

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re	§	Chapter 11
	§	
EXPRESS ENERGY SERVICES OPERATING, LP, <i>et al.</i> ,	§	Case No. 09-____ (____)
	§	
Debtors.	§	
	§	
	§	Joint Administration Requested

**DEBTORS' EMERGENCY MOTION FOR AN ORDER PURSUANT TO
SECTIONS 105(a), 506(a), 507(a)(8), AND 541 OF THE BANKRUPTCY CODE
AUTHORIZING DEBTORS TO PAY CERTAIN PREPETITION
SALES TAXES, USE TAXES, AND LICENSE AND PERMIT FEES**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Express Energy Services Operating, LP ("**EES**") and its affiliated debtors in the above referenced chapter 11 cases, as debtors and debtors in possession (collectively, the "**Debtors**"),¹ file this emergency motion (the "**Motion**") for entry of an order authorizing the Debtors to pay certain prepetition sales taxes, use taxes, and license and permit fees, and respectfully represent as follows:

I.

BACKGROUND

1. On the date hereof (the "**Commencement Date**"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Contemporaneously herewith, the Debtors filed a motion seeking joint administration of

¹ A list of the Debtors in these chapter 11 cases is attached hereto as **Exhibit A**.

their chapter 11 cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

2. Information regarding the Debtors’ business and events leading to the Debtors’ bankruptcy filings can be found in the Declaration of Darron Anderson in Support of the Debtors’ Chapter 11 Petitions and First Day Motions, filed contemporaneously herewith.

II.

JURISDICTION

3. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III.

RELIEF REQUESTED

4. By this Motion, the Debtors request entry of an order (substantially in the form of **Exhibit B** attached hereto) authorizing the Debtors, in their sole discretion and pursuant to sections 105(a), 506(a), 507(a)(8), and 541 of the Bankruptcy Code, to pay certain prepetition Tax Obligations (defined below) to the respective taxing authorities (collectively, the “**Taxing Authorities**”).

5. The Debtors further request that the Court authorize and direct the Debtors’ financial institutions (the “**Banks**”) to receive, honor, process, and pay, to the extent funds are available in their accounts, any and all checks drawn, or electronic fund transfers requested or to be requested, on the Debtors’ general disbursement accounts to the extent that such checks or electronic fund transfers relate to any of the Tax Obligations.

IV.

THE DEBTORS' TAX OBLIGATIONS

A. Sales Taxes

6. In the normal course of business, the Debtors are required to collect sales taxes (the "**Sales Taxes**") from purchasers of their drilling, production, and decommissioning services. The Debtors collect Sales Taxes on a per sale basis and periodically remit the Sales Taxes to the applicable Taxing Authorities. Typically, Sales Taxes accrue as services are sold and such taxes are calculated as a statutory percentage of the sale price. The process by which the Debtors remit Sales Taxes varies, depending on the Taxing Authority which is to be paid. Sales Taxes are remitted to the relevant Taxing Authorities either on the basis of estimated Sales Tax collections for the coming period or on the basis of Sales Tax actually collected from customers during the prior period. With respect to those jurisdictions that require the Debtors to remit estimated Sales Taxes, the Debtors subsequently reconcile payments to determine any payment deficiency or surplus for the period and the applicable payment is then made or refund requested. The timing and payment of Sales Taxes varies from jurisdiction to jurisdiction.

B. Use Taxes

7. The Debtors also incur use taxes (the "**Use Taxes**") in connection with the purchase of certain tangible personal property or services from vendors that have no nexus to the resident state of the particular Debtor purchasing property or services. Use Taxes arise when the Debtors purchase items or services from a vendor who is not registered to collect sales tax for the state in which the property is delivered or the services are provided. In this circumstance, such vendors are not obligated to charge Sales Taxes. Nonetheless, the purchasers (*i.e.* the Debtors) are obligated to self-assess and pay Use Taxes, when applicable, to the applicable Taxing Authorities in the states in which the Debtors operate. The Debtors pay

Use Taxes in arrears and the timing and payment of Use Taxes varies from jurisdiction to jurisdiction.

