 case because chapter 11 bankruptcy created a separate entity overseen by the trustee).[2]

---

[2] To be clear, we do not hold that the postpetition tax here is payable in full because of section 1222(a)(2)'s full payment rule for claims treated by the plan. That would be inconsistent with our conclusion that the postpetition tax here does not qualify for

(Continued on following page)

B

The Halls primarily rely on *Knudsen v. IRS*, 581 F.3d 696 (8th Cir.2009), in which chapter 12 debtors proposed a plan to sell farmland and farm equipment to fund their reorganization. Like the case before us, the plan treated the income taxes arising from these postpetition sales as unsecured claims under section 1222(a)(2)(A) and thus dischargeable. *Id.* at 701. The IRS objected there as well. *Id.* But the Eighth Circuit ruled for the debtors, holding that "§ 1222(a)(2)(A) applies to the *postpetition* sale of farm assets," so that the taxes arising from such sale could be treated as unsecured claims and dischargeable. *Id.* at 710 (emphasis added). In its view, the taxes arising from the postpetition sale met the requirement in section 1222(a)(2)(A) that they be a "claim[] entitled to priority under section 507." *Id.* at 708-09. Specifically, the court held that the taxes fell under section

---

the section 1222(a)(2)(A) exception to the full payment rule on the ground that the tax does not fall within section 507. Rather, the tax is payable in full because it is incurred and owed by the debtor outside of the plan, as discussed in the text accompanying this footnote. It is of no matter that the debtors attempted to include the tax in their plan, because the Bankruptcy Code places limits on the liabilities a plan may address. Chapter 12 plans bind "each creditor," 11 U.S.C. § 1227, and a "creditor" is defined, in relevant part, as "an entity that has a claim against the debtor that *arose at the time of or before the order for relief* concerning the debtor." 11 U.S.C. § 101(10)(A) (emphasis added). Because the tax in this case arose after the order for relief, *i.e.*, the automatic stay that commences upon the filing of a bankruptcy petition, 11 U.S.C. § 301(b), the debtors cannot avoid the tax simply by listing it in their proposed plan.

507(a)(2) as administrative expenses because they satisfied the relevant definition of administrative expenses in section 503(b) – "tax . . . incurred by the estate" – which means merely "tax . . . incurred post-petition." *Id.* at 708-09. The court expressly declined to give weight to Internal Revenue Code sections 1398 and 1399 when interpreting the phrase "tax . . . incurred by the estate," and took comfort in the fact that the Bankruptcy Code did not indicate that a chapter 12 estate could not incur taxes. *Id.* at 708-10.[3] We are not persuaded.

1

The Halls first argue, relying on the cases collected by *Knudsen,* 581 F.3d at 709, that "incurred by the estate" in section 503(b) means "incurred post-petition." In their view, it does not matter whether the estate can incur a tax because the key is when the tax was incurred.

It is true that the cases the Halls and *Knudsen* cite state that all taxes "incurred by the estate" are "incurred postpetition." They must: because an estate does not exist until after a bankruptcy petition is filed, any taxes an estate incurs are necessarily incurred postpetition. But just because all apples are

---

[3] The Tenth Circuit Bankruptcy Appellate Panel recently agreed with the Eighth Circuit's decision in *Knudsen* without further analysis. *IRS v. Ficken* (*In re Ficken*), 430 B.R. 663, 670-72 (10th Cir. BAP 2010).

fruits does not mean all fruits are apples. Likewise, although all taxes "incurred by the estate" are "incurred post-petition," not all taxes "incurred post-petition" are "incurred by the estate." The cases the Halls and *Knudsen* cite simply do not support the Halls' view, as a close reading of the language in the cases indicates. *See, e.g., W. Va. State Dep't of Tax & Revenue v. IRS* (*In re Columbia Gas Transmission Corp.*), 37 F.3d 982, 984 (3d Cir.1994) ("The priority for taxes 'incurred by the estate' extends *only* to taxes 'incurred' postpetition." (emphasis added)); *In re Ne. Ohio Gen. Hosp. Ass'n,* 126 B.R. 513, 515 (Bankr.N.D.Ohio 1991) ("Taxes incurred by the estate are administrative expenses pursuant to Section 503(b)(1)(B)(i). Because the estate does not exist prepetition, priority treatment is *limited* to taxes incurred post-petition." (emphasis added)).[4]

---

[4] We note that the United States is incorrect that these cases are distinguishable on the ground that they involve chapter 11, as opposed to chapter 12, because these cases involve *corporate* chapter 11 debtors, as opposed to *individual* chapter 11 debtors. Sections 1398 and 1399 of the Internal Revenue Code treat corporate chapter 11 debtors and chapters 12 and 13 debtors the same. 26 U.S.C. § 1398 ("apply[ing] to any case under chapter 7 . . . or chapter 11 . . . in which the debtor is an *individual*") (emphasis added); *id.* § 1399 ("Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a [bankruptcy] case. . . .").

The Halls next argue, again relying on *Knudsen*, 581 F.3d at 709, that the fact that a bankruptcy estate exists and can hold property means that it can incur taxes. Although the Halls admit that sections 1398 and 1399 of the Internal Revenue Code state a contrary view by classifying only certain estates in certain chapters as taxable entities, they believe all estates, regardless of the chapter under which they exist, can incur taxes. The Halls argue that the *Internal Revenue* Code should not be used to "frustrate" the *Bankruptcy* Code because Congress was not aware of the relevance of the former when drafting the latter.

