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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. MT-14-1499-KlPaJu  
)  
DANIEL BRUCE CARPENTER and ) Bk. No. 2:13-bk-61192-RBK  
MARY ESTHER CARPENTER, )  
)  
Debtors. )

\_\_\_\_\_  
DANIEL BRUCE CARPENTER; MARY )  
ESTHER CARPENTER, )  
)  
Appellants, )

v. )

O P I N I O N

MONTANA DEPARTMENT OF LABOR )  
AND INDUSTRY UNEMPLOYMENT )  
INSURANCE CONTRIBUTIONS BUREAU, )  
)  
Appellee. )  
\_\_\_\_\_

Argued by Video Conference  
and Submitted on July 23, 2015

Filed - November 18, 2015

Appeal from the United States Bankruptcy Court  
for the District of Montana

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Appearances: Harold V. Dye, Dye & Moe, PLLP, argued for  
appellants; Joseph Richard Nevin argued for  
appellee.

Before: KLEIN,<sup>1</sup> PAPPAS, and JURY, Bankruptcy Judges.

<sup>1</sup>Hon. Christopher M. Klein, U.S. Bankruptcy Judge, Eastern  
District of California, sitting by designation.

1 KLEIN, Bankruptcy Judge:  
2

3 This appeal involves the interplay between priority tax  
4 status under 11 U.S.C. § 507(a) (8) and Montana's statute imposing  
5 individual liability on "responsible officers" of corporations  
6 that do not pay their taxes.

7 The joint debtors owned and managed a corporation that did  
8 not pay its state unemployment taxes within three years before  
9 they filed their personal chapter 11 case. The bankruptcy court  
10 held that Montana's tax claim for unpaid corporate taxes is a  
11 § 507(a) (8) (E) excise tax priority claim in their personal case.

12 The court rejected the debtors' argument that, by negative  
13 inference from language in § 507(a) (8) (C), the § 507(a) (8) (E)  
14 excise tax priority cannot apply to responsible officers. In  
15 their view, the tax debt would be a § 507(a) (8) (E) priority tax  
16 as to the corporate taxpayer but merely a non-priority tax claim  
17 as to them as vicariously-liable individuals. This theory would  
18 enable them to confirm a chapter 11 plan without paying the tax  
19 debt in full and to escape the incidental consequence of  
20 nondischargeable status under § 523(a) (1) for any unpaid portion.

21 The debtors' negative-implication argument, while plausible,  
22 runs counter to too much precedent. We AFFIRM.  
23

#### 24 FACTS

25 The debtors Daniel and Mary Carpenter were officers and  
26 owners of Big Sky Fire Protection, Inc., which sold and serviced  
27 fire protection equipment. They were officers responsible for  
28 filing Big Sky tax returns and paying its taxes.

1 Unemployment tax contributions owed by Big Sky pursuant to  
2 Montana Code Annotated § 39-51-1103(1)<sup>2</sup> were not paid from  
3 October 2011 through June 2013.

4 The Montana Department of Labor and Industry, Unemployment  
5 Insurance Contributions Bureau, filed a proof of claim asserting  
6 § 507(a)(8) priority status for \$78,757.29, including \$125.00 in  
7 penalties. Attached was a statement of account addressed to "Big  
8 Sky Fire Protection Inc Attn Daniel Carpenter."

9 The debtors objected to the claim, asserting that Big Sky's  
10 tax debt was not a priority claim as to them despite Montana's  
11 responsible persons statute, which makes officers personally  
12 liable for unpaid corporate taxes. MONT. CODE ANN. § 39-51-1105.<sup>3</sup>

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13  
14 <sup>2</sup>Montana's unemployment tax "contributions" accrue and are  
payable as follows:

15 (1) Contributions accrue and become payable by each employer  
16 for each calendar year in which the employer is subject to  
17 this chapter with respect to wages, as defined in 39-51-201,  
18 paid for employment, as defined in this chapter, occurring  
during the calendar year.

