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firm which lacks monopolistic position in all individual phases of its activities can be distinguished from a U.S. Steel, a movie chain that wields the lever- age of "closed" towns against competitors in "open" towns, or tobacco manufacturers who act in tacit concert both in buying and selling. Mass buying power does not in itself mean the power to raise price, drive out all existing rivals, or foreclose new competition.

A realistic appraisal of the actual behavior of market forces justifies the continued existence of the kind of "monopoly power" possessed by A&P. Since this power is entirely consistent with competition in a real sense, the courts would do no violence to the Sherman Act in letting it pass.

**INTEREST ON TAX ARREARAGES AFTER BANKRUPTCY**

Interest on a debtor's unpaid obligations normally ceases to accrue when a bankruptcy petition is filed. This rule has no explicit statutory foundation, but stems from principles of equity and administrative convenience.

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62. See Schine, Griffith and Tobacco cases, supra note 2.
63. Perhaps the groundwork for protection of massed buying power was laid in the Griffith case:
   "Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor... may it be used to stifle competition by denying competitors less favorably situated access to the market." United States v. Griffith, 334 U.S. 100, 108 (1948).

Moreover, the Court in the Columbia Steel case attempted an over-all consideration of the character of a market, stating, for example, that "... the relative effect of percentage command of a market varies with the setting in which that factor is placed." United States v. Columbia Steel Co., 334 U.S. 495, 528 (1948). See Rostow, Monopoly under the Sherman Act: Power or Purpose? 43 ILL. L. REV. 745, 779 (1949); Note, The Columbia Steel Case: New Light on Old Antitrust Problems, 58 YALE L. J. 764 (1949).

2. The rule is of English origin. The British bankruptcy system did not allow interest beyond the date of commission, i.e., petition. Bromley v. Goodere, 1 Atk. 75, 26 Eng. Rep. 49 (1743); Ex parte Bennet, 2 Atk. 526, 26 Eng. Rep. 716 (1743); 2 B. & C. Comm. *488. More recent cases have reached similar results, e.g., In re London, Windsor and Greenwich Hotels (Quartermaine's Case) [1892] 1 Ch. 639. But cf. In re Talbott, 39 Ch. D. 567 (1886). The Supreme Court has held that this rule was taken over into American bankruptcy legislation. Sexton v. Dreyfus, 219 U.S. 339, 344 (1911).
3. In those cases where neither equity nor convenience were factors, English bank-
By denying interest on all unsecured claims, no class of creditors can profit from the legally imposed delays incident to the scheme of orderly liquidation provided for the benefit of unsecured creditors. In addition, the necessity for constantly revaluing each creditor's proportionate share in the estate is avoided.

4. "[Denial of interest is a] necessary and enforced rule of distribution due to the fact that . . . assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest . . . it would be immaterial whether the dividend was calculated on the basis of the principal alone or of the principal and interest combined. But some of the debts might carry a high rate of interest and some a low rate, and hence inequality would result in the payment of interest which accrued during the delay incident to collecting and distributing the funds. As this delay was the act of law, no one should thereby gain an advantage or suffer a loss." American Iron & Steel Mfg. Co. v. Seaboard Airline Ry., 233 U.S. 261, 266 (1914).

5. "[I]f interest were to accrue . . . after the adjudication, the amount of the several claims would vary from time to time, according to their respective rates of interest, and the proportionate share of the several creditors would be subject to constant readjustment. . . . If, at the declaration of every dividend, a new basis of apportionment were required, the administration of the estate would be seriously complicated."
Neither the Chandler Act nor its predecessors specifically exempted any class of claims from the scope of this judicially created rule. But courts, under early legislation, permitted federal, state and local claims for pre-bankruptcy taxes to draw interest until paid; and they continued the exception even under later Acts although the same considerations of equity and practicality which led to disallowance of post-bankruptcy interest on other claims had become equally applicable. Commentators have long criticized this exception as irrational and unjust. In the recent case of

re Kallak, 147 Fed. 276, 277-8 (D.C.N.D. 1906); see Note, 61 Harv. L. Rev. 354 (1948); 3 Collier 1836.