We disagree. Neither the Halls nor *Knudsen* cites any provision in chapter 12 stating that a bankruptcy estate has the inherent ability to incur taxes. That is because there is none. *Knudsen* quotes section 1207 of the Bankruptcy Code to support its view indirectly. 581 F.3d at 710. But that section merely includes as property of the estate whatever the debtor acquires postpetition. It does not contain the slightest suggestion that the ability to retain property implies the ability to incur taxes. Nor do the Halls or *Knudsen* cite any authority for the proposition that the Bankruptcy Code as a whole indicates that all estates, regardless of chapter, have the inherent ability to incur taxes. That is because the code does not institute a singular concept of the bankruptcy estate regardless of chapter. In fact, the concept of the bankruptcy estate in the Bankruptcy Code is so

amorphous that even such basic details as the contents of the estate vary within the code depending on the chapter,[5] and within chapters depending on the nature of the debtor.[6]

In any event, we must read the United States Code as a whole. Title 26 U.S.C. §§ 1398 and 1399 indicate that a chapter 12 bankruptcy estate cannot incur taxes. It does not matter that these sections appear in the Internal Revenue Code as distinguished from the Bankruptcy Code. We are to "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). In fact, we need not even risk the error of such assumption in this case because Congress has indicated repeatedly that it is aware that the taxable entity provisions in the Internal Revenue Code are relevant to the Bankruptcy Code. At the same time Congress enacted Bankruptcy Code section 503(b), it also enacted section 346, which deals with the relationship between the Internal Revenue Code's taxable entity provisions and state and local taxes. *See* Pub.L. No. 95-598, § 346, 92 Stat. 2549 (1978) (enacting § 346);

---

[5] *Compare* 11 U.S.C. § 541 (outlining general rules for property of estate), *id.* §§ 721-28 (outlining specific rules for chapter 7), *id.* § 1115 (same for chapter 11), *and id.* § 1207 (same for chapter 12), *with id.* § 1306 (same for chapter 13).

[6] *Compare id.* § 541 (outlining general rules for property of estate, applicable to corporate chapter 11 debtors), *with id.* § 1115 (outlining rules for property of estate for individual chapter 11 debtors).

id. § 503 (enacting § 503(b)). Similarly, at the same time Congress enacted Bankruptcy Code section 1222(a)(2)(A), it also amended section 346. *See* Pub.L. No. 109-8, § 1003(a), 119 Stat. 23 (amending § 1222(a)(2)(A)); *id.* § 719 (amending § 346). We are thus justified in relying on Internal Revenue Code sections 1398 and 1399, which specifically deal with taxation in bankruptcy.

3

The Halls last rely on *Knudsen* for an argument by omission. They argue that the fact that section 1222(a)(2)(A) does not restrict itself to prepetition taxes by its express terms is significant. *See Knudsen,* 581 F.3d at 709. But that is irrelevant because the cross-references in section 1222(a)(2)(A) itself clearly lead us to the provisions that restrict their reach. *Knudsen* fails to persuade us of the Halls' view and we decline to follow it.

C

The Halls also appeal to legislative history. They first note that the Senate Report on section 503(b) states that "*administrative expenses include taxes which the trustee incurs* in administering the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate *during the case.*" S.Rep. No. 95-989, at 66 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5852 (emphasis added). This language, they press, implies

that the tax in this case was "incurred by the estate." The Halls also cite the statement of a senator speaking in favor of an unenacted provision similar to section 1222(a)(2)(A), proposed six years before that section's enactment. That senator stated that the unenacted provision was aimed at situations in which "the I.R.S. must be paid in full for any tax liabilities generated during a bankruptcy reorganization." 145 Cong. Rec. S7520-02, 1999 WL 20426 (Jan. 20, 1999) (statement of Sen. Grassley).

But we cannot ignore clear statutory text because of legislative floor statements. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). Although we are sympathetic to the approach outlined by Senator Grassley, the operative language simply failed to make its way into the statute. This is confirmed when the statutory scheme is read as a whole. *Milavetz, Gallop & Milavetz, P.A. v. United States,* ___ U.S. ___, 130 S.Ct. 1324, 1332 n. 3, 176 L.Ed.2d 79 (2010); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988). When we trace section 1222(a)(2)(A)'s cross-references and consider the Internal Revenue Code provisions relevant to the cross-referenced sections, it is evident to us that, as enacted, it does not apply to the postpetition tax at issue in this case. Recourse to "legislative history is unnecessary in light of the

statute's unambiguous language." *Milavetz,* 130 S.Ct. 1324, 1332, n. 3.

Even if we were to consult legislative history, the statements the Halls cite are not persuasive. With respect to the Senate Report on section 503(b), the subject of the phrase the Halls quote is "trustee." S.Rep. No. 95-989, at 66. The trustee, of course, is the individual who acts on behalf of the estate. 11 U.S.C. § 323(a). When the estate acts, it is the trustee who is acting. Thus, the Senate Report's phrase "taxes which the trustee incurs" has the same meaning as the phrase "taxes which the estate incurs." This latter phrase is merely a rewording of the language in section 503(b) itself, that is, taxes "incurred by the estate."

In any event, the Supreme Court has warned us against attributing the views of one Congress to another Congress, *Massachusetts v. EPA,* 549 U.S. 497, 529-30, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007), and against relying on interpretations of bills Congress rejects, *Doe v. Chao,* 540 U.S. 614, 615, 124 S.Ct. 1204, 157 L.Ed.2d 1122 (2004). Here, the statement on which the debtors rely concerns an unenacted bill in a Congress convened six years prior to the one that enacted the section at issue in this case. Even if appeal to legislative history were appropriate, we are reluctant to afford it significant weight here.

It may well be that the drafter's intention for section 1222(a)(2)(A) differs from its text. *Hall,* 376

B.R. at 746; *see Collier on Bankruptcy* ¶ 503.07[2][a][i] (15th ed.2009) (speculating that the intent behind section 1222(a)(2)(A) might diverge from its "wording"); *id.* ¶ 1222.02[2] (speculating that the "intent" behind section 1222(a)(2)(A) might diverge from the application of its text); Roger McEowen, *Chapter 12 Bankruptcy Taxation: Did BAPCPA Really Change Tax Claims to Unsecured General Creditor Status?*, at 2, Sept. 16, 2009, http://www.calt.iastate.edu/bapcpa.html (noting disparity between text and intent in section 1222(a)(2)(A)). But it is our duty to follow the text because the text is the law. Congress is entirely free to change the law by amending the text.

REVERSED.

PAEZ, Circuit Judge, dissenting:

I respectfully dissent. After careful consideration of the majority's analysis of the relevant bankruptcy code and IRS code provisions, I am not persuaded that § 1222(a)(2)(A) does not entitle the debtors to treat the capital gains taxes arising from the post-petition sale of their farm assets as an unsecured claim not entitled to priority under § 507. In my view, Congress's intent was clear: it wanted to help family farmers keep their farms by allowing them to sell farm assets to pay off debts without being liable for the full amount of any capital gains tax arising from the sale, regardless of whether they sold the assets before or after filing their Chapter 12 petition.

