

**ENTERED**TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

A handwritten signature in black ink, appearing to be "T. Marshall", written over a horizontal line.

United States Bankruptcy Judge

Signed December 16, 2010

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	CHAPTER 11
PILGRIM'S PRIDE CORPORATION, <i>et. al.</i>	§	
	§	CASE NO. 08-45664 (DML)
	§	
DEBTORS.	§	JOINTLY ADMINISTERED
	§	

MEMORANDUM ORDER

Relates to dkt. nos. 5987 and 6015

Before the court is the *Stipulation with Respect to Diesel Fuel Tax Claims of Texas Comptroller and Civil Penalties Amounts* (the "Stipulation"), docket no. 6015, filed in accordance with the court's direction by Pilgrim's Pride Corporation ("PPC"); PFS Distribution Company; PPC Transportation Company; To-Ricos, Ltd.; To-Ricos Distribution, Ltd.; Pilgrim's Pride Corporation of West Virginia, Inc.; and PPC

Marketing, Ltd. (collectively, “Debtors”), and the Texas Comptroller of Public Accounts (the “Comptroller”).

The Stipulation is subject to the court’s core jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(B). This order constitutes the court’s findings of fact and conclusions of law. FED. R. BANKR. P. 9014 and 7052.

A. Background

The facts of this case are set forth in detail in the court’s *Memorandum Opinion and Order of October 28, 2010* (the “Memorandum Opinion”), docket no. 5987. Facts pertinent to the Stipulation are set forth below.

The Comptroller commenced a diesel fuel tax audit (the “Audit”) of PPC in June 2008. On February 27, 2009, the Comptroller filed a proof of claim, assigned number 1196, asserting a priority claim in the amount of \$1,163,191.70 (“POC 1196”) for diesel fuel taxes and interest allegedly incurred by PPC between November 11, 2004 and June 30, 2008 (the “Audit Period”).¹ The Office of the Attorney General, Bankruptcy Collections Division (the “OAG”) thereafter filed a proof of claim asserting an unliquidated general unsecured claim (“POC 1603”) for penalties assessed under TEXAS TAX CODE § 162.402 based on the diesel fuel taxes and interest allegedly incurred and unpaid by PPC during the Audit Period. Subsequently, on May 27, 2009, the Comptroller filed proof of claim number 3805 asserting a priority claim for \$1,205,606.69 (“POC 3805”) amending POC 1196. On June 1, 2009, the Comptroller

¹ Strictly speaking, the auditor investigated PPC’s diesel fuel purchases for the period from November 1, 2004 to June 30, 2008. The Comptroller only assessed taxes for the period from November 11, 2004 to June 30, 2008. For sake of simplicity, the court refers to the period from November 11, 2004 to June 30, 2008 as the Audit Period.

filed proof of claim number 5128 amending POC 3805 by asserting a priority claim in the amount of \$1,205,606.69 (“POC 5128”).

Debtors timely filed their *Debtors’ Objection to the Texas Comptroller’s Proofs of Claims Numbered 1196, 3805, and 5128*, docket no. 2491 (the “POC 5128 Objection”) on June 29, 2009. The Comptroller then filed the *Texas Comptroller’s Response to Debtor’s Objection to Claim 5128*, docket no. 2565, on July 8, 2009 (the “POC 5128 Response”). Debtors timely filed their *Debtors’ Objection to the Office of the Attorney General’s Claim—Claim Number 1603* (the “POC 1603 Objection,” and, with the POC 5128 Objection, the “Objections”), docket no. 5091, on May 13, 2010. The OAG filed its *Response to Debtors’ Objection to Claim No. 1603* (the “POC 1603 Response”), docket no. 5178, on May 25, 2010.

The court held a hearing on the Objections on August 3, 2010. On October 28, 2010, the court entered the Memorandum Opinion in which the court denied the POC 5128 Objection in part. For reasons explained below, the court instructed the parties to attempt to stipulate to certain facts relevant to the Objections.

