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COMMENTS

FEDERAL TAX LIENS

REX M. WALKER

The field of federal taxation is an area of law the complexities of which are unparalleled. In addition, the law of taxation is very fluid and the rule of today is more frequently than not gone tomorrow. The general practitioner sensed this problem at an early date and defaulted the tax practice to others who chose to specialize in tax law. However, one need only pick up a recent reporter and examine its contents to become aware of the fact that there is one facet of the federal tax law that is the concern of every active practitioner. This is the federal tax lien. This lien has no respect for the standard concepts of creditor security law, and has succeeded in fashioning a new set of rules which govern its priority. These rules are so contrary to the concepts that govern common law liens that the unwary and uninformed are almost certain to run afoul of them.

The purpose of this comment is to set out the basic statutory law on which the federal tax lien is founded, to examine the scope of the federal tax lien and its relative priority, and to indicate some of the precautions that can be taken to protect a credit transaction from it.

CREATION OF THE LIEN

The statutory provision which creates a lien in favor of the government is found in Section 6321 of the 1954 Internal Revenue Code. Section 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, additional to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

The federal government has seen fit to insure that the creation of the lien is a simple task. All that need be done to create the tax lien is for the Collector to make an assessment and a demand on the delinquent taxpayer.[1] Contrary to traditional practices for the creation of liens the government is not required to take possession of the property

[1] INT. REV. CODE of 1954 § 6322. Detroit Bank v. U.S., 317 U.S. 329 (1943); Guaranty Trust Co. v. McKendrick, 5 F.2d 553 (4th Cir. 1925); Cattani v. Korsan, 29 N.J. Super. 581, 103 A.2d 51 (1954).

to which the lien has attached, nor is filing a public notice a condition precedent to the creation of it.

The assessment and demand are both bathed in a cloak of secrecy; an interested party has no practical way of determining whether or not the lien exists if notice thereof has not been filed. Yet with these simple procedural steps the federal government has a lien the priorities of which are unknown among the ranks of private liens.

PROPERTY TO WHICH THE LIEN ATTACHES

The federal tax lien is like a giant invisible octopus which has thousands of tentacles which reach out and attach to the property of the delinquent taxpayer. Section 6321 states that the lien attaches "... upon all the property and rights to property, whether real or personal, belonging to such person," i.e., the delinquent taxpayer. Though this may appear to be a simple statement, there is no property, tangible or intangible, which escapes the grasp of this lien.[2] Thus, as has been stated, once the lien attaches "the property has in a sense two owners, the taxpayer, and, to the extent of the lien, the United States."[3]

It goes without saying that the tax lien can reach no greater interest in the property than that which the taxpayer owns. The extent of this interest is governed by state law.[4] The federal tax lien also attaches to after-acquired property.[5]

The rule is well-established that exemptions are governed by federal law, and state exemption laws are not operative. Property which by state law is exempt from the claims of creditors is subject to the federal tax lien and also subject to distraint.[6] Section 6334 exempts certain property from distraint. But it should be noted that this property is not

[2] The tax lien has been held to attach to the following types of property: Investment and Security Co. v. Robbins, 49 F. Supp. 620 (E.D. Wash. 1943) (intangible property); U.S. v. Cox, 119 F. Supp. 147 (N.D. Ga. 1953) (equity of redemption); Nelson v. U.S., 139 F.2d 162 (9th Cir. 1943) (crops); Welsh v. U.S., 220 F.2d 200 (D.C. Cir. 1955) (money); U.S. v. Behrens, 130 F. Supp. 93 (E.D. N.Y. 1955) (cash surrender value of life insurance policies); MacKenzie v. U.S., 109 F.2d 540 (9th Cir. 1940 (alimony payments); U.S. v. National City Bank of N.Y., 32 F. Supp. 890 (S.D. N.Y. 1940) (bank deposits); U.S. v. Brandenburg, 106 F. Supp. 82 (S.D. Cal. 1952) (jointly owned property); I.T. 3356, 1940-1 CB p. 72 (partner's interest in partnership); U.S. v. Dallas Nat. Bank, 152 F.2d 582 (5th Cir. 1946) (taxpayer's interest in a trust); Goldenberg v. Westover, 150 F.2d 388 (9th Cir. 1945) (bankruptcy funds); Citizens State Bank v. Vidal, 114 F.2d 380 (10th Cir. 1940) (balance owning on a construction contract); U.S. v. Warren R. Co., 127 F.2d 134 (2nd Cir. 1942) (leasehold interest); In re Decker's Estate, 355 Pa. 331, 49 A.2d 714 (1946) (pledged property).