Rather than follow the course proposed by the majority, I would follow the reasoning of the Eighth Circuit in *Knudsen v. IRS*, 581 F.3d 696 (8th Cir.2009), and the Tenth Circuit Bankruptcy Appellate Panel's recent decision in *In re Ficken*, 430 B.R. 663 (10th Cir. BAP 2010), to conclude that capital gains taxes arising from the post-petition sale of farm assets are dischargeable under the § 1222(a)(2)(A) exception. This approach would honor Congress's clear intent and avoid an unwarranted circuit split.

393 B.R. 857

United States District Court,
D. Arizona.
In re Lynwood D. HALL and Brenda A. Hall, Debtors.
Lynwood D. Hall, Brenda Hall, Appellants,
v.
United States of America, Appellee.
No. CV-07-679-TUC-DCB.
Bankruptcy No. 05-4423-TUC-EWH.
BAP No. 07-1441.

Aug. 6, 2008.

Clifford B. Altfeld, Altfeld Battaile & Goldman, P.C., Tucson, AZ, for Debtors.

Alan R. Costello, Costello Law Firm, Phoenix, AZ, for trustee.

ORDER

David C. BURY, District Judge.

This is an appeal from a bankruptcy decision, pursuant to 28 U.S.C. § 158(a)(1), entered in *In re Hall,* BK-05-4423-TUC-EWH.

FACTUAL AND PROCEDURAL BACKGROUND

The Bankruptcy Court in *In re Hall,* 376 B.R. 741 (Bankr.D.Ariz.2007), held that because a Chapter 12 estate is not a separate taxable entity, it cannot incur a federal capital gains tax liability arising from the postpetition sale of farm assets and, therefore, such

liability is not a claim entitled to priority which may be denied full payment under a Chapter 12 plan and treated as an unsecured claim that is not entitled to priority.

The Debtors are family farmers whose bankruptcy filing was governed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) and 11 U.S.C. § 1222(a)(2)(A). After the filing, the Bankruptcy Court granted Debtors' motion to sell their 320-acre farm for the sum of $960,000. The sale of the farmland generated a capital gains tax of about $29,000. Debtors' plan proposed to include that tax liability as an unsecured claim, which would be paid in full to the extent that funds were available; otherwise it would be paid pro rata with the other similarly situated claims, and the balance discharged. Relying on *In re Knudsen,* 356 B.R. 480 (Bankr.N.D.Iowa 2006), *aff'd in part and rev'd in part,* 389 B.R. 643 (N.D.Iowa 2008), the Debtors argued that, under § 1222(a)(2)(A), taxes generated by the sale of farming assets are treated as unsecured debt and are not entitled to priority if the debtor receives a discharge.

The Bankruptcy Court rejected the conclusion in *Knudsen* and agreed with the Bankruptcy Court in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass.2006). The Bankruptcy Court noted that, under § 1222(a)(2)(A), a Chapter 12 plan must provide for the full payment, in deferred cash payments, of all claims entitled to priority under 11 U.S.C. § 507 unless the claim is owed to a governmental unit and arises out of the

disposition of any farm asset used in the debtor's farming operation, in which case the claim must be treated as a nonpriority unsecured claim. This provision applies only if a debtor receives a discharge. The Bankruptcy Court said that, under the plain language of § 1222(a)(2), in order to qualify for treatment as an unsecured claim, the claim must fall within one of the priority categories in § 507. The only two potential categories under which taxes on a postpetition sale might fall are if the tax is an administrative expense (§ 507(a)(2)) or is an allowed unsecured claim of a governmental unit (§ 507(a)(8)).

The Bankruptcy Court went on to find that Section 507(a)(8) did not apply because that section applies exclusively to claims that arise from taxes owed prepetition. Further, § 507(a)(2) did not apply because it identifies as a priority administrative expenses allowed under section 503(b). In order for a tax to qualify as an administrative expense under § 503(b)(1)(B)(i), the tax must be incurred by the estate and not be a tax of a kind specified in § 507(a)(8). The question was whether the capital gains tax arising from the postpetition sale of the farmland is a tax "incurred" by the estate. The Bankruptcy Court agreed with the Internal Revenue Service (IRS) that the taxes in this case were not incurred by the estate because a Chapter 12 estate is not a separate taxable entity, and it cannot incur a tax liability constituting an administrative expense. *See* 26 U.S.C.A. §§ 1398, 1399.

Further, the Bankruptcy Court found that there is no provision for filing a claim for postpetition taxes in a Chapter 12 bankruptcy. The Court read Section 503(b)(1)(B)(i)in conjunction with §§ 1398 and 1399 of the Internal Revenue Code and resolved that there is no separate taxable entity created when an individual commences a case under Chapter 12. Consequently, the capital gains tax arising from the postpetition sale of the farmland cannot be a tax incurred by the Chapter 12 estate under § 503(b)(1)(B)(i). Because the postpetition capital gains tax is not entitled to priority under § 507, it does not fall within the exception carved out by § 1222(a)(2)(A), which creates an exception for priority claims arising from the prepetition sale, transfer, or exchange of farm assets. Because the taxes did not qualify as an administrative expense under § 503(b) and were not entitled to priority under § 507, they did not fall within the purview of the § 1222(a)(2)(A) exception and could not be treated as an unsecured claim that is not entitled to priority. The Bankruptcy Court sustained the IRS's objection to the Debtors' Chapter 12 plan.

On December 21, 2007, the Debtors filed an appeal from the Bankruptcy Court's decisions entered October 3, 2007 and November 20, 2007. On February 21, 2008, Debtors/Appellants' opening brief was filed. On February 21, 2008, Appellee USA's brief was filed. On March 5, 2008, Appellee State of Arizona's brief was filed. On March 7, 2008, Debtors/Appellants' reply brief was filed. On May 12, 2008, oral argument

was presented to the Court by the parties and the matter was taken under advisement.

STANDARD OF REVIEW

There are no questions of fact. The issue on appeal is an issue of law and is subject to de novo review by the District Court. *See In re Olshan,* 356 F.3d 1078, 1083 (9th Cir.2004); *In re Price,* 353 F.3d 1135, 1138 (9th Cir.2004); *In re Summers,* 332 F.3d 1240, 1242 (9th Cir.2003). The Bankruptcy Court's interpretation of the bankruptcy code is reviewed *de novo* by the District Court. *See In re DeVille,* 361 F.3d 539, 547 (9th Cir.2004).

