

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

24/6

2001 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2416

CO

NE

TH

WENT FORTH

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2416

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date February 12, 2001.

Tape Number	Side A	Side B	Meter #
1	x		8.1 to 17.9
2	x		40 to 53.0
(Feb 13/01) 3	x		31.6 to 33.8
Committee Clerk Signature <i>Doris E. Perez</i>			

Minutes:

The meeting was called to order. All committee members present. Hearing was opened on SB 2416 relating to discharge in bankruptcy of workers' compensation premiums and penalties.

No testimony in favor.

BRENT EDISON, VP of Legal and Special Investigations, NDWC, opposing this bill. Written testimony attached. Because the fund is supported by premium dollars from employers, we oppose to any attempt to change the existing law to allow employers do discharge their premium obligations. Include copy of legal decision in which court held unpaid premiums are non dischargeable and a summary of actuarial information.

SENATOR D. MATHERN: People not paying premiums, is it a big problem?

B EDISON: Collection unit is very busy. The question of discharge comes up but once they know its non dischargeable they usually pay.

SENATOR MUTCH: In the case of a corporation in bankruptcy,?

Page 2

Senate Industry, Business and Labor Committee

Bill/Resolution Number SB 2416

Hearing Date February 12, 2001.

B EDISON: In part of this bill there is a section that if corporation goes bankrupt officers won't be liable.

SENATOR KREBSBACH: Any other state discharges workers' comp. premiums?

B. EDISON: Not that I am aware of. This bill will increase uncollectibles and prevent us from collecting premiums we would be able to collect. We haven't been able to quantify, but it will be significant enough that we urge a do not pass.

CHUCK PETERSON, GNDA, opposing this bill. Written testimony attached. It's all too easy to go bankrupt. Since the cost of running the Bureau is borne by the employers this bill will increase the burden on those that do pay their premiums. Strongly urge do not pass.

February 13, 2001. Tape 3-A-31.6 to 33.8.

Committee reconvened. All members present, except SENATOR ESPEGARD. Discussion held.

SENATOR KREBSBACH: Motion: do not pass. SENATOR TOLLEFSON: Seconded.

Roll call vote: 6 yes; 0 no; 1 absent, not voting.

Carrier: SENATOR ESPEGARD.

FISCAL NOTE
 Requested by Legislative Council
 01/30/2001

Bill/Resolution No.: SB 2416

Amendment to:

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	1999-2001 Biennium		2001-2003 Biennium		2003-2005 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

1999-2001 Biennium			2001-2003 Biennium			2003-2005 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

**NORTH DAKOTA WORKERS COMPENSATION
 2001 LEGISLATION
 SUMMARY OF ACTUARIAL INFORMATION**

BILL DESCRIPTION: Discharge in Bankruptcy of Workers' Compensation Premiums

BILL NO: SB 2416

SUMMARY OF ACTUARIAL INFORMATION: North Dakota Workers Compensation, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed bill would make workers compensation premiums dischargeable in bankruptcy.

FISCAL IMPACT: Not quantifiable. The proposed bill may serve to increase uncollectibles from at-risk employers as well as preclude NDWC from collecting premiums after bankruptcy is filed. To the extent that this increases costs, the additional costs would be reflected in future premium adjustments.

DATE: January 31, 2001

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

Name:	Paul R. Kramer	Agency:	ND Workers Compensation
Phone Number:	328-3856	Date Prepared:	01/31/2001

Date: 2/13/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2416

Senate Industry, Business and Labor

Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP

Motion Made By Sen Krebsbach Seconded By Sen Tollefson

Senators	Yes	No	Senators	Yes	No
Senator Mutch - Chairman	✓		Senator Every	✓	
Senator Klein - Vice Chairman	✓		Senator Mathern	✓	
Senator Espgaard	A				
Senator Krebsbach	✓				
Senator Tollefson	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Sen Espgaard

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 14, 2001 8:10 a.m.

