

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
APOLLO PRINTING &)	CASE NO. 02-34625 HCD
THERMOGRAPHY, INC.,)	CHAPTER 11
DEBTOR.)	
)	
)	
APOLLO PRINTING &)	
THERMOGRAPHY, INC.,)	
PLAINTIFF,)	
vs.)	PROC. NO. 09-3126
)	
ST. JOSEPH COUNTY TREASURER,)	
DEFENDANT.)	

Appearances:

Thomas M. Walz, Esq., counsel for plaintiff, 509 West Washington Avenue, South Bend, Indiana 46614;
and

Charles S. Leone, Esq., counsel for defendant, Leone Halpin, LLP, 205 West Jefferson Boulevard, Suite 605,
South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 21, 2011.

Before the court in this adversary proceeding is the Debtor's Motion for Summary Judgment, filed by plaintiff Apollo Printing & Thermography, Inc., chapter 11 debtor ("plaintiff" or "debtor"). The defendant, St. Joseph County Treasurer ("defendant" or "Treasurer"), filed a response asking the court to deny the debtor's Motion and to grant summary judgment in favor of the defendant. At issue are the unpaid business personal property taxes, interest, and penalties requested by the Treasurer after the debtor's chapter 11 plan had been confirmed, the estate had been administered, and a final decree had been entered. After submission of the parties' briefs, the court took the matter under advisement.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), (K).

BACKGROUND

The facts in this case are not in dispute. The debtor is a corporation in the printing and graphics business. As chapter 11 bankruptcies go, this one went smoothly. Apollo filed its chapter 11 bankruptcy petition long ago, on August 16, 2002, and listed the St. Joseph County property taxes in its schedules. It filed its proposed Plan of Reorganization on December 18, 2002. On January 28, 2003, the St. Joseph County Treasurer filed a timely Proof of Claim (Claim Number 32), an unsecured priority claim pursuant to 11 U.S.C. § 507(a)(8) for property taxes in the amount of \$62,827.14.² The Treasurer claimed that the tax debt was incurred in “1998 pay 1999, 00 pay 01, 01 pay 02.” The attached Billing Information listed an undated spring tax of \$15,331.83; a fall tax of \$15,331.83; and penalties and fines for earlier unpaid taxes, listed as “1 year” and “2 year.” No claim was made for taxes incurred in 2002 payable in 2003 (“the tax debt ‘02 pay 03’”).

Under the debtor’s proposed Plan of Reorganization, all property taxes incurred by the debtor prepetition were to be treated as a § 507(a)(8)(B) unsecured priority debt *See* R. 100, Plan, ¶ 7.03.³ The Treasurer (whose Proof of Claim identified the taxes under § 507(a)(8)) raised no objection to the treatment under the Plan. On July 9, 2003, the debtor filed a Motion to Allow Claims; it listed the Treasurer’s claim as allowed in the amount of \$15,331.83. Again the Treasurer did not object.

² Section 507(a)(8) establishes the eighth priority status of “allowed unsecured claims of governmental units, only to the extent that such claims are for — (B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition.”

³ The debtor’s Plan of Reorganization provided for the following treatment of the Treasurer’s claim:

The claim of the St. Joseph County Treasurer for personal property taxes in the amount of . . . \$15,331.83 shall be paid pursuant to 11 U.S.C. [§] 507(a)(8)(B) as an unsecured priority claim in seventy-two (72) months pursuant to 11 U.S.C. [§] 1129 in equal monthly installments . . . of . . . \$234.24 per month.

The balance of the claim of the St. Joseph County Treasurer for personal property taxes in the amount of . . . \$49,503.66 shall be treated as a non-priority unsecured claim and shall be paid as provided hereafter for Class IV [unsecured nonpriority] Claimants in Section 7.04. . . .

Chapter 11 Plan ¶ 7.03.

After notice and hearing and with no objections, the court confirmed the debtor's Plan on September 5, 2003. The Order Confirming Plan provided that the holder of a § 507(a)(8) property tax claim will receive on account of such claim deferred cash payments, over a period not exceeding 6 years after the date of assessment of such claim, of a value, as of the effective date of the Plan, equal to the allowed amount of such claim.

