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OPINION	:	No. 79-721
	:	
of	:	December 21, 1979
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SUBJECT: REVENUE AND TAXATION CODE SECTIONS 3691 AND 4675—Sale of tax deeded property pursuant to the provisions of Revenue and Taxation Code section 3691 will discharge a properly perfected federal tax lien if proper notice is given and proper authority obtained. The United States may assert a lien against the “excess proceeds” subject to claim pursuant to Revenue and Taxation Code section 4675 by the delinquent taxpayer whose property was sold pursuant to Revenue and Taxation Code section 3691.

The Honorable Kenneth Cory, Controller, has requested an opinion on questions which we have rephrased as follows:

1. Does the sale of tax deeded property pursuant to the provisions of Revenue and Taxation Code section 3691 *et seq.* discharge a properly perfected federal tax lien?
2. May the United States assert a lien against “excess proceeds” subject to claim pursuant to Revenue and Taxation Code section 4675 by the delinquent taxpayer whose property was sold by the state pursuant to Revenue and Taxation Code section 3691?

CONCLUSIONS

1. A sale of tax deeded property pursuant to the provisions of Revenue and Taxation Code section 3691 will discharge a properly perfected federal tax lien if notice pursuant to title 26, United States Code section 7425, subsection (c) has been given to the United States or the United States consents to the sale; otherwise, the sale will not discharge the lien.

2. The United States may assert a lien against the “excess proceeds” subject to claim pursuant to Revenue and Taxation Code section 4675 by the delinquent taxpayer whose property was sold pursuant to Revenue and Taxation Code section 3691.

ANALYSIS

The Federal Tax Lien Act of 1966 (Pub.L. 89–719) was enacted by Congress to provide for a uniform treatment throughout the nation regarding the effect and priority of federal tax liens. (See 1966 U.S. Code Cong. & Admin. News vol. III, p. 3722.) The basic provision which creates the federal lien is title 26, United States Code section 6321, which 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, addition 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.

Title 26, United States Code section 7425 (also enacted as part of the Act) provides in pertinent part:

“(a) Judicial proceedings.— . . .

“(b) Other sales.—Notwithstanding subsection (a) *a sale of property on which the United States has or claims a lien, or a title derived from enforcement of a lien, under the provisions of this title, made pursuant to an instrument creating a lien on such property, pursuant to a confession of judgment on the obligation secured by such an instrument, or pursuant to a nonjudicial sale under a statutory lien on such property—*

“(1) shall, except as otherwise provided, be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or

recording more than 30 days before such sale and the United States is not given notice of such sale in the manner prescribed in subsection (c) (1); or

“(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if—

“(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

“(B) the law makes no provision for such filing, or

“(C) notice of such sale is given in the manner prescribed in subsection (c) (1).

“(c) Special rules.—

“(1) Notice of sale.—Notice of a sale to which subsection (b) applies shall be given (in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary or his delegate.

“(2) Consent to sale—Notwithstanding the notice requirement of subsection (b) (2) (C), a sale described in subsection (b) of property shall discharge or divest such property of the lien or title of the United States if the United States consents to the sale of such property free of such lien or title.

“(3) Sale of perishable goods.—Notwithstanding the notice requirement of subsection (b) (2) (C), a sale described in subsection (b) of property liable to perish or become greatly reduced in price or value by keeping, or which cannot be kept without great expense, shall discharge or divest such property of the lien or title of the United States if notice of such sale is given (in accordance with regulations prescribed by the Secretary or his delegate) in writing, by registered or certified mail or by personal service, to the Secretary or his delegate before such sale. The proceeds (exclusive of costs) of such sale shall be held as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the property sold, for not less than 30 days

after the date of such sale.

“(d) Redemption by United States.—

“(1) Right to redeem.—In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary or his delegate may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer.

“(2) Amount to be paid.—In any case in which the United States redeems real property pursuant to paragraph (1), the amount to be paid for such property shall be the amount prescribed by subsection (d) of section 2410 of title 28 of the United States Code.

“.....”

(Emphasis added.)

The first question raises the issue of the applicability of the notice requirements of title 26, United States Code section 7425 to a sale of real property on account of unpaid taxes pursuant to Revenue and Taxation Code section 3691 *et seq.*¹

Whether a taxpayer has property or right to property to which a federal tax lien can attach is a matter of state law, but once the tax lien has attached to the taxpayer’s state created interests, we enter the province of federal law, which the United States Supreme Court has consistently held determines the priority of competing liens asserted against the taxpayer’s property or rights to property. (*Aquilino v. United States* (1960) 363 U.S. 509, 513–514; accord *Business Title Corp. v. Division of Labor Law Enforcement* (1976) 17 Cal. 3d 878 (“*Business Title I*”); *Business Title Corp. v. United States* (1978) 21 Cal. 3d 710 (“*Business Title II*”).)