Module No: SR-27-3268
Carrier: Espgaard
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2416: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends
DO NOT PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2416 was
placed on the Eleventh order on the calendar.

2001 TESTIMONY

SB 2416

SENATE BILL NO. 2416

**Fifty-seventh Legislative Assembly
Before the Senate Industry, Business and Labor Committee
Monday, February 12, 2001**

**Testimony of Brent J. Edison
North Dakota Workers Compensation**

Mr. Chairman, Members of the Committee:

My name is Brent Edison. I am the Vice President of Legal and Special Investigations for North Dakota Workers Compensation (NDWC) and I am here to testify in opposition to 2001 Senate Bill No. 2416. The Workers Compensation Board of Directors unanimously opposes this bill and requests a "DO NOT PASS" recommendation.

The essential purpose of the Workers Compensation Act is to provide injured workers with "sure and certain relief ... regardless of fault" in exchange for which the injured worker gives up the right to sue his or her employer in court for damages. Section 65-01-01, N.D.C.C. The ability to provide sure and certain relief to injured workers is dependent on the financial soundness of the workers compensation fund. Because the fund is supported by premium dollars from employers, NDWC opposes any attempt to change existing law to allow employers to discharge their premium obligations in bankruptcy.

Senate Bill No. 2416 appears to be an attempt to overrule the bankruptcy court decisions in which NDWC successfully litigated the issue. Attached to my written testimony is a copy of the decision of Judge William A. Hill, United States Bankruptcy Court, District of North Dakota, in the case entitled In re Voightman. There the court held that unpaid premiums due North Dakota Workers Compensation are nondischargeable under the Bankruptcy Code. Although the Voightman case was appealed, the Eighth Circuit Bankruptcy panel upheld Judge Hill's ruling. A copy of the Eighth Circuit's decision is also attached to my written testimony.

Whether workers' compensation premiums may be discharged under the Bankruptcy Code must be determined under federal law rather than state law. Research indicates that state characterizations, such as that proposed in Senate Bill No. 2416, have no binding effect on the issue. To legislate in direct contradiction to a federal court would create uncertainty and litigation over a question that has been resolved within the appropriate context of the bankruptcy courts. As a result, the Legislative Assembly should reject Senate Bill No. 2416 on that basis alone.

In addition, workers' compensation benefits, rates and reserves are dependent upon the payment of employer premiums. In order to preserve the financial stability of the system, premiums should remain non-dischargeable in bankruptcy. Otherwise, employers incurring large premium debt may default, seek protection through bankruptcy and leave compliant employers to "pick up the tab" in the form of increased premiums.

This concludes my testimony on Senate Bill No. 2416. I respectfully request a "do not pass" recommendation on this bill and I will be happy to respond to any questions at this time.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA

IN RE:

Steven L. Voightman,
Debtor.

Bankruptcy No. 98-31430

North Dakota Workers'
Compensation Bureau,
Plaintiff,

v.

Adversary No. 98-7078

Steven L. Voightman,
Voightman Trucking, and
James River Dispatch,
Defendants.

FILED
at 12 o'clock & 20 min P.M.

APR 15 1999

Clerk
United States Bankruptcy Court
District of North Dakota

MEMORANDUM OPINION AND ORDER

Plaintiff North Dakota Workers' Compensation Bureau ("Bureau") filed its Complaint Objecting to Discharge of Debtor Steven L. Voightman ("Voightman") on November 12, 1998, and seeks to have the sum of \$21,497.92 declared nondischargeable in Voightman's bankruptcy proceedings pursuant to 11 U.S.C. § 523(a)(1)(A). Voightman answered on December 8, 1998, denying that any indebtedness which he might have to the Bureau is nondischargeable. The case was submitted to the Court on March 16, 1998, with the simultaneous filing of both parties' respective trial briefs and exhibits, as well as a Joint Statement of Stipulated Facts. Simultaneous reply briefs were filed by the parties on March 26, 1999. The following now constitutes this Court's findings of fact and conclusions of law:

