**SO ORDERED.**

**SIGNED this 14th day of April, 2014.**

Janice Miller Karlin
United States Bankruptcy Judge

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

**In re:**
**Mary Martinez**

**Case No. 13-41499**
**Chapter 13**

**Debtor.**

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**MEMORANDUM AND ORDER OVERRULING DEBTOR'S OBJECTION TO CLAIM #3, FILED BY INTERNAL REVENUE SERVICE**

Debtor Mary Martinez (Debtor) objected to Claim #22, a claim for unpaid taxes filed by the creditor Internal Revenue Service (IRS).[1] Debtor argues that the portion of the claim attributable to the 2009 tax year should be classified as a general unsecured debt. In response, IRS argues that the 2009 taxes are entitled to priority status because they fall within the three year "look-back" period between the day the taxes became due and the day Debtor filed her bankruptcy petition.[2] Although more than three years elapsed, IRS argues that it gets the benefit of the

[1] Doc. 15.

[2] Doc. 19.

tolling period plus an additional 90-day grace period under 11 U.S.C. § 507(a)(8)(A) because of the automatic stay imposed due to Debtor's previous bankruptcy filing within the look-back period. In response, Debtor urges the Court to exercise "good conscience and equity" to deny IRS the benefit of part of the tolling period because she claims it violated the automatic stay during her prior bankruptcy. For the reasons explained below, the Court overrules Debtor's objection to IRS's claim.

## I. STIPULATION OF FACTS

The parties have stipulated to certain facts.[3] Based on the stipulations, the Court makes the following findings of fact.

Although Debtor filed a timely 2009 tax return, she failed to report certain self-employment income. After filing the 2009 return— but before she filed her current bankruptcy petition on October 25, 2013,[4] Debtor filed a chapter 13 petition (in 2012) that was ultimately dismissed before she received a discharge. Her 2012 bankruptcy created an automatic stay that lasted 184 days.

IRS timely filed a proof of claim in this bankruptcy for $8,823.55,[5] claiming Debtor owes taxes for the 2009, 2011, and 2012 tax years. The claim indicates $6,740.59 is entitled to priority status under 11 U.S.C. § 507(a)(8). Debtor filed an objection to this claim,[6] alleging the $4,959 debt claimed for the tax period ending

[3] Doc. 33.

[4] Doc. 1.

[5] Claim 3-1.

[6] Doc. 15.

December 31, 2009 should be classified as an unsecured general claim instead of as a priority claim.

## II. Analysis

This matter is a core proceeding over which the Court has jurisdiction,[7] and the parties do not contest the Court's jurisdiction. "The burden of proving entitlement to a priority is on the person claiming priority,"[8] and statutory priorities are construed narrowly.[9]

IRS bases its claim on 11 U.S.C. § 507(a)(8)(A), which governs the priority of unsecured tax claims of governmental units. That section allows IRS to maintain priority status for:

> unsecured claims of governmental units, only to the extent that such claims are for–
> (A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition–
> (i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
> (ii) assessed within 240 days before the date of the filing of the petition, exclusive of–
> (I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and
> (II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that

[7] 28 U.S.C. § 157(b)(2)(B).

[8] *Isaac v. Temex Energy* (*In re Amarex*), 853 F.2d 1526, 1530 (10th Cir. 1988).

[9] *Id.*

> 240-day period, plus 90 days; or
> (iii) other than a tax of a kind specified in section 523 (a)(1)(B) or 523 (a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.
> . . .
> An otherwise applicable time period specified in this paragraph shall be suspended for . . . any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

The statute provides three possible avenues for the IRS to prove its claim has priority status. Debtor argues that, although the IRS meets § 507(a)(8)(A)(i), the statute should be read conjunctively, that is, with an understood "and" between parts (i) and (ii), such that the IRS would have to meet both parts (i) and (ii) or, in the alternative, part (iii). Under this reading, satisfying only subsection (i), as the parties agree the IRS has done, would be insufficient.

The Court finds that, contrary to Debtor's arguments, § 507(a)(8)(A)(i), (ii), and (iii) should be read disjunctively—IRS must only show one of these subsections applies to attain priority status. Although Debtor acknowledges that substantial case law supports the proposition that these provisions should be read in the disjunctive, and cites to no Tenth Circuit case law supporting her interpretation, she nevertheless argues that legislative history suggests Congress might not have intended to construe the three items disjunctively. In essence, Debtor argues that because the statute reads "(i), (ii), or (iii)," it is reasonable to place an "and" between (i) and (ii), which would have the practical effect of requiring IRS to show both (1)

that the tax became due within three years of the petition *and* (2) that it assessed the tax within 240 days of the petition. But this argument is contrary to the plain language of the statute.

