No. 07-312

IN THE
Supreme Court of the United States

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Petitioner,

v.

PICCADILLY CAFETERIAS, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

FREDERICK F. RUDZIK
ASSISTANT GENERAL COUNSEL
DEPARTMENT OF REVENUE
STATE OF FLORIDA
P. O. BOX 6668
TALLAHASSEE, FL 32314
(850) 410-2600

BILL MCCOLLUM
ATTORNEY GENERAL
SCOTT D. MAKAR*
SOLICITOR GENERAL
CRAIG D. FEISER
DEPUTY SOLICITOR GENERAL
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399
(850) 414-3300
(850) 410-2672 (FAX)

Counsel for the Petitioner
* COUNSEL OF RECORD

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Piccadilly sidesteps the key strengths of the most natural reading of section 1146(c), which is to limit stamp tax exemptions to only those post-confirmation transfers authorized under a confirmed Chapter 11 plan. It leaves the Department's arguments largely unanswered, devoting much effort trying to establish that section 1146(c) is sufficiently unclear to justify embarking on the voyage that follows through the general purpose, structure and history of various portions of the Bankruptcy Code. All of this, Piccadilly claims, supports its newly-proposed "instrumental" test for determining post-confirmation whether a pre-confirmation tax exemption should have been granted in the first place.

Piccadilly briefly addresses canons of statutory construction, but ignores the principle that Congress was presumed to be aware of and to have adopted the rationales of the *Hechinger* and *NVR* decisions when it readopted and renumbered section 1146(c) in 2005 without change. It also disregards the context of section 1146(c)'s placement in the Code's subsection entitled "POST-CONFIRMATION MATTERS." In Piccadilly's view, liberality in the interpretation of the Bankruptcy Code takes priority over the natural reading of section 1146(c) and trumps other relevant canons of construction, justifying an extraordinary grant of power to bankruptcy judges to exercise judicial prescience by granting contingent tax exemptions prospectively without the necessity of a confirmed plan as section 1146(c) requires. This Court has never accorded the Bankruptcy Code such elasticity, particularly in the context of a tax exemption statute; it should not do so in this case.

A. The Most Natural Reading of Section 1146(c) Does Not Support the Eleventh Circuit's or Piccadilly's Conclusion that Pre-Confirmation Transfers Under Preliminary Unconfirmed Plans Are Entitled to Stamp Tax Exemptions.

The most natural reading of section 1146(c) is that it applies to post-confirmation transfers under a confirmed Chapter 11 plan. Piccadilly makes no claim that section 1146(c) can be read to exclude such transfers. Instead, Piccadilly seeks to go beyond this simple, natural, and workable reading of section 1146(c) to inferentially include pre-confirmation transfers. Its burden of persuading this Court is "exceptionally heavy." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 9 (2000).

Yet, Piccadilly spends over half its argument (Resp. Br. 23-40) trying to create sufficient ambiguity[1] to justify a trip through the nooks and crannies of the

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[1] For instance, Piccadilly suggests that "in accordance with" and other phrases could plausibly substitute for "under" to expand one's reading of section 1146(c) to apply to pre-confirmation transfers. Resp. Br. 28, 33-34. It would be peculiar, however, to talk about doing some act "in accordance with" something that does not yet and may never exist; such a construction is awkward. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 450 (1999) (noting "it would be exceedingly odd to speak" in the proposed manner of statutory construction). Piccadilly also claims that Congress could have clarified that only post-confirmation transfers are eligible by using the "temporally limiting phrase 'dealt with under a confirmed plan'" used elsewhere in the Code. Resp. Br. 30. The addition of "dealt with" adds nothing because Piccadilly undoubtedly would claim that a pre-confirmation transfer listed in a confirmed plan is thereby "dealt with" by the plan and entitled to the exemption.

Bankruptcy Code and the section's sparse legislative history in search of its true meaning. The most natural reading of section 1146(c) makes this journey unnecessary; and the journey, if taken, leads back to the conclusion that the Eleventh Circuit's expansive view is insupportable, and that the courts in *In re Hechinger Inv. Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003), and *In re NVR, LP*, 189 F.3d 442 (4th Cir. 1999), correctly limited section 1146(c) to only post-confirmation transfers.

