

FEDERAL TAX LIENS, NOTICES OF LIENS UNDER 18 U.S.C. § 3613, MONEY JUDGMENTS IN FAVOR OF THE UNITED STATES – LIEN ATTACHMENT AND EFFECT ON ENTIRETIES PROPERTY

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1. Introduction and short summary.

This article will address federal tax liens under 26 U.S.C. §6323 (2. below), notices of liens under 18 U.S.C. §3613 (3. below) and judgments in favor of the United States under 28 U.S.C. §3201, et seq. (4. below), regarding whether these encumbrances attach to entireties property.

As indicated below, since federal tax liens (2. below) and liens under 18 U.S.C § 3613, including terrorism liens (3. below) are based on statutes that say the liens also attach to “rights to property” and not just “all property,” a lien against one spouse attaches to entireties property as discussed in 2. and 3. below, particularly because of the *Craft* case cited below. However, a judgment in favor of the United States discussed in 4. below against only one spouse does not attach apparently, for the reasons stated. It should be noted that encumbrances under 18 U.S.C § 3613 arise out of criminal liability, whereas 28 U.S.C. Title 28 judgments (discussed in 4.) are civil in nature. Also, it must be remembered that one reason for the different statutory language in Title 28 (discussed in 4.) is that Title 28 was drafted and enacted *before* in the infamous *Craft* decision. However, bring all 28 U.S.C. Title 28 judgments to our attention since some Assistant U.S. Attorneys seem to disagree.

Further, it is noted that as of this writing, there is pending an amendment to 26 U.S.C § 6323. See 2007 Cong. U.S. 2394, 110th Congress, 1st. Sess. (11-16-07). This would amend 26 U.S.C § 6323 (f)(1) to allow a tax lien to be filed in an internet based national federal registry under proposed new 26 U.S.C. § 6323 (k) instead of locally. Stay tuned.

2. Federal tax liens.

In our newsletter entitled, [Husband and Wife Transactions: Title, Other Interests and Liens](#), at IV. B, we discussed in great detail the decision of *U.S. v. Craft*, 535 U.S. 274 (2002), and the I.R.S.’s Notice 2003-60, 2003-39 I.R.B. 643 (9/29/03), entitled “Collection Issues Related to Entireties Property.”

A summary of the lien attachment principles is as follows:

a. Federal tax lien docketed before 4-18-02 (*Craft* was decided on 4-17-02).

Example:

1. *H&W* take title as tenants by the entireties.
2. FTL docketed against *H*.
3. *H & W* convey for value to *X*.
4. *Craft* is decided.

IRS position: IRS will **not** assert its lien on *X*’s title. If *X* conveys for value to *Y* after *Craft* or if *X* mortgages to *Y* after *Craft*, such transferees are protected.

b. Federal tax lien docketed on or after 4-18-02.

Example:

1. *H&W* take title as tenants by the entireties.
2. FTL docketed against *H*.
3. *Craft* is decided.
4. *H & W* convey for value to *X*.

IRS position: IRS will assert its lien against X's title (as held by X or by X's successors, etc.).

It is noted that *Craft* has decided on the basis of 26 U.S.C § 6321, which states that the lien:

... 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.

26 U.S.C. § 6323 (a) requires the lien to be filed. 26 U.S.C § 6323(f)(1)(A) requires the lien to be filed with the clerk of superior court where the real property is located, due to G.S. 44-68.12. 26 U.S.C. §6323 (f)(4)(A) requires indexing in accord with state law. See G.S. 44-68.14(a).

It should be remembered that the period for a federal tax lien's effectiveness is effectively 10 years and 30 days from the date of the assessment referenced in the lien because of refilling periods. 26 U.S.C. § 6502(a); 26 U.S.C. § 6323(g)(3). The lien can be refilled before that time expires. 26 U.S.C. § 6323(g)(3).

3. Notices of lien for fines, etc., pursuant to anti-terrorism, etc., act and for criminal liabilities (18 U.S.C.A. § 3613).

These are treated like federal tax liens in 2. above. This is because of 18 U.S.C. §3613 generally and 18 U.S.C. §3613(c) (the lien "is a lien...on all property and *rights to property*" of the person fined). The italicized language in 18 U.S.C. §3613(c) is lifted directly from 26 U.S.C. § 6321, pertaining to attachment of federal tax liens. 26 U.S.C. § 6321 was construed in the *Craft* case noted in 2. above. This is our position and the U.S.'s position.