19 MONT. CODE ANN. § 38-51-1103(1).

20 <sup>3</sup>Montana's responsible person liability statute provides:

21 (1) The officer of a corporation whose responsibility is to pay  
22 the taxes, penalties, and interest, as provided by 39-51-  
23 404, 39-51-1103(1) and (2), 39-51-1125(1), and 39-51-1301,  
is liable for the taxes, penalties, and interest due.

24 (2) (a) The department shall consider the officer of the  
25 corporation individually liable with the corporation for  
26 filing reports and unpaid taxes, penalties, and interest  
upon a determination that the corporate officer:

27 (i) possessed the responsibility to file reports and  
28 pay taxes on behalf of the corporation; and

(continued...)

1 The debtors conceded that unemployment taxes are an "excise  
2 tax" on employers under § 507(a)(8)(E). But, they contended that  
3 as to them as the employer's vicariously-liable officers, the tax  
4 debt is entitled to priority status only to the extent provided  
5 by § 507(a)(8)(C), which applies to so-called "trust fund" taxes  
6 "required to be collected or withheld" and for which the debtors  
7 are "liable in whatever capacity." 11 U.S.C. § 507(a)(8)(C).

8 The debtors relied on our 2012 Hansen decision, holding that  
9 unemployment insurance contributions were not taxes "to be

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10  
11 <sup>3</sup>(...continued)

12 (ii) possessed the responsibility on behalf of the  
13 corporation to direct the filing of reports or  
14 payment of other corporate obligations and  
15 exercised the responsibility that resulted in  
16 failure to file reports or pay taxes due.

17 (b) The department is not limited to considering the  
18 elements set forth in subsection (2)(a) to establish  
19 individual liability and may consider other available  
20 information.

21 (3) The liability imposed upon an individual by this section  
22 remains unaffected by the bankruptcy of a business entity to  
23 which a discharge cannot be granted under 11 U.S.C. 727.  
24 The individual is liable for the unpaid amount of taxes,  
25 penalties, and interest.

26 (4) In the case of a limited liability company treated as a  
27 partnership pursuant to 39-51-207, the liability for  
28 unemployment insurance taxes, penalties, and interest owed  
extends jointly and severally to each member and to each  
manager, if any.

(5) In the case of a limited liability company that is not  
treated as a partnership pursuant to 39-51-207, liability  
for unemployment insurance taxes, penalties, and interest  
owed extends jointly and severally to the managers and  
members of the limited liability company.

MONT. CODE ANN. § 39-51-1105.

1 collected," i.e. trust fund taxes, hence not entitled to  
2 § 507(a)(8)(C) priority. Cal. Employment Dev. Dep't v. Hansen  
3 (In re Hansen), 470 B.R. 535 (9th Cir. BAP 2012).

4 The state clarified that its basis for claiming priority tax  
5 status was a § 507(a)(8)(E) excise tax for which it asserted the  
6 debtors are individually liable, not a § 507(a)(8)(C) trust fund  
7 tax. It urged that its unemployment tax qualifies as an excise  
8 tax under the Ninth Circuit Lorber test. Cal. Self-Ins. Sec.  
9 Fund v. Lorber Indus. of Cal. (In re Lorber Indus. of Cal.), 564  
10 F.3d 1098, 1101 (9th Cir. 2009) ("Lorber").

11 Following an evidentiary hearing to establish the facts, the  
12 bankruptcy court overruled the objection and allowed the Montana  
13 claim as a priority claim to the extent of \$78,632.29 and as a  
14 general unsecured claim to the extent of the \$125.00 penalty. In  
15 re Carpenter, 519 B.R. 811, 818 (Bankr. D. Mont. 2014).

16 The debtors timely appealed.

#### 18 JURISDICTION

19 Federal subject matter jurisdiction is founded on 28 U.S.C.  
20 § 1334. A bankruptcy judge may hear and determine an objection  
21 to claim. 11 U.S.C. § 157(b)(2)(B). We have appellate  
22 jurisdiction under 28 U.S.C. § 158(a)(1).