[3] U.S. v. Greenville, 118 F.2d 963 (4th Cir. 1941).

[4] Poe v. Seaborn, 282 U.S. 101 (1930).

[5] Citizens National Trust and Savings Bank v. U.S., 135 F.2d 527 (9th Cir. 1943); Glass City Bank v. U.S., 326 U.S. 265 (1945).

[6] U.S. v. Heffron, 158 F.2d 657 (9th Cir. 1947); Sambough v. Schofield, 132 F.2d 345 (5th Cir. 1943).

exempt from the lien, but merely cannot be distrained for the collection of the delinquent taxes.[7] Whether such property will enjoy a like immunity in the hands of a transferee remains an open question.

COMMUNITY PROPERTY CONSIDERATIONS

Resolving the federal tax lien and the Washington community property system is not an easy task. The tax liability for the community income is split between the husband and the wife, each of them being personally liable for the tax on one half of the community income.[8] In such a case the lien would attach to the community property and also to the separate property of the individual members to the extent of their respective liabilities.[9]

However, if the delinquent taxes are for the separate income of one of the spouses, the results cannot be so summarily stated. It is beyond doubt that such an obligation is a separate debt. There is no question that the lien would attach to the separate property of the delinquent taxpayer and that such a lien is enforceable. It would also attach to the spouse's share of the community property. But whether the federal government can enforce its lien on the spouse's one-half interest in community property presents a doubtful question because Washington law declares that a spouse's interest in community property is exempt from execution for separate debts.[10] Query: Will the state law be recognized or does federal law govern?

It is possible that the state immunity can be invoked in such a situation on the theory that it presents a question of ownership and state law controls. In the case of *Morgan v. Moynahan*[11] the wife was allowed to restrain the sale of community property under a distraint for the husband's delinquent taxes. The court stated at page 525: "Any disposition of the husband's interest (community property) which interferes with her (the wife's) possession and use, reduces or affects its value, or clouds her title may be enjoined."

However, it is also possible that the immunity of community property from separate debts will be classed as a state exemption, and will not be operative against the federal government. The law on this

[7] U.S. v. Aetna Life Ins. Co., 46 F. Supp. 30, (D. Conn. 1942).
[8] Saenger v. Commissioner, 69 F.2d 633 (5th Cir. 1934); Hopkins v. Bacon, 282 U.S. 122 (1930).
[9] Smith v. Donnelly, 65 F. Supp. 415 (E.D. La. 1946).
[10] Stockand v. Bartlett, 4 Wash. 730, 31 Pac. 24 (1892).
[11] 86 F. Supp. 522 (S.D. Tex. 1949). See also Paddock v. Silmoniet, 147 Tex. 571, 218 S.W.2d 428 (1949); Jones v. Kemp, 114 F.2d 478 (10th Cir. 1944).

problem is in the formative stages; however, it does present a possible defense against the tax lien foreclosure in a community property state.

PRIORITY OF THE FEDERAL LIEN

The priority problems presented by the federal tax lien are simple when the only interested parties are the taxpayer and the federal government. On these facts the government is free to liquidate all the property, both tangible and intangible, that the taxpayer owns, with the exception of that exempted by Section 6334. But if third parties also seek satisfaction of claims out of the same property the problems are complex. In such a situation it is necessary to determine the priority of the competing claimants.

The Revenue Code does not grant the federal tax lien priority over various third party competing liens, and the task of determining its priority has fallen upon the courts.[12]

The federal lien is deemed to be specific and perfected,[13] and its relative priority is a federal question.[14] The upshot of this is that the federal courts can grant priority to the federal lien over a private lien, even though by state law standards the private lien would be given priority over a competing private lien were it in the position of the federal tax lien.