6. First American bankruptcy legislation created a priority only for all debts due the United States. Bankruptcy Act of 1800, 2 Stat. 19, 36 (1800), repealed, 2 Stat. 248 (1803). Under the Bankruptcy Act of 1841, 5 Stat. 440, 444 (1841), repealed, 5 Stat. 614 (1843), priorities were established for all debts due the United States, debts owing a person as a surety entitled to preference, and wage claims up to $25 for labor performed within 6 months of bankruptcy. The Bankruptcy Act of 1867, 14 Stat. 517, 531 (1867), gave taxes a priority just below administrative costs, with taxes due the United States payable prior to state taxes; priority of wage claims inferior to taxes was increased to $50. The Bankruptcy Act of 1898, 30 Stat. 544, 563 (1898), elaborated this system of priority claims and placed federal and state tax debts on a par, ahead of administrative costs. But no provision was made for post-bankruptcy interest on any type of claim. Neither the 1926 amendments, 44 Stat. 662 (1926), nor the Chandler Act, 52 Stat. 840 (1938), incorporated any provision for post-bankruptcy interest, although the scheme of distribution was altered in both enactments. See Hunt, Tax Claims in Bankruptcy Proceedings, 14 J.N.A. Ref. Bankr. 3 (1939); 3 Collier 2045-53.

7. The exception for tax claims appears to have originated with In re Kallak, 147 Fed. 276 (D.C.N.D. 1906). In the same year, the court in In re Fisher, 148 Fed. 907 (D.C.N.J. 1906), reached an opposite conclusion on the ground that the Bankruptcy Act of 1898 did not provide for such interest payments. But the Fisher case was ignored and the Kallak case generally followed, usually without discussion. E.g., In re Ashland Emery & Corundum Co., 229 Fed. 829 (D. Mass. 1916).

Never has the exception extended to more than tax liabilities. Thus, even though 52 Stat. 840, 874 (1938), 11 U.S.C. § 104(a)(4) (1946), establishes a fifth priority for unsecured non-tax debts owing the United States, it has never been held that such claims draw interest after bankruptcy.

Interest on pre-bankruptcy tax claims must be clearly distinguished from interest on unpaid post-bankruptcy taxes. Interest on the latter is always allowed as a first priority charge on the estate. Boteler v. Ingels, 308 U.S. 57 (1939). For a general discussion of tax problems arising during bankruptcy, see Wurzel, Taxation During Bankruptcy Liquidation, 55 Harv. L. Rev. 1141 (1942); Note, 29 Va. L. Rev. 206 (1942).

8. These later acts did not deter lower courts from adhering to their established practice and allowing post-bankruptcy interest on tax claims without much comment. E.g., In re L. Gandolfi, 42 F.Supp. 706 (S.D.N.Y. 1940). And the practice was likewise sustained in Davie v. Green, 133 F.2d 451 (1st Cir. 1943), even after exploration of the possible significance of changes in the bankruptcy law, although the court conceded that favored treatment of tax claims was inequitable and unjust. Id. at 453; see Note, 96 U. of Pa. L. Rev. 270 (1948).

City of New York v. Saper,\textsuperscript{10} the Supreme Court, squarely presented with the issue for the first time, by an 8–1 decision eliminated the preferential treatment accorded these claims.\textsuperscript{11}

Underlying the prior judicial practice of allowing interest were the provisions of the Bankruptcy Act of 1898,\textsuperscript{12} which clearly preferred tax claims over all other debts. While ordinary creditors were required to file and prove their claims,\textsuperscript{13} an affirmative duty was laid on the trustee to ascertain from a search of the tax rolls the amount due for taxes and to secure an order for payment from the bankruptcy court.\textsuperscript{14} Unlike ordinary claims, tax
courts, too, have expressed dissatisfaction with the rule. See, e.g., the statement in In re Union Fabrics, 73 F.Supp. 685, 687 (S.D.N.Y.1947), that the rule was “neither logical, sound, nor just.” See also the opinion of the referees in Matter of Dorsey, 46 Am. B.R. (N.S.) 146, 147 (W. D. Wash. 1940) and Matter of Summers, 45 Am.B.R. (N.S.) 123, 128 (N.D. Ohio 1939).