ISSUE

The issue to be resolved is whether or not, in a Chapter 12 bankruptcy, "the taxes incurred from the post-petition sale of a debtor's real property that is used in farming may be treated as a liability of the estate and discharged under 11 U.S.C. 1222(a)(2)(A) or whether the debtor in a Chapter 12 bankruptcy is personally liable for taxes incurred from the post-petition sale of farming real property." (Debtor's Opening Brief at 2.)

DISCUSSION

As indicated by the Court during oral argument, the Court continues to be inclined in favor of the Debtors' position and does find that, as in *In re*

Knudsen, 389 B.R. 643 (N.D.Iowa 2008), *In re Dawes,* 382 B.R. 509 (Bankr.D.Kan.2008), and *In re Schilke,* 379 B.R. 899 (Bankr.D.Neb.2007) (all Chapter 12 family farmer bankruptcies addressing the same issue as presented herein), the Halls may treat post-petition income taxes incurred from the post-petition sale of their farm as a liability of the estate, dischargeable under § 1222, and the plan may propose payment of such expenses by the estate. This Court is not persuaded by an application of the analysis and holding in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass.2006), a chapter 13 bankruptcy which did not address § 1222 and applied an IRS interpretation of bankruptcy policies.

Appellants contend that the Congress intended to offer relief to the farmer by the amendment and inclusion of § 1222(a)(2)(A), which is supported by a reading of the legislative history of this amendment, as follows:

> Chapter 12. Adjustment of Debts of a Family Farmer or Fisherman with Regular Annual Income
>
> § 1222. Contents of plan
>
> (a) The plan shall –
>
> * * *
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge.

Claims entitled to priority as described in Section 507, are as follows:

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

* * *

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

* * *

(8) Eighth, 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 for a taxable year ending on or before the date of the filing of the petition –

The *Hall* decision specifically found, as follows,

Perhaps Congress meant to provide relief for postpetition taxes, but that is not what the statute provides. "It is well established that 'when the statute's language is plain, the

> sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. United States Trustee,* 540 U.S. at 534[, 124 S.Ct. 1023] (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)) (other citations omitted). In this case, the disposition of the text is not absurd: as written, § 1222(a)(2)(A) creates an exception for priority claims arising from the *prepetition* sale, transfer or exchange of farm assets. That is what § 1222(a)(2)(A) provides and no more. It is beyond the province of this Court to provide "what we might think . . . is the preferred result." *Id.* at 542[, 124 S.Ct. 1023] (quoting *United States v. Granderson,* 511 U.S. 39, 68[, 114 S.Ct. 1259, 127 L.Ed.2d 611] (1994)).
>
> Because the taxes arising from the post-petition sale of the farm do not qualify as an administrative expense under § 503(b) and are not entitled to priority under § 507, they do not fall within the purview of § 1222(a)(2)(A)'s exception and may not "be treated as an unsecured claim that is not entitled to priority."

In re Hall, 376 B.R. at 747.

The government argued and the *Hall* Court agreed that the statute is not ambiguous and does not need clarification, and as such does not require

interpretation or review of legislative history. The *Hall* decision followed the *Brown* analysis:

> Instead, this Court agrees with the approach of the bankruptcy court in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass.Nov.20, 2006), which found that a Chapter 13 estate cannot be held liable for capital gains tax because it does not exist as a taxable entity . . . The Chapter 13 debtor argued that capital gains tax arising from the postpetition sale of his interest in rental property should be treated as an administrative claim for which the estate was liable. Since the debtor's interest in the property was property of the estate when it was sold, he contended the estate incurred the tax. *Id.* at *1. The debtor sought to have the taxes paid through the plan or have the Chapter 13 Trustee release funds to the debtor to pay the taxes. The Chapter 13 Trustee agreed that the taxes should be included in the plan. A creditor objected, arguing, *inter alia,* that § 1305 does not require a taxing authority to file a proof of claim; instead, a tax creditor may pursue its claim against the debtor after the case is closed.
>
> * * *
>
> This Court agrees with the *Brown* court that § 503(b)(1)(B)(i) must be read in conjunction with 26 U.S.C. §§ 398 [sic – 1398] and 1399 of the Internal Revenue Code. The starting point for interpreting a statutory provision is the language of the statute itself. *Lamie v. United States Trustee,* 540 U.S. 526, 534[, 124

S.Ct. 1023, 157 L.Ed.2d 1024] (2004). However, the statutory language must also be viewed in context: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341[, 117 S.Ct. 843, 136 L.Ed.2d 808] (1997) (citations omitted). In this case, the context includes the interplay between the Bankruptcy Code, as amended by BAPCPA, and the Internal Revenue Code of 1986. The Internal Revenue Code treats a Chapter 12 estate (and Chapter 13 estate) differently from an estate arising under Chapter 7 or 11. There is no separate taxable entity created when an individual commences a case under Chapter 12 or 13. 26 U.S.C. §§ 1398, 1399. Consequently, the capital gains tax arising from the postpetition sale of the farm land cannot be a tax "incurred" by the Chapter 12 Estate under § 503(b)(1)(B)(i) because it does not exist as a separate taxable entity. 26 U.S.C. §§ 1398, 1399. In turn, because the postpetition capital gains tax is not entitled to priority under § 507, it does not fall within the exception carved out by § 1222(a)(2)(A).

This construction of § 1222(a)(2), as amended by BAPCPA, is reinforced by the familiar maxim that courts are to "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32[, 111 S.Ct. 317, 112 L.Ed.2d 275] (1990). When BAPCPA was enacted in 2005,

> this Court must assume that Congress was aware that a Chapter 12 estate is not a separate taxable entity.

In re Hall, 376 B.R. at 745-46.

The Courts in *In re Schilke, In re Dawes*, and *In re Knudsen* found in favor of the Debtor's position that the intent of the amendment to the Bankruptcy Act was to help family farmers through a Chapter 12 bankruptcy. The Debtor asks the Court to find (1) that taxes incurred from the post-petition sale of a debtor's real-property that is used in farming may be treated as a liability of the estate and discharged under 11 U.S.C. § 1222(a)(2)(A); and, (2) that the debtors in a Chapter 12 bankruptcy are not personally liable for taxes incurred from the post-petition sale of farming real-property. The Debtor argues that "Section 1222 provides that a government claim (such as a claim by the federal government for capital-gain taxes) is stripped of its priority status and treated as an unsecured claim if the claim arises from the sale or other disposition [of] a farm asset." (Opening Brief at 6.)