In determining the priority of the federal lien it must be recognized that the code has divided private liens into two general classes: (1) Those against which the tax lien is effective from the date on which the assessment is received and a demand is made by the District Collector. For this class of liens it is not necessary that a notice of the tax lien be filed of record before it is prior in right· (2) Those against which the federal lien is not effective unless notice of the tax lien has been filed prior to the perfection of the private lien.[15]

The mechanics of filing a notice of a tax lien are simple. The notice of the lien sets out the name of the delinquent taxpayer and the amount of the government's claim. It is filed in the office of the local state official that has been designated for this purpose. If one has not been designated then the requirement is met by filing a copy of the notice with the clerk of the district court.[16] In Washington the county audi-

[12] It must also be assumed that the taxpayer is solvent. If the contrary is found, different rules of priority will follow. See 31 U.S. C.A. 191.

[13] U.S. v. Greenville, 118 F.2d 963 (4th Cir. 1941).

[14] U.S. v. Acri, 348 U.S. 211 (1954).

[15] INT. REV. CODE of 1954 § 6323 provides in part ". . . the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate..."

[16] INT. REV. CODE of 1954 § 6323.

tor's office of the county wherein the property subject to the lien is situated has been designated as the proper office in which to file a notice of the tax lien.[17]

Before a lien which falls within the first class mentioned above can achieve priority over the federal tax lien, it must appear that it has attached, and also was specific and perfected *before* the assessment list was received by the District Collector.[18] These two requirements are cumulative. The requirement that the lien must be specific and perfected is of recent vintage and was added by the United States Supreme Court in the case of *United States v. Security Trust and Savings Bank*.[19]

The impact of the *Security Trust* case is great enough to warrant special attention. In that case, a private creditor attached the taxpayer's property at the outset of the action. Subsequent thereto, but prior to the attaching creditor taking judgment, a tax lien attached to the property. It was held that the tax lien was prior in right, since the attachment was not "specific and perfected" but was a mere "caveat of a more perfect lien to come." The court also stated,

> Nor can the doctrine of relation back—which by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of the attachment—operate to destroy the realities of the situation.

Thus two new concepts were spawned by the *Security Trust* case:

1—A private lien must be specific and perfected before it can possibly be prior in right to a federal tax lien.

2—The court will not indulge in the fictional relation back doctrine in order to relate the specific and perfected status of the lien back to the date when it first attached in its inchoate status.

Armed with these two principles the Internal Revenue Collector has yet to lose a major battle with a private lien.[20]

Attaining the status of "specific and perfected" is not an easy goal for the private lien. A lien is deemed to be specific and perfected when

[17] RCW 60.68.010-.040.

[18] Fleming v. Brownfield, 47 Wn.2d 857, 290 P.2d 993 (1955); Weitz v. Electrovation, Inc., 48 Wn.2d 604, 295 P.2d 728 (1956).

[19] 340 U.S. 47 (1950).

[20] The following cases illustrate the success that the Collector has enjoyed: U.S. v. White Bear Brewing Co., 350 U.S. 1010 (1956) (federal tax lien held superior to mechanic's lien); United States v. Colotta, 350 U.S. 808 (1955) (federal tax lien held superior to mechanic's lien); U.S. v. Liverpool and London Inc. Co., 348 U.S. 215 (1955) (federal tax lien held superior to garnishment lien); U.S. v. Scovil, 348 U.S. 218 (1955) (federal lien held superior to landlord's lien); U.S. v. New Britain, 347 U.S. 81 (1954) (federal tax lien held superior to lien for local taxes); U.S. v. Gilbert Associates Inc., 345 U.S. 361 (1953) (federal tax lien held superior to lien for local taxes).

the identity of the lienor is certain, the property subject to the lien is identified, and the amount of the lien is certain.[21]

While it is true that the government can keep its lien a secret and prevail against subsequent liens and all prior liens which are not specific and perfected, it must be remembered that Section 6323 creates an exception to this rule. This section provides that the tax lien is not valid against a mortgagee, pledgee, purchaser, or judgment creditor acquiring a lien or an interest in the property, unless notice of the tax lien was filed of record prior to the perfection of the private interest.

As one might imagine, there has been a great deal of scurrying about by creditors attempting to qualify as one of the chosen few and thus enjoy the privileges afforded by this section.