I. FINDINGS OF FACT

Voightman is the owner of numerous semi-tractors and trailers and, in this connection, operates a trucking business based in Oakes, North Dakota, under the name of Voightman Trucking. Since July 1, 1993, Voightman has hired various employees to conduct his business, that is, driving his semi-tractors and trailers for the transport of various commodities for farmers. Voightman thereby became subject to the provisions of the North Dakota Workers' Compensation Act ("NDWCA"), North Dakota Century Code ("N.D.C.C.") § 65-01-01 et seq.

Since September 30, 1995, Voightman has been assessed employer premiums by the Bureau totaling \$19,180.33 for the period of July 1, 1993, through June 30, 1998. Of this amount, Voightman has already paid a total of \$4,050.29, leaving a current balance of \$15,130.04 in unpaid premiums due the Bureau. For purposes of this matter, the Bureau and Voightman have expressly stipulated that if the unpaid premiums are declared nondischargeable, then Voightman is also liable to the Bureau for the sum of \$6,367.88 which constitutes interest and penalties as compensation for *actual pecuniary loss* pursuant to 11 U.S.C. § 507(a)(8)(G).

Voightman filed a petition for relief under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., on August 21, 1998. The Bureau commenced this Adversary Proceeding by Complaint filed on November 12, 1998, seeking to have its claim for unpaid workers' compensation premiums, interest, and penalties which have accrued since August 21, 1995, declared nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(A). In this connection, the Bureau asserts this indebtedness constitutes "excise taxes" pursuant to 11 U.S.C. § 507(a)(8)(E).

II. CONCLUSIONS OF LAW

I. Nondischargeability

Taxes which receive priority status under 11 U.S.C. § 507(a)(8) are nondischargeable under Chapter 7 of the Code. 11 U.S.C. § 523(a)(1)(A).¹ In this respect, § 507(a)(8) provides that:

- (a) The following expenses and claims have priority in the following order:

- (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--

- (E) an excise tax on--

- (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

- (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition[.]

11 U.S.C. § 507(a)(8)(E).

Further, the pre-petition interest which accrues on such unpaid premiums is also entitled to priority status under § 508(a)(8), and thus, too, becomes nondischargeable.

¹Section 523 provides, in pertinent part, as follows:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

- (1) for a tax or a customs duty--

- (A) of the kind and for the periods specified in section . . . 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed[.]

11 U.S.C. § 523(a)(1)(A).

See In re Mosbrucker, 220 B.R. 656, 659 (Bankr. D. N.D.), aff'd, Mosbrucker v. Mosbrucker (In re Mosbrucker), 227 B.R. 434 (B.A.P. 8th Cir. 1998). Penalties, however, are only nondischargeable if "related to a claim of the kind specified in [§ 507(a)(8) (i.e. § 507(a)(8)(E))] and in compensation for actual pecuniary loss." 11 U.S.C. § 507(a)(8)(G).

Therefore, if the Bureau's claim for unpaid workers' compensation premiums is in the nature of "excise taxes" as defined by § 507(a)(8)(A), it will become nondischargeable pursuant to § 523(a)(1)(A), along with its pre-petition interest under either Mosbrucker, supra, or the parties' stipulation. Moreover, the Bureau's penalty claim will become nondischargeable pursuant to the party's stipulation. The sole issue before the Court, then, is that related to "excise taxes."

