IT IS ORDERED as set forth below:

Date: June 19, 2008

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 05-86016
Mouzon Enterprises, Inc.,	CHAPTER 11
Debtor.	JUDGE MASSEY

ORDER GRANTING DEBTOR'S MOTION TO VACATE CONSENT ORDER

In this reopened case, Debtor seeks an order vacating a consent order allowing a claim of the Georgia Department of Revenue ("GDOR") for tax debts. GDOR opposes the motion on several grounds, including that the Court should abstain from hearing it and that it is untimely under Bankruptcy Rule 9024 because it resolved a "contest" within the meaning of that Rule. The significance of the efforts of both sides is that GDOR is now attempting to collect sales taxes from Debtor's principals, and both sides have assumed, incorrectly, that the consent order determined the liability of Debtor for those taxes. The Court concludes that there was no contest for purposes of Bankruptcy Rule 9024 because the Court did not adjudicate a dispute over what

the allowed amount of GDOR's claim should be and did not determine in any event the amount of Debtor's actual tax liability. Consequently, the Court will vacate the consent order.

On May 9, 2006, GDOR filed a proof of claim in this case for $541,690.68, of which $285,959.94 was for sales and use taxes. The balance of the claim was for interest, penalties, withholding taxes, corporate income taxes and a corporate net worth tax. As reflected in an attachment to the proof of claim, most of the sales tax debt had to be estimated because Debtor had failed to file tax returns. On July 15, 2008, Debtor filed an objection to GDOR's claim, asserting that it had filed certain tax returns and that its sales tax liability was $83,031.94.

In its response to the objection to its claim, GDOR stated that it had "determined that its claim should be reduced to $233,553.42, consisting of a priority claim in the amount of $204,497.81 and a general unsecured claim in the amount of $29,055.61. According to its response, GDOR calculated its new claim after Debtor filed a majority but not all of the missing returns. Hence, its revised claim was also based in part on estimates. Unlike the analysis on the attachment to its proof of claim, which it did not amend, GDOR did not provide any details as to the basis for its revision of the amount of its claim, such as what types of tax were included and what portions represented interest and penalties.

The objection was resolved in a consent order entered on September 22, 2006, in which the parties agreed on the allowance of a priority claim in the amount of $174,348.84 and the allowance of a general unsecured claim in the amount of $29,683.15. Like GDOR's response to the objection, the consent order did not set out what types of taxes were involved and what portion of the claim, if any, consisted of interest and penalties. Hence, the consent order does not permit the conclusion that any portion of the amounts agreed to concerned sales taxes. Because

both the proof of claim and the response to the Debtor's objection to its claim were based on estimates, the Court had no way of knowing whether the revised numbers were also based on estimates or other assumptions. The consent order itself does not state that the parties intended to fix the actual liability of the Debtor to GDOR, and the Court did not intend when signing the consent order to do anything more than approve the agreement of the parties that the gross numbers in GDOR's proof of claim for allowance purposes were incorrect and were being replaced by new numbers. The parties could have achieved the same result through an amendment of GDOR's proof of claim to state its then best estimate of the tax liability and Debtor's withdrawal of its objection to the claim. The Court was not involved in any fashion with determining the amount of the claim to be allowed. Therefore, all the Court did in signing the consent order was to not disapprove what the parties could have done on their own without involving the Court.

The plan filed by Debtor was never confirmed, and there was no distribution to creditors. The Court dismissed this case on the Debtor's motion in an order entered on June 20, 2007. Thereafter, the Department of Revenue sought to collect taxes owed by the Debtor from Milton and Gloria Mouzon, who were, according to the Debtor's Statement of Financial affairs, officers of the Debtor. The collection effort prompted the Debtor to file a motion to reopen the case, which the Court granted in an Order entered on December 31, 2007.

Following the reopening of this case, Debtor filed a motion to vacate the consent order on the ground that the amounts stated to be due to the Department of Revenue in the September 22, 2006 consent order were wrong because sales tax returns filed by Debtor incorrectly included

sales taxes on labor. The motion further alleges that the Mouzons have since filed a corrected sales tax return showing the liability to be $54,818.54.

GDOR opposes the motion on the ground that the Mouzons have the right to timely contest tax assessments against them under state law and therefore the Court should abstain from hearing the motion. It further argues that the motion is untimely under Rule 60 of the Federal Rules of Civil Procedure made applicable by Bankruptcy Rule 9024 and that the mistake on which the motion to vacate is grounded, whether a mistake of fact or mistake of law, was the mistake of the Debtor alone and therefore not one that warrants setting aside the consent order.