#### 24 ISSUE ON APPEAL

25 Whether the claim for a corporation's unpaid Montana  
26 unemployment insurance taxes is an 11 U.S.C. § 507(a)(8)(E)  
27 priority claim against vicariously-liable individuals.

28 ///

1 STANDARD OF REVIEW

2 As no findings of fact are questioned, the issues are  
3 questions of law reviewed de novo. Litton Loan Serv'g, LP v.  
4 Garvida (In re Garvida), 347 B.R. 697, 703 (9th Cir. BAP 2006).

5  
6 DISCUSSION

7 The battle over § 507(a) (8) priority tax status matters for  
8 two main reasons in chapter 11 cases. First, a confirmable plan  
9 must provide for full payment of priority taxes within five years  
10 after the order for relief (unless the taxing entity agrees  
11 otherwise). 11 U.S.C. § 1129(a) (9) (C). Second, as to the  
12 individual chapter 11 debtors, unpaid § 507(a) (8) priority taxes  
13 are excepted from discharge. 11 U.S.C. § 523(a) (1) (A).

14  
15 I

16 The debtors argue from a negative inference based on  
17 comparison of the language of various § 507(a) (8) subsections.

18  
19 A

20 The foundation for the debtors' argument lies in the  
21 structure of § 507(a) (8).

22 Subsections (A) through (F) identify six tax categories that  
23 qualify as priority debts:

- 24 (1) taxes measured by income or gross receipts, 11 U.S.C.  
25 § 507(a) (8) (A);  
26 (2) property taxes, 11 U.S.C. § 507(a) (8) (B);  
27 (3) trust fund taxes (i.e., taxes "required to be collected  
28 or withheld"), 11 U.S.C. § 507(a) (8) (C);  
(4) employment taxes on § 507(a) (4) priority wage claims, 11  
U.S.C. § 507(a) (8) (D);  
(5) excise taxes, 11 U.S.C. § 507(a) (8) (E); and  
(6) customs duties, 11 U.S.C. § 507(a) (8) (F).

1 Each of these 11 U.S.C. § 507(a)(8) priority tax categories,  
2 except trust fund taxes, is temporary and measured by specified  
3 lookback periods ranging from 240 days to three years. Taxes  
4 older than the lookback periods are non-priority claims that do  
5 not necessarily have to be paid in full in a chapter 11 case and  
6 that do not automatically give rise to nondischargeable debts.

7 The § 507(a)(8)(C) trust fund provision is unique in three  
8 respects. First, there is no lookback limitation. Thus, trust  
9 fund taxes are perpetually § 507(a)(8) priority taxes and, hence,  
10 are always nondischargeable under § 523(a)(1). Second, it is the  
11 only provision in § 507(a)(8) that refers to who is liable for  
12 the taxes; it contains the phrase "for which the debtor is liable  
13 in whatever capacity." Third, it is focused on a method of  
14 collection, rather than describing a separate type of tax.

15 In other words, there really are only five categories of  
16 impositions that can be described as taxes or customs duties, all  
17 of which are entitled to priority status and potential exception  
18 from discharge only if not stale. The sixth, the trust fund tax,  
19 category does not constitute a separate type of tax, but rather  
20 prescribes circumstances of collection for which priority status  
21 and accompanying nondischargeable status is perpetual.

22  
23 B

24 The debtors seize on the phrase "for which the debtor is  
25 liable in whatever capacity" in § 507(a)(8)(C) to argue that the  
26 absence of such a reference in the other § 507(a)(8) subsections  
27 is significant.

28 The argument is that Congress knows how to provide that

1 persons other than the primary tax debtor are exposed to priority  
2 tax status, which it has done in the "trust-fund" portion of  
3 § 507(a) (8) with the "liable-in-whatever-capacity" language.