C. License and Permit Fees

8. Local governments sometimes require the Debtors to obtain a business license and pay fees associated with the obtaining and renewal of the license. To obtain such licenses and permits, payment of a fee is usually required (the “**License and Permit Fees**, and together with the Sales Taxes and Use Taxes, including any penalties and interest thereon, the “**Tax Obligations**”). The way in which License and Permit Fees are computed varies according to the tax law of the applicable jurisdiction. License and Permit Fees are paid on an as needed basis. Although the Debtors do not foresee significant License and Permit Fees related to new businesses, the Debtors believe that the expiration and renewal of various licenses and permits either in the recent past or in the near future may result in a small tax liability to the Debtors for certain prepetition License and Permit Fees.

F. Payment of Certain Prepetition Tax Obligations

9. By this Motion, the Debtors seek to pay approximately (i) \$125,000 in Sales Taxes; (ii) \$80,000 in Use Taxes; and (iii) \$25,000 of License and Permit Fees relating to the prepetition period in the ordinary course of business.

V.

BASIS FOR RELIEF REQUESTED

10. The following grounds support granting the requested relief: (A) Sales Taxes and Use Taxes must be remitted to the applicable Taxing Authorities because they are not property of the Debtors’ estates; (B) failure to pay certain prepetition Tax Obligations may distract the Debtors’ officers and directors from reorganization efforts by exposing them to personal liability; (C) payment of prepetition Tax Obligations affects only the timing of

payments; and (D) the Court has authority to grant the requested relief under section 105(a) of the Bankruptcy Code.

A. Sales Taxes and Use Taxes are Not Property of the Debtors' Estates

11. The Sales Taxes and Use Taxes constitute “trust fund” taxes, in which the Debtors hold only legal title and not an equitable interest. Section 541(d) of the Bankruptcy Code provides, in relevant part:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d).

12. To the extent the Debtors have collected Sales Taxes and Use Taxes from third parties, such funds must be held in trust by the Debtors for the benefit of the applicable Taxing Authorities. Such funds do not constitute property of the Debtors’ estates. See, e.g., McDonough v. Iowa Dep’t of Revenue (In re McDonough), 346 B.R. 492, 496 (Bankr. S.D. Iowa 2006) (concluding that sales taxes are trust fund taxes); Official Comm. of Unsecured Creditors of the Columbia Gas Transmission Corp. v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys. Inc.), 997 F.2d 1039, 1060 (3d Cir. 1993) (indicating that even if a statute does not establish an express trust, a constructive trust may be found); DiChiaro v. N.Y. State Tax Comm’n, 760 F.2d 432, 433–34 (2d Cir. 1985) (holding that a sales tax that is required by state law to be collected by sellers from their customers is a “trust fund” tax); In re Equalnet Comm. Corp., 258 B.R. 368, 370 (Bankr. S.D. Tex. 2000) (“[C]ertain prepetition tax claims, such as sales taxes, could be trust fund claims.”).

13. Because the Sales Taxes and Use Taxes are not property of the Debtors’ estates, these funds are not available for the satisfaction of creditors’ claims. Thus, the Court

should authorize, but not direct, the Debtors to remit prepetition Sales Taxes and Use Taxes to the applicable Taxing Authorities.

B. Failure to Pay Certain Prepetition Tax Obligations May Distract Directors and Officers from Reorganization Efforts

14. Failure to pay certain prepetition Tax Obligations may also inhibit the Debtors' reorganization efforts. The states in which the Debtors operate have specific tax laws that hold officers and directors of collecting entities personally liable for certain taxes owed by those entities. See, e.g., TEX. TAX CODE ANN. § 111.016 (Vernon 2007).

15. The threat of a lawsuit or criminal prosecution, and any ensuing liability, would distract the Debtors and their officers and directors from important tasks during a critical time. This would be detrimental to parties in interest because the dedicated and active participation of the Debtors' officers and directors is integral to the Debtors' continued operations and essential to the orderly administration of these chapter 11 cases. The Debtors' estates are best served by eliminating the possibility of these distractions at the outset of these chapter 11 cases. Accordingly, because the proposed relief is in the best interests of the Debtors' estates, the Court should authorize the Debtors to pay prepetition Tax Obligations.