R. 273, ¶ 8(C). On June 15, 2004, the court granted the debtor's Motion to Close Case. After finding that the debtor had substantially consummated the terms of the chapter 11 Plan and that the debtor's estate had been fully administered, it entered a final decree and closed the case.

No appeal was filed in the chapter 11 case. In fact, nothing further occurred in this bankruptcy case until the debtor filed a Motion to Reopen the case more than four years later. However, outside the bankruptcy, seven months after the debtor's bankruptcy case was closed, the Treasurer sent Apollo a letter dated January 24, 2005, stating that the following business personal property taxes were due and owing:

Taxes payable in 2003	\$24,508.39
10% penalty in 2003	2,450.84
Taxes payable in 2004	23,885.40
10% penalty in 2004	2,388.54
Annual penalty on 2003 taxes	<u>2,450.84</u>
TOTAL	\$55,684.01

R. 17, Ex. C. The court record is silent concerning the debtor's response or further developments.

On September 30, 2008, the court granted the debtor's Motion to Reopen the case for the purpose of clarifying the secured status of General Electric Capital Corporation ("GECC"). The Order of Confirmation was modified, and the court approved the debtor's compromise and settlement of the GECC claim. The first indication that there was an issue between the debtor and the Treasurer occurred on September 24, 2009, when the debtor responded to the court's Order to Show Cause why the case should not be dismissed due to lack of prosecution. The debtor stated, in its Response, that a dispute had arisen concerning the personal property taxes assessed prior to the bankruptcy. According to the debtor, the taxes had not been treated properly by the Treasurer in its Proof of Claim. Shortly thereafter, the debtor filed this adversary proceeding and presented the issues now before the court.

The debtor's position, in its Complaint and in its Motion for Summary Judgment, is that the Treasurer's Proof of Claim should have included all taxes due as of August 16, 2002, the date the bankruptcy petition was filed. According to the debtor, the liability for the tax debt "02 pay 03" was assessed and incurred prior to the bankruptcy filing, on March 1, 2002, although payment of the tax was due later. Even with delays in the actual calculation of a property tax, it asserted, the liability actually attached on the statutory assessment date. However, the Treasurer's Proof of Claim failed to include the tax debt "02 pay 03." The debtor's chapter 11 Plan addressed the Treasurer's claim as it was presented in the Proof of Claim, and it paid the allowed claim under the Plan. Upon confirmation of the Plan, the underlying tax debt then was discharged and, with it, any interest or penalty on that tax was discharged, as well. The debtor asked the court to find that it has no liability for the tax debt "02 pay 03" or interest or penalties thereon.

The Treasurer, in his Response, claimed entitlement to summary judgment as well, even though he made no formal cross-motion for summary judgment under Federal Rule of Civil Procedure 56. He agreed that there was no genuine issue of material fact. He pointed out that he had filed a timely Proof of Claim; that the taxes for 2002, payable in 2003, were not calculated until November 17, 2003; and that the tax bills for that tax liability were mailed to taxpayers after November 17, 2003, and were to be paid by December 12, 2003. For those reasons, he asserted, "it was factually impossible for St. Joseph County to file a valid claim for property taxes for 2002 payable 2003 in the time frame of the Debtor's bankruptcy case." R. 24 at 11. Based upon those facts, the Treasurer sought summary judgment in his favor.

The Treasurer argued that the tax debt "02 pay 03," calculated on November 17, 2003, was determined after the petition had been filed, the bar date for creditors had been set, the Plan had been approved, and the discharge of debts had been granted. It therefore could not have been considered a "debt" due during the debtor's bankruptcy proceeding.⁴ Nor did he have a "claim" before November 17, 2003,

⁴ Section 101(12) defines the term "debt" as "liability on a claim." 11 U.S.C. § 101(12).

since the amount due was “zero” until it was calculated.⁵ Since the tax debt “02 pay 03” was not a claim at the time the debtor’s bankruptcy was pending, that tax liability was not discharged as a debt under the Confirmation Order of September 5, 2003, the Treasurer contended, and is still due and owing.

