

The United States Bankruptcy Code Stamp-Tax Exemption,
§ 1146(a), Does Not Apply to Transfers Executed Before
the Plan is Officially Confirmed Under Chapter 11: *Florida
Dept. of Revenue v. Piccadilly Cafeterias, Inc.*

UNITED STATES BANKRUPTCY CODE – CHAPTER 11 BANKRUPTCY – ASSET TRANSFER – STAMP TAX EXEMPTION – The United States Supreme Court found in favor of the Petitioner holding that the Bankruptcy Code’s stamp-tax exemption, § 1146(a), applies only to transfers made under the authority of a Chapter 11 plan that has been previously confirmed.

Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc., 128 S. Ct. 2326 (2008).

On October 29, 2003, Piccadilly Cafeterias, Inc. (“Piccadilly”) declared bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code (“Code”), 11 U.S.C. § 1101 et seq. (2000).¹ Shortly thereafter, Piccadilly sought court approval to sell the majority of its assets under 11 U.S.C. § 363(b)(1) (2000).² In contemplation of these business transfers, Piccadilly requested an exemption from any stamp-tax³ arising from the proposed transactions pursuant to 11 U.S.C. § 1146(a).⁴ On February 13, 2004, the United States Bankruptcy Court for the Southern District of Florida (“Bankruptcy Court”) approved Piccadilly’s January 26, 2004 settlement agreement which controlled the priority of the distribution of the sales proceeds among

1. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008).

2. *Piccadilly*, 128 S. Ct. at 2330. 11 U.S.C. § 363(b)(1) reads in pertinent part:

The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless-- (A) such sale or such lease is consistent with such policy; or (B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease-- (i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and (ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

11 U.S.C § 363(b)(1) (2000).

3. *Id.* A stamp-tax is defined as: “a tax imposed by requiring the purchase of a revenue stamp that must be affixed to a legal document (such as a deed or note) before the document can be recorded.” BLACK’S LAW DICTIONARY 1223 (8th ed. 2004).

4. *Id.* “When litigation commenced in the lower courts, the stamp-tax exemption was contained in § 1146(c) (2000 ed.). In 2005, Congress repealed subsections (a) and (b), and the stamp-tax exemption was recodified as § 1146(a). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 719(b)(3), 119 stat. 133. For [s]implicity, we will cite the provision as it is currently codified.” *Id.*

both its secured and unsecured creditors.⁵ Additionally, the Bankruptcy Court ruled that the transfer of Piccadilly's assets to its creditors was completely exempt from stamp-taxes under § 1146(a).⁶

Piccadilly completed its asset sale on March 16, 2004, raising nearly eighty million dollars.⁷ Ten days later, Piccadilly filed its original Chapter 11 plan in the Bankruptcy Court and then filed an amended plan on July 31, 2004.⁸ The official bankruptcy plan provided for allocation of the sale proceeds as negotiated in the settlement agreement previously established between Piccadilly and its creditors.⁹ However, before the Bankruptcy Court could confirm the plan, Florida's Department of Revenue ("Department") submitted an objection to the proposed plan.¹⁰ The Department's objection was premised on the argument that the asset sale had not occurred under a confirmed plan as required under § 1146(a),¹¹ and as a result, the Department sought stamp-taxes on Piccadilly's transferred assets.¹² On October 21, 2004, the Bankruptcy Court officially confirmed Piccadilly's bankruptcy plan.¹³

At the initiation of the bankruptcy proceeding, both Piccadilly and the Department cross-motivated for summary judgment on the issue of whether pre-confirmation transfers are subject to the stamp-tax exemption.¹⁴ The Bankruptcy Court found in favor of Piccadilly, and held that the asset transfer at issue was a conveyance pursuant to a confirmed plan, because the transfer itself was necessary to accomplish the plan, thereby satisfying the requirements of the stamp-tax exemption.¹⁵ The Department then appealed this decision to the United States District Court for the District of Florida, which affirmed the Bankruptcy Court's holding, reasoning that in certain factual circumstances, the stamp-tax exemption applies to a transfer that occurs before the confirmation of a bankruptcy plan.¹⁶ Subsequently, the Department appealed to the Court of Appeals for the Eleventh Circuit, which affirmed the lower court holding on the basis that the stamp-tax exemption may apply to transfers that occur before the plan, but are necessary for the

5. *Id.* at 2330.

