

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

N(34)613(1)(f)-2

June 11, 1997

Asserting Priority Under
Subject: 31 U.S.C. Sec. 3713(a) **Cancellation Date:** September 11, 1997

The purpose of this Notice is to inform district counsel attorneys of a recent appellate decision from which a petition for certiorari was filed on April 11, 1997, In the Estate of Romani, No. 59 W.D. Appeal Docket 1995 (Pa. Sup. Ct. Jan. 17, 1997), and to instruct that any correspondence with the Tax Division of the Department of Justice with respect to the priority issue involved in Romani should be transmitted to the Office of Chief Counsel (General Litigation) for prereview. In Romani, a creditor recorded a judgment lien against the taxpayer prior to the filing of a Notice of Federal Tax lien and later claimed priority to real property included in the taxpayer's insolvent decedent estate under I.R.C. § 6323(a). The Government argued that 31 U.S.C. § 3713(a)(1)(B), the Federal Insolvency Statute, which requires the claims of the United States be paid first in the case of an insolvent decedent's estate, controls the priority issue. The court held that section 6323(a) is the controlling provision, and that the creditor thus had the superior interest.

The Pennsylvania Supreme Court's decision in Romani, presents a direct conflict between a state court of last resort and two federal circuit court opinions in which the Government prevailed. Commonwealth of Kentucky, Dept. of Revenue v. United States, 383 F.2d 13 (6th Cir. 1967); Nesbitt v. United States, 622 F.2d 433 (9th Cir. 1980), aff'g 445 F. Supp. 824 (N.D. Cal. 1978), cert. denied 451 U.S. 984 (1981). The Service has consistently taken the position that the Insolvency Statute controls in cases involving prior judgment liens, because no provision in the federal tax lien statute overrides the priority given to the United States by the Insolvency Statute.

Because this issue is now pending in the Supreme Court, any correspondence with the Tax Division of the Department of Justice about this issue should be transmitted to the Office of Assistant Chief Counsel (General Litigation) for prereview. See CCDM (34)613(1)(f).

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Anyone with questions concerning this notice should contact Mitchel S. Hyman of Branch 2 in General Litigation at (202) 622-3620.

_____/s/_____
ELIOT D. FIELDING
Associate Chief Counsel
(Enforcement Litigation)