DISCUSSION

This court renders summary judgment only if the record shows that “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

When, as in this case, each party has asked for summary judgment, the court must examine the evidence and “construe all facts and inferences therefrom in favor of the party against whom the motion under consideration is made.” *The First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 567 (7th Cir. 2009) (citations omitted). Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

Both parties have stated that there are no genuine issues of material fact; both claim entitlement to summary judgment. The record reveals that the debtor’s chapter 11 Plan provided for monthly payments of the Treasurer’s allowed § 507(a)(8)(B) prepetition claim over a six-year period and for payments of post-

⁵ Section 101(5)(A) defines the term “claim” as a “right to payment.” 11 U.S.C. § 101(5)(A).

petition tax obligations “to the extent applicable.” The Order of Confirmation, entered on September 5, 2003, discharged all the debtor’s debts that arose before entry of that Order. The Treasurer raised no objection to the treatment of its tax claim and sought no modification in the bankruptcy. When the Order became final, he did not appeal it or ask for reconsideration or other relief. After the case closed, the Treasurer did not request a reopening to seek a postbankruptcy remedy. Instead, in his January 24, 2005 letter, the Treasurer required Apollo to pay personal property taxes, including the tax debt “02 pay 03.”⁶

The issue now before the court concerns the tax debt for the year “02 pay 03.” The debtor contended that the tax debt constituted a prepetition claim which should have been included in the Treasurer’s Proof of Claim. It insisted that the debt was discharged along with all debts that arose before the entry of the Order of Confirmation. The Treasurer disagreed; he claimed that the tax debt was not a “debt,” as the Bankruptcy Code defined it, until after November 17, 2003, when the amount of the debt finally was known. For that reason, he asserted, the tax debt could not be a “claim” in the Proof of Claim and was not discharged upon confirmation of the Chapter 11 Plan.

A court’s confirmation of a chapter 11 plan of reorganization has powerful consequences. The Bankruptcy Code states that the provisions of the confirmed plan bind the debtor and all its creditors, even when a particular creditor did not accept the plan. *See In re Specialty Equipment Cos., Inc.*, 3 F.3d 1043, 1046 (7th Cir. 1993) (citing § 1141(a)). Upon confirmation, the property vests in the debtor, free and clear of the creditor’s claims. *See* § 1141(b), (c); *see generally*, *In re Penrod*, 50 F.3d 459, 463 (7th Cir. 1995). In addition, a court’s order of confirmation is a final judgment with res judicata effect. *See D & K Props. Crystal Lake v. Mutual Life Ins. Co.*, 112 F.3d 257, 259-60 (7th Cir. 1997); *Holstein v. Brill*, 987 F.2d 1268, 1270 (7th Cir. 1993). Therefore, “[u]nder the Bankruptcy Code, proof of claims must be presented to the Bankruptcy Court for administration, or be lost when a plan of reorganization is confirmed.” *N.L.R.B. v.*

⁶ The court notes that personal property taxes in Indiana are generally unsecured; they “do not automatically attach to or become a lien upon the property taxed.” *In re Harrison*, 387 B.R. 759, 761 (Bankr. N.D. Ind. 2008). The Treasurer based his Proof of Claim on § 507(a)(8), which is applicable only to unsecured claims. He does not hold a secured claim or lien on the debtor’s property.

Bildisco and Bildisco, 465 U.S. 513, 529, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984). In recognition of that finality, the Seventh Circuit made clear that “[m]odification of a confirmed and substantially consummated plan is forbidden except to the limited extent 11 U.S.C. § 1127 permits” because it “may throw monkey wrenches into the proceedings, making the plan infeasible or altering the distributions to remaining creditors,” and “assuredly disrupt[s] the orderly process of adjudication.”⁷ *Id.* at 1270-71. In light of such admonitions, the court considers whether the Treasurer may demand payment of the tax debt “02 pay 03” after the confirmation of the debtor’s Plan or whether that debt was discharged upon confirmation.