10. 69 S.Ct. 554 (1949), aff'g Saper v. City of New York, 168 F.2d 263 (2d Cir. 1948).

11. Certiorari was granted by the Supreme Court because of a conflict between the First and Second Circuits. The First Circuit, in Davie v. Green, 133 F.2d 451 (1st Cir. 1943), rev'g Matter of Union Beverage Co., 50 Am. B. R. (N.S.) 825 (N.Hamp.1942), decided that the Chandler Act did not authorize courts to abandon the customary practice of allowing interest on tax claims. Reasons stated in Davie v. Green, supra, persuaded Mr. Justice Reed to become a solitary dissenter when the issue reached the Supreme Court in City of New York v. Saper, 69 S.Ct. 544 (1949).

The Second Circuit, however, by a quirk in the judicial calendar, came to a different conclusion. A dictum in Hammer v. Tuffy, 145 F.2d 447, 449 (2d Cir. 1944), while admitting that earlier holdings had permitted interest on tax claims to run until the date of payment, declared that “whether the priority of taxes . . . includes interest must therefore be regarded as an open question” since the passage of the Chandler Act. Two trustees accepted this open invitation to litigation. In the first case to arise, In re Union Fabrics, 73 F.Supp. 685 (S.D.N.Y.1947), the court denied interest; in the second, In re Spotlight Productions, 75 F.Supp. 458 (S.D.N.Y.1947) the court followed the rule in Davie v. Green. On appeal, these cases were assigned for argument to benches composed of different personnel and the later Spotlight case was decided first. A unanimous court (Judge Clark writing the opinion with Judges L. Hand and Swan concurring) reversed the lower court and directed that the interest claim be denied. Sub nom. Saper v. City of New York, 168 F.2d 263 (2d Cir. 1948). When the Union Fabrics case was decided, only one of the judges participating in the prior Saper case (Judge Clark) was on the bench. Feeling itself bound, the reconstituted court affirmed the Union Fabrics case and once more disallowed an interest claim. Sub nom. Carter v. United States, 163 F.2d 272 (2d Cir. 1948). But the opinion of Judge A. Hand expressly stated that he and Judge Chase agreed with the decision in Davie v. Green, supra, and acquiesced in the holding of the Union Fabrics case only because it was in accord with the views of a majority of judges in the Second Circuit as expressed in the Saper case. Had the Carter case been decided first, no conflict in the circuits would have developed and the Supreme Court might not have granted certiorari. See Snedecor, Taxes and Tax Claims, 23 J. N. A. Ref. Banker, 47 (1949).


13. § 57(n), 30 Stat. 544, 561 (1898).

14. § 64, 30 Stat. 544, 563 (1898).
claims shared in the distribution of the debtor's non-exempt assets even when not properly filed. They were not subject to discharge and were directed to be paid in full with an absolute priority over all other debts.\textsuperscript{16} Since tax claims were singled out as \textit{sui generis} for these purposes, courts were easily persuaded to go one step further and grant tax claimants the right to post-bankruptcy interest as well. Under the 1898 Act no barrier was found in the considerations of administrative inconvenience which generally precluded allowance of interest on other claims: since no one could share in any dividend until tax claims, including interest, were paid in full, there was no need for constant recomputation of each creditor's share.

But subsequent amendments to the bankruptcy law, culminating in the Chandler Act, have eliminated many distinctions between tax claims and other debts.\textsuperscript{16} Although tax claims remain non-dischargeable,\textsuperscript{17} the provision that the court order the trustee to pay all "taxes legally due and owing" was deliberately eliminated. Instead, tax claims must now be filed and proved like other debts.\textsuperscript{18} Consequently, tax claimants do not share in the distribution of the estate if they fail to prove their claims within the statutory period. Moreover, tax claims have been relegated to a fourth priority, yielding in precedence to administrative costs, certain wage claims and specified creditor's expenses.\textsuperscript{19} Since immediate settlement of debts is neces-

\begin{footnotes}
\item[15.] §17, 30 Stat. 544, 550 (1898), made unpaid taxes non-dischargeable, a proviso carried over into the present bankruptcy law. See notes 17 and 35 infra. The absolute priority conferred by §64, 30 Stat. 544, 563 (1898), however, was altered in 1926. See note 19 infra.