C. Paying Prepetition Tax Obligations Will Affect Only the Timing of Payments

16. Moreover, most, if not all, of the Tax Obligations described herein are afforded priority status pursuant to section 507(a)(8) of the Bankruptcy Code.² See 11 U.S.C. § 507(a)(8)(A) (“[A] tax on or measured by income or gross receipts for a taxable year on or

² Although labeled “fees,” the License and Permit Fees are actually are taxes. The License and Permit Fees bear all four characteristics of a tax as enumerated by the courts: (1) an involuntary pecuniary burden, regardless of name, laid upon the individuals or property; (2) imposed by, or under the 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. See, e.g., LTV Steel Co. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478, 498 (2d Cir. 1995). As taxes, the License and Permit Fees fall within the ambit of section 507(a)(8) of the Bankruptcy Code.

before the date of the filing of the petition”); *id.* at (C) (“[A] tax required to be collected or withheld and for which the debtor is liable in whatever capacity.”) (emphasis added).

17. As priority claims, the Tax Obligations must be paid in full before any general unsecured obligations of the Debtors may be satisfied. 11 U.S.C. § 1129(a)(9)(C). The Debtors submit that sufficient assets exist to pay all the Tax Obligations. Accordingly, the proposed relief will affect only the timing of payment of the Tax Obligations and will not prejudice the rights of any general unsecured creditor or other party in interest. Therefore, the Court should grant the Debtors authority to pay prepetition Tax Obligations.

D. The Court has Authority to Grant the Requested Relief Under Section 105(a) of the Bankruptcy Code

18. The Court may grant the requested relief pursuant to its equitable powers under section 105(a) of the Bankruptcy Code, which provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” *See* 11 U.S.C. § 105(a). Where pre-plan payment of prepetition obligations is essential to the continued operation of a debtor and is needed to facilitate the rehabilitation of a debtor — as is the case here — court authorization of such payments is necessary and appropriate to carry out the provisions of the Bankruptcy Code. *See In re Unoil*, 948 F.2d 678, 682 (10th Cir. 1991); *In re Just for Feet, Inc.*, 242 B.R. 821, 824-25 (D. Del. 1999); *In re NVR L.P.*, 147 B.R. 126, 127-28 (Bankr. E.D. Va. 1992); *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175-76 (Bankr. S.D.N.Y. 1989). Thus, the Court should grant the Debtors’ proposed relief.

19. In fact, courts in this district and other districts have often exercised their equitable powers under section 105(a) of the Bankruptcy Code to authorize debtors to pay prepetition tax obligations. *See, e.g., In re Energy Partners, Ltd.*, Case No. 09-32957 (Dkt. No.

92) (Bankr. S.D. Tex. May 8, 2009); In re Crusader Energy Group, Inc., Case No. 03-31797 (Dkt. No. 43) (Bankr. N.D. Tex. April 2, 2009); In re Daisytex, Case No. 03-34762 (Dkt. No. 55) (Bankr. N.D. Tex. May 12, 2003). The Debtors submit similar relief is warranted in these chapter 11 cases, and therefore, the Court should authorize, but not direct, the Debtors to pay such prepetition Tax Obligations.

E. The Banks Should Be Authorized and Directed to Honor and Pay Checks Issued, and to Make Other Transfers to Pay Tax Obligations

20. The Debtors further request that the Court authorize and direct the Banks to receive, process, honor and pay any and all checks drawn or electronic funds transferred to pay the Tax Obligations, whether such checks were presented prior to or after the Commencement Date; provided, however, that such checks or electronic transfers are identified by the Debtors as relating directly to the authorized payment of the Tax Obligations. The Debtors also seek authority to issue new postpetition checks, or effect new electronic fund transfers, on account of the Tax Obligations to replace any prepetition checks or electronic fund transfer requests that may be dishonored or rejected as a result of the commencement of the Debtors' chapter 11 cases.

F. Immediate Relief is Necessary to Avoid Immediate and Irreparable Harm

21. Bankruptcy Rule 6003 provides that “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition” FED. R. BANKR. P. 6003. For the reasons stated above, the Debtors and their estates will suffer immediate and irreparable harm absent to ability

to satisfy their Tax Obligations as requested herein. Accordingly, the relief requested in this Motion is consistent with Bankruptcy Rule 6003 and should be approved.

G. Request for Waiver of Stay

22. The Debtors further seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of ten (10) days after entry of the order, unless the court orders otherwise.” As set forth in detail above, payment of the Tax Obligations as proposed herein is essential to prevent potentially irreparable damage to the Debtors’ operations, the value of their estates, and their ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify waiver of the ten (10) day stay imposed by Bankruptcy Rule 6004(h), and the notice requirements under Bankruptcy Rule 6004(a), if applicable.