The Treasurer asserted that an obligation could be discharged in bankruptcy only if it qualified as a “debt,” which is a “liability on a claim.” According to him, the County held a “claim” for the tax debt “02 pay 03” only after November 17, 2003, when the amount was determined. Only then was the claim valid and the debtor liable on that claim. For that reason, he contended, the debtor’s tax debt was not discharged upon confirmation of the Chapter 11 Plan on September 5, 2003, and it still is due and owing.

The court finds that the Treasurer has too narrow an understanding of a “claim” in bankruptcy. Certainly a “debt” is a “liability on a claim” and a “claim” is a “right to payment” in bankruptcy cases. *See* 11 U.S.C. § 101(12), § 101(5)(A). However, the full definition of “claim” in § 101(5)(A) is extensive; it encompasses any “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” *See In re Wabash Valley Power Ass’n, Inc.*, 72 F.3d 1305, 1316 (7th Cir. 1995), *cert. denied*, 519 U.S. 965 (1996) (quoting the definition, pointing out its breadth). When enacting the Code, Congress stated that the “terms ‘debt’ and ‘claim’ are coextensive: a creditor has a ‘claim’ against the debtor; the debtor owes a ‘debt’ to the creditor.” *In re Knight*, 55 F.3d 231, 234 (7th Cir. 1995) (citation omitted). Congress underscored that the Code “contemplates that all legal obligations of the debtor, no matter how

⁷ Section 1127 of the Bankruptcy Code sets forth conditions for permitting modification of a plan. Those conditions are narrowly defined under § 1127(b), which permits modification after confirmation but “before substantial consummation of such plan.”

remote or contingent, will be able to be dealt with in the bankruptcy case.” *Id.* (noting the “virtual synonymy of ‘debt’ and ‘claim’”). A tax claim for bankruptcy purposes may be assessable as well as actually assessed, *see U.S. v. Frontone*, 383 F.3d 656, 658 (7th Cir. 2004), or contingent or unliquidated:

[A tax “claim”] may be contingent, for example, because the due date for the tax payment had not passed as of the petition date. It may be unliquidated because the taxing authority has not yet set tax rates or because the value of the property had not been finally determined. Thus, while a taxing authority holds a liquidated claim on the due date for the taxes that might be payable post-petition, an unliquidated contingent claim may nevertheless have arisen at a pre-petition point in time substantially earlier than the date on which the tax liability finally becomes liquidated and noncontingent.

In re Anchor Glass Container Corp., 375 B.R. 683, 687 (Bankr. M.D. Fla. 2007) (internal citations omitted); *see also In re Columbia Gas System, Inc.*, 146 B.R. 114, 118 (Bankr. D. Del. 1992) (concluding that the fixing of the amount due “is not required for an unmatured, contingent claim for taxes to exist”). It is clear to this court that the Treasurer had an unliquidated contingent right to payment before November 17, 2003, when the tax was calculated. It now considers when the Treasurer held an enforceable obligation for the tax debt “02 pay 03” which was a “claim” in the bankruptcy.

The parties agreed throughout the bankruptcy that the tax debt listed in the Proof of Claim (for the years “1998 pay 1999, 00 pay 01, 01 pay 02”) was a prepetition priority unsecured debt under § 507(a)(8)(B). The debtor argued that the tax debt “02 pay 03” assessed against the debtor was also an eighth priority unsecured debt. A property tax qualifies for eighth priority status under § 507(a)(8)(B) if it is “a property tax assessed before the commencement of the case and last payable without penalty after one

year before the date of the filing of the petition.”⁸ To be entitled to that priority, four criteria must be satisfied:

- (i) the creditor claiming priority must be a governmental unit;
- (ii) the claim relates to a property tax;
- (iii) the claim was incurred pre-petition; and
- (iv) the last date the relevant property taxes could have been paid without penalty was less than one year prior to the petition date.

In re Probulk, Inc., 2010 WL 5376284 at *2 (Bankr. S.D.N.Y. Dec. 23, 2010).