\item[16.] Judge Clark, writing the lower court opinion in Saper v. City of New York, 168 F.2d 268, 270 (2d Cir. 1948), emphasized the fact that "the process of assimilation of tax claims to other debts appears, to us at least, to have been completed by the Chandler Amendments of 1938." This "loss of prestige" argument was earlier recognized in United States v. Roth, 164 F.2d 575, 577, 578 (2d Cir. 1948). See 3 Collier 1841, and Weinstein, \textit{The Bankruptcy Law of 1938} 133-4 (1938).

\item[17.] §17(a), 11 U.S.C.A. §35(a) (1946): "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are due as a tax levied by the United States or any State, county or municipal- ity . . . ." For a discussion of reasons underlying retention of this provision and recent proposals to eliminate it, see note 35 infra.

\item[18.] §57(n), 11 U.S.C. §93(n) (1946), provides that: "all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed . . . ." (Italics added). An exception, however, provides that a court may, in its discretion, "before expiration of such period and for cause shown, grant a reasonable fixed extension of time for the filing of claims by the United States or any State or subdivision thereof . . . ."

\item[19.] §64, 11 U.S.C. §104 (1946). While bankruptcy amendments adopted in 1926, 44 Stat. 662 (1926), neither required tax claims to be filed and proved nor eliminated the requirement that the court order the trustee to pay all taxes legally due and owing, this legislation reduced taxes to a sixth priority by §15, 44 Stat. 644, 662 (1926) which amended §64 of the Bankruptcy Act of 1898. See Colin, \textit{An Analysis of the 1926 Amend-
sarily impossible in an orderly liquidation, allowance of interest on tax claims required a periodic recomputation of every unsecured creditor's proportionate share. Under the Chandler Act, therefore, preferential treatment of tax claims became extremely unwieldy from an administrative point of view.

Despite these significant revisions in bankruptcy legislation since the Act of 1898, the tax claimants in the Saper case nevertheless contended that section 57(j) of the Chandler Act, when properly interpreted, allowed interest on tax arrearages to the date of payment. This section bars allowance of "debts owing to the United States, a State, county, district or municipality . . . as a penalty or forfeiture . . . except for . . . the pecuniary loss sustained by the act . . . out of which the penalty or forfeiture arose . . . and such interest as may have accrued thereon according to law." Ignoring the impropriety of applying a section hinged to penalties and forfeitures in cases where no penalty or forfeiture was involved, tax claimants seem to have pursued an intricate line of reasoning: where the interest rate imposed by statute is so high as to be a penalty disallowed by section 57(j), the pecuniary loss (i.e., tax debt) could nevertheless be recovered in bankruptcy, and courts have repeatedly construed the last clause of section 57(j) to authorize reasonable interest thereon until the date of payment; this interest survives bankruptcy and accrues until the pecuniary loss is paid, inasmuch as the pecuniary loss itself survives bankruptcy under the provisions of section 17 prohibiting discharge of tax debts; a fortiori, where the statutory interest is reasonable to begin with, interest should be permitted to accrue until the pecuniary loss is paid. And they asserted that the Supreme Court


22. Validity of this argument is dubious. Neither taxes nor ordinary interest are penalties. And a proviso dealing with debts owing the United States as a penalty or forfeiture should have no application beyond penalty and forfeiture cases. See Saper v. City of New York, 168 F.2d 268, 271 (2d Cir. 1948). Section 57(j) merely deals with the distinction between penalties and damages. Thus, where a public contract, e.g., provides
at least \textit{sub silentio}, had twice accepted this interpretation of section 57(j): once in a pre-Chandler Act case \textsuperscript{23} and once in a case arising subsequent to the Act.\textsuperscript{24} In addition, they urged that Congress, by re-enacting section 57(j), had placed its stamp of approval on this construction and intended to incorporate it into the Bankruptcy Act.\textsuperscript{25}