6. *Id.* 11 U.S.C. § 1146(a) provides for "a tax-stamp exemption for any asset transfer 'under a plan confirmed under section 1129.'" 11 U.S.C. § 1146(a) (2000). *Id.*

7. *Piccadilly*, 128 S. Ct. at 2330.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2330. *See* 11 U.S.C. § 1146(a) (2000). Section 1146(a), entitled "Special Tax Provisions," provides: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax." *Id.* at 2331.

12. *Piccadilly*, 128 S. Ct. at 2330.

13. *Id.*

14. *Id.* at 2330. The Court summarized the parties arguments as follows: "Florida asserts that § 1146(a) applies only to postconfirmation sales; Piccadilly contends it extends to preconfirmation transfers as long as they are made in accordance with a plan that is eventually confirmed." *Id.* at 2331.

15. *Id.* at 2330-31.

16. *Id.* at 2331.

completion of the confirmed plan.¹⁷ The circuit court reasoned that its interpretation of § 1146(a) followed the principle that an ambiguous remedial statute should be liberally construed and also, effectively accounted for the realities of Chapter 11 bankruptcy.¹⁸ Furthermore, the Eleventh Circuit acknowledged that this holding was contrary to that of several sister circuits, including the Third and Fourth Circuits, which have previously decided similar issues.¹⁹

The United States Supreme Court granted certiorari to address the issue of whether Section 1146(a) of the federal bankruptcy code applies to preconfirmation transfers.²⁰ In order to evaluate the issue presented, the Court analyzed the statutory language employing two separate assumptions, ultimately reaching the same result under both.²¹ The Court first scrutinized the statutory language itself to determine whether the wording of the statute is unambiguous on its face.²² The Court then undertook a separate analysis under the premise that the statutory language was ambiguous in order to resolve the ambiguity by other means.²³

The first sub-issue that the Court dealt with was whether the language of the statute was ambiguous on its face.²⁴ In support of its contention that the language of the statute unambiguously limits the stamp-tax exemption solely to postconfirmation transfers, the Department put forth two arguments.²⁵ First, the Department argued that the word “confirmed” is a past participle that modifies the word “plan.”²⁶ In other words, the phrase “plan confirmed” indicates the requirement that the plan be confirmed in the past.²⁷ Piccadilly countered the Department’s argument, insisting that the language of the statute did not necessarily require a temporal happening of events and asserting that the Department was erroneous in assuming that the terminology “plan confirmed” was the same as a confirmed plan.²⁸

Secondly, the Department insisted that the word “under,” as used in the phrase “under a plan confirmed,” requires that eligibility for the stamp-tax exemption exists only when a transfer is made under the guidance of an es-

17. *Piccadilly*, 128 S. Ct. at 2331.

18. *Id.* at 2331 (citing *In re Piccadilly Cafeterias, Inc.*, 484 F.3d 1299, 1304 (11th Cir. 2007)).

19. *Id.* at 2331 (citing *In re Hechinger Inv. Co. of Del.*, 335 F.3d 243, 246 (3d Cir. 2003)). *In re Hechinger*, decided several years prior, held that §1446(a) “appl[ies] only to transfers under the Plan occurring after the date of formation.” *Id.*

20. *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 741 (2007).

21. *Piccadilly*, 128 S. Ct. at 2331 (analyzing the statutory language of 11 U.S.C. § 1146(a) (2000)).

22. *Id.*

23. *Id.* at 2333.

24. *Id.* at 2332.

25. *Id.* at 2331-32.