Neither party mentioned in their initial briefs section 502(j) of the Bankruptcy Code or Bankruptcy Rule 3008. Section 502(j) provides:

> (j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

Bankruptcy Rule 3008 provides:

> A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

At the request of the Court, each party filed a brief on the effect of section 502(j) and Bankruptcy Rule 3008 on this dispute. In its brief, Debtor quoted a portion of footnote 5 in *In re International Yacht and Tennis, Inc.*, 922 F.2d 659, 662 (11th Cir. 1991) for the proposition that

the Court of Appeals had addressed the effect of an amendment to section 502(j) in 1984 that removed the words "before the case is closed" from that section. The quote of the footnote ended with the words, "the effect of this change most likely is to permit reconsideration of claims once a case is reopened (cites) . . . ." The text quoted was not the entire footnote, however. Counsel omitted the final sentence of the footnote that states, "Because the motion in this case was filed before the closing of the estate, there is no reason for us to consider the potential broadening effect of Congress's revision of Section 502(j)." Thus, Debtor's omission of the last sentence of the footnote had the effect of distorting the significance of that case.

Debtor cited two other cases that somewhat support the proposition that a court may reconsider claims after reopening a case. The pertinent portion of the opinion in *U.S. v. Rowe*, 1989 WL 163860 (N.D. Ga.1989) was dicta, as was the statement in *In re Turchon*, 62 B.R. 461, 464 (Bankr. E.D.N.Y. 1986) in the second paragraph of footnote 3 that ". . . if a case is reopened as provided by section 350(b) of the Bankruptcy Code, reconsideration of the allowance of a claim may be sought and granted.")

Here, GDOR does not contend that a court may never reconsider a claim in a reopened case. It would have made little sense to delete the words "before the case is closed" in section 502(j) if, after a case is closed, a party in interest could not under any circumstances seek reconsideration of an order allowing or disallowing a claim following the reopening of the case. The Advisory Committee's note to Rule 3008 makes clear what it thought about the issue:

> The rule expands § 502(j) which provides for reconsideration of an allowance only before the case is closed. Authorities have disagreed as to whether reconsideration may be had after a case has been reopened. Compare 3 Collier, Bankruptcy ¶57.23[4] (14th ed. 1964), see generally 3 id. ¶502.10 (15th ed. 1979), with 2 Remington, Bankruptcy 498 (Henderson ed. 1956). If a case is reopened as provided in § 350(b) of the Code,

> reconsideration of the allowance or disallowance of a claim may be sought and granted in accordance with this rule.

On the basis of the foregoing analysis, the Court concludes that it has the authority to reconsider the allowance or disallowance of a claim in a reopened case, subject to the limitation in Bankruptcy Rule 9024 discussed below.

GDOR points out that the power under the Bankruptcy Rules to reconsider claims in any case, including one that is reopened, is not open-ended because Bankruptcy Rule 9024, incorporating Civil Rule 60, relaxes the time limit in Rule 60 only with respect to an order on a claim "entered without a contest." Bankruptcy Rule 9024 provides in relevant part:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b)[1] . . . .

GDOR asserts that there has been a contest with respect to the objection of Debtor to its proof of claim for two reasons. First, the objection to the claim was a contested matter, and, second, it filed a response to the objection and negotiated a deal with the Debtor. (Response to Debtor's Motion to Overturn Consent Order, pp 3-5.)

The term "contested matter" is undefined in the Bankruptcy Code but certainly does not mean that every contested matter is necessarily resolved by a "contest." If "contested matter" and "contest" always meant the same thing, Rule 9024 would presumably have referred to the absence of a contested matter. The drafters of the Bankruptcy Rules surely understood the difference. *Compare* Bankruptcy Rule 9024 *with* Bankruptcy Rule 9014.

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[1] The reference to subsection (b) was a typo that will be corrected if a proposed amendment to Bankruptcy Rule 9024 is not disapproved by Congress prior to December 1, 2008.

The filing of the response also did not create a contest. The objection was to a claim for $541,690.68. The response conceded that the objection was valid. There was no contest. The objection stated numbers to which Debtor would agree. The response stated different numbers. It was not necessary for the parties to agree on new numbers in order to resolve the objection to a claim for $541,690.68. The parties negotiated lower amounts than those stated in the proof of claim. They reached an agreement but did not engage in a contest.