A tax exemption under section 1146(c) hinges on the existence of an actual confirmed plan under section 1129 of the Code. A confirmed plan is the *sine qua non* of section 1146(c)'s operation, triggering the availability of its stamp tax exemption. In Piccadilly's view, however, section 1146(c) empowers bankruptcy courts to grant *tentative* tax relief *prospectively* based on a *preliminary*, *unconfirmed* plan that contains an asset transfer a debtor hopes the court will deem to have been "instrumental" to the plan the court might eventually confirm. This view stretches section 1146(c)'s language too far.

It is implausible that Congress intended the word "plan" in section 1146(c) to mean a preliminary, unconfirmed plan. To do so disengages the word "plan" from its adjacent modifier "confirmed," rendering the latter irrelevant. This reading ignores that the linchpin of section 1146(c) is a "plan confirmed under section 1129" of the Code. Proposed plans routinely are amended, often significantly; competing plans may be proposed. A plan proposed prior to confirmation is merely a preliminary proposal; it has no imprimatur of approval until it successfully runs its course through the confirmation process, if ever.

That a proposed plan might later be confirmed in its entirety or even with what Piccadilly terms its "instrumental" parts intact is possible. But that possibility does not justify giving power to bankruptcy courts to grant contingent pre-confirmation tax exemptions. To do so would thwart the laudable purpose of the plan confirmation process itself, which Congress has painstakingly structured to provide fairness to affected parties in its sequential steps: plan formulation, disclosure statement, solicitation of votes, voting, confirmation hearing, and plan confirmation. The grant of a tax exemption, as was done below, based solely on an asset sale done "in contemplation of a plan" and outside the plan confirmation process renders the "plan confirmed" language of section 1146(c) meaningless.

Such power would be extraordinary because it would be based on the *assumption* that: (a) the case will not be dismissed or converted to a Chapter 7 liquidation; (b) a Chapter 11 plan will be proposed, will conform to the requirements of the confirmation process, and will eventually be confirmed; (c) a competing plan will not prevail; *and* (d) the transfer at issue ultimately will be deemed "instrumental" (or some other non-statutory test) to the final plan that is ultimately confirmed. All this is far too much to assume. If any of these contingencies occur (and the likelihood is high that one will),[2] the grant of the tax

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[2] Available data reflects that approximately 74-83% of Chapter 11 cases do not result in confirmed plans, most converting to Chapter 7 liquidations or resulting in dismissal. *See generally* Gordon Bermant & Ed Flynn, Outcomes of Chapter 11 Cases: U.S. Trustee Database Sheds Light on Old Questions, 17 AM. BANKR. INST. J. 8 (1998) (reviewing database of U.S. Trustees for period 1989-1995).

exemption at this preliminary, pre-confirmation stage of a Chapter 11 proceeding will be for naught; the exemption will be unjustified and have to be undone. The exercise of such power would require a crystal ball to foresee that none of these possibilities will arise, thereby undermining the plausibility of Piccadilly's reading of section 1146(c).

The simplicity and workability of the decisions in *Hechinger* and *NVR* contrast sharply with the Eleventh Circuit's approach, which raises unanswered ancillary questions such as: (a) how are unjustified pre-confirmation tax exemptions to be corrected later if, for example, no plan is confirmed, the case is converted, or the petition is dismissed?; (b) how are state and local governments to know of each proposed transfer (whether under section 363 or simply in the ordinary course of a debtor's business) to protect their interests?; and (c) what are the administrative and judicial costs of unraveling unjustified tax burdens? Indeed, one must question whether the litigation costs of the parties objecting to and defending requests for pre-confirmation tax exemptions, together with post-confirmation litigation under one of the fact-driven tests proposed (discussed in next paragraph), may quickly eclipse the amount of the tax.