The initial question is whether a sale under section 3691 is a “non-judicial sale under a statutory lien” within the meaning of the federal statute. (See *Runkel v. United States* (9th Cir. 1975) 527 F.2d 914.) To answer this question some discussion of state tax sales procedure is necessary. In California every tax on real property is a lien against the property assessed. (§ 2187.) When a property owner is in default in the payment of his taxes, delinquent penalties are imposed. (§§ 2617, 2618, 2621.) If the delinquency persists, after statutory notice (§§ 3351–3353), the property is “sold” to the state by operation of law.

¹ Hereafter all unidentified section references will be to the Revenue and Taxation Code.

(§§ 126, 3436.) At the end of a five-year period, if the owner has not redeemed the property (see §§ 4101, 4102) and after statutory notice (§§ 3361–3366), the property is deeded to the state. (§§ 127, 3511; see also *Weston Inv. Co. v. State of California* (1948) 31 Cal. 2d 390, 393.) The deed to the state conveys to the state absolute title to the property free of all encumbrances except those specified in section 3520.² Not included among those excepted encumbrances is a federal tax lien.

After the property is tax deeded and further statutory notice is given (§§ 3698, 3701, 3702–3704), it may be disposed of by sale at public auction pursuant to section 3691 *et seq.*³ The auction sale extinguishes the privilege of redemption and conveys the property

² Section 3520 provides:

“As used in this section ‘lien’ includes any lien for:

“(a) Interest and penalties or both on taxes or special assessments or both.

“(b) Amounts payable to cities for their account on redemption of property from sale for taxes, special assessments, or other amounts.

“The deed conveys to the State the absolute title to the property, free of all encumbrances, except:

“(1) Liens for taxes levied for municipal, irrigation, reclamation, protection, flood control, public utility or other district purposes, not included among those taxes and assessments for delinquency in the payment of which the property is conveyed to the State.

“(2) Liens for special assessments collected on tax rolls.

“(3) Liens or assessments for other amounts which by law are collected on tax rolls by or for account of cities.

“(4) Easements constituting servitudes upon or burdens to the property; water rights, the record title to which is held separately from the title to the property; and restrictions of record.

“Where the tax collector executes a single deed conveying property to the State for the delinquent taxes and assessments of the county and of revenue districts, the tax and assessment liens of such revenue districts are extinguished by the conveyance to the State and are not included in the exceptions enumerated in subparagraphs (1), (2) and (3) of this section. Each such revenue district, however, shall retain an equitable lien in the property and there shall be paid by the county to each such district its pro rata share of the proceeds of any resale by the State, or redemption from the State, and such lien and right shall be terminated in the manner and at the time that the county’s rights in the property are terminated.

“When the land is owned by the United States or this State, the deed is prima facie evidence of the right of possession accrued as of the date of the deed without prejudice to the taxes or assessments which are a lien upon the property.”

³ Certain public agencies may also acquire the property by other means. (See §§ 3547, 3552,

free of encumbrances except those mentioned in section 3712.⁴ Section 3712, subsection (b) excepts a tax lien of a “taxing agency which does not consent to the sale, but a federal tax lien is not a lien within the meaning of that section because the United States is not a “taxing agency” as that term is defined by section 121⁵ who may object to the sale. (See § 3695.)

We conclude that the procedure just outlined results in a “non-judicial sale under a statutory lien on such property. . .” within the meaning of title 26, United States Code section 7425, subsection (b). As stated in *Garcia v. County of Santa Clara* (1978) 87 Cal. App. 3d 319, 324:

“A tax on real property becomes a lien against that property (Rev. & Tax. Code, § 2187). If the tax is not paid the normal method of enforcement

3791, 3791.3.)

⁴ Section 3712 provides:

“The deed conveys title to the purchaser free of all encumbrances of any kind existing before the sale, except:

“(a) Any lien for installments of special assessments, which installments will become payable upon the secured roll after the time of the sale.

“(b) The lien for taxes or assessments or other rights of any taxing agency which does not consent to the sale under this chapter.

“(c) Liens for special assessments levied upon the property conveyed which were, at the time of the sale under this chapter, nor included in the amount necessary to redeem the property from the sale to the state, and, where a taxing agency which collects its own taxes has consented to the sale under this chapter, not included in the amount required to redeem from sale to such taxing agency.