Generally speaking, whether an assessment levied against a debtor constitutes a “tax” and therefore is entitled to priority treatment under § 507(a) is a federal question. *See Boston Regional Medical Ctr., Inc. v. Massachusetts Div. of Health Care Finance*, 365 F.3d 51, 57 (1st Cir. 2004). Because the Bankruptcy Code is premised upon an equality of distribution to creditors, provisions that grant priority are narrowly construed. *See id.*; *see also In re National Steel Corp.*, 321 B.R. 901, 905 (Bankr. N.D. Ill. 2005). Section 507 of the Bankruptcy Code gives priority to certain unsecured claims of creditors and establishes an order of payment for those claims. “The type of tax involved determines what amount of back taxes are prioritized.” *Illinois Dept. of Revenue v. Hayslett/Judy Oil, Inc.*, 426 F.3d 899, 902 (7th Cir. 2005). Subsection 8 gives priority to the allowed unsecured claims of governmental units, and subsection 8(b) specifies that a property tax qualifies if it fulfills the statutory requirements listed above.

⁸ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 substituted the term *incurred* for *assessed* when it revised § 507(a)(8)(B), and so priority treatment now is granted to property taxes *incurred* before the petition date. A succinct explanation of the modification was provided by the esteemed bankruptcy treatise *Collier on Bankruptcy*:

The reason for the change was presumably twofold. One was to establish a measuring date in those jurisdictions that don’t have assessment dates for property taxes. Another was to make clear that priority was to be based on the date that the debtor became obligated with respect to the tax rather than [an] assessment date that might not bear any relation to the date on which the debtor became liable for payment.

4 *Collier on Bankruptcy* ¶ 507.11[3][b] at 507-65 (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2010). The treatise further pointed out that, “[a]s a general rule, it seems clear that a tax which accrues or is incurred during a prepetition period is not to be considered a postpetition tax claim even though a return of or payment of such tax claim is not due until after the petition is filed.” 4 *Collier*, ¶ 502.10[1] at 502-73.

The parties did not dispute (or even discuss) three of the criteria, (i), (ii), and (iv).⁹ They focused on the third factor, the determination of when the claim was incurred. The Bankruptcy Code does not define the term “incurred.” See *In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 1001 (6th Cir. 2001). Courts determine when a tax is incurred by looking to state law. See *id.* at 1000; see also *Marion County Treasurer v. Blue Lustre Prods., Inc.*, 214 B.R. 188, 189 (S.D. Ind. 1997) (citing *Butner v. U.S.*, 440 U.S. 48, 54, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979)); *In re Stillwater Inc.*, 443 B.R. 714, 716 (Bankr. W.D. Va. 2011). The Indiana statutes provide that property taxes are assessed on March 1 of each year. See Ind. Code § 6-1.1-1-2(1). On that assessment date, the property owner is liable for the property taxes imposed for that year. See Ind. Code § 6-1.1-2-4(a). Under Indiana law, therefore, the assessment date and the date the tax is incurred “are the same, in that Ind. Code § 6-1.1-2-4 imposes annual tax liability on the person who is the owner of the property *on the assessment date.*” *Blue Lustre*, 214 B.R. at 190.

Relying on *Blue Lustre*, the debtor insisted that the tax debt “02 pay 03” was incurred by the debtor on March 1, 2002, the assessment date, and thus was assessed prior to the bankruptcy filing on August 16, 2002. However, the Treasurer presented a different interpretation of those statutory provisions. In his view, Indiana Code § 6-1.1-2-4 established who would be responsible for the tax payment and § 6-1.1-1-2 established the March 1 assessment date, but “[n]either section establishe[d] the amount of tax that will be due.” R. 24 at 4. He distinguished the *Blue Lustre* case on its facts. In *Blue Lustre*, unlike in the case