The Appellant/Debtor urges the Court to consider and apply the legislative history of 11 U.S.C. § 1222(a)(2)(A) to rule in their favor and overrule the Bankruptcy Court's decision. The government argues that the Court need not consider the legislative history because the language of the statute itself is not ambiguous on its face. Appellant urges that three cases that are contrary to the bankruptcy decision in

Hall, did consider and apply legislative history (*In re Dawes, In re Schilke, In re Knudsen*). "In light of the several courts' divergent conclusions, there must be some disconnect between a strict reading of the statute and its intended purpose. The governments' pleas to this Court to ignore the purpose of the law should not be heeded. This Court ignores the legislative history (and sound authority from several other jurisdictions) at the possible expense of denying the law its remedial purpose." (Debtor Reply at 8.)

This Court concurs with the application of *Knudsen* in *Dawes*:

> The IRS contends this Court should not follow *Knudsen* because it improperly relied upon [*In re L.J.O'Neill Shoe Co.,* 64 F.3d 1146 (8th Cir.1995)] It points out that in *O'Neill Shoe* administrative claim status of the capital gains from postpetition dispositions of assets was not in dispute, that amendment to § 507 by the BAPCPA abrogated the ruling of *O'Neill Shoe,* and that *O'Neill Shoe* was a Chapter 11 rather than a Chapter 12 case. None of these matters cause the Court to reject the holding of *Knudsen.* The fact that administrative claim status was not litigated supports this Court's view that the allowance of such claims as entitled to administrative priority is so well established, even for Chapter 11 corporate debtors, that it is seldom litigated. Further, as thoroughly examined above, this Court concludes that Chapter 12 postpetition capital gains taxes are administrative expenses

based upon Congressional intent without reliance on either *Knudsen* or *O'Neill Shoe*. Second, the amendment to § 507 after the *O'Neill Shoe* decision had to do with eighth priority claims, a matter not in issue in this case. Third, the fact that *O'Neill Shoe* is a Chapter 11 corporate debtor case means that in that case, as in this case, the filing of the petition did not create a separate taxable estate. This supports Debtors' argument that the fact that the filing of a Chapter 12 case does not create a new taxpayer does not defeat administrative claim status for the taxes in issue.

The Court respectfully declines to follow *Hall,* the § 1222(a)(2)(A) case which adopted the IRS' arguments. This Court questions the *Hall* court's reliance on the "maxim that the courts are to 'assume that Congress is aware of existing law when it passes legislation.'" Although IRC §§ 1398 and 1399 were in place at the time of BAPCPA, this Court has been unable to find any Chapter 12, or even any Chapter 7 or Chapter 11 case, where those IRC provisions were held to be relevant to the construction of the definition of administrative claim in § 503(b)(2)(B)(i). It is highly doubtful that Congress could have foreseen the impediment to the application of § 1222(a)(2)(A) relied upon by the IRS in this case.

In re Dawes, 382 B.R. at 516-17.

This Court also concurs with and adopts the analysis in *Schilke*:

> The *Knudsen* court acknowledged that the statute is ambiguous, but stated "I believe that Congress intended to help farmers reorganize and stay in business by lessening the burden of prepetition and postpetition taxes arising from the sale of assets used in the farmer's farming operation . . . " *In re Knudsen,* 356 B.R. at 491.
>
> The *Knudsen* court also relied on legislative history with respect to a bill that preceded the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") which contained a proposed amendment to § 1222(a)(2) identical to the change that was ultimately made in BAPCPA. Senator Grassley, who introduced that bill, made the following comments:
>
> "Safety 2000" [the predecessor bill] also helps farmers to reorganize by keeping the tax collectors at bay. Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs . . . Under the bankruptcy code, the I.R.S. must be paid in full for any tax liabilities generated during a bankruptcy reorganization. If the farmer can't pay the I.R.S. in full, then he can't keep his farm. That isn't sound policy. Why should the I.R.S. be allowed to veto a farmer's reorganization plan? "Safety 2000" takes this power away from the I.R.S. by reducing the

> priority of taxes during proceedings. This will free up capital for investment in the farm, and help farmers stay in the business of farming. 145 Cong. Rec. S750-02, 1999 WL 20426 (Jan. 20, 1999) (statement of Sen. Grassley on S.260).

In re Schilke, 379 B.R. at 902.

Finally, the United States District Court for the District of Iowa affirmed the bankruptcy court's decision in *Knudsen*, finding that "[t]he bankruptcy court's fundamental error, this court finds, was accepting the IRS's characterization of the pertinent provisions as federal income tax provisions found in the Bankruptcy Code, when they are properly understood as bankruptcy provisions to be construed in accordance with the Bankruptcy Code and bankruptcy policy to promote the effective reorganization of family farming operations." *In re Knudsen,*[1]

CONCLUSION

After a de novo review, this Court finds that it concurs with the results in *In re Knudsen, In re Dawes, and In re Schilke*. The legislative history relating to an earlier bill to amend § 1222(a)(2) in an identical manner clearly shows that the language used was intended to allow the debtor to use the amendments to § 1222(a)(2) for taxes generated

---

[1] *See also Towers v. United States,* 64 F.3d 1292, 1298-1301 (9th Cir.1995) (Chapter 11 bankruptcy).

during the bankruptcy reorganization from the sale of assets used in a farming operation. The Court finds that the Halls, family farmers and Chapter 12 Debtors, may treat their postpetition capital gains taxes derived from their postpetition sale of real property as an administrative expense and the Halls' plan may treat the claim as an unsecured claim not entitled to priority.

Accordingly,

IT IS ORDERED that the decision of the Bankruptcy Court is REVERSED and the action is REMANDED with instructions to conform with this decision. The Clerk of the Court is directed to close this appeal and return the matter to the Bankruptcy Court.

376 B.R. 741

United States Bankruptcy Court,
D. Arizona.
In re Lynwood D. HALL and Brenda Hall, Debtors.
No. 4-05-bk-04423-EWH.