“(d) Easements constituting servitudes upon or burdens to the property; water rights, the record title to which is held separately from the title to the property; and restrictions of record.

“(e) Unaccepted, recorded, irrevocable offers of dedication of the property to the public or a public entity for a public purpose, and recorded options of any taxing agency to purchase the property or any interest therein for a public purpose.

“(f) Unpaid assessments under the Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500) of the Streets and Highways Code) which are not satisfied as a result of the sale proceeds being applied pursuant to Chapter 1.3 (commencing with Section 4671) of Part 8 of this division.”

⁵ Section 121 provides:

“‘Taxing agency’ includes the State, county, and city. ‘Taxing agency’ also includes every district that assesses property for taxation purposes and levies taxes or assessments on the property so assessed.

is sale of the property (Rev. & Tax. Code, § 3436 *et seq.*; 5 Witkin, Summary of Cal. Law (8th ed. 1974) p. 4142).”

The more difficult question which must be answered is when the “nonjudicial sale” occurs for purposes of the federal statute. The state procedure resulting in the sale pursuant to section 3691 has three different events which could arguably be considered such a sale. The property is first “tax-sold” to the state (§ 3436), then “tax-deeded” to the state (§ 3511) and thereafter sold at auction by the state (§ 3691).

The federal statute and related regulations do not correspond to the state procedure. (See tie. 26, C.F.R., § 301.7425–2, examples 5 and 6.) There is little case authority as to what constitutes a sale under title 26, United States Code section 7425, subsection (b). (See *Runkel v. United States, supra*, 527 F.2d 914.)

Title 26, United States Code section 7425, subsection (d), establishes the right of the United States to redeem the property sold at a nonjudicial sale within a specified period of days after the sale. To redeem the property, the United States must pay the purchaser (1) the amount paid for the property at the sale, (2) interest from the date of the sale, and (3) an amount equal to the excess of the expenses incurred in connection with the property over the sum of (a) the income received from the property and (b) a reasonable rental value of such property. (28 U.S.C. § 2410, subsection (d).) It is clear that Congress in establishing this federal redemption scheme envisioned a nonjudicial sale wherein the property is sold to a purchaser who pays a certain amount as a purchase price in the case of the procedure set forth in the Revenue and Taxation Code, this event occurs at the sale pursuant to section 3691 *et seq.* (*Little v. United States* (CD CA., 1977) 77–2 USTC, ¶ 9670, p. 88,248.)

We conclude that a sale of tax deeded property pursuant to section 3691 *et seq.* is a nonjudicial sale within the meaning of title 26, United States Code section 7425, subsection (b). Whether such a sale discharges a federal tax lien involves a determination of whether the conditions for discharge set forth in subsection (b) and (c) have been met.

In examining these conditions we note that the question presented refers to a “properly perfected federal tax lien.” A lien for nonpayment of federal taxes cannot attach to property the taxpayer no longer owns. A property owner’s title is transferred to the state when the real property is “tax deeded” pursuant to section 3511. Thus, a federal tax lien cannot attach to real property after it has been tax deeded to the state. (Compare *Business Title I, supra*, with *Business Title II, supra*.)⁶

⁶ We need not consider whether a federal tax lien can attach to the privilege of redemption. That privilege is only an equitable right of the former owner which is extinguished by the sale at

By the term “properly perfected federal tax lien” we assume the requestor means one which has properly attached to the real property before the property was tax deeded to the state and “. . . notice of such lien was filed . . . in the place provided by law for such filing . . . more than 30 days before [the sale pursuant to § 3691 *et seq.*].” (Tit. 26, U.S.C. § 7425, subsection (b) (1).)⁷

In such a case, if the 25–day notice pursuant to title 26, United States Code section 7425, subsection (c) (1) is not given to the federal government, then the sale will not discharge the lien unless “. . . the United States consents to the sale of such property free of such lien. . . .” (Tit. 26, U.S.C. § 7425, subsection (c) (2).) If proper notice is given to the federal government, the sale at auction discharges the federal lien by virtue of local law, i.e., Revenue and Taxation Code section 3712. (Tit. 26 U.S.C. § 7425, subsection (b)(2).)

We conclude that a sale of tax deeded property pursuant to the provisions of Revenue and Taxation Code section 3691 will discharge a properly perfected federal tax lien if notice pursuant to title 26, United States Code section 7425, subsection (c) has been given to the United States or the United States consents to the sale; otherwise, the sale will not discharge the lien.