4 The debtors, relying on the canon of statutory construction  
5 that effect must be given to each word, argue that it follows, by  
6 negative implication, that the absence of "liable-in-whatever-  
7 capacity" language in the other subsections means that persons  
8 who are not the primary taxpayers are not required to bear the  
9 burden of priority claim status. Since the "liable-in-whatever-  
10 capacity" provision is not part of the § 507(a) (8) (E) excise tax  
11 provision, it is argued that tax claims against persons who are  
12 vicariously liable as "responsible officers" for the excise tax  
13 debt of a corporation are not entitled to priority status.

14 Extra traction for the debtors' argument comes from the  
15 proposition that priorities are narrowly construed because they  
16 derogate from the principle of equality of distribution among  
17 unsecured creditors. Howard Delivery Serv., Inc. v. Zurich Am.  
18 Ins. Co., 547 U.S. 651, 667 (2006); Lorber, 564 F.3d at 1100.

19 Underlying premises of the argument are that the subsections  
20 of § 507(a) (8) are mutually exclusive and that a trust fund tax  
21 is a separate type of tax. The difficulty is that key precedents  
22 treat the categories as overlapping and not necessarily separate.

## 23 24 II

25 In order to assess the debtors' argument, a review of the  
26 history of the priority tax provisions and of judicial  
27 constructions is in order.

28 ///



1 A

2 The phrase "for which the debtor is liable in whatever  
3 capacity" is a legacy of the Supreme Court's 1978 interpretation  
4 of the 1966 amendments to the former Bankruptcy Act in which  
5 Congress permitted, for the first time, discharge of most taxes  
6 due and owing more than three years before bankruptcy and  
7 prescribed a distribution priority for taxes that were not  
8 discharged. Act of July 5, 1966, Pub. L. 89-496, 80 Stat. 270.<sup>4</sup>

9 One exception to discharge was for trust fund taxes. Those  
10 were defined as taxes "which the bankrupt has collected or

11 \_\_\_\_\_  
12 <sup>4</sup>The 1966 tax discharge provision in the Bankruptcy Act made  
13 dischargeable all taxes except those that:

14 (1) are taxes which became legally due and owing by the  
15 bankrupt to the United States or to any State or any  
16 subdivision thereof within three years preceding bankruptcy:  
17 Provided, however, That a discharge in bankruptcy shall not  
18 release a bankrupt from any taxes (a) which were not  
19 assessed in any case in which the bankrupt failed to make a  
20 return required by law, (b) which were assessed within one  
21 year preceding bankruptcy in any case in which the bankrupt  
22 failed to make a return required by law, (c) which were not  
23 reported on a return made by the bankrupt and which were not  
24 assessed prior to bankruptcy by reason of a prohibition on  
25 assessment pending the exhaustion of administrative or  
26 judicial remedies available to the bankrupt, (d) with  
27 respect to which the bankrupt made a false or fraudulent  
28 return, or willfully attempted in any manner to evade or  
defeat, or (e) which the bankrupt has collected or withheld  
from others as required by the laws of the United States or  
any State or political subdivision thereof, but has not paid  
over; but a discharge shall not be a bar to any remedies  
available under applicable law to the United States or to  
any State or any subdivision thereof, against the exemption  
of the bankrupt allowed by law and duly set apart to him  
under this Act: And provided further, That a discharge in  
bankruptcy shall not release or affect any tax lien.

Act of July 5, 1966, § 2, 80 Stat. at 270.

1 withheld from others as required by the laws of the United States  
2 or any State or political subdivision thereof, but has not paid  
3 over." Bankruptcy Act of 1898, § 17a(1)(e), codified at 11  
4 U.S.C. § 35(a)(1)(e) (1976 ed.). Those taxes were never stale.

5 A fourth distribution priority was created for all taxes not  
6 released by discharge, with the restrictive proviso that "no  
7 priority over general unsecured claims shall pertain to taxes not  
8 included in the foregoing priority." Bankruptcy Act of 1898,  
9 § 64a(4), codified at 11 U.S.C. § 104(a)(4) (1976 ed.).<sup>5</sup> In  
10 short, all claims for state taxes were general unsecured claims  
11 and dischargeable, while taxes within the lookback periods and  
12 other exceptions were priority taxes and not discharged.