26. *Piccadilly*, 128 S. Ct. at 2331. Florida contended that “the word ‘confirmed’ modifies the word ‘plan’ and is a past participle, i.e., ‘a verb form indicating past or completed action or time that is used as a verbal adjective in phrases such as baked beans and finished work.’” *Id.*

27. *Id.*

28. *Id.* at 2332.

established plan.²⁹ Piccadilly countered this argument by positing that the phrase in question is just as easily read with no temporal requirement, but rather a transfer that occurs in accordance with a plan.³⁰

The Court deemed that both interpretations of the statutory language were plausible, but that the Department's arguments were more credible since its construction provided a more organic reading.³¹ Specifically, when analyzing the terminology "plan confirmed," it was apparent to the Court that § 1146(a) required that the transfer be under a plan, and more importantly, that the plan must be confirmed as required by 11 U.S.C. § 1129.³²

The Court then proceeded to examine the statute under the assumption that the language was ambiguous on its face.³³ Assuming that the statute was ambiguous, the Court determined that the Department presented the most compelling argument and deemed that if the statute was found to be ambiguous, then the ambiguity must be decided in favor of the Department.³⁴

Piccadilly advanced two major arguments to support its position that the potential ambiguity of 1146(a) is bolstered by other evidence.³⁵ First, Piccadilly analyzed several other Code provisions which showed that Congress had expressly provided temporal limitations when Congress had intended such a requirement.³⁶ Secondly, Piccadilly provided evidence that the term "under" should be construed broadly to mean "in accordance with," as opposed to a narrow interpretation limiting it to "authorized by," as the narrow interpretation would not make sense in light of how it is used throughout the Code.³⁷

The Department countered Piccadilly's arguments by showing that its reading of § 1146(a) in the context of the subchapter in which it is included, eliminates any ambiguity present in the text.³⁸ Specifically, the Department argued that because § 1146(a) falls under the subchapter entitled "Postconfirmation Matters," one is led logically to conclude that a plan must be first

29. *Id.*

30. *Id.* Piccadilly argues that Florida's interpretation of the statutory term "under" to mean "subject to" can "just as easily read to mean 'in accordance with.'" *Id.*

31. *Piccadilly*, 128 S. Ct. at 2332.

32. *Id.*

33. *Id.*

34. *Id.* at 2335.

35. *Id.* at 2333-35.

36. *Piccadilly*, 128 S. Ct. at 2333. Piccadilly provides several different code sections as evidence. Piccadilly cites 11 U.S.C. § 1127 (2000), which "governs modifications to a Chapter 11 plan, providing that the proponent of the plan may modify the plan 'at any time before confirmation,' or, subject to certain restrictions, 'at any time after confirmation of such plan.' See, e.g., 11 U.S.C. § 1104(a) ('at any time after the commencement of the case but before confirmation of a plan . . .'); § 1104(c) ('at any time before the confirmation of a plan . . .')." *Id.* (quoting 11 U.S.C. §§ 1127(a)-(b) (2000) and 11 U.S.C. §§ 1104 (a)-(c)).

37. *Id.* at 2334. Piccadilly sets forth the following Bankruptcy code provisions as examples to bolster its contention: 11 U.S.C. § 302 (2000), 11 U.S.C. § 111(b)(4)(A) (2000), 11 U.S.C. § 303(a) (2000) 11 U.S.C. § 343 (2000) and 11 U.S.C. § 365(g)(1) (2000).

38. *Piccadilly*, 128 S. Ct. at 2335.

confirmed in order to gain the privilege of the stamp-tax exemption.³⁹ Further, the Department countered Piccadilly's reliance on other Code provisions use of temporal language by contending that it would be unnecessary and redundant for Congress to include temporal language in § 1146(a) because its temporal element is already unambiguous on both its face and its location.⁴⁰

The Court, after reviewing the proffered arguments, held that the contextual arguments offered by the Department were more persuasive, and if the statutory text was deemed ambiguous, then the contextual evidence supported the Department's position.⁴¹ First, the Court found that the examples of temporal language found in the Code offered by Piccadilly, differ from the stamp-tax exemption, because in the other statutory sections, the temporality itself is an indispensable component to the effective connotation of the provisions themselves.⁴² The Court compared § 1146 (a) and § 1127, finding that contrary to Piccadilly's interpretation, § 1127 differs significantly from § 1146(a), as § 1127 intentionally differentiates between preconfirmation and postconfirmation modifications.⁴³ Second, the Court found that even if it adopted Piccadilly's broad definition of "under," the factual situation would still favor the Department because the asset sale occurred before Piccadilly had even submitted its plan.⁴⁴ Piccadilly could not contend that its transfer occurred "in accordance" with any plan, because no plan had even been submitted to the Chapter 11 Bankruptcy Court.⁴⁵ Finally, the Court took into consideration as a contextual tool, the fact that the provision appears in the subchapter entitled "Postconfirmation Matters," as contextual evidence further justifying the Department's position.⁴⁶