⁹ Based upon the facts in the record and the parties’ general agreement on the subject, the court accepts that St. Joseph County, represented by its Treasurer, constitutes a governmental unit within the meaning of 11 U.S.C. § 101(27) and that the taxes at issue constitute personal property taxes; therefore, the statute’s criteria (i) and (ii) are fulfilled. The fourth factor (that the tax debt be “last payable without penalty after one year before the date of the filing of the petition”) also has been met: Apollo filed its petition on August 16, 2002; one year before the date of the petition filing is August 16, 2001. December 12, 2003, the last date for paying the tax without penalty, clearly is after August 16, 2001. See *In re Aime*, 2010 WL 128381 at *1 (Bankr. E.D. Va. Jan. 11, 2010). The court finds that the fourth requirement has been misinterpreted in some cases. See, e.g., *In re Probulk, Inc.*, 2010 WL 5376284 at *2 (requiring that the last date for payment without penalty be “*less than one year prior to the petition date*”) (emphasis added); see also *In re Nguyen*, 2010 WL 56075 at *1 (Bankr. E.D. Va. Jan. 6, 2010); and *In re Precision Concepts, Inc.*, 305 B.R. 438, 446 (Bankr. M.D.N.C. 2004) (requiring that the last non-penalty date be *within* one year before the petition date).

before this court, the tax bills had been sent and received, the first installment had been paid, and four days before the second installment was due the debtor filed its chapter 11 petition. The court held that the tax liability for that second installment was a prepetition claim entitled to priority status under § 507(a)(8)(B), not an administrative expense of the bankruptcy estate. In contrast, the Treasurer pointed out, in this bankruptcy case none of those events occurred prior to the debtor's filing of its petition. *See Blue Lustre*, 214 B.R. at 191. Because of substantial changes in the tax process, the Treasurer explained, the tax bills were sent out after the petition was filed and the claims bar date had passed. *See R. 24* at 5-6. He insisted he did not have a valid claim until the amount owed was calculated. *See id.* at 6.

The court finds that the Treasurer's distinction cannot stand. It is clear that, under Indiana's property tax laws, a tax obligation is incurred when it has accrued, which is on the assessment date triggering a taxpayer's liability, and not on the date the amount actually was calculated or the date on which it was payable. *See Blue Lustre*, 214 B.R. at 190 (“[C]ourts addressing this issue have held that it is the date that property taxes are incurred, rather than the date that taxes are due, that determines whether taxes qualify as [prepetition or postpetition] expenses.”); *In re Payless Cashways, Inc.*, 254 B.R. 746, 749 (Bankr. W.D. Mo. 2000) (“Under Indiana law property taxes are incurred on their pre-petition assessment date, even if the taxpayer is not required to file a return or pay the taxes until sometime post-petition”); *see also Hammond v. Graoch Assocs. No. 52, L.P.*, 909 N.E.2d 1086, 1092 (Ind. App. 2009) (“A plain reading of the property tax statutes is that tax liability accrues on the assessment date.”).

When considering the Treasurer's argument that he did not have a claim which was valid until it was calculated, the court found persuasive the reasoning in *In re Federated Dept. Stores, Inc.*, 270 F.3d 994 (6th Cir. 2001). The Sixth Circuit weighed whether a property tax is an assessed claim when “all things necessary to create the tax liability have occurred – determination of the property's value, determination of the applicable tax rate, and attachment of a lien on the property” or “on the date the entity is made liable for it, regardless of when the tax is calculated and due.” *In re Federated Dept. Stores*, 270 F.3d 994 at 1004-05

(quoting lower court opinion). Adopting the second position, that a tax is assessed on the date the entity is made liable for it, the appellate court explained that the property tax “is incurred when it accrues and liability is fixed,” and that liability is fixed when “the entity is made liable for [the tax].” *Id.* at 1005 (reviewing § 507(a)(8)(B) under N.Y. law). The courts reviewing Indiana law have come to the same conclusion: A property tax was incurred and became a fixed liability on the assessment date.

This court therefore holds that the debtor’s property tax “02 pay 03” was incurred on the prepetition assessment date of March 1, 2002, and was entitled to unsecured priority status under § 507(a)(8)(B). At that time, the Treasurer held a contingent unliquidated claim, and he should have preserved his right to payment of the taxes by filing his claim in the bankruptcy. *See In re Payless Cashways*, 254 B.R. at 749 (finding that the county “would have been entitled to an unsecured priority tax claim for its 1997 property taxes, even though those taxes were not due and owing on the petition date”); *cf. In re O.P.M. Leasing Servs., Inc.*, 68 B.R. 979, 984 (Bankr. S.D.N.Y. 1987) (“[A]lthough the Debtor’s exact tax liability was unknown on the petition date, Indiana could have filed an unliquidated, pre-petition claim in order to preserve its right to recover the sum in dispute.”). The Treasurer offers no authority for the proposition that the County’s claim for the property tax arose only when the amount was due.¹⁰

