

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

GUE Liquidation Companies, Inc., et al.,

Debtors.

Chapter 11

Case No. 19-11240 (LSS)

(Jointly Administered)

Ref. Docket No. 1476

MEMORANDUM ORDER

Background¹

1. On June 3, 2019, GUE Liquidation Companies, Inc. (f/k/a FTD Companies, Inc.) and certain affiliated entities (“Debtors”) filed voluntary petitions under chapter 11 of the Bankruptcy Code. During the course of the bankruptcy cases, the court entered various orders approving sales of substantially all of Debtors’ respective assets and on December 19, 2019, the Court entered an Order confirming the First Amended Joint Plan of Liquidation for the Debtors [Dkt. No. 1005] (“Plan”).

2. Pursuant to the Plan, on the Effective Date (December 30, 2019), the “Debtor Liquidation Trust” was established and Howley Law PLLC was appointed as the Debtor Liquidation Trustee. Among the assets transferred to the Debtor Liquidation Trust were Tax Refunds. Debtors reported a net operating loss of \$18,521,488 on their 2018 federal corporate income tax return (filed October 11, 2019) and \$452,296,837 on their 2019 federal

¹ The Motion (defined below) was accompanied by the Declaration of Tanya M. Thomas in Support of the Motion of the Debtor Liquidation Trust for an Order Pursuant to Section 505 of the Bankruptcy Code Granting the Debtor Liquidation Trust’s Rights to Tax Refunds [Dkt. No. 1476-3]. The transcript does not reflect that this declaration was admitted into evidence. The basic facts, however, were not contested.

corporate income tax return (filed July 20, 2020).² On July 20, 2020, the Debtor Liquidation Trustee also requested a prompt determination of any unpaid federal income tax liability for the 2019 tax year.

3. According to the Debtor Liquidation Trust, in March, 2020, Congress enacted Public Law 116-113 (the “CARES Act”), which modified certain rules relating to net operating losses to allow a taxpayer a five year carryback period for net operating losses arising in taxable years beginning after December 21, 2017 and before January 1, 2021. Pursuant to the CARES Act, on May 19 and August 14, 2020, the Debtor Liquidation Trustee filed IRS forms 1139 with the IRS seeking tentative refunds for the years 2013-2017. The IRS refunded \$6,783,786 plus interest (on July 24, 2020) and an additional \$45,362,531 plus interest (on March 18, 2021), which funds were placed in the Debtor Liquidation Trust. The Debtor Liquidation Trust contends that the IRS has until at least July 2023 to commence tax deficiency procedures to recover these refunds. He further contends that this lengthy period of time prevents the certainty the Debtor Liquidation Trust seeks before making a distribution to beneficiaries of the trust.

4. The Debtor Liquidation Trust seeks to short circuit this process by having this court determine the tax liability for the relevant years. To do so, the Debtor Liquidation Trust filed its Motion for an Order Pursuant to Section 505 of the Bankruptcy Code Granting the Debtor Liquidation Trust’s Rights to Tax Refunds (“Motion”) [Dkt. No. 1476]. The United States filed its Response to the Motion of the Liquidation Trust for an Order Pursuant to Section 505 of the Bankruptcy Code [Dkt. No. 1491] and the Debtor

² The record does not reflect who filed Debtors’ 2019 federal income tax return although, presumably, it was the Debtor Liquidation Trustee.

Liquidation Trust filed its Reply in Support of the Debtor Liquidation Trust for an Order Pursuant to Section 505 of the Bankruptcy Code Granting the Debtor Liquidation Trust's Rights to Tax Refunds [Dkt. No. 1497]. The parties presented argument and the matter was taken under advisement.³

Discussion

Section 505 of the Code permits the court, in certain circumstances, to determine the amount or legality of a tax. But, there are exceptions. As relevant here:

The court may not so determine—

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

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed.

11 U.S.C. § 505(A)(2)(B)(i).

The Third Circuit has repeatedly held that § 505 is a jurisdictional statute that confers on the court authority to determine specified tax disputes. *In re Custom Distribution Services Inc.*, 224 F.3d 235, 239-40, n.3 (3d Cir. 2000). In *Custom Distribution*, the question before the court was the contours of the “proper request” mandated by the statute—i.e. whether a debtor had to follow state court law regarding refund requests before the bankruptcy court had jurisdiction to determine the debtor’s tax liability under § 505. In ruling that it did, the Third Circuit interpreted the phrase “properly requests” by employing a traditional statutory analysis: (i) review the language of the statute, and (ii) only if the words are capable of more than one meaning, look to legislative history for guidance.

³ At the court’s request, post-argument, the Debtor Liquidation Trust submitted certain legal authority that it cited in the Motion [Dkt. No. 1506]. The Debtor Liquidating Trust also sought leave to file a supplemental post-hearing brief [Dkt. No. 1514], which was opposed [Dkt. No. 1519]. The objection is sustained.

Here, the question is whether the proper request required by § 505 can be made by the Debtor Liquidation Trust. The Debtor Liquidation Trustee acknowledges that the only circuit authority directly on point answers that question in the negative. The Second Circuit, in *U.S. v. Bond*, 762 F.3d 255 (2d Cir. 2014), ruled that a liquidation trustee is not a “trustee” for purposes of § 505. In doing so, the Court started with the principle that a court must strictly construe the words of a jurisdictional provision even if the same language might be read more expansively in a non-jurisdictional provision of the Code. *Id.* at 261. It distinguished between the unique role of a “bankruptcy trustee” (i.e. a chapter 7 trustee, a debtor-in-possession, or a trustee appointed under § 1104) and an estate representative. The Court explained that § 505 is a grant of jurisdiction to the bankruptcy court to determine certain tax claims while § 1123(b)(3)(B) is a grant of powers to a plan-appointed estate representative. *Id.* at 262. Consistent with this explanation, the Court held that an § 1123(b)(3)(B) estate representative may properly pursue a claim for a refund through non-bankruptcy channels, but may only invoke § 505 if a bankruptcy trustee has first requested the refund thus invoking bankruptcy jurisdiction. The Second Circuit also distinguished the cases cited by the Debtor Liquidation Trust in support of its position noting that none of those cases grappled with the jurisdictional issue.

I find *U.S. v. Bond* persuasive. While the Third Circuit has not directly addressed this specific jurisdictional issue, it has addressed a statute of limitations issue under § 546 in similar fashion.⁴ In *In re American Pad & Paper Co.*, 478 F.3d 546 (3d Cir. 2007), the Court

⁴ In *U.S. v. Bond*, the Second Circuit cited to a case interpreting § 546:

This requirement of administrative exhaustion by a bankruptcy trustee in § 505(a)(2)(B) is not inconsistent with § 1123(b)(3), which authorizes the broad assignment of an estate's claims post-confirmation. The “unique role” of the bankruptcy trustee, *see Hartford Underwriters*, 530 U.S. at 7, 120 S.Ct. 1942, is a reason Congress would differentiate the trustee from other actors in matters relating to bankruptcy court jurisdiction. The Tenth Circuit endorsed this view

held that § 546 provides an additional year for the commencement of preference actions to certain trustees appointed under enumerated sections of the Code (§§ 702, 1104, 1163, 1202 or 1302), but not under an unenumerated section of the Code (§ 701).⁵ Looking to the plain language of the statute, the Court concluded that there was no basis to read into § 546 a reference that was not there notwithstanding the similarity of functions between § 701 and § 702 trustees. Further, the court rejected the notion that such a distinction resulted in an absurd result even though the result was the loss of a cause of action.

The Debtor Liquidation Trust urges that *U.S. v. Bond* was wrongly decided, but it does not address the foundational jurisdictional arguments nor point to any contrary legislative history.⁶ Rather, it argues policy—that the court should promote the prompt closure of cases, which in turn permits prompt payout to creditors. However laudable this goal, it cannot override subject matter jurisdiction. The Debtor Liquidation Trustee has a path for a determination of the tax liability. That path simply does not lie in this court.

in *Starzynski v. Sequoia Forest Industries*, 72 F.3d 816 (10th Cir.1995), which held that “appointment of an estate representative who is neither a debtor nor a trustee cannot start the running of the two-year statute of limitations of § 546(a)(1),” *id.* at 821.

762 F. 2d at 261.

⁵ 11 U.S.C. § 546 provides in relevant part:

Limitations on avoiding powers

(a) An action or proceeding under section ... 547 ... of this title may not be commenced after ...

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section

702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A)[.]

⁶ “The legislative history contains virtually no discussion of the meaning of ‘trustee’ in the context of § 505. But both of the two references to tax refund claims reiterated the trustee requirement.” *Bond*, 762 F.3d n. 6 (citation omitted).

Bankruptcy courts are not courts of general jurisdiction. Bankruptcy jurisdiction is spelled out in 28 U.S.C. § 1334. Congress has further restricted bankruptcy jurisdiction in § 505, which the Third Circuit has expressly found to be a jurisdictional provision.⁷ For these reasons, the Motion is **DENIED**.

Dated: August 17, 2022



Laurie Selber Silverstein
United States Bankruptcy Judge

⁷ As the Second Circuit recognized, the term “trustee” may well be interpreted differently in non-jurisdictional provisions of the Code. The analysis herein is limited to § 505.