Oct. 2, 2007.

Clifford B. Altfeld, Altfeld Battaile & Goldman, P.C., Tucson, AZ, for Debtors.

MEMORANDUM DECISION

EILEEN W. HOLLOWELL, Bankruptcy Judge.

I. *INTRODUCTION*

The Debtors, relying on a provision added to Chapter 12 by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L. 109-8, 119 Stat. 23, seek to have the capital gains tax generated by the postpetition sale of their farm treated as a liability of their Chapter 12 Estate ("Estate"). However, the new provision, 11 U.S.C. § 1222(a)(2)(a),[1] only applies to prepetition taxes that are entitled to priority status under § 507. Because the capital gains tax in question was generated by a postpetition sale, it may not be paid through the Chapter 12 plan or included in the Debtors' Chapter

---

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as revised by BAPCPA.

12 discharge. The reasons for this conclusion are explained in the balance of this decision.

II. *FACTS AND PROCEDURAL HISTORY*

The facts are not in dispute. The Debtors filed for Chapter 12 relief on August 9, 2005.[2] The Court granted Debtors' motion to sell their 320-acre farm for the sum of $960,000 on September 22, 2005. The sale of the farm land generated a capital gains tax of about $29,000. The Internal Revenue Service ("IRS") filed Proofs of Claim for prepetition debt, but it did not file a Proof of Claim against the Estate for the postpetition capital gains tax. The Debtors' First Amended Plan, however, proposes to include that tax liability as an unsecured claim in Class 6,[3] which will be paid in full to the extent that funds are available, and otherwise will be paid pro rata with the other Class 6 claims and the balance discharged.

The IRS filed a timely objection. The IRS asserts that because the Estate is not a separate taxable entity in a Chapter 12 bankruptcy, the tax liability resulting from the postpetition sale was not incurred by the Estate, but is the responsibility of the Debtors. The

---

[2] Unlike the general effective date of BAPCPA, the amendment to § 1222(a)(2) became effective on the date of enactment, April 20, 2005. Pub.L. 109-8, 119 Stat. 23 § 1003(c). Consequently, the newly added § 1222(a)(2)(A) applies to this case.

[3] Class 6 encompasses the priority claims of the IRS and Arizona Department of Revenue.

Debtors argue that postpetition taxes generated by the sale of farming assets are treated as unsecured debt of the Estate and dischargeable under 11 U.S.C. § 1222(a)(2), as amended by BAPCPA. In support, Debtors cite *In re Knudsen,* 356 B.R. 480 (Bankr.N.D.Iowa 2006), the only published opinion on the application of amended § 1222(a)(2) to postpetition taxes.

III. *ISSUE*

Is the capital gains tax arising from the postpetition sale of farm land a priority claim under § 507, which can be denied full payment in a Chapter 12 plan and treated as an unsecured claim not entitled to priority pursuant to § 1222(a)(2)(A)?

IV. *JURISDICTION*

Jurisdiction is proper under 28 U.S.C. § 1334 and § 157(a) and (b)(2)(B), (J) and (L).

V. *DISCUSSION*

A. *Statutory Framework*

Chapter 12 was created as a remedy for a "family farmer with regular annual income." *See* § 101(19). It is modeled after Chapter 13 and allows eligible farmer debtors to adjust their debts in a similar manner. 8 Collier on Bankruptcy ¶ 1200.01[2], p. 1200-4 (15th ed. rev.2006). The Chapter 12 debtor remains in possession and control of all the property and continues to operate the farm. § 1203. Upon confirmation

of the Chapter 12 debt adjustment plan, all property of the estate vests in the debtor unless the plan provides otherwise. § 1227(b). Section 1222(a) prescribes the mandatory contents of a Chapter 12 plan. Under § 1222(a)(2)(A) – the provision at issue – a Chapter 12 plan shall:

> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –
>
> > (A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; . . .

Under the plain language of § 1222(a)(2), in order to qualify for treatment as an unsecured claim, the claim must fall within one of the priority categories in § 507. Only claims entitled to priority under § 507 *and* falling within the terms of § 1222(a)(2)(A) may "be treated as an unsecured claim that is not entitled to priority under section 507." There are two potential categories under which taxes may fall within § 507: administrative expenses (§ 507(a)(2))[4] or allowed

[4] This section was § 507(a)(1) before the general effective date of BAPCPA, when it was re-numbered to § 507(a)(2) and

(Continued on following page)

unsecured claims of governmental units (§ 507(a)(8)). Because § 507(a)(8) claims arise from taxes owed for prepetition years, 4 Collier on Bankruptcy ¶ 507.10[1], p. 507-61 (15th ed. rev.2006), the postpetition taxes in question here do not fall under that section. Consequently, the question is whether the taxes arising from the postpetition sale of the farm qualify as administrative expenses under § 507(a)(2).

The pertinent portion of § 507(a)(2) identifies as a priority "administrative expenses allowed under section 503(b)." In turn, § 503(b) provides, in relevant part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, . . . including –
>
> (1)(B) any tax –
>
> (i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; . . . .[5]

---

administrative expenses were given second priority. Because the priority position of administrative expenses are not at issue, this section will be referred to as it was re-numbered under BAPCPA.

[5] The language quoted is the pre-BAPCPA version. Section 503(b)(1)(B)(i) was amended by BAPCPA to clarify that it applies to both secured and unsecured tax claims, *In re Brown & Cole Stores,* 375 B.R. 873, 877 (9th Cir. BAP 2007), and now reads: "incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title."

(Continued on following page)

In order for a tax to qualify as an administrative expense under § 503(b)(1)(B)(i), the tax must: (1) be "incurred by the estate"; and (2) not be specified in § 507(a)(8). *Towers v. United States* (*In re Pacific-Atlantic Trading Co.*), 64 F.3d 1292, 1298 (9th Cir.1995) (referring to § 507(a)(7)[6]); *Missouri Dept. of Revenue v. L.J. O'Neill Shoe Co.* (*In re O'Neill*), 64 F.3d 1146, 1149 (8th Cir.1995) (§ 507(a)(7), now § 507(a)(8)) (citations omitted). "If either of these two requirements is not satisfied, then the claim is not entitled to administrative expense treatment." *In re O'Neill,* 64 F.3d at 1149. As discussed above, the second prong is met because postpetition taxes do not fall within § 507(a)(8),[7] which applies to taxes owed for prepetition years.

