



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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MEMORANDUM FOR ASSOCIATE DISTRICT COUNSEL, SOUTHERN  
CALIFORNIA DISTRICT

FROM: Alan C. Levine, Chief, Branch 1 (General Litigation)

SUBJECT:

This responds to your request for advice regarding the above subject. This document is not to be cited as precedent.

LEGEND:

Taxpayer X  
Date A  
Date B  
Date C  
Amount A  
Amount B  
Amount C  
Date D  
Amount D  
Amount E  
Date E  
Amount F  
Date F  
Date G  
Amount G  
Date H  
Amount H  
Amount I  
Date I  
Date J  
Date K  
ISSUE(S):

Whether the federal tax lien of I.R.C. § 6321 continues to attach to real property purchased by a taxpayer in \_\_\_\_\_ after a judgment against him in \_\_\_\_\_ in which the contract of sale was rescinded.

#### CONCLUSION:

The federal tax lien remained attached to the property even after rescission of a contract of sale of real property purchased by the taxpayer .

#### FACTS:

The taxpayer and a third party entered into a contract to purchase real property in \_\_\_\_\_, from the sellers at a price of \$ \_\_\_\_\_. As part of the contract, the taxpayer agreed to either assume the existing trust deed that had a balance of \$ \_\_\_\_\_ or refinance. After a down payment of \$ \_\_\_\_\_, the sellers conveyed legal title to the taxpayer and a third party as joint tenants. <sup>1/</sup> The Internal Revenue Service filed a Notice of Federal Tax Lien against the taxpayer in the county where the real property was located on \_\_\_\_\_, in the amount of \$ \_\_\_\_\_ for \_\_\_\_\_. The taxpayer never did assume the existing loan nor did he refinance. He made monthly payments of \$ \_\_\_\_\_ to the sellers on the existing deed of trust from September \_\_\_\_\_ until early \_\_\_\_\_. Since the sellers of the property were primarily liable on the loan, they made a total of 7 payments plus late fees totaling \$ \_\_\_\_\_ after the taxpayer defaulted.

The sellers sued the taxpayer in state court on \_\_\_\_\_, for breach of contract and rescission. On \_\_\_\_\_, the sellers obtained a default judgment, the taxpayer was declared in breach, and the court ordered the contract rescinded. The court awarded the sellers \$ \_\_\_\_\_ in compensatory damages for the loan payments they made, as well as attorney's fees and costs of \$ \_\_\_\_\_. The taxpayer refused to cooperate; therefore, the court appointed an elisor who executed a deed and conveyed the property back to the sellers on \_\_\_\_\_. The sellers are now reselling the property for \$ \_\_\_\_\_ and question the Service's demand in the amount of \$ \_\_\_\_\_, which is the current amount of the taxpayer's tax liability for \_\_\_\_\_ including interest and penalties.

#### LAW AND ANALYSIS

I.R.C. § 6321 provides that a lien for unpaid taxes attaches to "all property and rights to property" of the taxpayer. The federal tax lien in this case arose in \_\_\_\_\_ and a federal tax lien was recorded in \_\_\_\_\_ while the taxpayer was the owner of \_\_\_\_\_

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<sup>1/</sup> The joint tenant died on \_\_\_\_\_ and the federal tax lien attached to the entire property at that time.

the property. The federal tax lien continues until satisfied or unenforceable due to lapse of time. I.R.C. § 6322. Treas. Reg. § 6331-1(a)(1) authorizes the Service to seize property “subject to a federal tax lien which has been sold or otherwise transferred by the taxpayer.” The lien therefore, attached to the property and continued to attach regardless of any conveyance to a third party or a reconveyance back to the original seller. “[I]t is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere*. . . .’ United States v. Bess, 357 U.S. 51 (1958). In addition, the federal tax lien is not limited to the value of the property at the time of the sale to a third party but may share in any appreciation of the property. Han v. United States, 944 F.2d 526 (9<sup>th</sup> Cir. 1991).

In this case, the property subject to the federal tax lien was transferred back to the sellers after a judgment in which the court held that the contract of sale was rescinded. The federal tax lien remained attached to the property at the time it was transferred back to the sellers and had priority over the sellers’ interest. The Government has the right to seize the property, sell it, and compensate the sellers for the value of their interest. United States v. Big Value Supermarkets, Inc., 898 F.2d 493 (6<sup>th</sup> Cir. 1990) (Government not limited to amount of taxpayer’s down payment on installment real estate contract who immediately transferred it to a third party.) Alternatively, the Government could accept the amount due on the liability from the sellers and release the lien.

The only way the sellers could defeat a federal tax lien filed at least thirty days prior to the sale would be to notify the Government at least 25 days prior to the sale pursuant to I.R.C. § 7425(b). Otherwise the sale is made “subject to and without disturbing such lien.” The Government was not notified about the sale.

Sanborn v. Ballanfonte, 277 P. 152 (Cal. 1929) provides that upon rescission of an executory contract in California, the parties should be restored to their former positions. In this case, as a matter of state law, the sellers should refund to the taxpayer his down payment and any mortgage payments made on the property. While it could be concluded from an analysis of Sanborn that the United States has a lien on the subject real property after the rescission because the taxpayer has an equitable interest in it at that time, this would be an inaccurate analysis. Even if a taxpayer has relinquished all rights to the property by a valid sale or transfer, the federal tax lien would still attach. United States v. Avila, 88 F.3d 229 (3d Cir. 1996) (taxpayer transferred to wife who later transferred to a third party. Federal tax lien remained attached with respect to his one-half interest.) Nor would it be accurate to limit the value of the federal tax lien to the down payment and mortgage payments made. “[F]ixing the value of the lien at the time the taxpayer transfers the property certainly ‘affects the lien,’ and therefore Bess prohibits it.” Id. at 233.

We recommend advising the sellers' legal representative that if the sellers choose not to satisfy the lien, the United States will either seize and sell the property or file suit to reduce the tax claim to judgment and sell the property after the court awards judgment.

**CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS:**

We can identify no other litigating hazards that would change or qualify the conclusions reached in this memorandum.

If you have any further questions, please call the branch.

cc: Assistant Regional Counsel (GL) WR