But Justice Jackson, speaking for the Court in the \textit{Saper} case, rejected this argument.\textsuperscript{26} Implicit in his opinion is the view that the clause permitting "interest . . . according to law" does not establish any right to interest after bankruptcy. Section 57(j), the Justice indicated, is inapplicable to any claim, even interest charges, arising after the petition has been filed;\textsuperscript{27} its function is rather to prohibit the allowance of pre-bankruptcy interest at rates so high as to constitute a penalty.\textsuperscript{28} In the exhaustive legislative

for a penalty or forfeiture on breach, the penalty provisions would not be enforceable in bankruptcy, but the government would be allowed a claim for actual loss resulting from the breach with interest which may have accrued to an unspecified date.

The notion that § 57(j) independently justifies post-bankruptcy interest on tax claims probably stems from the fact that the question of disallowance of penalties arises most frequently in connection with claims for past due taxes where the claim may be valid but penalties and excessive interest barred. 3 \textit{Collier} 301 and see note 28 \textit{supra}. Though in these cases § 57(j) should apply only after the question as to what, if any, interest is legal has been decided (see \textit{Saper v. City of New York}, supra), some courts have construed the clause "interest . . . according to law" to require allowance of interest to the date of payment, e.g., \textit{In re J. Menist Co.}, 290 Fed. 947 (2d Cir. 1923), \textit{rev'd on other grounds}, United States v. Childs, 266 U.S. 304 (1924); \textit{see Davie v. Green}, 133 F.2d 451 (1st Cir. 1943). But while many cases did allow interest until the date of payment under authority of § 57(j), e.g., \textit{In re Beardsley} and Wolcott Mfg. Co., 82 F.2d 239 (2d Cir. 1936), all involved the issue whether interest was to be treated as a penalty. When, as in the present case, tax agencies take the position that the accrued interest is not a penalty, § 57(j) should have no effect in its allowance or disallowance. \textit{See Matter of Union Beverages}, 50 Am.B.R. (N.S.) 825 (D.N.H. 1942), \textit{rev'd sub nom.}, Davie v. Green, \textit{supra}. And \textit{see McCormick v. Puritan Coal Mining Co.}, 41 F.2d 213, 214 (3d Cir. 1930): "... [A]fter property of an insolvent corporation has passed into the hands of its receivers, interest as penalties for the non-payment of taxes are not allowable on claims against the funds . . ."

23. United States v. Childs, 266 U.S. 304 (1924), \textit{rev'd In re J. Menist Co.}, 290 Fed. 947 (2d Cir. 1923), see note 30 \textit{infra}.


25. This was the basis for the opinion in Davie v. Green, 133 F.2d 451 (1st Cir. 1943), with which Mr. Justice Reed in his \textit{Saper} dissent agreed, and seems to be the view of at least two judges in the Second Circuit. See note 11 \textit{supra}.


Penalties on tax claims arising after bankruptcy are provable as a first priority charge on the estate. Boteler v. Ingels, \textit{supra}, and see note 7 \textit{supra}.

28. For a collection of cases in which the problem of penalties masquerading as in-
history accompanying the Chandler Act, there is no evidence that Congress supposed section 57(j) to have a broader meaning. Moreover, the opinion denied that either of the cases relied on by the tax claimants had held differently. Although in both cases the court had allowed the collection of tax claims with interest until payment, the only question decided by these cases was the legality of the interest rate. The propriety of allowing any interest at all to accrue beyond bankruptcy was not adjudicated.

In disallowing interest on tax claims after bankruptcy, the decision in the Saper case seems to harmonize judicial treatment of such claims with other sections of the Act. Those sections which refer to interest provable in bankruptcy, such as section 63(a)(1), which pertains to claims based on judgments and written instruments fixed as to liability prior to bankruptcy, and section 63(a)(5), which relates to provable debts reduced to judgment after bankruptcy, provide that interest accrues only until a petition is filed. And although tax claims remain unique in that they are always non-dischargeable, retention of this proviso in the Chandler Act was predicated more on reducing the possibility of tax evasions than on a concern for differentiating such claims from other unsecured debts.