Mortgagee

Generally a mortgage which is recorded before notice of the tax lien is filed creates a lien prior in right.[22] In order to enjoy priority the mortgage must be bona fide,[23] but the fact that the mortgagee knows that an assessment has been made does not deny him the protection afforded by Section 6323.[24]

If a mortgage is executed *before* a tax lien is filed, but recorded *after* the tax lien has been filed, the tax lien is prior in right.[25] However, the mortgagee need not give a present consideration for the mortgage as an antecedent debt is deemed a sufficient consideration.[26]

A literal reading of Section 6323 would seem to require that any mortgage filed of record prior to the time the District Collector files a notice of the tax lien is entitled to priority. This perhaps is the general rule, but here again the practitioner is going to feel the pinch of the test adopted in the *Security Trust* case, which requires that a private lien be specific and perfected and which also rejects the relation back doctrine.

It seems almost certain that a mortgage which is of record before the tax lien notice but which is forced to rely on the relation back doctrine will not be granted priority. For example, the status of an

[21] U.S. v. White Bear Brewing Co. Inc., 350 U.S. 1010 (1956); Fleming v. Brownfield, 47 Wn.2d 857, 290 P.2d 993 (1955); Illinois v. Campbell, 329 U.S. 362 (1946); In re Carroll Const. Co., 41 Wn.2d 317, 249 P.2d 234 (1952).

[22] Ormsbee v. U.S., 23 F.2d 926 (S.D. Fla. 1928); Metropolitan Life Ins. Co. v. U.S., 107 F.2d 311 (6th Cir. 1939); Bank of America v. U.S., 84 F. Supp. 387 (S.D. Cal. 1949).

[23] Hart v. U.S., 207 F.2d 813 (8th Cir. 1953).

[24] U.S. v. Beaver Run Coal Co., 99 F.2d 610 (3rd Cir. 1938).

[25] Exchange National Bank of Tulsa v. Davy, 13 F. Supp. 226 (N.D. Okla. 1936).

[26] Ferris v. Chic-Mint Gum Co., 14 Del. Ch. 232, 124 A. 577 (1924).

open-end mortgage which is recorded prior to the time a notice of a tax lien is filed, but upon which advances are made *after* notice of the tax lien is filed, remains in doubt. The Internal Revenue Service has issued a ruling that a mortgagee is afforded no protection by Section 6323 for advances made after the notice of the tax lien is filed.[27] The ruling rests squarely on the holding in the *Security Trust* case.

The utility of the open-end mortgage as a credit device is universally recognized, and the courts have judicially sanctioned its use.[28] However, the priority of the advances under such a mortgage often turns on whether or not the advances are obligatory or optional. The advances which are obligatory are generally given priority over intervening interests,[29] while the optional advances are not given priority.[30]

The Revenue Ruling makes no distinction between advances which are optional and those which are obligatory. The upshot of the ruling is that a mortgagee can not safely make an advance without first searching for a tax lien notice.

Common everyday mortgage transactions which rely on the relation back doctrine present similar problems. What is the status of the mortgage covering after-acquired property, where the tax lien is filed prior to the acquisition of the property, but after the mortgage is recorded? What of the situation where a purchase money mortgage is taken after a tax lien has been filed against the mortgagor? A like problem is presented by the situation where a mortgage is recorded, but prior to the time the loan is actually made, notice of the tax lien is filed. This latter problem is illustrated by the normal construction loan, where periodic advances are made as the need arises, yet the mortgage does not contain a future advance clause.

It is possible that all of the above examples run afoul of the rule of the *Security Trust* case. The Revenue Ruling on the open-end mortgage problem certainly tips the hand of the Collector, and there is no doubt that he will assert that such mortgages are not entitled to priority. While it is impossible to determine with any degree of certainty just what the outcome of these cases will be, it would behoove mortgagees to enter such transactions with caution.

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[27] Revenue Ruling 56-41; 1956 Int. Rev. Bull. No. 6 at 15.

[28] Home Savings and Loan Assn. v. Burton, 20 Wash, 688, 56 Pac. 940 (1899); Heal v. Evans Creek Coal and Coke Co., 71 Wash. 225, 128 Pac. 211 (1912). See Annot., 81 A.L.R. 631; Comment, 18 Wash. L. Rev. 24 (1943).

[29] Cedar v. W. E. Roche Fruit Co., 16 Wn.2d 652, 134 P.2d 437 (1943).