13 In 1978, the Supreme Court construed the trust fund  
14 provision of the 1966 amendment in the context of federal tax  
15 liability of responsible parties for withholding taxes. United  
16 States v. Sotelo, 436 U.S. 268 (1978). Under Internal Revenue  
17 Code § 6672, 26 U.S.C. § 6672, responsible parties are assessed a

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18  
19 <sup>5</sup>The new priority section was:

20 Sec. 3. Clause (4) of subdivision a of section 64 of such  
21 [Bankruptcy] Act, as amended (11 U.S.C. 104), is amended to  
22 read as follows:

23 "(4) taxes which became legally due and owing by the  
24 bankrupt to the United States or to any State or any  
25 subdivision thereof which are not released by a discharge in  
26 bankruptcy: Provided, however, That no priority over general  
27 unsecured claims shall pertain to taxes not included in the  
foregoing priority: And provided further, That no order  
shall be made for the payment of a tax assessed against any  
property of the bankrupt in excess of the value of the  
interest of the bankrupt estate therein as determined by the  
court;"

28 Act of July 5, 1966, § 3, 80 Stat. at 271.

1 "penalty" equal to the amount of the tax not paid over. The  
2 bankrupt responsible persons objected that they should not be  
3 liable for the taxes of the corporation and that the designation  
4 of the obligation as a "penalty" made it dischargeable.

5 Although the statute made no reference to responsible  
6 officers, the Court held that, despite the designation as  
7 "penalty," the essential nature of the debt was a tax for  
8 purposes of the Bankruptcy Act, which tax debt is not discharged.  
9 Sotelo, 436 U.S. at 274-75 & 280-81.

10  
11 B

12 Five months after Sotelo was decided, Congress enacted the  
13 Bankruptcy Code of 1978, with the phrase "for which the debtor is  
14 liable in any capacity" included in § 507(a)(8)(C).<sup>6</sup>

15 The legislative history explained that the priority section  
16 reached the same result as Sotelo.<sup>7</sup>

---

17  
18 <sup>6</sup>What is now § 507(a)(8) was originally § 507(a)(6). In  
19 1984, it became § 507(a)(7). Bankruptcy Amendments & Federal  
20 Judgeship Act of 1984, Pub. L. No. 98-353, § 350(2), 98 Stat.  
333, 358. In 1994, it became § 507(a)(8). Bankruptcy Reform Act  
of 1994, Pub. L. No. 103-394, § 304(c)(2), 108 Stat. 4106, 4132.

21 <sup>7</sup>The House and Senate floor leader statements are identical:

22 Taxes which the debtor was required by law to withhold or  
23 collect from others and for which he is liable in any  
24 capacity, regardless of the age of the tax claims. This  
25 category covers the so-called "trust fund" taxes, that is,  
26 income taxes which an employer is required to withhold from  
the pay of his employees, and the employees' share of social  
security taxes.

27 In addition, this category includes the liability of a  
28 responsible officer under the Internal Revenue Code (sec.  
6672) for income taxes or for the employees' share of social  
(continued...)

1           Since the basic reasoning of Sotelo was carried forward into  
2 the Bankruptcy Code, that decision retains vitality.

3           One instructive thing about Sotelo is that the Supreme Court  
4 construed responsible officer liability as qualifying for  
5 priority status even though Bankruptcy Act § 17a(1)(e) did not  
6 mention responsible officers and notwithstanding the statutory  
7 proviso that "no priority over general unsecured claims shall  
8 pertain to taxes not included in the foregoing priority."

9           Since the Sotelos were held liable as responsible officers  
10 on a bankruptcy tax priority that did not mention responsible  
11 officers, Sotelo appears to stand for the proposition that a tax  
12 priority applies against anyone who is liable for any priority  
13 tax within the period specified by the particular priority.

14           There is no indication in the 1978 legislative history that  
15 Congress intended to limit the Sotelo responsible-officer  
16 analysis to trust fund taxes and no other category of tax when it  
17 enacted the Bankruptcy Code.