The lien must be filed, docketed and indexed in accord with state law. 18 U.S.C. §3613(d). That means docketing and indexing in accord with 2. above.

The lien is good for 20 years from entry or 20 years from release from imprisonment of the person fined, or upon the death of the person fined. 18 U.S.C. § 3613(b). Bankruptcy discharge has no effect. 18 U.S.C. § 3613(e).

The case of *U.S. v. Godwin*, 446 F.Supp.2d 425 (E.D.N.C. 2006), should be noted. On 4-10-01, *W* transferred to *H* real property held by *H* and *W* as tenants by the entirety. While the facts in the opinion are unclear, apparently at some point, apparently prior to the transfer, *W* still owed \$100,465.71 pursuant to *W*'s "criminal judgment debt" reduced to an 18 U.S.C. §3613(c) judgment and restitution order against *W*. The government filed a fraudulent conveyance action against *H* pursuant to 28 U.S.C. § 3301, et.seq. (including 28 U.S.C. §3306).

The court held that the criminal restitution judgment against *W* attached to the entirety property under 18 U.S.C. §3613(c) and under the *Craft* logic, since the rule under 11 U.S.C. §3613(c) is the equivalent of the federal tax lien act and the fraudulent transfer action against *H* was appropriate.

4. Money judgments in favor of the U.S. under Title 28 (28 U.S.C. §3201, et al).

This is treated as a state law money judgment and not as a federal tax lien, unlike in 2. and 3. above. So, a judgment lien against one spouse is not a lien on tenancy by the entireties property if the owners are still married. The reason is 28 U.S.C. §3201 which is phrased differently than 18 U.S.C. §3613(c) and 26 U.S.C. §6321. A judgment under 28 U.S.C. §3201 "shall create a lien on all real proper of a judgment debtor," says 28 U.S.C. §3201(a) if filed "in the manner in which a notice of a tax lien would be filed" under 26 U.S.C.A §6323 (f). The reference to 26 U.S.C. §6323(f) is only to place of filing and indexing, not lien attachment. Note that 28 U.S.C. §3201 does *not* contain 26 U.S.C. §6321's reference to "all property *and rights to property*" (see 2. above) which also appears in 18 U.S.C. §3613(c) (see 3. above), the words "and rights to property" being critical in the *Craft* case (see 2. above) as cited in *Godwin* (see 3. above). Also, see 18 U.S.C. 3613(a).

See, also, 28 U.S.C. §3010(a) which provides that a judgment lien against a debtor is a lien to be enforced "only to the extent allowed by the law of the state where the property is located." That would be, incidentally, North Carolina law. *Craft*, discussed in 2. above and dealing with federal tax liens under 26 U.S.C. §6321 and 26 U.S.C. §6323 did not deal with federal judgments under Title 28 discussed in this 4. of this article.

Also, see 28 U.S.C. § 3014(a)(2)(B) which allows an individual debtor to exempt any interest in property in which the debtor had an interest as a tenancy by the entirety or joint tenant. Also, see 28 U.S.C. §3203(a).

Godwin, discussed in 3. above, did not deal with such a judgment.

Important: One Assistant U.S. Attorney disagreed with our analysis and felt that judgments discussed in 4. *are* treated like federal tax liens in 2. and liens in 3. No authority was cited and she seemed puzzled at our distinctions. We believe that that office has not carefully reviewed the wording of Title 28. However, to avoid claims and unnecessary litigation, report all such judgments against one spouse and let us resolve the matter for you with the U.S. Attorney.

However, if a judgment is docketed, for example, against *H* only, and before that *H* conveyed his title to *H* and *W*, a possible fraudulent conveyance has occurred. This should be considered by the title underwriter. Fraudulent conveyances are discussed in 3. above. Also, see G.S. 39-23.1, et seq., which can also be used by the government.

The judgment needs to docketed where a federal tax lien is docketed. 28 U.S.C. §3201(a). See 2. above.

The priority of a judgment lien “shall have priority over any other lien or encumbrance which is perfected later in time.” 28 U.S.C. §3201(b).

As to the duration of lien, 28 U.S.C. §3201(c) provides:

- (1) Except as provided in paragraph (2), a lien created under subsection (a) is effective, unless satisfied, for a period of 20 years.
- (2) Such lien may be renewed for one additional period of 20 years upon filing a notice of renewal in the same manner as the judgment is filed and shall relate back to the date the judgment is filed if ---
 - (A) the notice of renewal is filed before the expiration of the 20 year period to prevent the expiration of the lien; and
 - (B) the court approves the renewal of such lien under this paragraph.