The Court also tried to determine the controlling canons of statutory interpretation in the event that the statutory text was deemed ambiguous.⁴⁷ To this end, the Court decided that the statute must be interpreted narrowly in favor of the Department and the statutory canons that it puts forth.⁴⁸ By reading the statute in the manner in which Piccadilly had proposed would have been to recognize a tax exemption that Congress has not clearly autho-

39. *Id.* at 2334-2335. (citing *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1504 (1989)). *Davis* stated that, "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 2335.

40. *Id.*

41. *Id.* at 2336.

42. *Id.* at 2335.

43. *Piccadilly*, 128 S. Ct. at 2335.

44. *Id.*

45. *Id.*

46. *Id.* at 2336. The Supreme Court uses the chapter heading as evidence but it points out that the heading under which a statute falls "cannot substitute for the operative text of the statute." *Id.* See, e.g., *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("The title of a statute . . . cannot limit the plain meaning of the text"). *Id.*

47. *Id.*

48. *Piccadilly*, 128 S. Ct. at 2338.

rized.⁴⁹ Furthermore, because Congress has reenacted § 1146(a) in its identical wording in light of several circuit courts interpreting the statute in the manner that the Department proposes, it appears Congress has ratified its longstanding understanding.⁵⁰ Finally, the Court reasoned that the narrow reading of § 1146(a) still accomplished the purpose of the statute, which was to afford a debtor relief from taxation to assist in the carrying out of a reorganization plan.⁵¹

The majority opinion of the Court held that the Department offered the most natural interpretation of § 1146(a), and that both the context of the statute and the canons of interpretation, all arrived at the conclusion that the statute could not be read to include preconfirmation transfers.⁵² Accordingly, the Court reversed the decisions of the lower court and remanded the case.⁵³

The Court also had a dissenting opinion, with Justices Breyer and Stevens joining.⁵⁴ The major theme of the dissent was that the operative language of the statute was undoubtedly ambiguous.⁵⁵ Specifically, the dissent believed that either proposed reading of “plan confirmed” is linguistically probable, therefore rendering the sections ambiguous.⁵⁶ Furthermore, the dissent found that neither the contextual arguments nor the canons of construction offered definitive help to settle the core of the problem.⁵⁷ Consequently, the dissent chose to focus on the statute’s purpose of advancing the goals of Chapter 11.⁵⁸ The dissent stated that a temporal requirement would not help fulfill either basic objective of Chapter 11, and therefore, a required temporal constraint simply adds a longer waiting period to the transfer of an asset that may be desperately needed by both the creditor and debtor.⁵⁹ The dissent concluded that neither the statutory text, nor the statutory context, calls

49. *Id.*

50. *Id.* at 2336. Both the Third and Fourth Federal Circuits have addressed this issue since the last revision of § 1146(a) took place in 1978. See, e.g. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change”). *Id.* at 2336; *In re Hechinger Inv. Co. of Del.*, 335 F.3d 243, 246 (2003) (holding that § 1146(a) “does not apply to . . . transactions that occur prior to the confirmation of a plan under Chapter 11 of the Bankruptcy Code”); *In re NVR, LP*, 189 F.3d 442, 458 (1999) (holding that § 1146(a) “appl[ies] only to transfers under the Plan occurring after the date of confirmation”).

51. *Piccadilly*, 128 S. Ct. at 2338-39.

52. *Id.* at 2339.

53. *Id.*

54. *Id.*

55. *Id.* at 2340.

56. *Piccadilly*, 128 S. Ct. at 2340. (Breyer, J., dissenting).

57. *Id.* at 2341.

58. *Id.* at 2341. The dissent deems that “the statute’s purpose is apparent on its face. It seeks to further Chapter 11’s basic objectives: “(1) ‘preserving going concerns’ and (2) ‘maximizing property available to satisfy creditors.’” *Id.* at 2341 (quoting *Bank of Am. Nat’l. Trust & Sav. Ass’n. v. 203 N. LaSalle St. P’ship*, 119 S. Ct. 1411, 1413 (1999)).