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19           <sup>7</sup>(...continued)

20 security taxes which that officer was responsible for  
21 withholding from the wages of employees and paying to the  
22 Treasury, although he was not himself the employer. This  
23 priority will operate when a person found to be a  
24 responsible officer has himself filed in title 11, and the  
25 priority will cover the debtor's responsible officer  
26 liability regardless of the age of the tax year to which the  
27 tax relates. The U.S. Supreme Court has interpreted present  
28 law to require the same result as will be reached under this  
rule. U.S. v. Sotelo, 436 U.S. [268] (1978).

Statement of Rep. Don Edwards, Sep. 28, 1978, 124 Cong. Rec.  
32415-16 & Statement Sen. Dennis DeConcini, Oct. 6, 1978, 124  
Cong. Rec. 34015, reprinted at 1978 U.S.C.C.A.N. 6436, 6497 &  
6505, 6566.

1 So viewed, there is nothing inconsistent with Sotelo about  
2 applying responsible officer liability under applicable  
3 nonbankruptcy law to any category of priority tax. But a  
4 responsible officer for a tax in any category that is not a trust  
5 fund tax would enjoy the same protection from stale tax claims as  
6 the taxpayer for whom the officer is responsible.

7  
8 C

9 The new 1978 Bankruptcy Code remodeled the tax discharge and  
10 priority tax provisions but did not make significant changes.

11 Under the Bankruptcy Act, the exceptions to discharge for  
12 "taxes," without specifying which types of taxes, were in the  
13 § 17 discharge exception section, while the priority provisions  
14 at § 64a merely afforded priority to any tax debt not discharged.  
15 Compare Bankruptcy Act § 17, as amended in 1966, with id. § 64a.

16 The Bankruptcy Code introduced greater specificity by naming  
17 categories of taxes and transferred the tax provisions to the  
18 priorities section, § 507(a). Now, the discharge exceptions  
19 provide only that any priority tax is not discharged. Compare 11  
20 U.S.C. § 523(a)(1), with id. § 507(a)(8) (formerly § 507(a)(6)).

21 The exceptions relating to unfiled, late, and fraudulent  
22 returns and willful attempts to evade or defeat taxes remained in  
23 the discharge provisions. Compare Bankruptcy Act §§ 17a(1)(a)-  
24 (d), as amended in 1966, with 11 U.S.C. § 523(a)(1)(B)-(C).

25 As relevant here, the trust fund tax provision moved from  
26 the discharge section to the priority tax section, with the  
27 addition of the phrase "for which the debtor is liable in  
28 whatever capacity." Compare Bankruptcy Act § 17a(1)(e), as

1 amended in 1966, with 11 U.S.C. § 507(a)(8)(C).<sup>8</sup>

3 III

4 The decisional law interpreting the Bankruptcy Code's  
5 priority tax provisions has focused on categorization because  
6 different categories become stale at different times and whether  
7 particular liabilities – especially workers' compensation  
8 obligations – are taxes.

9 One consistent theme in the Ninth Circuit decisions is that  
10 the § 507(a)(8) priority categories are not mutually exclusive  
11 and not applied mechanically. Ilko v. Cal. Bd. of Equalization  
12 (In re Ilko), 651 F.3d 1049, 1056-57 (9th Cir. 2011), adopting &  
13 publishing, No. SC-09-1119 (9th Cir. BAP 2009); Shank v. Wash.  
14 Dep't of Revenue (In re Shank), 792 F.2d 829, 832 (9th Cir.  
15 1986); accord, 4 COLLIER ON BANKRUPTCY ¶ 507.11[4] (Alan Resnick &  
16 Henry Sommer eds., 16th ed. 2013) ("COLLIER").

17 Another theme is that responsible officer taxes are

18  
19 \_\_\_\_\_  
20 <sup>8</sup>The 1966 provision excepting trust fund taxes from  
discharge (which were also entitled to priority) was:

21 which the bankrupt has collected or withheld from others as  
22 required by the laws of the United States or any State or  
political subdivision thereof, but has not paid over.