2. Nature of the Unpaid Premiums

The Bankruptcy Code does not define the term "tax" or "excise tax" for purposes of 11 U.S.C. § 507. See In re Park, 212 B.R. 430, 432 (Bankr. D. Mass. 1997). Thus, whether an obligation constitutes a tax within the meaning of the Code must be otherwise determined by federal law. See City of New York v. Feiring, 313 U.S. 283, 283, 61 S. Ct. 1028, 1029, 85 L.Ed. 1333 (1941); Ohio Bureau of Workers' Compensation v. Yoder (In re Suburban Motor Freight, Inc.), 36 F.3d 484, 487 (6th Cir. 1994). In Feiring, the Supreme Court defined the term as being, "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." 313 U.S. at 285, 61 S. Ct. at 1029. The United States Court of Appeals for the Ninth Circuit has since refined that definition in In re Lober Industries of California, Inc., 675 F.2d 1062 (9th Cir. 1982), as follows:

[T]he elements which characterize an exaction as a "tax" . . . are as follows:

- (a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property;

- (b) Imposed by, or under authority of, the legislature;
- (c) For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;
- (d) Under the police or taxing power of the state.

Id. at 1066 (citation omitted); see Waldo v. Montana Dep't of Labor & Indus. Uninsured Employers' Fund (In re Waldo), 186 B.R. 118, 121 (Bankr. D Mont. 1995), aff'd, 108 F.3d 340 (9th Cir. 1997). Further, and with respect to the meaning of "excise tax," Black's Law Dictionary defines the term as being:

A tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. Tax laid on manufacture, sale, or consumption of commodities or upon licenses to pursue certain occupations or upon corporate privileges. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the income tax.

Black's Law Dictionary 506 (5th ed. 1979) (citation omitted).

This Court has previously applied the Lober definition for purposes of construing § 507. See In re Skjonsby Truck Line, 39 B.R. 971, 972-73 (Bankr. D. N.D. 1984). Applying the four-pronged Lober qualifications in the instant matter, Voightman's unpaid obligations for workers' compensation premiums must be considered as taxes, and more specifically, as excise taxes for purposes of § 507(a)(8)(E). As this Court has previously stated, "[T]he [NDWCA] . . . provides for a monopolistic and exclusive method of providing for workers' compensation within the State of North Dakota. Private insurance is not permitted." See Vogel v. North Dakota (In re Vogel), Bankr. No. 95-30126/Adv. No. 95-7041 (Bankr. D. N.D. Nov. 27, 1995); see also Zimmerman v. Valdak Corp., 570 N.W.2d 204, 206 (N.D. 1997) ("Four separate sections in the North Dakota Century Code state that workers' compensation is the exclusive remedy for injured employees."). Further, the NDWCA "was created to provide sure and certain relief to employees." Zimmerman, supra; see N.D.C.C. § 65-01-01 ("[T]he prosperity of the state depends in large measure upon the well-being of its wage workers, and, hence, . . . sure and certain

relief is hereby provided . . ."). Additionally, the NDWCA is an exercise of North Dakota's "police and sovereign powers." N.D.C.C. § 65-01-01. Thus, in the matter at hand, the Court is satisfied that the workers' compensation premiums bear all of the characteristics of a tax obligation. They are involuntary, imposed by the legislature, benefit the general public by providing a stable funding program, and fall under the police or taxing powers of the state. Moreover, "[c]laims for unpaid [workers' compensation] premiums are generally found to be priority tax claims when a state requires all employers to purchase workers' compensation insurance from the state, with no private insurance option." In re Park, 212 B.R. at 435 (and cases cited therein); see e.g., In re Chateaugay Corp., 177 B.R. 176, 183-84 (D. S.D. N.Y. 1995), aff'd, 89 F.3d 942 (2d Cir. 1996).

III. CONCLUSION

For the foregoing reasons, unpaid workers' compensation premiums due the North Dakota Workers' Compensation Bureau in the amount of \$15,130.04, along with interest and penalties accrued thereon in the amount of \$6,367.88, and aggregating \$21,497.92, are entitled to priority under 11 U.S.C. § 507(a)(8)(E), and are thus nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(A).

JUDGMENT MAY BE ENTERED ACCORDINGLY.

SO ORDERED.

Dated this 15th day of April 1999.