59. *Piccadilly*, 128 S. Ct. at 2342. (Breyer, J., dissenting).

for a temporal requirement, and furthermore, a temporal constraint actually inhibits the statute from fulfilling its purpose.⁶⁰

The stamp-tax exemption found in § 1146(a) of the Code originated from § 77B(f) of the Bankruptcy Act of 1898 (the “Act”).⁶¹ Three decades later, this provision was augmented by a revision of the Act and renumbered so that the exemption was now located in § 267.⁶² The current § 1146(a) became effective on October 1, 1979, and exists in a limited form of § 267.⁶³ Specifically, the stamp-tax exemption found in § 267, governed federal, state and local taxes, whereas § 1146(a), provides exemptions only for state and local taxes.⁶⁴

The pertinent language of § 1146(a) of the Code, creates a stamp-tax exemption for a debtor’s “transfers” under a bankruptcy “plan confirmed.”⁶⁵ To comprehend the statute, several statutory terms must be understood in reference to definitions and/or tests provided in the Code or subsequent judicial interpretations.

Traditionally, courts have chosen to follow a three-pronged test in order to determine if the disputed tax on the transfer at issue is one which may be exempted under § 1146(a).⁶⁶ The three-pronged test for stamp-tax exemption includes the following elements: (1) the tax must be a “stamp or similar tax;” (2) the tax must be in reference to the “making or delivery of an instrument or transfer;” (3) the transfer must be effectuated “under a plan confirmed” pursuant to 11 U.S.C. § 1129.⁶⁷ By examining each element of this test, it is noteworthy that the key term “transfer” is elucidated explicitly within the Code.⁶⁸

Noticeably absent in the Code is a formal definition of stamp-tax, and as a result, courts have developed an elemental breakdown to aid in determining

60. *Id.* at 2342-43.

61. 8-1146 *Collier on Bankruptcy*, P 1146.LH (Matthew Bender 15th Edition). § 77B(f) of the Bankruptcy Act “exempted ‘the issuance, transfers, or exchanges of securities or making or delivery of conveyances to make effective any plan of reorganization confirmed under the provisions of this section’ from certain federal tax provisions.” *Id.* (quoting *In re Consolidated Automatic Merchandising Corp.*, 90 F.2d 598 (2nd Cir.), *cert. denied*, 302 U.S. 727 (1937)).

62. *Id.* The Revised Section 267 of the Bankruptcy Act of 1898 read as follows:

The issuance, transfer, or exchange of securities or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or of any State.

Id. (quoting Bankruptcy Act of 1898 § 267 (1938)).

63. *Id.*

64. *Id.*

65. 11 U.S.C. § 1146(a) (2000).

66. *In re Amsterdam Ave. Dev. Assocs.*, 103 B.R. 454, 457 (Bankr. S.D.N.Y. 1989).

67. *In re Amsterdam*, 103 B.R. at 457.

68. 11 U.S.C. § 101(54) (2007). The term “transfer” is explicitly defined by §101(54) of the Bankruptcy Code as:

“(A) the creation of a lien; (B) the retention of title as a security interest; (C) the foreclosure of a debtor’s equity of redemption; (D) or each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property.”

Id.

if the state or local tax at issue is a stamp-tax.⁶⁹ Furthermore, courts are also provided with explicit instructions as to what constitutes a proper “confirmation” of the plan by following the precise directives handed down by the legislature in § 1129.⁷⁰

The above mentioned language, on several occasions, has been the subject of federal appellate court decisions; however, the terminology in § 1146(a) that has caused the most confusion is the requirement that in order for a transfer to be exempt from stamp-taxes, it must be executed “under a plan confirmed.”⁷¹ The uncertainty that arose from the wording of this section has become a disputed issue in multiple circuit courts, resulting in a division amongst the circuits on how to correctly interpret this provision.⁷²