The second question presented for analysis is whether the United States may assert a lien against the portion of the “excess proceeds” subject to claim by the delinquent taxpayer pursuant to section 4675,⁸ which provides:

“Any party of interest in the property at the time of sale by the state may file with the county a claim for the excess proceeds at any time prior to the expiration of one year following the recordation of the tax collector’s deed to the purchaser.

“After the property has been sold by the state, a party of interest in the property at the time of the sale may assign his or her right to claim the excess proceeds only by a dated, written instrument that explicitly states that the

auction. Assuming a lien could attach to the privilege, it would be extinguished with the privilege. (See *Runkel v. United States*, *supra*, 527 F.2d 914.)

⁷ We are not asked to consider the situation of a federal tax lien that is not “properly perfected.” It would appear in such case the sale at auction would discharge the lien. (See nt. 26, U.S.C. § 7425, subsection (b) (2) (A).)

⁸ Section 4675 has been amended by Statutes of 1979, chapter 615, section 3. We quote the new version of section 4675, although our discussion would be equally applicable to the former version.

right to claim the excess proceeds is being assigned, and only after each party to the proposed assignment has disclosed to each other party to the proposed assignment all facts of which he or she is aware relating to the value of the right that is being assigned. Any attempted assignment that does not comply with these requirements shall have no effect. This paragraph shall apply only with respect to assignments on or after the effective date of this paragraph. In addition, any person or entity who in any way acts on behalf of, or in place of, any party of interest in respect to filing a claim for any excess proceeds shall submit proof with the claim that the amount of excess proceeds has been disclosed to such party of interest and that such party of interest has been advised of his or her right to file a claim for such excess proceeds on his or her own behalf.

“The claims shall contain any information and proof deemed necessary by the board of supervisors to establish the claimant’s rights to all or any portion of the excess proceeds.

“No sooner than one year following the execution of the tax collector’s deed to the purchaser, and if the excess proceeds have been claimed by any party of interest as provided herein, such excess proceeds shall be distributed only to those parties of interest who have claimed such excess proceeds on order of the board of supervisors to the parties of interest who have claimed such excess proceeds in the order of priority set forth in subdivisions (a) and (b). For the purposes of this article, parties of interest and their order of priority are:

“(a) First, lienholders of record prior to the property becoming tax deeded to the state or to any other taxing agency, in the order of their priority, as to liens that were extinguished by the issuance of the deed to the state; and

“(b) *Then, any person who would be established with title to all or any portion of the property sold by the state by redemption of such property immediately prior to the sale by the state.*

“In the event more than one party of interest, as defined in subdivisions (a) and (b) of this section, files claims for excess proceeds as provided herein, the board of supervisors shall give all claimants opportunity for a hearing to establish the priority and extent of their claim following a period of at least 90 days after written notice has been given to each claimant. Any action or proceeding to review the decision of the board of supervisors shall be commenced within 90 days after the date of such decision of the

board of supervisors.” (Emphasis added.)

The person referred to in subparagraph (b) of section 4675 would include the former owner of the property who lost his redemption privilege because of the tax sale. (See § 3691; *Settlors Corp. v. City of San Diego* (1967) 254 Cal. App. 2d 631, 636.) We are advised by the Controller that the Internal Revenue Service on occasion has asserted a lien on the former owner’s “right to claim excess proceeds” pursuant to title 26, United States Code section 6321. As we have seen, title 26, United States Code section 6321 creates a lien for unpaid taxes “in favor of the United States upon all property and *rights to property*, whether real or *personal*, belonging to such person.” (Emphasis added.)

Prior to the enactment of section 4675 (Stats. 1976, ch. 113, § 6), a former owner of property sold at a tax sale had no right to claim excess proceeds from the sale. (*Chesney v. Gresham* (1976) 64 Cal. App. 3d 120, 131.) Section 4675 gives the former owner that right and even specifies how it may be assigned. Clearly, this right is a right to personal property within the meaning of title 26, United States Code section 6321 subject to a federal tax lien. (See *United States v. Durham Lumber Co.* (1960) 363 U.S. 522, 525–526.)

It is our conclusion, therefore, that the United States may assert a lien against the “excess proceeds” subject to claim under Revenue and Taxation Code section 4675 by the former property owner whose property was sold pursuant to section 3691.⁹

⁹ We have not been asked and we do not consider the authority, if any, of the United States to submit a claim as a former lienholder pursuant to section 4675. Neither do we consider the hypothetical situation of the United States asserting a lien on the former owner’s claim under section 4675 while also exercising its redemption rights on the property pursuant to title 26, United States Code section 7425, subsection (d).