As IRS argues, drafters of statutes commonly use the form (X), (Y), *or* (Z) when they mean to say (X) *or* (Y) *or* (Z), and this is a generally accepted formulation.[10] "When the term 'or' is used, it is presumed to be used in the disjunctive sense unless the legislative intent is clearly contrary."[11] Debtor's argument that the drafters' use of (X), (Y) *or* (Z) really means (X) *and* (Y) *or* (Z) is contrary to common sense and common usage, and would certainly depart from precedent in interpreting this statute. The Court rejects this strained reading of the statute.

Applying the correct reading of § 507(a)(8)(A) to the stipulated facts makes Debtor's objection simple to resolve. The tax for the tax year 2009 was due April 15, 2010. Under the three year look-back period, tax debts owing three years from October 25, 2013—the date of Debtor's petition—are entitled to priority. One must

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[10] *See, e.g., Hosack v. IRS* (*In re Hosack*), 282 F. App'x. 309, 315 (5th Cir. 2008)(rejecting the disjunctive reading argument); *Lastra v. IRS* (*In re Lastra),* No. 12-1188, 2012 WL 6681739, at *4 (Bankr. D.N.M. Dec. 21, 2012)(Same). *See also* 4 COLLIER ON BANKRUPTCY ¶ 507.11[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("A tax measured by gross income or gross receipts will be entitled to priority if the tax is for a taxable year ending on or before the date of the filing of the petition and one of three *alternative* grounds has been fulfilled.") (emphasis added); 3 NORTON BANKRUPTCY LAW AND PRACTICE § 49:50 (3d. ed. 2013) ("Taxes on prepetition income . . . warrant eighth-priority treatment in three separate situations. These present *alternative* bases for obtaining priority; i.e., a claimant need only qualify under any of the three to receive priority.") (emphasis added).

[11] *United States v. O'Driscoll*, 761 F.2d 589, 597–98 (10th Cir. 1985).

then subtract the 184 days during which the automatic stay was in effect during Debtor's first bankruptcy (from July 25, 2012 to January 25, 2013).[12] That pushes the cut-off date back to April 24, 2010. Finally, because the cut-off date is then pushed back an additional 90 days pursuant to the language at the end of §507(a)(8),[13] the proper cut-off date occurs well before the date when the 2009 return was due.

Debtor makes an additional argument against permitting this priority claim; she claims this Court should, using its 11 U.S.C. § 105(e) equitable powers, deny one or both tolling periods. This suggestion is based on her claim that IRS willfully violated the automatic stay during her first bankruptcy, although she declined to prosecute such a stay violation during that case. Because IRS needs both the tolling period from the first bankruptcy and the additional 90-day period to satisfy the three year look-back rule, denying either tolling period would have the practical effect of barring IRS from meeting the three year look-back rule. This would result in IRS not receiving priority treatment for the 2009 taxes.

But the parties agreed to present this objection on stipulated facts, and there are no stipulated facts, whatsoever, to support Debtor's claim that IRS willfully violated the stay in her prior bankruptcy. Fortunately, the Court need not make any factual findings concerning the considerable discrepancy between Debtor's

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[12] *United States v. Richards* (*In re Richards*), 994 F.2d 763 (10th Cir. 1993).

[13] *United States v. Montgomery*, 475 B.R. 742 (D. Kan. 2012).

allegation that IRS levied against Debtor's wages during her first case and IRS's position that Debtor entered into a voluntary payroll deduction before her first bankruptcy, but then IRS admittedly failed to release that voluntary wage deduction until Debtor's counsel demanded it post-filing.

Even assuming Debtor's version of the facts is accurate—that IRS placed a lien on Debtor's pay during her first bankruptcy and collected $50 from each of four pay periods while the stay was in effect, the Court would not use its equitable powers to change the tolling period. The alleged harm ($200 of tax collection that was relatively promptly repaid to Debtor when she brought that fact to the attention of the U.S. Attorney) is grossly disproportionate to the amount of sanctions Debtor effectively seeks. If the sanction request were granted, IRS would lose priority status for $4,959.00 of its claim over what even Debtor admits was a short-lived period. And the stay violation was apparently so minor that she made no effort to seek damages for the stay violation when it actually occurred or during the following months when her bankruptcy was still pending. Further, Debtor's description of IRS's alleged actions does not exhibit any coercion or harassment, which also militates against sanctioning IRS effectively almost $5,000. Even Debtor's version of the events do not justify denying IRS the benefit of this tolling period. As a result, the Court rejects Debtor's request for the Court to use its equitable powers to eliminate the statutory tolling requirements in § 507(a)(8)(A).

Because the Court finds that the IRS has met its burden to show, by a preponderance of the evidence, that its claim meets the requirements for priority

required by § 507(a)(8)(A), and because the Court has determined that avoiding the tolling requirements of this statute would not be a reasonable use of the Court's equitable powers, Debtor's objection to claim #3 is overruled.

**It is so ordered.**

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