[30] Elmendorf-Anthony Co. v. Dunn, 10 Wn.2d 29, 116 P.2d 253 (1941).

Pledgee

A pledgee has a lien prior in right, unless notice of the tax lien is of record prior to the creation of the pledge.[31] However, if the pledge is created after the tax lien has been filed the tax lien is prior in right.[32] The courts will give the transaction close scrutiny to determine if in fact a bona fide pledge was contemplated by the parties, or whether a pledge for purposes other than security was intended.[33] If the transaction is an assignment (i.e. the assignee holds in a capacity other than as a pledgee) the assignee takes subject to the secret tax lien, whereas if the transaction is a pledge the pledgee holds the property free of the secret tax lien.

Purchaser

Section 6323 also grants protection to a purchaser unless the tax lien is of record prior to the date of the purchase. The United States Supreme Court has recently stated:

> A purchaser within the meaning of 3672 (Section 6323 in the 1954 code) usually means one who acquires title for a valuable consideration in the manner of vendor and vendee.[34]

The court's statement that title is necessary to qualify as a purchaser casts a cloud of doubt over the status of the vendee who purchases under a conditional sales contract.[35] Such a vendee acquires no title until the contract is paid off. Whether or not the Supreme Court will treat the conditional vendee as a purchaser remains an open question. The lower courts have held that a conditional vendee is a purchaser.[36]

Contrary to the treatment given a mortgagee, it has been held that a purchase made with notice or knowledge of the fact that a tax lien exists is not protected by Section 6323, notwithstanding the fact that notice of the lien is not filed. [37]

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[31] INT. REV. CODE of 1954 § 6323.

[32] Grand Prairie State Bank v. U.S., 206 F.2d 217 (5th Cir. 1953); U.S. v. Caldwell, 74 F. Supp. 114 (M.D. Tenn. 1947).

[33] Knight v. Knight, 71 N.Y.S.2d 357 (1947); U.S. v. Gargil, 218 F.2d 556 (1st Cir. 1955); U.S. v. E. Regensburg and Sons, 124 F. Supp. 687 (S.D. N.Y. 1954).

[34] United States v. Scovil, 348 U.S. 244 (1955); In re Litt, 128 F. Supp. 34 (E.D. Penn. 1955).

[35] See U.S. Treas. Reg. 118, § 301.632-1, which defines a purchaser as "a person who, for a valuable present consideration acquires property or an interest in property."

[36] Tildesley Coal Co., v. American Fuel Corp. 130 W.Va. 720, 45 S.E. 2d 750 (1947). See also National Refining Co. v. U.S., 160 F.2d 951 (8th Cir. 1947). It is possible for an assignee to qualify as a purchaser. See National Refining Co. v. U.S., supra; Exchange National Bank v. Davy, 13 F. Supp. 226 (N.D. Okla. 1936).

[37] U.S. v. Rosebush, 45 F. Supp. 664 (E.D. Wis. 1942); Hayword v. U.S., 2 F.2d 467 (5th Cir. 1924).

Judgment Creditor

A "judgment creditor" is also given protection by Section 6323, and the tax lien is not effective against a judgment creditor unless notice of the lien is filed prior to the acquisition of the judgment. Determining who qualifies as a judgment creditor within the meaning of this section is not as simple as it might seem. The United States Supreme Court has stated that a judgment creditor is one who has a judgment from a court of record.[38] The Commissioner of Internal Revenue has taken the position that the mere obtaining of a judgment does not afford any protection under this section.[39] The Commissioner requires that a perfected lien on the property be obtained under such judgment before priority can be attained.[40] In Washington a judgment creates a lien on the "real estate" of the judgment debtor located within this state.[41] No such lien is created on the personal property of the judgment debtor. Thus as far as personal property is concerned, it apparently is necessary for the judgment creditor to levy on property before he has attained the status of judgment creditor within the meaning of Section 6323.

Securities

The priority of a tax lien on a "security" is governed by special rules. The code in Section 6323(c)(2) defines a security as:

> . . . the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

Notwithstanding the fact that notice of the tax lien has been filed, the lien is not valid against a mortgagee, pledgee, or purchaser of a security unless they have acquired their interest in the security with *actual knowledge* that a tax lien existed thereon. The special treatment given securities is necessary to maintain their negotiable character.