Furthermore, while the legislative history may be ambiguous, there are

interest is discussed, see 3 COLLIER 296-301. See Note, 104 A.L.R. 884 (1936). For the view that §57(j) does not authorize post-bankruptcy interest, see Hunt, Tax Claims in Bankruptcy Proceedings, 14 J.N.A. REP. BANKER 3, 7 (1939); Cf. Kruse, Tax Claims, Wage Claims and Inheritances, 15 J.N.A. REP. BANKER 64 (1941).


30. United States v. Childs, note 22 supra, and Meilink v. Unemployment Reserves Comm’n of California, note 23 supra. Both cases sustained a statutory exception of interest amounting to 12% per annum, but neither holding goes further than deciding that not even high interest rates are necessarily penalties barred by §57(j). Even the court in Davie v. Green, 133 F.2d 451 (1st Cir. 1943), which sustained post-bankruptcy interest on tax claims, admitted that “this question [whether to allow post-bankruptcy interest] does not appear to have been before the Court in the Meilink case and we are aware of no decision by that Court ... in which it has been considered.” Id. at 453.


33. While §§63(a)(1) and 63 (a)(5) are rarely invoked in practice, they reflect a principle of long standing. City of New York v. Saper, 69 S.Ct. 554, 555 n. 10. See 2 BL. COMM. 3438, and Judge Clark’s opinion in Saper v. City of New York, 163 F.2d 293, 270 n. 6 (2d Cir. 1948).

Nor do the requirements in §57(n), 11 U.S.C.A. §93(n) (1943) and §64(a), 11 U.S.C.A. §104(a) (1948), that tax claims be paid in full, imply that interest charges after bankruptcy must be paid to satisfy the statutory mandate. As between general and priority creditors, “payment in full” usually refers to the payment of the principal of the preferred claim existing when liquidation proceedings commenced. People v. American Loan & Trust Co., 172 N.Y. 371, 65 N.E. 200 (1902); see Hammer v. Tuffy, 145 F.2d 447, 449 (2d Cir. 1944).

34. See note 17 supra.

35. The House bill deleted the provision exempting federal taxes from discharge, but
suggestions that Congress would approve the Saper decision. A report accompanying a recent proposed amendment to section 57(j) indicated that the House regarded preferential treatment for interest on taxes as "obsolete" and based on reasoning no longer applicable in the light of the Chandler Act. Indeed, the House approved the amendment, but the Senate had no opportunity to act at that session of Congress.

For general creditors, the Saper decision presages larger shares when a debtor's estate is distributed. Even without interest, priority charges

the Senate refused to accept the change. 83 Cong. Rec. 8684 (1938). See statement of Rep. Chandler, 83 Cong. Rec. 9106-7 (1938): "The House bill makes Federal taxes dischargeable, while the Senate amendment retains existing law in the clarifying change. The Senate felt that if Federal taxes were made dischargeable, it would open the door to tax evasion. The Treasury Department recommended against the House amendment." A similar elimination of the exemption from discharge of state taxes was not suggested because of presumed constitutional limitations. Hearings before the House Committee on the Judiciary on H.R. 8046, 75th Cong., 1st Sess. 67-8 (1937).

The National Bankruptcy Conference has recently attempted to eliminate even this preferential discharge status of tax claims. H.R. 5829, 80th Cong., 2d Sess. (1948), provided that unsecured tax claims, due and owing for more than a year prior to bankruptcy, were to be deprived of their present fourth priority, relegated to the status of general unsecured debts and discharged with other claims when not paid. See Moore and Tone, Proposed Bankruptcy Amendments: Improvement or Retrogression? 57 Yale L.J. 683, 701-5 (1948).

36. H.R. 5693, 80th Cong., 2d Sess. (1948). The bill was introduced by Congressman Reed, with the support of the National Bankruptcy Conference, March 4, 1948. Section 57(j) would have been altered as follows:

"(1) Debts owing to the United States or to any state or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with such reasonable and actual costs occasioned thereby and such interest as may have accrued [thereon according to law] on the amount of such loss up to the date of bankruptcy.