The word "contest" in Rule 9024 means actual litigation, as the Fifth Circuit recognized in a case that GDOR cited: *In re Colley*, 814 F.2d 1008, 1010 (5th Cir. 1987) ("We interpret Rule 9024 to provide that, **when a proof of claim has in fact been litigated** between the parties in a bankruptcy proceeding, the litigants must seek reconsideration of the bankruptcy court's determination pursuant to the usual Rule 60 standards . . . ."). (Emphasis added.) Debtor and GDOR may have talked, agreed, disagreed, argued and negotiated, but they did not in fact litigate in the critical sense of having the Court resolve the dispute by determining what amount should be allowed and what priority in the distribution scheme of the Bankruptcy Code portions of the claim should enjoy. As the District Court stated in *In re Tender Loving Care Health Care Services, Inc*., 377 B.R. 798, 804 (E.D.N.Y. 2007):

> Under the factual circumstances of this case, the Bankruptcy Court did not err in determining that there was "any contest" regarding the Claim for purposes of Rules 60(b) and 9024. As in [*In re Willoughby*, 324 B.R. 66, 72 (Bankr. S.D.Ind.2005)], the Bankruptcy Court here never heard or considered the merits of Debtor's Ninth Omnibus Objection. Even though the objection was formally filed with the Bankruptcy Court, the parties informally settled prior to the formal hearing on the merits for that objection.

GDOR would distinguish this case on the ground that no response was filed to the objection, but it is a distinction without a difference, because the filing of a response does not a contest make.

As pointed out earlier, the consent order was the equivalent of an amendment of GDOR's proof of claim and the withdrawal of the objection, a non-judicial resolution that would not involve a competition. Not only did the Court not judge a contest to fix the amount of the claim, nothing in the record shows that as of the submission of the consent order, the parties thought there was a contest.

The September 22, 2006 consent order did nothing more than establish the amount and type of the State's allowed claims in this case for the sole purpose of the computation of the distributions to unsecured creditors (including holders of priority claims) under Debtor's plan of reorganization. The Court does not interpret the consent order as adjudicating the actual liability of Debtor to GDOR. The operative language of the consent order makes this clear: "The Georgia Department of Revenue shall have an allowed claim . . . ." It is not necessary that parties to an objection to a claim agree on the actual liability that might be determined outside bankruptcy in order to agree on the amount of the claim for purposes of allowance in a bankruptcy case. In a Chapter 11 context, it is largely immaterial to a plan proponent how funds projected to be available to pay unsecured claims are allocated between priority unsecured claims and general unsecured claims, at least so long as there is some reasonable basis for compromise with respect to the amount of a priority claim to which an objection might otherwise be made. Similarly, it was immaterial for allowance purposes whether the claim was for unpaid income taxes or unpaid sales taxes. It bears re-emphasizing that the consent order says nothing about whether the claim allowed was with respect to unpaid sales taxes.

The only purpose of the consent order was to resolve what the Debtor would pay to GDOR under its plan if confirmed. The plan was not confirmed. There was no distribution to

creditors in the case. Hence, the consent order serves no purpose other than to ferment further litigation when what the parties should be doing first is having competent accountants or analysts determine the actual liability.

Finally, the Court notes that the consent order would have no res judicata or collateral estoppel effect as to the actual liability of Debtor to GDOR for sales taxes even if it were not vacated. *Balbirer v. Austin,* 790 F.2d 1524, 1528 (11th Cir.1986) (a consent judgment has no collateral estoppel effect unless the parties intended preclusive effect); *see Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000) ("[S]ettlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel), unless it is clear ... that the parties intended their agreement to have such an effect."); *Blakely v. Couch*,129 Ga.App. 625, 629, 200 S.E.2d 493, 497 (1973) (The doctrine of res judicata did not apply to a consent judgment entered into by plaintiff's employer and defendant driver in federal court so as to bar plaintiff from suing driver in state court.) To be sure, a consent judgment imposing damages is in effect a contract and entitled to res judicata effect as between the parties. *Brown & Williamson Tobacco Corporation v. Gault,* 280 Ga. 420, 627 S.E.2d 549 (2006). But the consent order was not a judgment of liability. As indicated above, the consent order adjudicated only the allowed amount of GDOR's claim for purposes of distribution in the bankruptcy case and nothing else. Even if the consent order were not vacated, it does not fix the amount of Debtor's liability for unpaid sales taxes. Hence, neither GDOR nor a Georgia court or administrative agency may legitimately rely on the consent order as fixing the actual amount of Debtor's liability to GDOR for any tax, including a sales tax.

GDOR asked that the Court not rule on Debtor's motion but instead abstain. In that way the parties to this contested matter and the Mouzons would be forced to resolve their differences under the applicable procedures and laws governing the collection of sales taxes by the State of Georgia. This is the relief the Court is in effect granting. This morass would have been avoided if Debtor had properly withheld and timely paid to GDOR sales taxes that it collected or should have collected. It has no excuse for not filing timely tax returns. The Court would have dismissed this case if GDOR or any other party had so moved and Debtor had not promptly filed missing returns. The alleged errors in the returns that Debtor finally filed are its problem to work out with GDOR. If Debtor, the Mouzons and GDOR cannot reach an agreement, they may resolve the dispute in accordance with Georgia law in a State forum.

For these reasons, the consent order entered by this Court on September 22, 2006 is VACATED.

END OF ORDER