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[38] U.S. v. Gilbert Associates, 345 U.S. 361 (1953).
[39] U.S. Treas. Reg. 118, § 301-632-1.
[40] See Miller v. Bank of America, 166 F.2d 415 (9th Cir. 1948), which held that a specific lien under the judgment was necessary.
[41] RCW 4.56.190 and RCW 4.56.200.

Mechanics' and Materialmen's Lien

In every major battle the mechanics' and materialmen's lien have had with a federal tax lien, the former has come out second best. The recent case of *Fleming v. Brownfield*[42] illustrates the fate of the mechanics' and materialmen's lien when doing battle with the federal tax lien. In that case a claim for mechanics' and materialmen's lien was filed and an action commenced to reduce the lien to judgment. Subsequent thereto, but prior to the entry of the judgment, the federal government filed a notice of its tax lien and intervened in the action. It was held that the federal lien was prior in right because the mechanics' lien was not "specific and perfected" by federal law standards. It should be noted that the plaintiff had done everything possible under the local law to perfect the lien, yet priority was denied.

The inequities of the situation are immediately apparent. The mechanic and the materialman are void of any method of protecting themselves. The federal tax lien can remain secret while the mechanic and materialman enhance the value of the taxpayer's property. Even though the federal lien is a secret, it takes priority over the mechanics' and materialmen's lien and receives the benefit of this enhanced value. This is unjust enrichment in its grossest form!

The judicial decisions in this area are so strongly entrenched that it will take legislation to correct the situation. An amendment to Section 6323 has been introduced in the United States Congress.[43] This amendment would include "mechanic lienors" in the class of liens against which the tax lien is ineffective until notice thereof has been filed. The bill also includes a definition of "mechanic lienor" which is aimed at defeating the requirement that the lien be specific and perfected.

Such legislation is not only desirous but is necessary for the promotion of building activities. It is also necessary if the mechanics' and materialmen's liens are to be restored to the secured position that they once enjoyed.

FILING AND RECORDING

Deciding in which county public records should be searched to determine if a notice of a federal tax lien has been filed presents a thorny task. Section 6223 provides that notice must be filed in the ". . . office

[42] 47 Wn.2d 857, 290 P.2d 993 (1955). See U.S. v. White Bear Brewing Co., 350 U.S. 1010 (1956); U.S. v. Colotta, 350 U.S. 808 (1955); U.S. v. King County Iron Works, 224 F.2d 232 (2nd Cir. 1955); U.S. v. Eisinger Mill and Lumber Co., 202 Md. Rep. 613, 98 A.2d 81 (1953).

[43] H.R. Rep. No. 77967, 84th Cong. (1956).

designated by the law of the State or Territory in which the property subject to the lien is situated." In Washington the county auditor's office of the county in which the property subject to the lien is located has been designated as the proper place to file notice of the federal tax lien.[44]

When dealing with real property the problem is simple. The notice can be properly filed in only one place, i.e., the county wherein the property is situated. When dealing with personal property the situation becomes acute.[45] Relying on the doctrine that the situs of personal property is the domicile of the owner, it has been held that a notice filed in the county wherein the delinquent taxpayer is domiciled is sufficient filing, notwithstanding the fact that the property is actually situated in a different county.[46] This rule has been applied to both tangible personal property and to intangibles.[47]

Both the federal and the state acts are silent about refiling in case the property is moved to a different county after filing has once been perfected. Presumably the filing once perfected remains valid even though the property is moved to another county[48] or indeed even to another state.[49]

The rule that filing in the taxpayer's domicile is sufficient filing of the notice for personal property, regardless of its actual situs, is the result of judicial legislation. What would be the result if notice is filed in a county where the property is in fact situated? Such filing would certainly fall within the literal wording of the recording acts. To date there is no case dealing with the validity of such filing.

This present state of the law makes it virtually impossible to determine whether or not a federal tax lien on personal property has been filed. To determine whether a tax lien is a matter of record it is sug-

[44] RCW 60.68.010-040.

[45] When dealing with a "security" the mortgagee, pledgee or purchaser is not required to search the records. See § 6323.