B. The Stipulation’s Effect on the POC 5128 Objection

In the POC 5128 Objection, Debtors argued that their diesel fuel purchases were exempt from taxation under section 162.204(a) because all of the fuel was either delivered into refrigeration units, *see* section 162.204(a)(11), or delivered into the bulk storage facility of a dyed diesel fuel bonded user and used for off-road purposes, *see* section 162.204(a)(8). PPC did not maintain a bonded user license during the Audit Period. As a diesel fuel purchaser must do so to take advantage of section 162.204(a)(8)’s exemption, the court concluded in the Memorandum Opinion that any

diesel fuel for which Debtors claimed a tax exemption under section 162.204(a)(8) was subject to tax. The court therefore denied the POC 5128 Objection in part.

The court faced an issue of statutory interpretation with respect to fuel for which Debtors claimed a tax exemption under section 162.204(a)(11). This section states that “[t]he tax imposed by [subchapter C of chapter 162 of the TEXAS TAX CODE] does not apply to . . . dyed diesel fuel delivered by a license holder into the fuel supply tanks of . . . refrigeration units or other stationary equipment powered by a separate motor from a separate fuel supply tank.” TEX. TAX CODE § 162.204(a)(11). “License holder” is defined in sections 162.001(38) and 162.205(a) to include a “supplier” and a “permissive supplier,” in addition to a “dyed diesel fuel bonded user.” TEX TAX CODE §§ 162.001(38) and 162.205(a). By its plain language, section 162.204(a)(11) exempts from taxation dyed diesel fuel delivered into the fuel supply tanks of refrigeration units by a supplier, permissive supplier, or dyed diesel fuel bonded user. Because this section does not require that the recipient of the dyed diesel fuel be licensed, an unlicensed purchaser is exempt from taxation provided its supplier or permissive supplier *actually delivers the dyed diesel fuel into the fuel supply tank of the refrigeration unit*. If, on the other hand, the dyed diesel fuel is not delivered by the supplier or permissive supplier directly into the fuel supply tank, the recipient of the fuel must maintain a dyed diesel fuel bonded user license to avoid owing tax on the purchase.

In paragraph 1 of the Stipulation, PPC and the Comptroller stipulate that “[t]he dyed diesel fuel at issue in this case was delivered to storage tanks, from which PPC delivered the fuel into refrigeration units. None of the fuel at issue was delivered by a licensed supplier or distributor into PPC’s refrigeration units.” Stipulation at 2-3. As

PPC also did not maintain a dyed diesel fuel bonded user license during the Audit Period, it is now clear that none of the dyed diesel fuel on which the Comptroller seeks to impose tax was delivered by a license holder into the fuel supply tanks of refrigeration units. Accordingly, Debtors may not claim a tax exemption under section 162.204(a)(11) and the Comptroller may assess tax on fuel purchased by PPC for use in refrigeration units. The POC 5128 Objection is overruled in full.

C. The Stipulation's Effect on the POC 1603 Objection

In the POC 1603 Objection, Debtors object to the OAG's imposition of civil penalties under sections 162.402(12) and (13). Debtors' argument is that they are not liable for the underlying taxes, and therefore cannot be liable for civil penalties under these sections.² Because the OAG's claim remained unliquidated as of the date of the Memorandum Opinion, the court instructed the parties to stipulate to the amount of civil penalties owed by Debtors, if any. In the Stipulation, PPC and the OAG agree that, assuming Debtors are liable for civil penalties, the resulting liability would be \$43,550. PPC does not concede liability in the Stipulation. As Debtors' only argument against the OAG imposing civil penalties is that Debtors are not liable for the underlying taxes, an argument negated by the court's decision to overrule the POC 5128 Objection in full, the court holds that Debtors are liable to the OAG in the amount of \$43,550. The POC 1603 Objection is overruled and POC 1603 is allowed as a general unsecured claim in the amount of \$43,550.

It is therefore

² In the POC 1603 Response, the Comptroller argued that Debtors could be liable for civil penalties even if Debtors were not liable for the underlying taxes. Because Debtors are liable for the underlying taxes, the court need not consider this argument.

ORDERED that pursuant to the Stipulation the POC 5128 Objection is now
overruled in full; and it is

ORDERED that pursuant to the Stipulation the POC 1603 Objection is overruled
and POC 1603 is allowed as a general unsecured claim in the amount of \$43,550.

IT IS SO ORDERED.

END OF ORDER