In 1985, the Second Circuit decided *In re Jacoby Bender, Inc.*, in which the court held that if a transfer is necessary for the confirmation of the plan, the transfer itself is implicitly concluded under the plan.⁷³ The Second Circuit determined that the congressional intent in passing the stamp-tax exemption was to promptly facilitate a company’s reorganization under bankruptcy proceedings through the granting of tax relief for transfers of assets.⁷⁴ Therefore, the Second Circuit reasoned that even if the plan did not specifically include the transfer at issue, although the transfer was a necessary component for the consummation of the plan itself, the plan must be held to have implicitly contained the transfer so that the intent of the legislation may be fulfilled.⁷⁵

In 1999, the Fourth Circuit was confronted with the “under a plan confirmed” interpretative exemption issue in *In re NVR, L.P.*⁷⁶ The court decided that only transfers specifically listed in a bankruptcy reorganization plan are entitled to the stamp-tax exemption.⁷⁷ The Fourth Circuit distinguished between this type of transaction and the transaction found in *In re Jacoby Bender*.⁷⁸ Specifically, the Fourth Circuit felt that a post-confirmation transfer necessary to consummate the plan, as seen in *In re*

69. *In re 995 Fifth Ave. Assoc., L.P.*, 963 F.2d 503, 512 (2d Cir. 1992). The elemental definition developed by the Second Circuit Court of Appeals to determine if a tax is a stamp-tax is as follows:

(1) They are imposed only at the time of the transfer or sale of the item at issue; (2) the amount due is determined by the consideration for, par value of, or value of the item being transferred; (3) the tax rate is a relatively small percentage of the consideration, par value or value of the property; (4) the tax is imposed irrespective of whether the transferor enjoyed again or suffered a loss on the underlying sale or transfer; and (5) in the case of state documentary transfer taxes, the tax must be paid as a prerequisite to recording.

Id.

70. 11 U.S.C. § 1129 (2005).

71. 11 U.S.C. § 1146(a) (2000).

72. *Piccadilly*, 128 S. Ct. at 2331.

73. 758 F.2d 840, 842 (2nd Cir. 1985).

74. *In re Jacoby-Bender*, 758 F.2d at 842.

75. *Id.*

76. 189 F.3d 442 (4th Cir. 1999).

77. *In re NVR, L.P.*, 189 F.3d at 458.

78. *Id.* at 456.

Jacoby Bender, was quite distinct from a pre-confirmation transfer necessary to confirm the plan as seen in this case.⁷⁹

Building on this distinction, the Fourth Circuit proceeded to use the interpretative principle set forth in, *California State Board of Equalization v. Sierra Summit, Inc.*, which required a court to narrowly interpret federal legislation dealing with local or state tax issues in favor of the taxing authority.⁸⁰ Therefore, the court held that § 1146(a) is linguistically unambiguous legislation and, therefore, applying a strict interpretation, Congress unequivocally intended for stamp-tax exemptions to apply only to transfers reviewed and confirmed by the court.⁸¹

In 2003, the Third Circuit received its chance to weigh in on the confusion surrounding the phrase “under a plan confirmed” in *In re Hechinger Investment Co. of Delaware, Inc.*⁸² The Third Circuit was confronted with an issue factually similar to the dilemma found in *In re NVR*.⁸³ Specifically, the court was confronted with the issue of whether the § 1146(a) stamp-tax exemption applied to a pre-confirmation real estate transfer.⁸⁴ The court began its analysis by looking at the possible interpretations of the word “under.”⁸⁵ After considering several alternative definitions, the court held that the most natural comprehension of the phrase “under a plan confirmed” would mean that a transfer is authorized by a plan confirmed.⁸⁶ In applying this interpretation of the word “under,” the court found that if a transfer is concluded “under” a plan, the plan must endow the authority for the transfer.⁸⁷ Therefore, to qualify for the § 1146(a) stamp-tax exemption, the plan would have had to be confirmed prior to the transfer.⁸⁸

The discretion of the Justices of the Supreme Court in determining which cases to hear, is governed by Rule 10 of the Rules of the Supreme Court of the United States.⁸⁹ The power of judicial discretion ensures that the vast

79. *Id.*

80. 490 U.S. 844 (1989). The Supreme Court held that “although Congress can confer an immunity from state taxation, . . . a court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed.” *Cal. State Bd. Of Equalization*, 490 U.S. at 851.