[46] Grand Prairie State Bank v. U.S., 206 F.2d 217 (5th Cir. 1953); U.S. v. Spreckels, 50 F. Supp. 789 (N.D. Calif. 1943); U.S. v. Royce Shoe Co., 137 F. Supp. 786 (D. N.H. 1956); U.S. v. King County Iron Works, 224 F.2d 232 (2nd Cir. 1955); Investment and Securities Co. v. U.S., 140 F.2d 894 (9th Cir. 1944). But see Gulf Coast Marine Ways Inc. v. The J. R. Hardee, 107 F. Supp. 379 (S.D. Texas 1952).

[47] Grand Prairie State Bank v. U.S., supra note 46, (tangible property); U.S. v. Royce Shoe Co., supra note 46 (intangible property).

[48] In the case of Grand Prairie State Bank v. U.S., supra note 46, the court found that filing had in fact been perfected and then stated that it was not necessary to thereafter file in every county to which the property might subsequently be moved.

[49] Investment and Securities Co. v. U.S., supra note 46. Here notice filed in the state of Wisconsin was held sufficient to give notice in the state of Washington. The authority of this case is somewhat diluted, however, because the intervening lienor in Washington had actual notice of the tax lien.

gested that a search be made of the public records in the county wherein the taxpayer is domiciled and also in every county into which the property has at one time or another been taken.

The cost of such an undertaking is of course prohibitive for some chattels, such as automobiles. Perhaps the only solution is a complete examination of the tax status of a person furnishing a security interest in personal property.

Duration of the Lien

Having once attached, how long does the federal tax lien remain enforceable? Section 6322 states that the lien shall continue until it is "satisfied or becomes unenforceable by operation of time." That the lien is extinguished when the underlying debt is satisfied states the obvious. The lien becomes unenforceable by operation of law when the underlying debt which the lien secures becomes unenforceable by reason of lapse of time. Under Section 6502 a tax becomes unenforcable six years after the date of the assessment, unless the taxpayer agrees to an extension of time prior to the expiration of the six year period.[50] Thus in the usual case the lien will have a life of six years, with the period commencing from the date the assessment was made.

However, the federal government need not sit idly by and let time fill out the death certificate on its lien. The life of the lien can be indefinitely prolonged by commencing an action within the six years to reduce the tax debt to a judgment. Once the tax debt is merged in the judgment there is no limitation of time during which the judgment must be collected. The judgment does not discharge the lien,[51] but rather the lien continues and is enforceable as long as the judgment is valid, which theoretically is forever.

Foreclosure

As discussed earlier, a mortgage which is recorded prior to the filing of notice of the federal tax lien is generally prior in right.[52] However,

[50] An extention of the statute of limitation by the taxpayer is operative against the creditors of the taxpayer. Equitable Life Assurance Soc'y. v. Moore, 29 F. Supp. 179 (E.D. Ill. 1939); United States v. Ettelson 159 F.2d 193 (7th Cir. 1947).

[51] United States v. Caldwell, 74 F. Supp. 114, (M.D. Tenn. 1947) (Assessment made in 1932, judgment taken in 1938. Held, the lien was still valid in 1946); Investment and Securities Co. v. U.S., 140 F.2d 894 (9th Cir. 1944) (Assessment made in 1934, judgment taken in 1937. Held, the lien still in existence in 1941); United States v. Ettelson, 159 F.2d 193, (7th Cir. 1947) (Assessment made in 1937, in 1938 legal proceedings were commenced. Held, the lien was still in existence in 1944).

[52] Int. Rev. Code of 1954 § 6323. See also U.S. v. Sampsell, 153 F.2d 731 (9th Cir. 1946); Schmitz v. Stockman, 151 Kan. 891,101 P.2d 962 (1940); U.S. v. Beaver Run Coal Co., 99 F.2d 610 (3rd Cir. 1938); Equitable Life Assurance Soc'y. v. Moore, 29 F. Supp. 179 (N.D. Ill. 1939).

this temporary victory should not lull the mortgagee into a false sense of security. Should it become necessary to foreclose the mortgage the federal tax lien is still a problem to be reckoned with.

The mortgagee who follows normal foreclosure procedure, without considering the posibility of an existing federal lien, will find that the purchaser at the foreclosure sale takes subject to the federal lien, if notice thereof has been filed.[53] If the federal lien is not a matter of record on the sale date then the purchaser is protected by Section 6323 and takes the property free of the federal lien.