It is unlikely that Congress meant to spawn all these practical difficulties that flow from the Eleventh Circuit's broad reading of section 1146(c). Moreover, the court's approach requires inventing a judicial test for determining *post-confirmation* whether a *pre-confirmation* transfer was justified. Tests abound.[3]

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[3] Piccadilly's new test is that a pre-confirmation exemption is justified if the asset transfer was part of a preliminary plan and the transfer is later deemed to be "instrumental" to the plan (Continued …)

Each is based on a subjective and malleable view of the importance of a pre-confirmation asset transfer (was it "instrumental," "necessary," or just "material" to the plan eventually confirmed?), enmeshing the courts in a non-textual endeavor fraught with practical difficulties and administrative burdens. *See 203 N. LaSalle St. P'ship*, 526 U.S. at 450 (noting "practical" difficulties with reading a bankruptcy statute in a non-textual way that leads to malleable characterizations such as "substantial," "significant," or "considerable" that lack sharpness). None of these proposed tests has textual support in section 1146(c), whose most natural reading eliminates the need for any of them.

B. The Purpose, Structure, and History of the Code Support the Department's Reading of Section 1146(c).

Piccadilly invokes the purpose, structure, and history of the Bankruptcy Code (Resp. Br. 41-52), which provide a firmer foundation for the Department's reading of section 1146(c). First, the purpose of 1146(c) is reflected in its text. It provides that debtors who comply with the Chapter 11 confirmation process and achieve a confirmed plan will not have stamp taxes imposed on the making or delivery of instruments of transfer authorized under

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ultimately approved. Resp. Br. 1, 20-23, 47. The Eleventh Circuit held the exemption applies to "*those* pre-confirmation transfers that are necessary to the consummation of a confirmed plan" requiring at least "some nexus between the pre-confirmation sale and the confirmed plan." Pet. App. 8a-9a (emphasis in original). The amici's test is whether the sale is a "material element" of the debtor's business plan, provided "the basis of the plan ultimately confirmed … is substantially the same as that of the earlier business plan." Prof. Br. 2-3.

the confirmed plan. It provides a narrowly defined *stamp* tax exemption on a limited set of transactions involving *securities and asset transfers* under a *confirmed* plan. It is reasonable to conclude that the purpose of section 1146(c) is to give a very limited tax exemption to those debtors who successfully reach the confirmation stage.

Given the exemption's limited nature, it cannot be characterized as generalized tax relief whose purpose is to benefit debtors or creditors in all types of bankruptcies. It is not available in Chapter 7 liquidation cases or in Chapter 13 matters. It does not extend to other taxes such as sales, income, excise, or capital gains taxes, all of which are larger and would provide greater relief if exempted. Instead, section 1146(c)'s prohibition against taxation is triggered only upon completion of the Chapter 11 confirmation process, and then only for a limited set of specific transactions involving a stamp or similar transfer tax.

Next, Piccadilly's claim that a stamp tax "is simply a tax on the bankruptcy process itself" is hyperbole. Resp. Br. 42. Stamp taxes are not imposed only when a debtor files for bankruptcy; they are generally applicable taxes, like sales and income taxes, that are due and payable when incurred whether a company has filed for bankruptcy or not. *See Cal. State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 849 (1989) (noting "no constitutional impediment to the imposition of sales or use tax on a liquidation sale."). They are neutral taxes applied to all relevant transactions. The Code allows debtors who believe it is economically justifiable to sell assets within (e.g., *NVR*) or outside the ordinary course of their businesses (e.g., *Hechinger*) to do so prior to confirmation. But, like

other debtors without confirmed plans, they will incur all the ordinary costs of transfer, which may include a stamp tax.

Similarly, it is exaggeration to suggest that the stamp tax itself is an impediment to corporate reorganizations under Chapter 11 when the Code flexibly allows the pursuit of value-maximization in a variety of ways via sales and other competitive dispositions of assets, and further allows an exemption from such a tax upon successful completion of the confirmation process. Congress established flexibility in the filing, modification, and confirmation of a proposed plan. It is not required that a debtor have a fully-negotiated plan ready to go at the outset of filing under Chapter 11. Simple plans can be filed followed by more detailed plans. Timing, to a great extent, is in the hands of the debtor. Given this flexibility and structure, one must question whether the parties would have foregone the $80 million transaction at issue to avoid a $39,200 stamp tax on the four Florida properties at issue. Piccadilly suggests it might forgo such a sale because waiting for confirmation would "disadvantage the process." Resp. Br. 44. But section 1146(c) speaks in terms of a completed plan confirmation process, which Piccadilly's approach strips of meaning.