"(2) Except where the estate of the bankrupt is solvent, interest accruing after the date of bankruptcy on taxes legally due and owing to the United States or to any State or any subdivision thereof shall not be allowed." (Matter in brackets eliminated, matter in italics added.)

See Moore and Tone, Proposed Bankruptcy Amendments: Improvement or Retrogression? 57 Yale L.J. 683, 718-9 (1948), where, prior to the Saper case, the proposed amendment is described as "clarifying and in line with a sound, but not judicially accepted, construction of the present Act." See also Oglebay, Some Developments in Bankruptcy Law, 21 J.N.A. Ref.Bankr. 105, 106-7 (1947); Sneedor, Taxes and Tax Claims, 23 J.N.A. Ref.Bankr. 47 (1949).

37. H.R. Rep. 2083, 80th Cong., 2d Sess. 5 (1948). "The addition of clause (2) [see note 36 supra] is intended to overrule an obsolete rule as to interest on delinquent tax debts. . . . Although . . . the Chandler Act . . . [rendered] obsolete the reasoning in the Kallak case, nevertheless its rule has not been changed, and therefore requires this statutory modification." Relevant sections of this Report are set forth in City of New York v. Saper, 69 S. Ct. 554, 560 n. 17 (1949).

38. The amendment was passed by the House on June 8, 1948, and referred to the Senate Committee on the Judiciary on June 9, 1948, but no action was taken by the Committee prior to adjournment or at the subsequent special session of Congress.

39. See N.Y. Herald-Tribune, March 15, 1949, p. 31, col. 5. Tax Situation in Bank-
attributable to the mushroom growth of taxing units, the multiplication of
taxes in number and kind, and the swollen rates characteristic of current
levies, often leave but meager remains for non-priority unsecured creditors
to apportion. Before the Saper case, the superimposition of high statutory
rates of interest on this constantly expanding base reduced even further the
recovery of ordinary creditors. Moreover, the inexorable accrual of in-
terest often dictated a hurried liquidation which was disadvantageous to
creditors and was a factor in discouraging the trustee from advancing possi-
bly meritorious defenses to asserted claims. And when liquidation was
necessarily time consuming, creditors who were not responsible for the delay
in payment were the ones ultimately penalized through the allowance of
interest charges.

ruptey, 18 J.N.A. Ref. Bankr. 17 (1943), cites a bankruptcy proceeding where disallow-
ance of the interest claim would have provided a sum sufficient to pay general creditors
a dividend of 10%. These proposed changes are resisted by the Treasury Department on
the ground that such a limitation would result in a loss of needed revenue and impose an
impossible burden on tax administration. For a discussion of these proposed changes, see
Olive, Taxes in Bankruptcy Proceedings, 25 Taxes 5-10 (1947); Musgrave, The Tax
Priority Bugaboo, Corp. Regorg. and Bank. Rev. 43 (1945); Tax Situation in Bankruptcy,
18 J.N.A. Ref. Bankr. 17 (1943); Commercial Law League Bankruptcy Committee Re-

40. See Hunt, Bankruptcy Tax Problems, 17 J.N.A. Ref. Bankr. 121 (1943): “Now-
adays we have a multiplicity of taxing units, all desperately seeking to collect whatever
they can. . . We might well define the average bankrupt estate as: ‘A body of money . . .
entirely surrounded by taxes.’” Jones, Metropolitan Government 16 (1942), cites
the horrible example of Cook County, Ill. with a total of 358 governmental units. For
other expressions of alarm at the proliferation of tax levying bodies, see Beyer, Financial
Dictators Replace Political Bosses, 22 Nat’l Mun. Rev. 162 (1933); Porter, A Plague
of Special Districts, id. at 544.