23 Bankruptcy Act § 17a(1)(e), as amended in 1966.

24  
25 The 1978 provision affording priority to trust fund taxes  
(which are also excepted from discharge) is:

26 a tax required to be collected or withheld and for which the  
27 debtor is liable in whatever capacity.

28 11 U.S.C. § 507(a)(8)(C) (originally § 507(a)(6)).

1 enforceable for any category of priority tax. Ilko, 651 F.3d at  
2 1057-59 (§ 507(a)(8)(A)(iii)); Shank, 792 F.2d at 832  
3 (§ 507(a)(8)(E)); George v. Cal. Bd. of Equalization (In re  
4 George), 95 B.R. 718, 720-21 (9th Cir. BAP 1989), aff'd mem., 905  
5 F.2d 1540 (9th Cir. 1990) (§ 507(a)(8)(E)); accord, 4 COLLIER  
6 ¶ 507.11[4].

7 Similarly, not every responsible officer liability is a  
8 trust fund obligation. Ilko, 651 F.3d at 1056-57; Hansen, 470  
9 B.R. at 542-45.

10 Substance controls form. Thus, a five-part test has emerged  
11 for determining what constitutes a § 507(a)(8)(E) priority excise  
12 tax. Lorber, 564 F.3d at 1101-02; George v. Uninsured Employers  
13 Fund (In re George), 361 F.3d 1157, 1162-63 (9th Cir. 2004);  
14 County Sanitation Dist. No. 2 v. Lorber Indus. of Cal., Inc. (In  
15 re Lorber Indus. of Cal., Inc.), 675 F.2d 1062, 1066 (9th Cir.  
16 1982).<sup>9</sup>

#### 18 IV

19 This brings us back to our decision in Hansen, which the  
20 debtors contend is controlling. It is not.

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22 <sup>9</sup>The Ninth Circuit test for a § 507(a)(8)(E) excise tax is:  
23 (1) involuntary pecuniary burden, regardless of name, laid upon  
24 individual or property; (2) imposed under authority of  
25 legislature; (3) for public purposes, including purposes of  
26 defraying expense of government or undertakings authorized by it;  
27 (4) under the police or taxing power of the state; (5) no private  
28 creditor similarly situated to the government can be hypothesized  
under the relevant statute. Lorber, 564 F.3d at 1101-02. The  
debtors conceded from the outset that the Montana tax is an  
excise tax. Our own review of Montana Code § 39-51-1105 confirms  
that it is an excise tax under the Lorber test.

1  
2        Hansen was an unemployment insurance tax case in which a  
3 corporation's responsible officer under California Unemployment  
4 Insurance Code § 1735 was assessed in March 2004 for underpaid  
5 unemployment insurance taxes. Administrative litigation was  
6 settled in March 2009. The responsible officer defaulted after  
7 making six of the eleven contractual installments and filed a  
8 chapter 7 bankruptcy case in January 2010 in which the taxing  
9 authority filed an adversary proceeding seeking determination  
10 that the debt was excepted from discharge under § 523(a)(1)(A) as  
11 a § 507(a)(8) priority tax.

12        But, the passage of nearly six years between the date of  
13 assessment and the date of the Hansens' bankruptcy posed a stale  
14 tax problem. Unable to persuade the court that the various  
15 § 507(a)(8) lookback periods should be tolled during the period  
16 of administrative litigation, the taxing authority was reduced to  
17 arguing that the unemployment tax qualified as a § 507(a)(8)(C)  
18 trust fund tax for which liability is perpetual.

19        The barrier was the "tax required to be collected" element  
20 because California unemployment insurance taxes are payable  
21 directly by the employer.

22        Our panel rejected the argument that the phrase "tax  
23 required to be collected" in § 507(a)(8)(C) meant required to be  
24 collected by the taxing authority. That construction does not  
25 square with the legislative history describing trust fund taxes  
26 as taxes "which the debtor was required by law to withhold or  
27 collect from others." Hansen, 470 B.R. at 544. And, it proves  
28 too much – all taxes are "required to be collected" by a taxing



1 authority.