Further, Piccadilly's claim that the Department seeks to impose a "temporal limitation" overlooks the statute's language and tenses, its subheading ("POST-CONFIRMATION MATTERS"), and its requirement of a confirmed plan. The language of section 1146(c), taken as a whole, itself expresses a temporal limitation. The past tense of "confirmed" establishes that a tax exemption cannot exist until a confirmed plan exists. Read Piccadilly's way, section 1146(c)

would allow transfers to avoid tax before a "confirmed" plan exists thereby rendering the word "confirmed" irrelevant. In reality, it is Piccadilly who seeks to *eliminate* the temporal limitation of a "confirmed plan," which is the statute's sequential triggering mechanism. Only after the successful completion of the confirmation process and confirmation of a plan do the statute's tax exemptions become operative.

Next, Piccadilly claims that it is "absurd" and an "anomaly" to read section 1146(c) as did the courts in *Hechinger* and *NRV*. The holding of those courts, consistent with the Department's position in this case, is simple: section 1146(c) creates a bright line by providing that transfers flowing from a confirmed plan will not be taxed. Putting aside the unrealistic hypothetical of a "crucial" transfer made "two minutes before confirmation" (Resp. Br. 43), what Piccadilly essentially posits is that deadlines, cutoff dates, or other lines of demarcation are inherently absurd and nonsensical. But lines must be drawn, and the language of section 1146(c) requiring "a plan confirmed under section 1129" forms the most natural and commonsense point at which to draw it.

Second, the structure of the Bankruptcy Code supports the Department's reading of section 1146(c). Piccadilly paints a portrait of a company that carefully and methodically invoked the Chapter 11 process, choosing to sell its assets under section 363 before a reorganization plan was even filed. The course that Piccadilly chose in selling its assets was a permissible one under the Code's structure. *But it was entirely outside the structure of the Code's plan confirmation process*. The approval of the sale and the grant of the tax exemption occurred over a month

prior to Piccadilly's filing of its initial proposed plan (and over eight months *prior* to the confirmation order).

Under these circumstances, it is a leap of logic to read section 1146(c), which pivots around the necessity of a "plan confirmed under section 1129," to authorize bankruptcy judges at a preliminary juncture before a proposed plan is even filed to predict that asset transfers are entitled to tax exemptions. As the bankruptcy judge noted, the section 363 sale was merely "in *contemplation* of a plan." Jt. App. 46a (emphasis added). What Piccadilly fails to explain is why its approach, via a preliminary plan and sale entirely outside the plan confirmation process, must control the extent of section 1146(c)'s application. It should not control. As the court in *NVR* concluded, "§1146(c) exclusively, and not a plan's provisions, control the extent of the statute's own operations." 189 F.3d at 456-57.

Finally, Piccadilly claims the exceptionally meager legislative history supports a broad reading of section 1146(c) to apply to pre-confirmation transfers. The scant legislative history establishes only that Congress intended to expand the stamp tax to the states in 1938 and the stamp tax exemption to "similar" taxes in 1978.

No legislative history exists in support of extending the tax exemption to *pre-confirmation* transfers. Piccadilly cites none. Instead, the limited history it cites suggests the contrary. Notably, Piccadilly misconstrues the statement of the Assistant General Counsel of the Treasury Department, Arthur H. Kent, before the Senate Subcommittee of the Committee on the Judiciary on January 21, 1938. *See*

Revision of the National Bankruptcy Act, Hearings Before a Subcommittee of the Comm. on the Judiciary on H.R. 8046, 75th Cong. 132-45 (1937-38) (hereafter *Kent Statement*); Resp. Br. 49.