This change was not effective until October 17, 2005, and the amendment does not apply to this case. In any event, the additional language would not affect the outcome here.

[6] The Bankruptcy Reform Act of 1994 re-numbered § 507(a)(7) to § 507(a)(8).

[7] At a status hearing in this case, the Trustee argued that the taxes arising from the sale of the farm are entitled to priority under § 507(a)(8)(C), as taxes "required to be collected or withheld and for which the debtor is liable in whatever capacity." Section 507(a)(8)(C) extends priority to so-called "trust fund" taxes, which "must be owed by a party other than the debtor and then collected or withheld by the debtor from the other party." 4 Collier on Bankruptcy ¶ 507.10[4], p. 507-73 (15th ed. rev.2006). Because the taxes at issue here are owed by the Debtors in the first instance, they do not fall within the scope of § 507(a)(8)(C). *Id.*

B. *Are Taxes Arising from the Postpetition Sale of Farm Assets Incurred by the Chapter 12 Estate?*

The question, then, is whether the capital gains tax arising from the postpetition sale of the farm land is a tax "incurred" by the Estate. The IRS argues that the taxes cannot be incurred by the Estate because – unlike cases filed under Chapter 7 or 11 – a Chapter 12 estate is not a separate taxable entity. The Internal Revenue Code creates a separate taxable entity upon the filing of petitions by individuals under Chapters 7 and 11, but does not create a separate taxable entity in cases filed by individuals under Chapters 12 and 13. 26 U.S.C. §§ 1398, 1399. Chapter 12 debtors must file their own tax returns and pay any postpetition taxes, which are incurred by the debtors themselves. Because a Chapter 12 estate does not constitute a separate taxable entity, it cannot incur a tax liability constituting an administrative expense.

The IRS also points out that there is no provision for filing a claim for postpetition taxes in Chapter 12. A Chapter 13 tax creditor may file a claim for postpetition taxes under § 1305,[8] but there is no corresponding provision in Chapter 12. The IRS argues that because it cannot file a claim for postpetition

---

[8] Section 1305(a) provides that a creditor holding a claim "for taxes that become payable" while the case is pending may file a proof of claim. It should be noted that § 1305 speaks of "a claim against the debtor" – not the estate.

taxes against the Estate, the postpetition taxes cannot be claimed as an administrative expense of the Estate.

The Debtors counter that the court in *Knudsen* recognized that a Chapter 12 estate is not a separate taxable entity, but concluded that taxes incurred postpetition by the individual debtors can still be treated as administrative expenses under § 503(b)(1)(B) for purposes of payment under the plan. The *Knudsen* court specifically relied on *O'Neill,* 64 F.3d at 1152, in reaching this conclusion. 356 B.R. at 490.

However, the *Knudsen* court's reliance on *O'Neill,* a corporate Chapter 11 case, is misplaced. The primary issue before the Eighth Circuit in *O'Neill* was whether state taxes for prepetition corporate income qualified as administrative expenses. 64 F.3d at 1148. The Eighth Circuit did not decide whether the prepetition tax was "incurred by the estate" because the tax failed the second prong of the administrative expense test – it was "a tax of a kind specified in § 507(a)(7)" (now § 507(a)(8)). 64 F.3d at 1149. Further, there was no dispute that the taxes on postpetition corporate income were administrative expenses. 64 F.3d at 1148. The state's argument pertaining to postpetition taxes was that when income taxes straddle the petition date, the tax claim cannot be split into prepetition and postpetition portions because that splits the tax year between the prepetition corporation and the postpetition estate, but the estate is not a separate taxable entity under 26 U.S.C. § 1399. *Id.* at 1151-52. The Eighth Circuit

dismissed that argument, explaining that the corporate debtor was not being taxed as two separate entities. Rather, it was being taxed as one continuous corporate entity, but the payment of the tax was being divided into separate components under bankruptcy law to determine the priority of payment. *Id.* at 1152. Thus, *Knudsen* is not persuasive because of its reliance on a corporate Chapter 11 case, which is inapposite to answering the precise question at issue here – whether a Chapter 12 estate can incur a federal capital gains tax liability that arises postpetition.

Instead, this Court agrees with the approach of the bankruptcy court in *In re Brown,* 2006 WL 3370867 (Bankr.D.Mass. Nov.20, 2006), which found that a Chapter 13 estate cannot be held liable for capital gains tax because it does not exist as a taxable entity.[9] The Chapter 13 debtor argued that capital gains tax arising from the postpetition sale of his interest in rental property should be treated as an administrative claim for which the estate was liable. Since the debtor's interest in the property was property of the estate when it was sold, he contended the

---

[9] Because Chapter 12 was modeled after Chapter 13 and many of the provisions are identical, it is appropriate for a court to look to Chapter 13 cases when ruling in a Chapter 12 case. 8 Collier on Bankruptcy ¶ 1200.01[5], p. 1200-12 (15th ed. rev.2006); *see also Cohen v. Lopez* (*In re Lopez*), 372 B.R. 40, 45 n. 13 (9th Cir. BAP 2007). Here, individuals filing under Chapter 12 and 13 are similarly situated in that the debtor's bankruptcy estate is not a separate taxable entity.

estate incurred the tax. *Id.* at *1. The debtor sought to have the taxes paid through the plan or have the Chapter 13 Trustee release funds to the debtor to pay the taxes. The Chapter 13 Trustee agreed that the taxes should be included in the plan. A creditor objected, arguing, *inter alia,* that § 1305 does not require a taxing authority to file a proof of claim; instead, a tax creditor may pursue its claim against the debtor after the case is closed.