2 Concluding that the unemployment insurance taxes were not  
3 "required to be collected," our panel held that the taxing  
4 authority had not established the initial essential element for a  
5 § 507(a)(8)(C) trust fund tax.

6 There being no other basis for § 507(a)(8) status, the tax  
7 debt was discharged as stale.

8  
9 B

10 The debtors contend that they are in the "exact situation"  
11 as the debtor in Hansen. Not so.

12 The debtor in Hansen was a responsible officer who was  
13 vicariously liable with respect to non-trust fund unemployment  
14 insurance taxes that were stale under § 507(a)(8)(E) because they  
15 were more than three years old.

16 The debtors in this appeal are responsible officers who are  
17 vicariously liable with respect to non-trust fund unemployment  
18 insurance taxes that are not stale under § 507(a)(8)(E) because  
19 they were less than three years old. Therein lies all the  
20 difference.

21 Since the Hansens' unemployment tax debt was too stale for  
22 the § 507(a)(8)(E) priority, the state's only possible route to  
23 priority status and the concomitant exception to discharge was  
24 the § 507(a)(8)(C) trust fund theory that has no time limit. The  
25 insurmountable problem for the state was that the facts did not  
26 satisfy the essential element for a trust fund tax that the tax  
27 must have been withheld from or collected from third parties.

28 Hansen, 470 B.R. at 44-45. Hence, the unemployment insurance tax

1 was not entitled to priority status and was dischargeable.

3 C

4 The debtors' negative inference argument assumes that the  
5 various § 507(a)(8) priorities are mutually exclusive. But Ninth  
6 Circuit precedent teaches that the categories are not mutually  
7 exclusive. Ilko, 651 F.3d at 1056-57; Shank, 792 F.2d at 832;  
8 accord, 4 COLLIER ¶ 507.11[4].

9 This brings the analysis back to the Supreme Court's Sotelo  
10 decision. The salient point is that the Court did not construe  
11 the responsible officer "penalty" in the Internal Revenue Code as  
12 being outside the priority tax provision. Since there was no  
13 mention of responsible officer liability in the Bankruptcy Act,  
14 the Court could have applied a narrow construction to deny  
15 priority status to responsible officer liability. Instead,  
16 preferring substance over form, it concluded that the responsible  
17 officer liability that the tax statute termed a "penalty" was for  
18 taxes for purposes of bankruptcy law. Sotelo, 436 U.S. at 275.

19 It follows that the Montana statute imposing responsible  
20 officer liability on the debtors is, itself, a tax. Sotelo, 436  
21 U.S. at 275; George, 95 B.R. at 720-21.

22 The question becomes, what category of tax? The answer is  
23 the same category as the underlying corporate tax – a  
24 § 507(a)(8)(E) excise tax.

25 The rationale, which originates with Sotelo, is twofold.  
26 First, it should not matter whether an individual operates as a  
27 sole proprietorship or through a corporation. Sotelo, 436 U.S.  
28 at 281-82. Second, to hold otherwise would function as an

1 incentive to cause a corporation to default on tax obligations.  
2 Sotelo, 436 U.S. at 280-81; Shank, 792 F.2d at 832; George, 95  
3 B.R. at 720-21. We cannot ignore those precedents.

4  
5 Conclusion

6 The liability imposed upon corporate responsible officers by  
7 Montana Code § 39-51-1105 is a tax that has the same status as  
8 the underlying corporate tax for purposes of § 507(a)(8). Here,  
9 it is an "excise" tax under § 507(a)(8)(E) entitled to priority  
10 during the three-year period specified in that subsection. As  
11 the corporation was not required to collect or withhold the tax  
12 from others, it is not a § 507(a)(8)(C) trust fund tax.

13 Accordingly, we AFFIRM the order of the bankruptcy court.  
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