NOTICE OF ENTRY PURSUANT
TO F.R.B.P. 9022
Entered on docket 04/15/99
Copies mailed 04/15/99 to:
U.S. Trustee
Steven Voigtman, Defendant
Brad A. Sinclair, Fargo, ND
(Atty. for Defendant/Debtor)
Leo F.J. Wilking / Daniel Rouse
(Atty. for Plaintiff)
Clerk, U.S. District Court



WILLIAM A. HILL, JUDGE
U.S. BANKRUPTCY COURT

DEBTOR'S PERSONALITIES LTD TO 1 701 320 3750 1999.09-28 00:55 #523 P.04/10

Debtor Steven L. Voightman appeals the decision of the bankruptcy court,¹ which found that the Debtor's unpaid workers' compensation premiums were entitled to priority under 11 U.S.C. § 507(a)(8)(E) and, thus, were nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(A). We affirm.

I BACKGROUND

The facts in this case are largely undisputed. Debtor Steven Voightman ("Debtor") operated a trucking business known as Voightman Trucking, which transported various commodities for farmers and others. Debtor first hired employees to work in his business in July of 1993, and at that time became subject to the provisions of the North Dakota Workers Compensation Act ("Act"). Under the Act, farmers directly employing workers in the same capacity as Debtor's employees would not have to carry workers' compensation insurance because the Act excludes, *inter alia*, agricultural employment.

The North Dakota Workers Compensation Bureau ("Bureau") assessed Debtor with premiums totaling \$19,180.33. The parties agree that the unpaid portion of the assessments totals \$15,130.04. After the Debtor filed for bankruptcy relief on August 21, 1998, the Bureau brought an adversary proceeding seeking to have the unpaid premiums declared nondischargeable excise taxes pursuant to Bankruptcy Code §§ 523(a)(1)(A) and 507(a)(8)(E). The parties stipulated that if the unpaid premiums were nondischargeable, penalties and interest totaling \$6,367.88 would also be nondischargeable as compensation for actual pecuniary loss pursuant to Bankruptcy Code § 507(a)(8)(G).

The bankruptcy court, applying a four-part test announced by the Ninth Circuit in County Sanitation Dist. No. 2 v. Lorber Indus. of Cal., Inc. (In re Lorber Indus. of Cal., Inc.), 675 F.2d 1062 (9th Cir. 1982), found that the workers' compensation premiums were entitled to priority as excise taxes under Bankruptcy Code § 507(a)(8)(E) and, accordingly, were nondischargeable pursuant to § 523(a)(1)(A). In this appeal, the Debtor argues that the bankruptcy court applied an outdated test and that, using a more recent test adopted by the

¹The Honorable William A. Hill, United States Bankruptcy Judge for the District of North Dakota.

Sixth Circuit in Ohio Bureau of Workers' Compensation v. Yoder (In re Suburban Motor Freight, Inc.), 36 F.3d 484 (6th Cir. 1994) ("Suburban II"), the workers' compensation premiums would be dischargeable. The Bureau contends that the bankruptcy court did not apply the improper test and, even if the bankruptcy court used the more recent Suburban II test, the outcome would not change.

II. STANDARD OF REVIEW

The bankruptcy court's decision that the workers' compensation premiums qualify as excise taxes under the Bankruptcy Code is a conclusion of law over which we exercise de novo review. Sacred Heart Hosp. v. Pennsylvania Dept. of Labor & Industry (In re Sacred Heart Hosp.), 209 B.R. 650, 653 (E.D. Pa. 1997); Oregon Fryer Comm'n v. Robert K. Morrow, Inc. (In re Belozor Farms, Inc.), 199 B.R. 720, 723 (B.A.P. 9th Cir. 1996); see Mosbrucker v. United States (In re Mosbrucker), 227 B.R. 434, 436 (B.A.P. 8th Cir. 1998) (exercising de novo review over a similar conclusion under § 507(a)(8)(C) of the Bankruptcy Code).

III. DISCUSSION

Bankruptcy Code § 523(a)(1)(A) provides that any debt for a tax "of the kind and for the periods specified in section . . . 507(a)(8)" is not dischargeable. 11 U.S.C. § 523(a)(1)(A) (1994). The relevant portion of § 507(a)(8) provides priority for an excise tax on -

- (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or
- (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition. . . .

11 U.S.C. § 507(a)(8)(E).

Pursuant to this statutory scheme, if the obligation is a tax, it must fit within the specific definition of an "excise tax" in order to be excepted from the Debtor's discharge.

An excise tax is an indirect tax, one not directly imposed upon persons or property but imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. New Neighborhoods, Inc. v. West Virginia Workers' Compensation Fund, 836 F.2d 714, 719 (4th Cir. 1989); In re Payne, 27 B.R. 809, 813 (Bankr. D. Kan. 1983). The obligation in question here, if it is a tax, would qualify as an excise tax because it is an indirect assessment that arises through the transaction or act of employing. New Neighborhoods, 836 F.2d at 719; see Ohio Bureau of Workers' Compensation v. Yoder (In re Suburban Motor Freight, Inc.) ("Suburban II"), 36 F.3d 484, 488 n.2 (6th Cir. 1994); Yoder v. Ohio Bureau of Workers' Compensation (In re Suburban Motor Freight, Inc.) ("Suburban I"), 998 F.2d 338, 340 n.3 (6th Cir. 1993). We, therefore, turn to the more fundamental question of whether the Debtor's obligation to the Bureau can be classified as a tax.

The term "tax" is not defined by the Bankruptcy Code. In re Sacred Heart Hosp., 212 B.R. 467, 471 (E.D. Pa. 1997); In re Park, 212 B.R. 430, 432 (Bankr. D. Mass. 1997). Whether an obligation owed to the government constitutes a tax is a question of federal law. Suburban II, 36 F.3d at 487 (citing New York v. Feiring, 313 U.S. 283, 285 (1941)); New Neighborhoods, 836 F.2d at 718; Sacred Heart Hosp., 212 B.R. at 471; Park, 212 B.R. at 432. The statute's characterization of the obligation is not controlling. United States v. Juvenile Shoe Corp. (In re Juvenile Shoe Corp.), 99 F.3d 898, 901 (8th Cir. 1996); New Neighborhoods, 836 F.2d at 718; Park, 212 B.R. at 432-33; In re Metro Transp. Co., 117 B.R. 143, 151 (Bankr. E.D. Pa. 1990). Thus, the fact that the Act refers to premiums instead of taxes is not dispositive. Rather, the court must look to the substance of the statute to determine whether the obligation bears the characteristics of a tax. Feiring, 313 U.S. at 285; Juvenile Shoe Corp., 99 F.3d at 900; Metro Transp., 117 B.R. at 151.

The Supreme Court has defined taxes as "those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." Feiring, 313 U.S. at 285. See also United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996); Juvenile Shoe Corp., 99 F.3d at 900. In short, a payment may be classified as a tax if the state has compelled the payment and if the payment serves a public purpose. Metro Transp., 117 B.R. at 152 (quoting New Neighborhoods, 836 F.2d at 718). In contrast to taxes, fees

are monies paid to the government incident to a voluntary act that bestows a benefit on the applicant, not shared by other members of society. National Cable Television Ass'n v. United States, 415 U.S. 336, 340-41 (1974); Suburban I, 998 F.2d at 339-40; Sacred Heart Hosp. v. Pennsylvania Dept. of Labor and Indus. (In re Sacred Heart Hosp.), 209 B.R. 650, 654 (E.D. Pa. 1997) ("[A] government's claim looks less like a tax and more like a commercial charge when it involves a fee in exchange for the privilege of engaging in a certain regulated activity not available to the public generally or for the provision of a service which a person may obtain lawfully from others or may provide himself."). Such fees are meant to restore to the government the costs of the benefits supplied, rather than to produce general revenues. Park, 212 B.R. at 433. Several courts have summarized the distinction between taxes and fees by noting that taxes are involuntary exactions for a public purpose and non-taxes are voluntary payments for a private benefit. Park, 212 B.R. at 433 (citing In re S.N.A. Nut Co., 188 B.R. 392, 394 (Bankr. N.D. Ill. 1995); In re Jennv Lynn Mining Co., 780 F.2d 585, 589 (6th Cir. 1986)).

Based upon the Supreme Court's definition, the Ninth Circuit outlined the four elements necessary for classifying an obligation as a tax: (1) an involuntary pecuniary burden, regardless of name, laid upon individuals or property; (2) imposed by, or under authority of the legislature; (3) for public purposes, including the purposes of defraying expenses of government or undertakings authorized by it; and (4) under the police or taxing power of the state. County Sanitation Dist. No. 2 v. Lorber Indus. of Cal., Inc. (In re Lorber Indus. of Cal., Inc.), 675 F.2d 1062, 1066 (9th Cir. 1982). Most government assessments satisfy the second and fourth prongs of the test, Park, 212 B.R. at 433, which is indisputably the case here. Furthermore, the Debtor does not dispute that the workers' compensation premiums satisfy the remaining elements. The premiums are involuntary exactions on employers to serve the public purpose of upholding the prosperity of the state by ensuring the well-being of workers through sure and certain relief to those injured on the job. See N.D. Cent. Code § 65-01-01. Based on the Lorber test and its interpretation of the Supreme Court's definition of taxes, Debtor's unpaid workers' compensation premiums are nondischargeable excise taxes.

While Debtor does not dispute the result under the Lorber test, he maintains that the court must apply a refined version of the test developed by the Sixth Circuit. See Suburban

II, 36 F.3d at 488-89. Citing concern that the public purpose portion of the Lorber test would lead to classifying all government debts as taxes, the Sixth Circuit refined the third element to include two additional requirements: (1) that the pecuniary obligation be universally applicable to similarly situated entities; and (2) that according priority treatment to the government claim not disadvantage private creditors with like claims. Suburban II, 36 F.3d at 488.

Debtor argues that the Act is not universally applicable to all similarly situated entities. Debtor's argument stems from the fact that farmers are not required to pay premiums under the Act although they employ workers in the same capacity as Debtor's employees. That argument is unpersuasive. Many taxes are imposed on a subclass of taxpayers and do not lose their identity as taxes merely because they are not imposed beyond the confines of that class. New Neighborhoods, 886 F.2d at 719 n.4; Sacred Heart Hosp., 212 B.R. at 474. The Act applies to a certain subclass of employers. While agricultural employees may perform the same duties as Debtor's employees, the North Dakota Supreme Court has specifically held that the exclusion of agricultural employers from the Act has a rational basis. Haney v. North Dakota Workers Compensation Bureau, 513 N.W.2d 195, 202 (N.D. 1994).² Accordingly, agricultural employers are not similarly situated with the Debtor because they occupy a protected position in North Dakota. Thus, they permissibly lie outside the subclass of employers covered by the Act.

Debtor also argues that granting priority to the Bureau could disadvantage private entities with like claims. Debtor speculates that if he employed workers in Minnesota and obtained workers' compensation insurance, the private insurance provider in Minnesota would not receive the same treatment as the Bureau. Debtor's argument in this respect is also unpersuasive. Numerous courts, including the court that announced the test that Debtor relies upon, have granted priority to workers' compensation premiums in monopolistic states despite the fact that many other states have the option of private insurance. See, e.g.

² Debtor cites Benson v. North Dakota Workmen's Compensation Bureau, 283 N.W.2d 96 (N.D. 1979) as authority that the exclusion of agricultural employment from the Act is an unconstitutional denial of equal protection. However, the Haney court expressly overruled the Benson decision. Haney, 513 N.W.2d at 199.

Suburban I, 998 F.2d at 341-42. Debtor's argument would prevent every state's workers' compensation premiums from being classified as taxes merely because other states' systems allow for private insurance.

In sum, even if the refined Suburban II test is the proper standard, Debtor's unpaid workers' compensation premiums still qualify as taxes. The Act is universally applicable to all similarly situated entities and according priority treatment to the Bureau does not disadvantage any private creditors with like claims.

This result also conforms to the general trend of cases involving workers' compensation premiums. Generally, courts determining whether premiums under a state's workers' compensation scheme should be classified as excise taxes have looked at whether the scheme requires an employer to subscribe to a state-administered insurance plan or whether the employer may purchase private insurance. Workers' Compensation Trust Fund v. Saunders, 234 B.R. 555, 562 (Bankr. D. Mass. 1999). When a state requires all employers to purchase workers' compensation insurance from the state, with no private insurance option, the premiums fairly consistently have been classified as priority taxes. Industrial Comm'n v. Camilli (In re Camilli), 94 F.3d 1330, 1335 (9th Cir. 1996); Suburban I, 998 F.2d at 340 ("The theory goes that where the State has intended to supplant all private forms of workers' compensation insurance, to centralize the system and to force all employers to participate on pain of legal sanctions, the coercive and universal nature of the state program makes payments it collects more akin to taxes than to fees or insurance premiums, which are paid voluntarily."); Saunders, 234 B.R. at 562; Park, 212 B.R. at 435; Waldo v. Montana Dept. of Labor & Indus., 186 B.R. 118, 122 (Bankr. D. Mont. 1995). The North Dakota system is monopolistic. All employers must pay premiums into the state fund, with no option of private insurance. See N.D. Cent. Code § 65-04-04. Therefore, the prevailing rule regarding the classification of workers' compensation premiums also supports the conclusion that Debtor's unpaid premiums are nondischargeable priority excise taxes.

CONCLUSION

Based on the foregoing, we hereby affirm the decision of the bankruptcy court.

A true copy.

Attest

CLERK, U.S. BANKRUPTCY APPELLATE PANEL
FOR THE EIGHTH CIRCUIT

**NORTH DAKOTA WORKERS COMPENSATION
2001 LEGISLATION
SUMMARY OF ACTUARIAL INFORMATION**

BILL DESCRIPTION: Discharge in Bankruptcy of Workers' Compensation Premiums

BILL NO: SB 2416

SUMMARY OF ACTUARIAL INFORMATION: North Dakota Workers Compensation, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The proposed bill would make workers compensation premiums dischargeable in bankruptcy.

FISCAL IMPACT: Not quantifiable. The proposed bill may serve to increase uncollectibles from at-risk employers as well as preclude NDWC from collecting premiums after bankruptcy is filed. To the extent that this increases costs, the additional costs would be reflected in future premium adjustments.

DATE: January 31, 2001

**2-12-2001 STATEMENT BY CHUCK PETERSON, REPRESENTING
GNDA, REGARDING SB 2416 WORKER COMPENSATION
LEGISLATION.**

Chairman Mutch and members of the Senate Industry, Businesses and Labor Committee. I am Chuck Peterson, a member of GNDA, and a North Dakota businessman. Thank you for the opportunity to provide testimony in regarding SB 2416.

The Greater North Dakota Association is the voice of business and the principle advocate of positive change in North Dakota. As a member of GNDA we represent over 1000 business and professional organizations from all areas of North Dakota. GNDA is governed by a 25 member Board of Directors elected by our membership.

I also speak for the Associated General Contractors, the North Dakota Petroleum Council, the North Dakota Retail Petroleum Marketers Association, the North Dakota Motor Carriers Association, and the Automobile Dealers and Implement Dealers Association.

We urge a no vote on this legislation. It is our opinion that the Workers Compensation Bureau should be afforded all of the necessary tools to collect the past due premiums. The cost of premiums that are not collected will be born by the rest of the employer community; we fail to see a benefit from this.

We urge a no vote.