In addressing whether the estate was liable for the tax, the *Brown* court first noted that § 503(b)(1)(B) "does not answer the question of what it means for a tax to be 'incurred by the estate.'" *Id.* at *2. The court opined, however, that § 1305 – not § 503(b) – controls postpetition tax claims in Chapter 13. *Id.* at *2. Section 1305 provides that a creditor may file a proof of claim. The choice to file a claim belongs to the creditor, and the debtor may not file one on its behalf. *Id.* The court then turned to the Internal Revenue Code, noting that it does not treat the Chapter 13 estate as a taxable entity. "It is the Debtor, not his estate, who is burdened by and benefits from gains and losses." *Id.* at *3 (citation omitted). The court concluded the Chapter 13 estate could not incur the capital gains tax when it did not exist as a taxable entity. *Id.*

This Court agrees with the *Brown* court that § 503(b)(1)(B)(i) must be read in conjunction with 26 U.S.C. §§ 1398 and 1399 of the Internal Revenue Code. The starting point for interpreting a statutory provision is the language of the statute itself. *Lamie*

v. United States Trustee, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). However, the statutory language must also be viewed in context: "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (citations omitted). In this case, the context includes the interplay between the Bankruptcy Code, as amended by BAPCPA, and the Internal Revenue Code of 1986. The Internal Revenue Code treats a Chapter 12 estate (and Chapter 13 estate) differently from an estate arising under Chapter 7 or 11. There is no separate taxable entity created when an individual commences a case under Chapter 12 or 13. 26 U.S.C. §§ 1398, 1399. Consequently, the capital gains tax arising from the postpetition sale of the farm land cannot be a tax "incurred" by the Chapter 12 Estate under § 503(b)(1)(B)(i) because it does not exist as a separate taxable entity. 26 U.S.C. §§ 1398, 1399. In turn, because the postpetition capital gains tax is not entitled to priority under § 507, it does not fall within the exception carved out by § 1222(a)(2)(A).

This construction of § 1222(a)(2), as amended by BAPCPA, is reinforced by the familiar maxim that courts are to "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.,* 498 U.S. 19, 32, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). When BAPCPA was enacted in

2005, this Court must assume that Congress was aware that a Chapter 12 estate is not a separate taxable entity.

The *Knudsen* court relied, in part, on legislative history to conclude that Congress intended to provide tax relief for taxes generated postpetition. 356 B.R. at 492. The history cited in *Knudsen,* however, is not the legislative history of BAPCPA, but of legislation introduced in 1999. *Id.* As other bankruptcy courts have pointed out, the legislative history of BAPCPA is sparse and of little assistance in discerning legislative intent.[10]

Perhaps Congress meant to provide relief for postpetition taxes, but that is not what the statute provides. "It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Lamie v. United States Trustee,* 540 U.S. at 534, 124 S.Ct. 1023 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000)) (other citations omitted). In this case, the disposition of the text is not absurd: as written, § 1222(a)(2)(A) creates an exception for

---

[10] *See, e.g., In re Sorrell,* 359 B.R. 167, 176 (Bankr.S.D.Ohio 2007) ("To the extent legislative history of the 2005 Act can be used to resolve any arguable ambiguity in the statutory language, it is of dubious assistance."). *See also In re Kenney,* 2007 WL 1412921, at *7 (Bankr.E.D.Va. May 10, 2007); *In re Quevedo,* 345 B.R. 238, 246 (Bankr.S.D.Cal.2006).

priority claims arising from the *prepetition* sale, transfer or exchange of farm assets. That is what § 1222(a)(2)(A) provides and no more. It is beyond the province of this Court to provide "what we might think . . . is the preferred result." *Id.* at 542, 124 S.Ct. 1023 (quoting *United States v. Granderson,* 511 U.S. 39, 68, 114 S.Ct. 1259, 127 L.Ed.2d 611(1994)).

Because the taxes arising from the postpetition sale of the farm do not qualify as an administrative expense under § 503(b) and are not entitled to priority under § 507, they do not fall within the purview of § 1222(a)(2)(A)'s exception and may not "be treated as an unsecured claim that is not entitled to priority." Accordingly, the IRS's objection is sustained.

IV. *CONCLUSION*

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Fed. R. Bankr.P. 7052. An order consistent with this Memorandum Decision will be entered this date.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. BRENDA HALL; LYNWOOD D. HALL, Appellees.	No. 08-17267 D.C. No. 4:07-cv-006790-DCB District of Arizona, Tucson **ORDER** (Filed Oct. 1, 2010)

Before: O'SCANNLAIN, TROTT* and PAEZ, Circuit Judges.

Judge O'Scannlain has voted to deny the petition for rehearing en banc, and Judge Trott has so recommended. Judge Paez has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* Senior Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, v. BRENDA HALL; LYNWOOD D. HALL, Appellees.	No. 08-17267 D.C. No. 4:07-cv-00679-DCB District of Arizona Tucson **ORDER**

Before: O'SCANNLAIN, Circuit Judge

Appellees' Application for Stay of Mandate, filed with this court on October 8, 2010, is GRANTED. Fed. R. App. P. 41(b).

It is ordered that the mandate is stayed for 90 days so that Appellees may file a petition for writ of certiorari in the Supreme Court. Fed. R. App. P. 41(d)(2). If such a petition is filed, the stay shall continue until final disposition by the Supreme Court.

U.S. Const. art. I, § 8, cl. 1.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States

. . . .

11 U.S.C. § 503. Allowance of administrative expenses

* * *

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

* * *

(1) . . .

* * *

(B) any tax –

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title . . . .

* * *

---

11 U.S.C. § 507. Priorities

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

. . .

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and

charges assessed against the estate under chapter 123 of title 28.

. . .

(8) Eighth, 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 for a taxable year ending on or before the date of the filing of the petition –

(i) 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 before the date of the filing of the petition, exclusive of –

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days.

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

* * *

---

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

. . .

(7) Any interest in property that the estate acquires after the commencement of the case.

---

11 U.S.C. § 1207. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title –

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first . . . .

* * *

---

11 U.S.C. § 1222. Contents of the plan

(a) The plan shall –

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless –

(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge; or

(B) the holder of a particular claim agrees to a different treatment of that claim;

* * *

(c) Except as provided in subsections (b)(5) and (b)(9), the plan may not provide for payments over a period that is longer than three years unless the court for cause approves a longer period, but the court may not approve a period that is longer than five years.

---

11 U.S.C. § 1305. Filing and allowance of post-petition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor –

(1) for taxes that become payable to a governmental unit while the case is pending . . .

* * *

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

---

26 U.S.C. § 1398. Rules relating to individuals' title 11 cases

(a) Cases to which section applies. – Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of title 11 of the United States Code in which the debtor is an individual.

---

26 U.S.C. § 1399. No separate taxable entities for partnerships, corporations, etc.

Except in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a case under title 11 of the United States Code.