The court further finds that the county’s late assessment of taxes does not affect when the statutory responsibility was placed on the property owners. When determining liability for property taxes in a year when the property assessment was delayed, “the date on which the tardy tax assessment was actually completed relates back to the statutory March 1 assessment date.” *Van Prooyen Builders, Inc. v. Lambert*, 907 N.E.2d 1032, 1038 (Ind. App. 2009). Apollo, the title owner of the property on March 1, 2002, was responsible for the property tax debt “02 pay 03” on that assessment date. The November 17, 2003 billing of the completed tax assessment related back to the statutory date of assessment, March 1, 2002,

¹⁰ The Treasurer’s reliance on *In re Guterl Special Steel Corp.*, 95 B.R. 370 (Bankr. W.D. Pa. 1989), is misplaced. That bankruptcy court found that postpetition actions to create tax liens against property of the estate violated the automatic stay. *See id.* at 375.

which was prior to the bankruptcy filing on August 16, 2002. For that reason, the property tax debt “02 pay 03” was a prepetition debt. The tax was “assessed” on the date the debtor was made liable for it, regardless of when the tax was calculated and due.

To summarize, the court determines that the Treasurer had a prepetition § 507(a)(8)(B) claim for the property tax debt “02 pay 03” on March 1, 2002, and that he failed to present the claim to the bankruptcy court in his Proof of Claim for administration. In addition, he did not object to the Plan or to confirmation of it. As a result, that debt was not incorporated into the debtor’s chapter 11 Plan and was discharged along with all preconfirmation debts in the Order of Confirmation. See *In re Payless Cashways*, 254 B.R. at 749 (concluding that County, which failed to respond to debtor’s objection to its tax claim and failed to object to confirmation of plan, could not justify relief from the confirmation order). The Supreme Court made clear that “the filing of a proof of claim is a necessary condition to the allowance of an unsecured or priority claim, since a plan of reorganization is binding upon all creditors once the plan is confirmed, whether or not the claim was presented for administration.” *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 530 n.10, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984) (citing § 1141(d)(1)(A)(i)); see also *In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 830 F.2d 758, 766 n.9 (7th Cir. 1987) (noting that “bankruptcy courts will not consider contingent claims that have not been properly presented by filing a proof of claim”). The Seventh Circuit, reviewing an IRS tax claim, emphasized that filing deadlines are intended “to enable the debtor and his creditors to know, reasonably promptly, what parties are making claims and in what general amounts.” *In re Stavriotis*, 977 F.2d 1202, 1206 (7th Cir. 1992). “To every thing there is a season, and the season for stating the amount of a debt is before the confirmation of a plan of reorganization.” *Holstein v. Brill*, 987 F.2d 1268, 1271 (7th Cir. 1993); see also *In re UAL Corp.*, 2009 WL 4068023 at *4 (Bankr. N.D. Ill. 2009) (denying postconfirmation amendment of claim).

It is now clear that the Order of Confirmation discharged the “02 pay 03” tax debt. The debtor also asserted that the interest and penalties related to that debt were discharged. The Treasurer responded,

without any legal argument, that the County was entitled to recover the taxes and all accrued interest and penalties. The court first considered the interest on a tax debt. Interest is treated as part of the tax debt; it is dischargeable to the extent that the underlying taxes are dischargeable. *See In re Eleazar*, 271 B.R. 766, 777 (Bankr. D.N.J. 2001). For that reason, all interest charged on the “02 pay 03” taxes was discharged with the tax debt itself. However, tax penalties are treated separately from the underlying tax obligation; they are governed by § 523(a)(7). *See id.* Under that section of the Bankruptcy Code, “government fines or penalties are not dischargeable except for tax penalties which (A) relate to the tax which is itself dischargeable, or (B) stem from a transaction that occurred more than three years before the bankruptcy petition was filed.” *In re Roberts*, 129 B.R. 171, 172 (C.D. Ill 1991). Subparagraphs (A) and (B) are disjunctive exceptions to the general rule that tax penalties are nondischargeable. *See* 4 Collier on Bankruptcy ¶ 523.13[4] at 523-102 (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2010). Under subparagraph (A), a “tax penalty is discharged if the tax to which it relates is discharged.” *Id.* (quoting *Burns v. United States (In re Burns)*, 887 F.2d 1541, 1544 (11th Cir. 1989)). In this case, the tax penalty is related to an underlying tax debt that was discharged by the Order of Confirmation. Accordingly, the court determines that the interest and penalties added to the property tax debt “02 pay 03” are discharged as well.