81. *In re NVR, L.P.*, 189 F.3d at 456.

82. *In re Hechinger Investment Co. of Delaware, Inc.*, 335 F.3d 243 (3rd Cir. 2003).

83. *In re Hechinger*, 335 F.3d at 246.

84. *Id.*

85. *Id.* at 252.

86. *Id.* at 253.

87. *Id.* at 254.

88. *In re Hechinger*, 335 F.3d at 254.

89. The United States Supreme Court Rule 10, entitled Considerations Governing Review on Writ of Certiorari, reads in pertinent part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanc-

majority of cases heard by the Court are controversial and will likely have a significant impact on both federal and state law. The decision handed down in *Piccadilly* is no exception to this general rule, as there was an immediate impact on multiple diverse parties, including state revenue departments, debtors, creditors, potential asset purchasers and the federal appellate judiciary.

First, the *Piccadilly* decision eliminated the significant statutory interpretative difference that has split several of the aforementioned circuit courts. Importantly, the Court has provided the circuit courts with a uniform interpretation of § 1146(a), thus ensuring that all states, debtors and creditors will be entitled to a standardized implementation of the federal stamp-tax exemption.

Secondly, the Court's adoption of the narrow interpretation of § 1146(a) has resulted in a substantial victory for each state's taxing authority. Specifically, any state that has a stamp-tax has been given an expanded percentage of bankruptcy transfers on which it may collect tax revenue. On the one hand, many bankruptcy debtors and creditors will elect to simply wait until an official plan is confirmed before they conduct any asset transfers, thereby enabling them to exercise the stamp-tax exemption. However, in certain circumstances, a debtor's interests will be better served by liquidating assets quickly, in order to both pay creditors and reorganize. Therefore, the debtor may choose to voluntarily forgo waiting to qualify for the stamp-tax exemption, thereby benefiting the revenue of the state.

It is necessary to expand on the above example in order to illustrate why any debtor would voluntarily elect to make a transaction subject to a stamp-tax. Essentially, state and local stamp-taxes tend to be an extremely small percentage of the overall consideration paid.⁹⁰ Specifically, in an amicus curiae brief filed by various states in support of Florida and its revenue department, it was noted that the typical stamp-tax assessed on an asset transfer normally amounts to less than one-percent of the consideration paid.⁹¹ Therefore, in most asset sales, other concerns such as the extra revenue produced from a timely sale or the avoidance of depreciation or liquidity to the creditor, would prompt the debtor to sell regardless of the stamp-tax.⁹²

Finally, the relationship between the debtor, creditor and potential asset purchaser will be forced to incorporate the economic outcomes of either, delaying asset sales to avoid the stamp-tax or hastening asset sales and succumbing to the stamp-tax. Specifically, a postponement in the asset sale delays payment to the creditor and hampers the debtor's ability to reorganize,

tioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
Sup. Ct. R. 10 (2005).

90. Forrest B. Lammiman & Ann M. Bredin, *Possible Effects of Piccadilly on Asset Sales*, 50 BCD News and Comment 7 (2008).

91. *Id.*

92. *Piccadilly*, 128 S. Ct. at 2342.

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while simultaneously allowing depreciation and waste devalue the assets.⁹³ On the other hand, forgoing the stamp-tax exemption will require one or all parties to account for taxes, which could be substantial depending on the value of the assets. In other words, the decision in *Piccadilly* will result in a balancing of all the creditors, debtors and potential asset purchaser's interests, with some economic inefficiency being absorbed by the parties.

The decision reached in *Piccadilly* has provided tax benefits to the states and uniformity to the judiciary. In the future, as more entities are forced into bankruptcy, the debtors, creditors and potential asset purchasers will be involved in a complicated economic relationship where a balancing of interests will occur, revealing the true magnitude of economic effects of the majority's decision in *Piccadilly*.

Craig Joseph Sperlazza

93. Lorenzo Marinuzzi & Jordan A. Wishnew, *Piccadilly Cafeterias: Congress Should Revisit Supreme Court's Bright-Line Test*, 27-6 ABII 55, 57 (2008).