41. See Comment, Municipal Real Estate Taxation as an Instrument for Community
Planning, 57 Yale L. J. 219, 220 n. 4 (1947), listing many new taxes imposed by munici-
palities to supplement inadequate revenue from traditional property taxes. See also, Drab-
sen, New Sources of Income for Municipalities, 25 Taxes 499 (1947); Roesken, Tax

42. See Matter of Rafłowitz, 43 A.M. B.R. (N.S.) 358, 361 (D. Conn. 1940), rev’d, 37
F.Supp. 202 (D. Conn. 1941): “Taxing authorities and collectors are not responsible for
a single dollar’s worth of goods on any bankrupt’s shelves, or for one single fixture in
his store and every penny paid in tax priorities is at the expense of the general creditors.”

43. Tax officials filing claims for accumulated taxes plus interest helped make the
interest-bearing arrearage still larger by laxity in asserting and collecting claims before
bankruptcy ensued. Earlier presentation and payment might have reduced the amount of
interest charges and made a greater portion of the debtor’s estate available to creditors.
When collectors were dilatory, these tax delinquencies often went unsuspected. Conse-
quently, creditors were lured into extending credit and failed to recover advances used to
satisfy these arrearages. Montgomery, Recent Developments and Proposed Reforms in
Respect to Tax Claims in Bankruptcy, 19 J.N.A. Ref. Bankr. 31 (1944); Moore and Tone,
Proposed Bankruptcy Amendments: Improvement or Retraction? 57 Yale L. J. 633,
704 (1948).

44. Hunt, Bankruptcy Tax Problems, 17 J.N.A. Ref. Bankr. 121, 122 (1943); Note,
(2d Cir. 1948).

45. In re Union Fabrics, 73 F.Supp. 685 (S.D.N.Y. 1947), see note 9 supra, illustrates
But while the Saper decision will undoubtedly improve the position of the general creditor, this gain may well come at the expense of the debtor's stake in rehabilitation. Interpretation of the Court's opinion to mean that interest on tax claims ceases altogether when bankruptcy ensues would safeguard the debtor's interests. Presumably, however, the case holds only that interest accruing after a petition is filed is not provable in bankruptcy; it does not seem to affect the proviso of section 17 that bars discharge of tax claims not satisfied out of a debtor's assets. Under this construction, the debtor henceforth will probably emerge from bankruptcy with undischargeable indebtedness increased by the amount of interest denied tax claimants. Assets which formerly were applied to payment of non-dischargeable tax claims will now be consumed in payment of claims which would be discharged whether paid or not.

Thus the Saper case abolishes an anomaly in the operation of the Bankruptcy Act. It alters a rule which was often unfair to creditors, vexing to trustees, and perhaps inconsistent with Congressional intent. But unless the Saper case can be interpreted as halting the accrual of interest under the tax statutes, only Congressional amendment of section 17 can relieve debtors from the claims of taxing agencies.

46. The Saper decision does not affect dischargeability of the principal amount of tax arrearages. Interest, however, is not part of the tax, but something in addition to the tax. Capital Building & Loan Ass'n v. Commissioner, 23 B.T.A. 848 (1931); Penrose v. United States, 18 F.Supp. 413, 415 (E.D.Pa. 1937). And though some time must elapse between the time a claim is filed and the date of payment, the court leaves unanswered the question whether interest accruing on pre-bankruptcy taxes after a petition is filed will survive payment in bankruptcy of the principal claim which gave it birth. To say that interest does not survive is only to say that, in effect, interest ceases to run, despite the revenue statutes, because bankruptcy ensues. Under this construction, the prohibition against discharging tax claims would be avoided since there would be no interest to discharge.

47. While the possibility of making interest on tax claims dischargeable by judicial construction is not referred to in the Supreme Court opinion, the lower court indicated that "the fact that the bankrupt may not have received an immunity he might desire is not ground for upsetting the statutory scheme of distribution of the estate in the hands of the trustee...." Saper v. City of New York, 168 F.2d 268, 272 (2d Cir. 1948).

48. Interest on tax arrearages is only another instance of the burden placed on debtors by the present non-dischargeability of tax claims. See note 35 supra. Of course, where the debtor is a corporation whose existence is terminated by bankruptcy, possible subsequent liability for unpaid interest becomes academic.

49. Proposals to amend § 17 have already been placed before Congress. See note 35 supra.