When the Chandler Act was considered in 1937, it contained three proposed stamp tax exemptions: (a) one for confirmed plans in reorganization; (b) one for "arrangements" involving the treatment of unsecured debt; and (c) one for "arrangements" involving modification of the rights of secured creditors.[4] The Treasury Department protested the extension of the stamp tax to these latter two "arrangements" under a House version of the act because it would expand the exemption's scope broadly, materially increase the administration of the tax, and allow unnecessary and undesirable exemptions.[5] In response, the final version of the

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[4] *See* H.R. REP. NO. 1409, at 111 (§ 267), 126 (§ 365) & 137 (§ 520) (proposed exemptions) & at 120 (§ 306(1)) & 129 (§ 406(1)) (definitions of "arrangements") (1937) (setting forth three proposed exemptions (a) one for confirmed plans in reorganization under Chapter X ("Corporate Reorganizations"); (b) one for "arrangements" involving the settlement, satisfaction, or extension of the time of payment of unsecured debt under Chapter XI (entitled "Arrangements"); and (c) one for "arrangements" involving "any plan altering or modifying the rights of creditors or of any class of them, holding debts secured by real property or a chattel real of which the debtor is the legal or equitable owner" under Chapter XII (entitled "Real Property Arrangements by Persons Other Than Corporations")).

[5] Kent's statement included the January 14, 1938 letter of Roswell Magill, Acting Secretary of the Treasury, which noted the "difficulties of administering the exemption [contained in the House version, which included arrangements] would be materially increased over those arising from administering the stamp-tax provisions of [the Senate version] because under the former the exemptions apply to additional transactions more

(Continued …)

Chandler Act was modified to *eliminate* its proposed application to these two categories of "arrangements" entirely. S. REP. NO. 1916, at 8-9 (1938). Thus, rather than strengthening Piccadilly's position, this *restriction* on the proposed scope of the stamp tax's application in response to the Treasury Department's statement suggests strongly to the contrary.

Moreover, Piccadilly entirely overlooks that Mr. Kent exclusively addressed the *federal* stamp tax, specifically stating "[w]e are not interested in the *State* aspect of the question." *Kent Statement,* at 139 (emphasis added). The potential administrative or fiscal burdens on the then 48 *states* were simply not addressed and formed no part of this legislative history. Moreover, that the stamp tax was deemed of "diminished importance insofar as *federal* revenues are concerned" (Resp. Br. 50) (emphasis added) (citation omitted) is of little moment given the substantial importance of such revenues to states such as Florida, whose revenues (though currently declining due in part to fewer real property transfers) have ranged from $1.572 billion (FY 2001-02) to $4.058 billion (FY 2005-06) in recent years.[6]

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numerous than under the latter." *Kent Statement*, at 141. His letter noted further that "the language in the stamp-tax exemptions provisions of [the House version] is somewhat indefinite and for this reason may be susceptible of interpretations which would permit exemptions not necessary or desired." *Id.*

[6] *See* Florida Department of Revenue, Documentary Stamp Tax Collections, Historical Data, *available at* http://dor.myflorida.com /taxes/doc_stamp_coll.html (last visited March 13, 2008).

Furthermore, a primary focus of the Treasury Department was its concern about the *post-confirmation* time period for transfers, which it wanted to limit to one year from plan confirmation. The concern was that it might pose administrative burdens if transfers "continued for a period of 5 years after the consummation of the plan" because the "determination of whether they come within the terms of the exception becomes an extremely difficult matter." *Kent Statement,* at 140. While Congress did not impose this suggested limitation, the point is that Mr. Kent's statement focused on *post-confirmation* concerns, not pre-confirmation ones. For all these reasons, Piccadilly's invocation of legislative history undermines rather than supports its position.

C. The "Realities" of Bankruptcy Practice and the "Remedial" Nature of the Code Do Not Trump Statutory Language.

A central theme of Piccadilly and its amici is that the language of section 1146(c) should conform to the "realities" of "modern" bankruptcy practices. Both ask this Court to construe section 1146(c) with flexibility and liberality to reach a result they deem desirable from a policy perspective, a task better suited for Congress. *Hartford Underwriters*, 530 U.S. at 13-14 ("Achieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts.").

What they ignore is the reality that most Chapter 11 filings do not result in confirmed plans, thereby leading to unnecessary administrative burdens arising from the grant of pre-confirmation tax exemptions that must later be undone. They also ignore that the Bankruptcy Code is sufficiently

flexible to accommodate the type of structured, unhurried approach that Piccadilly employed, as well as time-sensitive situations in which value-maximizing competitive sales or auctions are desirable.