The Treasurer’s justification for choosing not to include the tax debt “02 pay 03” in its Proof of Claim as a contingent unliquidated “claim” was incorrect as a matter of law. For that reason, his request for summary judgment, based upon his overly narrow definitions of “claim” and “debt,” are denied. In addition, his attempt to collect the tax debt postconfirmation through its letter of January 24, 2005, without requesting relief through this court was a violation of § 524, the discharge injunction.¹¹ *See In re Payless Cashways*, 254 B.R. at 750 (“[A]ny attempt to collect that debt without first seeking the relief provided by the Code,

¹¹ Section 524 provides that a discharge “operates as an injunction against the commencement or continuation of an action, the employment of a process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.” 11 U.S.C. § 524(a)(2).

the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, this Court, or an appellate Court, is a violation of the discharge injunction, pursuant to 11 U.S.C. § 524.”). The Treasurer is bound by the debtor’s confirmed Plan and the court’s Order of Confirmation, each of which provided that all debts other than those provided for in the Plan were automatically discharged. Accordingly, the court holds that the Treasurer’s tax debt was discharged.

One last allegation by the Treasurer must be considered. The Treasurer asserted that the debtor was required, under Local Bankruptcy Rule B-2015-2, to pay “all federal, state and local taxes on account of the operations of the estate as and when due.” He contended that the debtor failed to follow the local rule and that those amounts were not discharged by this court.

The court’s Local Rule L.B.R. B-2015-2 requires a debtor or trustee to pay postpetition tax debts. The debtor’s Plan provided for payments of postpetition tax obligations “to the extent possible.” The Treasurer did not object to that language, and nothing in the record shows that the Treasurer requested additional postpetition taxes to be paid under the Plan. In his Response to the debtor’s Motion for Summary Judgment, the Treasurer provided no evidence of any amounts of unpaid postpetition taxes or the years or periods of time for which taxes were unpaid. In addition, the record before the court does not reveal noncompliance with the debtor’s obligation to pay postpetition taxes “to the extent possible” under the Plan or the Order of Confirmation. The court finds the Treasurer’s allegation to be vague and self-serving. Without evidence to demonstrate that a postpetition tax debt was incurred and was not paid, the court concludes that the debtor was not in violation of Local Rule L.B.R. B-2015-2. Consequently, the court denies the Treasurer’s request for a finding of nonpayment of postpetition taxes or of failure to obey L.B.R. B-2015-2. *See In re Maxfield*, 2009 WL 2105953 (Bankr. N.D. Ind. Feb. 19, 2009) (denying motion to dismiss chapter 13 case for postpetition tax delinquency or for failure to follow L.B.R. B-2015-2).

In conclusion, the court finds, as a matter of law, that the property tax debt “02 pay 03” was a prepetition priority debt under 11 U.S.C. § 507(a)(8)(B) and that the debt was discharged by the court’s

Order of Confirmation. As a matter of law, any interest and penalties associated with the tax debt were also discharged. The court determines, as well, that the Treasurer failed to prove that the debtor had failed to pay postpetition taxes, in violation of L.B.R. B-2015-2. Finally, the court holds that the Treasurer's attempt to collect that tax debt "02 pay 03" violated the discharge injunction of 11 U.S.C. § 524.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the court grants the Debtor's Motion for Summary Judgment. Summary judgment is granted in favor of the plaintiff, chapter 11 debtor Apollo Printing and Thermography, Inc., and against the defendant, the St. Joseph County Treasurer.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT