

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE: ALL FUNDS ON DEPOSIT IN) ACCOUNT NUMBER 000669829075 in) THE BANK OF MM APMC BANQUE DE) COMMERCE, INC., AT NATIONSBANK,) N.A., CONSISTING OF \$18,756,420.97,) MORE OR LESS.)		
GEORGE AND DOLORES ROLLAR,)		C.A. NO. 3:98mc96-McK
Plaintiffs,)		
v.)		C.A. NO. 3:01CV205-McK
UNITED STATES OF AMERICA, et al.,)		
Defendants.)		
RICHARD VASQUEZ,)		(CASES CONSOLIDATED)
Intervener.)		

**RECEIVER’S UNOPPOSED MOTION TO ESTABLISH
TAX LIABILITY RESERVE AND BRIEF IN SUPPORT**

TO THE HONORABLE H. BRENT MCKNIGHT, UNITED STATES MAGISTRATE JUDGE:

COMES NOW, Michael J. Quilling (“Receiver”), and files this his Motion to Establish Tax Liability Reserve and Brief in Support and in support of such would respectfully show unto the Court as follows:

1. On October 11, 2001 the Court issued its Consent Order regarding the appointment of a receiver in these proceedings. Thereafter, on October 29, 2001 the Court issued its Order Appointing Receiver pursuant to which Michael J. Quilling was specifically appointed to serve as receiver in this case.

2. In connection with performing his duties, on August 7, 2002 the Receiver filed his Unopposed Motion to Convey Seized Funds to Receiver which was granted by Order of this Court dated August 12, 2002. Pursuant to the Order, on September 3, 2002 the United States Marshals Service transferred \$18,982,691.10 to the Receiver. The voucher sent to the Receiver along with the funds indicated that of such amount \$16,565,958.91 constituted the balance of the account or “principal” and \$2,416,732.19 represented interest which had accrued with respect to the funds while they were in the possession of the U.S. Marshals Service. A true and correct copy of the voucher is attached hereto as Exhibit “1” and is incorporated herein by reference for all purposes.

3. Applicable law, as discussed in more detail below, provides that a Receiver can be subjected to personal liability for any tax owed to the United States government under certain circumstances. Applicable law also indicates that where the tax liability is not known, as is the case here, that one of the options available to the Receiver is to establish a reserve for the potential tax liability. Accordingly, the Receiver seeks authority from this Court to establish a tax liability reserve in the amount of \$1.7 million dollars. Attached hereto as Exhibit “2” and incorporated herein for reference for all purposes is a schedule which sets forth how the reserve is calculated. This reserve is being requested as a contingency only and is not an admission by the Receiver that tax is owed or the amount of such tax.

Argument and Authorities

4. Title 31 of the United States Code Annotated (the “Federal Debt Priority Statute”) provides that the claims of the United States government should be paid first when a person indebted to the government is insolvent, and (1) the debtor without enough property to pay all debts makes a voluntary assignment of property, (2) the property of the debtor, if absent, is attached, or (3) an act of bankruptcy is committed. 31 U.S.C.A. § 3713. Furthermore, the U.S. Court of Appeals for

the Fourth Circuit has found that appointment of a receiver triggers the application of the federal insolvency statute under the former § 192 of Title 31 granting such priority to debts owed to the U.S. *U.S. v. Clover Spinning Mills Company*, 373 F.2d 274, 276-277 (4th Cir. 1966).

The Federal Debt Priority Statute also provides that the representative of a person or estate paying any part of a debt of the person or estate before paying a claim of the government is liable to the extent of payment for unpaid claims of the government. 31 U.S.C.A. § 3713(b). The Supreme Court of the U.S. has imposed this personal liability on a fiduciary who pays other creditors before satisfying a debt owed to the United States. *See generally King v. U.S.*, 379 U.S. 329, 85 S.Ct. 427, 13 L.Ed.2d 315 (1964). Additionally, a United States District Court in Maryland has specifically held that there is personal liability on the part of a receiver when the receiver fails to observe and disregards U.S. debt priority. *U.S. v. Sachs*, 217 F. Supp. 545, 545-547 (D. Md. 1963). *See also U.S. v. Crocker*, 313 F.2d 946 (9th Cir. 1963) (holding generally that a receiver appointed by federal or state court who takes possession and control of assets of an insolvent debtor is subject to personal liability if he knowingly disregards the priority to satisfy obligations of the U.S.); *Kirk v. Kirk*, 243 Cal. App .2d 580, 52 Cal. Rptr. 725, (Cal. Dist. Ct. App. 1966) (receiver is personally liable if he does not give priority to tax liens of the U.S.); *U.S. v. Burczyk*, 389 F. Supp. 782 (D. Wis. 1975) (receiver appointed by state court could be held liable in action in federal district court to hold receiver personally answerable for his failure as receiver to give priority to the government's claims).

More recently, the U.S. Court of Appeals for the Second Circuit has held that a receiver, as a fiduciary, can incur personal liability under the Federal Debt Priority Statute. *S.E.C. v. Credit Bancorp, Ltd.*, 297 F.3d 127 (2nd Cir. 2001). The Court states, however, that a receiver has a number of options to prevent assessment of such personal liability. 297 F.3d at 139-141. First, the receiver

has the option of paying the taxes immediately and seeking a refund thereafter. *Id.* at 139-140. Further, the receiver can request an administrative determination of the liability by applying for a private letter ruling. *Id.* Additionally, because the receiver is a fiduciary, he is entitled to a notice of deficiency before any assessment is made and can challenge such notice in the Tax Court. *Id.* Finally, the receiver can set up a reserve for taxes. *Id.* The Court emphasized that setting funds aside as a reserve is the common approach, which would “doubtless be approved by the court.” *Id.*

The function of a receivership is to preserve property. *Metropolitan Trust Co. of City of New York*, 162 F. 170 (C.C.E.D.N.C. 1908). Accordingly, the receiver should not incur expenses beyond what is essential to the preservation of the property. *Cowdrey v. Galveston R. Co.*, 93 U.S. 352, 23 L.Ed. 950 (1876). Therefore, in order to prevent personal liability under the Federal Debt Priority Statute, the receiver should take the approach that bears the least financial burden on the property in his care. Given the resources and expertise that would be needed in either paying the taxes and later seeking a refund, seeking a private letter ruling, or challenging a deficiency in Tax Court, the best approach to ensure the priority of U.S. taxes is for the receiver to set aside a reserve for taxes. This approach allows the receiver to ensure that any tax liability is paid as a priority without expending the higher cost of other alternatives.

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that upon final hearing and consideration of this Motion that the Court allow him to establish a tax liability reserve in the amount of \$1.7 million dollars and for such other and further relief, general or special, at law or in equity, to which the Receiver may show himself justly entitled.

Respectfully submitted,

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By:

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ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of October, 2002 a true and correct copy of the foregoing document was served facsimile, on:

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This Motion will also be posted on the Receiver's website, www.secreceiver.com, immediately after filing.

Michael J. Quilling