Perhaps most importantly, they ignore that real world conduct must conform to the Code and not vice versa. In this regard, while debtors may "favor pre-confirmation sales rather than waiting for confirmation," nothing in the Code requires that debtors must "await the plan confirmation process before selling assets" as is claimed. Prof Br. 19. Debtors may use section 363 to sell assets, as was done below; but a sale under section 363 is not *ipso facto* entitled to a section 1146(c) tax exemption. Section 363 sales may be done for a host of laudable, sound business reasons, but that alone does not entitle them to stamp tax exemptions.

Instead, the Bankruptcy Code has established an orderly, fair, and flexible process, one in which debtors must operate to achieve the equitable goals that Congress intends. But flexibility and equity do not trump the Code; equity in bankruptcy must be achieved within the confines of the Code itself. *See Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 206 (1988) ("The short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").

Notably, the amici's view of the Congressional intent underlying section 1146(c) is somewhat remarkable. They assert that "if the current practice of making pre-confirmation sales part of a debtor's program of reorganization had been the practice

decades ago when Congress brought the exemption into bankruptcy reorganization law, it would have intended such sales to be exempt if the basis for the reorganization under the plan confirmed is substantially the same as provided by the debtor's program for reorganization under its earlier business plan." Prof. Br. 3. They similarly assert that this "increase in the usage of pre-confirmation sales in chapter 11 cases, along with the transformation in the bankruptcy process as a whole, is a change of circumstances upon which Congress could not have focused when originally drafting the transfer tax exemption decades ago. Had such circumstances existed when Congress was considering whether to bring the exemption from transfer taxes into the law, it surely would have intended such pre-confirmation sales to be exempt." *Id.* at 19.

What is overlooked is that Congress – if it so intended – had the perfect chance in 2005 to amend and "modernize" section 1146(c) into the type of statute that the amici desire. Congress could have rewritten section 1146(c) to include pre-confirmation transfers and to incorporate a test for determining what pre-confirmation transfers should be eligible for stamp tax exemptions. Congress, however, chose only to readopt section 1146(c) verbatim and to renumber it. The view that this Court should essentially rewrite the statute to bring it into "modern" practice is all the more troubling given that Congress so recently readopted section 1146(c) unchanged with both *Hechinger* and *NVR* on the books.

Notably, neither the Eleventh Circuit nor Piccadilly cite any case in which this Court has held that the "remedial" nature of the Bankruptcy Code trumps the requirement that tax exemptions be

carefully and narrowly construed.[7] None exist. Moreover, the Department does not contest that section 1146(c) establishes a stamp tax exemption, that it applies to post-confirmation transfers, and that it displaces the state's tax system to that extent. It is the far-reaching *inferential* expansion of the exemption to pre-confirmation transfers to which the Department objects, making highly relevant the principle of *California State Board of Equalization v. Sierra Summit, Inc.*, that courts must "proceed carefully when asked to recognize an exemption from state taxation *that Congress has not clearly expressed*." 490 U.S. at 851-52 (emphasis added).

Congress has not clearly expressed a pre-confirmation tax exemption in section 1146(c). Nothing in the plain language of the statute or its legislative history, or the structure of the Bankruptcy Code, provides a clear expression of this intent. *Id.* at 852. As this Court noted in *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 607 (1943), where "Congress intends to prevent" a state from imposing a general non-discriminatory tax, "it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Here, Piccadilly claims that section 1146(c) "plainly establishes" entitlement to pre-confirmation tax exemptions (Resp. Br. 58), yet neither the Eleventh Circuit nor Piccadilly

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[7] Tellingly, neither of the two cases upon which the Eleventh Circuit relied for its conclusion that "remedial" bankruptcy statutes must be liberally construed involved tax exemptions. One merely broadly paraphrased this Court's statement in *Bank of Marin v. England*, 385 U.S. 99, 103 (1966), that "equitable principles govern the exercise of bankruptcy jurisdiction." The other was not even a bankruptcy case. *See* Pet. App. 8a (citing *Matter of Crist*, 632 F.2d 1226 (5th Cir. 1980), and *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995)).

can point to the "plain words" that Congress used to establish this entitlement. Indeed, they deem section 1146(c) to be ambiguous, not plain, and rely on the type of doubtful inferences that do not justify further intrusion into state and local tax systems.