The procedure that can be employed to free property of a junior federal tax lien in a foreclosure sale is simple and free from pitfalls. The mortgagee has two courses of action which can be pursued. The mortgagee can seek a certificate of release,[54] and if this fails, the federal government can be joined in the foreclosure action as a junior lien claimant.[55] Either of these two action will release the property from the federal lien.

The conditions under which a release of the federal lien on the property will be given are:[56]

1. The tax is paid or has become legally unenforceable.
2. A bond securing the payment of the tax is furnished.
3. The value of the property remaining subject to the lien after a release of part of the property is twice the amount of the tax debt plus any lien superior to the tax lien.
4. The government is paid an amount equal to the value of the property for which a release is sought.
5. The tax lien has no value.

If the government refuses to grant a release of the property from its junior lien it is then necessary for the mortgagee to join the federal government as a defendant. Consent by the federal government to be sued in federal or state courts by persons wishing to foreclose a lien or mortgage or to quiet title to property in which the federal government claims a lien is granted by statute.[57] If the United States is sued under the authority of this section it is necessary that the statute be

[53] INT. REV. CODE of 1954 § 6323; Sherwood v. U.S., 5 F.2d 991 (E.D. N.Y. 1925); Oden v. U.S., 33 F.2d 553 (W.D. La. 1929); Metropolitan Life Ins. Co. v. U.S., 107 F.2d 311 (6th Cir. 1939); U.S. v. Cox, 119 F. Supp. 147 (N.D. Ga. 1953). But see U.S. v. Rayan, 124 F. Supp. 1 (D.C. Minn. 1954); Trust Co. of Texas v. U.S. 3 F. Supp. 683 (S.D. Tex. 1933). See 9 Mertens, *The Law of Federal Taxation*, § 54.42 (5th ed. 1955).

[54] INT. REV. CODE of 1954 § 6325.

[55] 28 U.S.C.A. 2410.

[56] See U.S. Treas. Reg. 118, § 301.6325-1 for the mechanics of obtaining a release.

[57] 28 U.S.C.A. 2410.

strictly complied with, to insure that the action falls within the consent given by the federal government.

It is suggested that the standard procedure to be followed in foreclosing a mortgage include a search of the records immediately prior to the commencement of the foreclosure action. If a lien is discovered a release should be sought and if this fails the federal government should be made a party defendant. If notice of a tax lien is not a matter of record then normal foreclosure procedure is sufficient until immediately prior to the sale date. Then another search should be made to determine if a tax lien has been filed subsequent to the commencement of the foreclosure action. This two-step search is necessary because there are no authoritative cases which hold that a *lis pendens* filed after the first search will preclude a federal lien filed subsequent to the commencement of the action but prior to the sale date.[58] If the federal tax lien is not filed prior to the sale date, the purchaser takes free from any secret federal lien or any liens which are subsequently filed for record.[59]

SUMMARY

In the main this has been nothing more than a "horseback appraisal" of the federal tax lien. This lien is a potent weapon in the hands of the tax collector, and the unwary have little chance of prevailing against it. If this comment has done nothing more than impress this fact upon the minds of the practitioner it has served its purpose.

In recapitulation the salient features of the federal tax lien are:

1. From the date of assessment and demand the federal government has a lien on *all* the property of the taxpayer.
2. A private lien which antedates the federal tax lien is not prior in right unless it is specific and perfected.
3. An antedating federal tax lien which remains secret has priority over all private liens except a specific and perfected mortgage, pledge, purchase or judgment lien.
4. A mortgage, pledge, purchase or judgment lien which is specific and perfected prior to the filing of a notice of the federal tax lien is prior in right, though subsequent in time.

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[58] Sherwood v. U.S., 5 F.2d 991 (E.D. N.Y. 1925) holds that a lis pendens is inoperative against a federal tax lien. There are numerous cases which hold that a tax lien can be discharged only by the methods provided for in the federal statutes. See Oden v. U.S., 33 F.2d 553 (W.D. La. 1929); Metropolitan Life Ins. Co. v. U.S., 107 F.2d 311 (6th Cir. 1939); U.S. v. Cox, 119 F. Supp. 147 (N.D. Ga. 1953).

[59] INT. REV. CODE of 1954 § 6323.