VI.

RESERVATION OF RIGHTS

23. Nothing contained herein is intended or shall be construed as (i) an admission as to the validity of any Tax Obligation against the Debtors or (ii) a waiver of the Debtors’ or any party in interest’s rights to dispute any Tax Obligation. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court’s order is not intended and should not be construed as an admission to the validity of any Tax Obligation. Finally, the relief requested herein shall not oblige the Debtors to accept any services, to accept the shipment of goods, or prevent the Debtors from returning or rejecting goods.

VII.

NOTICE

24. The Debtors have served notice of this Motion on (i) the Office of the United States Trustee for the Southern District of Texas; (ii) Credit Suisse, as administrative agent for (a) the Debtors' prepetition secured lenders under the Credit Agreement dated as of July 11, 2008, as amended, and (b) the Swap Agreement dated as of July 11, 2008; (iii) Akin Gump Strauss Hauer & Feld (Attn: J. Michael Chambers and Charles R. Gibbs), attorneys for Credit Suisse; (iv) the Debtors' 20 largest unsecured creditors (on a consolidated basis); and (v) all applicable government agencies, to the extent required by the Bankruptcy Rules or the Local Rules of Bankruptcy Procedure for the Southern District of Texas. The Debtors submit that no other or further notice need be provided.

WHEREFORE, the Debtors request entry of an order granting the relief requested herein and such other and further relief as is just.

Dated: October 27, 2009
Houston, Texas

/s/ Alfredo R. Pérez
Alfredo R. Pérez (15776275)

WEIL, GOTSHAL & MANGES LLP
700 Louisiana Street, Suite 1600
Houston, Texas 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511

Attorneys for Debtors
and Debtors in Possession

EXHIBIT A**LIST OF DEBTORS**

Debtor	Last Four Digits of Federal Tax I.D. No.
Express Energy Services Operating, LP	7644
Express Energy Services (2008) LLC	3087
Express Energy Services Holding, LP	7122
Express Energy Services GP, LLC	7083
Express Energy Services CT, LP	8432
Express Energy Services Ark, LP	5287
Express Energy Services P&A, LP	8402
Express Energy Services WL, LP	2834
Express – Byrd R&S GP, LLC	7556
Express – Byrd R&S Oilfield Services, L.P.	7580
Express – MBCC GP, LLC	0760
Express – MBCC, Ltd.	0802
Express – Mike Byrd Casing Crews GP, LLC	0852
Express – Mike Byrd Casing Crews, Ltd.	0938
Express – R&S Tong Services GP, LLC	2230
Express – R&S Tong Services, Ltd.	7465
Express – BAH Leasing GP, LLC	0510
Express – BAH Leasing, Ltd.	0708
D&D Tongs GP, LLC	6566
D&D Tongs, L.P.	6586
Express – North Trail Oilfield Services, GP, LLC	7506
Express – North Trail Oilfield Services, Ltd.	7526
Express – Ace Rat Hole Service GP, LLC	6617
Express – Ace Rat Hole Service, Ltd.	6632

EXHIBIT B

PROPOSED ORDER

set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor, it is ORDERED that:

1. The relief requested in the Motion is GRANTED to the extent provided herein.
2. The Debtors are authorized, but not directed, to pay the prepetition Tax Obligations due and owing to all Taxing Authorities, including any penalties and interest thereon consistent with the practices and policies in effect as of the Commencement Date.
3. The Banks are directed and authorized to honor, process, and pay, to the extent of funds on deposit, any and all prepetition checks or electronic fund transfer requests issued by the Debtors in respect of any Tax Obligations, whether pre- or postpetition.
4. Any Bank may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Commencement Date should be honored pursuant to this Order, and such Bank shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.
5. Nothing in this Order or the Motion shall be construed as prejudicing the rights of the Debtors to dispute or contest the amount of or basis for any claims against the Debtors in connection with or relating to the Tax Obligations.
6. Bankruptcy Rule 6003(b) has been satisfied.
7. Notwithstanding any applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
8. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rules 4001(d) and 6004(a)

are waived.

9. This Court shall retain jurisdiction to hear and consider all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: Houston, Texas
_____, 2009

UNITED STATES BANKRUPTCY JUDGE