

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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August 25, 2004

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Re: United Artists Theatre Company, et al.
Case No. 00-3514 (PJW)

Dear Counsel:

This ruling is with respect to the motion for reconsideration (Doc. # 1724) filed by debtor United Artists Theatre Company ("United Artists"). United Artists objected to the proof claim filed by the Florida Department of Revenue (the "FDOR"). On March 23, 2004 I issued a letter indicating my inclination to permit the claim. Furthermore, I asked for additional briefing regarding the classification of the claim, if

allowed. In response, United Artists filed a "Notice of Debtors' Response and Motion for Reconsideration of the Court's Ruling Regarding Claim Number 1686 Filed by the Florida Department of Revenue." For the reasons discussed below, the Court will grant United Artists motion and disallow the FDOR's claim.

BACKGROUND

On January 8, 1998 the FDOR issued a "Notification of Intent to Audit Books and Records" of United Artists. The audit period was December 1992 to June 1998. The audit commenced on October 19, 1998. The FDOR was unable to complete the audit within the statutory period and, as a result, several voluntary extensions were granted resulting in a December 31, 2001 audit deadline by which the FDOR had to issue a final assessment.

On September 5, 2000, United Artists filed voluntary petitions for relief in this Court under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. The deadline for a governmental entity to file a proof of claim was March 5, 2001. The FDOR filed a claim on January 23, 2001, within the period of the first extension deadline, in the amount \$12,208,241.40, representing use taxes. The total consisted of an unsecured claim of \$2,923,513.79 and a priority claim of \$9,284,727.61. The claim clearly stated at the top under the heading "claim comment text": "AUDIT BASED ON ESTIMATE PENDING REVIEW OF BOOKS AND RECORDS".

United Artists objected to the claim on March 16, 2001 and the FDOR filed a response on April 12, 2001. On November 8, 2002, the FDOR filed an amended proof of claim, whereby the claim was reduced to \$2,497,591.57 (the unsecured claim being \$581,523.84 and the priority claim being \$1,916,067.73). A "Notice of Proposed Assessment" was issued on November 25, 2002. United Artists filed a protest to the assessment on December 19, 2002 based on the statute of limitations for assessment, claiming that the notice was served after the deadline. The protest was rejected by the FDOR on May 23, 2003. The FDOR asserts that the timely filed proof of claim in this Court constituted an assessment and was therefore filed within the statutory period.

DISCUSSION

Section 95.091(3)(a) of the Florida Statutes states in relevant part:

[T]he Department of Revenue may determine and assess the amount of any tax, penalty, or interest due under any tax . . . which it has the authority to administer:

1.a. [W]ithin 3 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later.

Fla. Stat. Ann. § 95.091 (3)(a) (West 2004).

The statutory time period for assessment can be extended by consensual written agreement. See Fla. Stat. Ann. § 213.23 ("The executive director of the department . . . may enter into

agreements with taxpayers which extend the period during which an assessment may be issued"). Here, the statutory period was extended on three separate occasions, whereby the final expiration date was set for December 31, 2001.

The issue raised in this case is whether the proof of claim constituted an assessment.¹ Pursuant to Florida statute section 212.12(5)(b) an estimate can serve as an assessment

[i]n the event any dealer or other person charged herein fails or refuses to make his or her records available for inspection so that no audit or examination has been made of the books and records of such dealer or person, . . . then, in such event, it shall be the duty of the department to make an assessment from an estimate based upon the best information then available to it Then the department shall proceed to collect such taxes, interest, and penalty on the basis of such assessment which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner, or lessor, as the case may be.

¹According to Florida Statute section 213.015, Florida taxpayers are entitled to certain rights. With regard to an audit and assessment, that section states in relevant part: The right to obtain simple, nontechnical statements which explain the reason for audit selection and the procedures, remedies, and rights available during audit, appeals, and collection proceedings, including, but not limited to, the rights pursuant to this Taxpayer's Bill of Rights and the right to be provided with a narrative description which explains the basis of audit changes, proposed assessments, assessments, and denials of refunds; identifies any amount of tax, interest, or penalty due; and states the consequences of the taxpayer's failure to comply with the notice. Fla. Stat. Ann. § 213.015(5).

Fla. Stat. Ann. § 212.12(5)(b).

In my March 23, 2004 letter, I concluded, based on the representations made by the FDOR's counsel at the September 11, 2003 oral argument, that since "the Debtors were not cooperating in providing books and records, so [] an accurate determination of the tax deficiency could not be established." (Doc. # 1722 at 3.) Therefore, I found that the proof of claim was sufficient to satisfy the standards of an assessment and, consequently the assessment was timely.

The motion for reconsideration filed by United Artists, however, presented new evidence showing that United Artists cooperated with the FDOR and therefore the estimate should not serve as an assessment under section 212.12(5)(b). United Artists included an affidavit from Debra S. Liller, Director of Tax and subsequently Vice President of Tax for United Artists, which stated that "Debtors provided these Department of Revenue representatives with full access to Debtors' books and records." (Doc. # 1724, Aff. at 2.) Furthermore, United Artists provided a letter, dated July 10, 2001, from a representative of the FDOR to Ms. Liller, that states: "If further information is needed, I will contact you at that time." (Doc. # 1724, Aff., Ex. C.)

This evidence is directly contrary to the FDOR counsel's representations at the September 11, 2003 hearing. In its response to the motion for reconsideration, the FDOR did not dispute United

Artists contention that they complied with the FDOR's requests during the audit period. Moreover, when presented with the issue at a June 9, 2004 hearing, the FDOR's counsel could not provide any specific facts regarding United Artists' alleged failure to cooperate. As a result, I find that the FDOR's proof of claim does not fall within the exception of section 212.12(5)(b) that permits an estimate to serve as an assessment. Therefore, the assessment was not timely filed and as a result the claim will be disallowed.

CONCLUSION

For the reasons discussed above, the Court will grant United Artists' reconsideration motion and deny the claim of the FDOR.

Very truly yours,

A handwritten signature in black ink, appearing to read "P.J. Walsh", with a stylized flourish at the end.

Peter J. Walsh

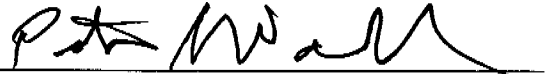
PJW:ipm

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:)
) Chapter 11
UNITED ARTISTS THEATRE COMPANY,)
et al.,) Case No. 00-3514 (PJW)
) (Jointly Administered)
Reorganized Debtors.)

ORDER

For the reasons set forth in the Court's letter ruling of this date, United Artists Theater Company's motion for reconsideration (Doc. # 1724) is **GRANTED** and the claim of the Florida Department of Revenue is **DISALLOWED** by reason of the objections (Doc. # 1036 and 1704) by United Artists Theater Company.



Peter J. Walsh
United States Bankruptcy Judge

Dated: August 25, 2004