D. Piccadilly Miscasts the Department's Position.

Finally, Piccadilly makes two assertions that miscast the Department's position. First, Piccadilly points to a "current" Florida administrative rule, which it characterizes as "implementing" section 1146(c) and "mirror[ing]" the decision in *Piccadilly Cafeterias*. Resp. Br. 16 & 49. Piccadilly fails to note that this regulation is neither current nor binding; does not implement section 1146(c); and was not raised below. The rule is merely a non-binding interpretative statement.[8] It is one of three related rules[9] issued in 1994 but never updated. The rule to which Piccadilly points attempted to interpret section 1146(c) in light of two non-binding cases from 1985,[10]

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[8] *See, e.g., Leadership Housing, Inc. v. Fla. Dep't of Rev.*, 336 So. 2d 1239, 1241 (Fla. App. 1976) (department rule regarding application of documentary stamp tax to existing mortgages "is merely an interpretative rule setting out respondent's position on the point at issue. It is not a substantive rule and has no legislative effect."); *see also Batterton v. Francis*, 432 U.S. 416, 425 (1977) ("… a court is not required to give effect to an interpretative regulation.").

[9] *See* Rules 12B-4.013(19) ("Conveyances Subject"), 12B-4.014(15) ("Conveyances Not Subject to Tax"), & 12B-4.054(30) ("Exempt Transactions"), Fla. Admin. Code (2008).

[10] Rule 4.014(15)'s text includes the following: "(11 U.S.C. Section 1146(c); In re Jacoby-Bender, Inc., 758 F.2d 840 (2d Cir. 1985); In re Smoss Enterprises Corp., 54 Bankr. 950 (E.D.N.Y. 1985)."

and was enacted prior to *NVR* (1999), *Hechinger* (2004), and *In re T.H. Orlando* (2004).[11] It is outdated by over a decade, interprets non-binding cases that are over two decades old, and could not "mirror" *Piccadilly Cafeterias*, which was not issued until 2007. Even if the rule were updated it would necessarily reflect the *Piccadilly Cafeterias* decision because that is the law in the Eleventh Circuit currently. For these reasons, Piccadilly's invocation of a non-binding, out-of-date interpretive regulation proves nothing.

Second, Piccadilly points to claims forms filed by the Department, asserting that "Florida's ultimate objective" is to have its stamp tax "paid as a priority expense of administration ahead of the claims of almost every other creditor." Resp. Br. 54. This assertion is a red herring. If the tax is valid and owed, it receives the priority to which it is entitled under the Code, no more and no less. *See* 11 U.S.C. § 503(b)(1)(B) (granting an administrative expense priority to taxes an estate incurs post-petition). The Department obviously seeks payment of stamp taxes. The payment of such taxes, however, is neither an unjustified priority nor does it make the Chapter 11 process any "more difficult" than does the payment of other justifiable liabilities and other taxes that arise in the course of the process. Resp. Br. 55.

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[11] The statement that the debtor must "be a party to the transfer" is also outdated. *See In re T.H. Orlando Ltd.*, 391 F.3d 1287 (11th Cir. 2004) (extending section 1146(c)'s tax exemption to transfers of *non-debtor* property between two *non-debtors*).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

FREDERICK F. RUDZIK
ASSISTANT GENERAL COUNSEL
DEPARTMENT OF REVENUE
STATE OF FLORIDA
P. O. BOX 6668
TALLAHASSEE, FL 32314
(850) 410-2600

BILL MCCOLLUM
ATTORNEY GENERAL
SCOTT D. MAKAR*
SOLICITOR GENERAL
CRAIG D. FEISER
DEPUTY SOLICITOR GENERAL
STATE OF FLORIDA
OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399
(850) 414-3300
(850) 410-2672 (FAX)

Counsel for the Petitioner

March 17, 2008

* COUNSEL OF RECORD