



1960

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Recommended Citation

Langford, Robert D. (1960) "Attachment of Tax Liens in North Dakota," *North Dakota Law Review*. Vol. 36 : No. 3 , Article 4.

Available at: <https://commons.und.edu/ndlr/vol36/iss3/4>

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ATTACHMENT OF TAX LIENS IN NORTH DAKOTA

The existence of a functional government depends upon the collection of monies from its people to provide demanded services. This proposition was well stated by the United States Supreme Court in 1893: "A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name".¹

The governmental source of revenue, the tax, will not always be voluntarily paid by the tax debtor. At such times, the government must exert a claim on the property of the debtor to receive its due. This claim, known as a tax lien, may co-exist with claims asserted by other creditors of the tax debtor. The result is a dispute between the interested parties as to who has the proper claim in the property. Property rights demand decision on the basis of priorities. In this essence, the time a lien attaches is most significant.

Tax liens have not risen from the common law, but are creatures of statutes.² The fundamental condition to the attachment of the lien is the obligation to pay the tax, and where there is no obligation, there can be no tax lien.³ Further conditions to the attachment of the tax lien may be provided by statute.⁴ This note deals with the subject of when tax liens arise in North Dakota, in light of statute and judicial decision surrounding the liens.

I. REAL PROPERTY

A tax lien is a charge against real property in North Dakota, and may result in change of title.⁵ Real property taxes are listed and assessed every odd numbered year with reference to the value of the real estate on April first of that year.⁶ The due date of such taxes is fixed as the first day of January of the year following the assessment and listing of the tax.⁷ Since a tax not due cannot raise a lien, the tax lien will not rise until the first day of January of the year

1. *United States v. Snyder*, 149 U.S. 210, 214 (1893).

2. *Libby, McNeill & Libby v. City of Yakutat*, 206 F.2d 612, 613 (9th Cir. 1953); *J. I. Case Threshing Machine Co. v. Bentson*, 57 S.D. 244, 245, 231 N.W. 948, 950 (1930).

3. *In re Brannon*, 53 F.2d 401 (D.C. Tex. 1931), reversed on other grounds, *City of Dallas v. Ryan*, 62 F.2d 595 (5th Cir. 1933); *State v. Divide County*, 68 N.D. 708, 710, 283 N.W. 184, 190 (1938).

4. See *Werre v. Bowman County*, 79 N.D. 617, 58 N.W.2d 792 (1953); where

extension and entry are necessary for lien for personal property taxes to attach to realty,

5. *Cavalier County v. Gestson*, 75 N.D. 657, 31 N.W.2d 789 (1948).

6. N.D. Rev. Code § 57-0211 (1943).

7. N.D. SESS. L., c. 387 (1959) "All real and personal property taxes, hail insurance taxes, and yearly installments of special assessment taxes shall become due on the first day of January following the year for which such taxes were levied"

following the assessment and listing of the tax.⁸ This is the time of attachment of the real property tax lien accepted by the court in North Dakota.⁹ Where the party holding the property on the assessment date retains title through the due date, he holds subject to the interest of the lien.¹⁰

The lien for taxes on real property is not a personal charge, but follows the property into the hands of a subsequent holder.¹¹ Enforcement of the lien as between parties to a transfer of the property between the assessment date and the due date is governed by Section 57-0241, North Dakota Revised Code of 1943: "All taxes as between vendor and purchaser shall become a lien on real estate on and after the first day of January following the year for which such taxes were levied". Thus, if A held property assessed and listed on the first day of April, and sold to B on the first of November, B would be subject to the lien for taxes arising on the first of January of the year following.

The situation where B would be a party exempt from taxation¹² is not so clear as those previously enumerated. Section 57-0240 (1) which establishes the real property tax lien makes two important exceptions to the lien: "Taxes upon real property are a perpetual lien thereon against all persons, *except the United States and this state*". (Emphasis added). In the Opinion of the Attorney General of North Dakota, the United States would not be subject to the lien arising when it took after the date of assessment, but before the due date of the first day of January of the year following.¹³ Similarly, the North Dakota Supreme Court has ruled the state exempt when taking land subject to assessment, if such taking is accomplished after the assessment date and before the due date.¹⁴ Thus, where either the United States or the State take prior to the January first date, but after the assessment date, the interest the lien would have protected is lost to the governmental unit which would have claimed it.

Though not specifically exempted from the tax lien by Section

8. *Nystul v. Waller*, 94 N.W.2d 584, 586 (N.D. 1957); *Murray Bros. v. Buttles*, 32 N.D. 565, 572, 156 N.W. 207, 211 (1916) construing § 2186, C. L. N. D. (1913) and statutes providing for the liens of special assessments for urban and country improvements as *pari materia*, and the liens attaching on the first day of December after assessment and levy. (§ 2186 subsequently changed to first day of January of the year following assessment by N.D. Rev. Code §§ 57-0240, 0241 (1943).

9. *United States v. 909.30 Acres of Land*, 114 F.Supp. 756, 758, (D.N.D. 1953).

10. See *Nystul v. Waller*, 84 N.W.2d 584 (N.D. 1957).

11. *Cavalier County v. Gestson*, 75 N.D. 657, 662, 31 N.W.2d 787, 790 (1948).

12. N.D. Rev. Code §§ 57-0208, 0210 (Supp. 1957) provides for real property exemption from taxation.

13. North Dakota Attorney General's Opinion of November 10, 1955.

14. *State v. Divide County*, 68 N.D. 708, 718, 283 N.W. 184, 190 (1938).

57-0240 (1), tax exempts other than the United States and the State should receive the same benefit. The statement of the court in the *State v. Divide County*¹⁵ case, would seem to include all taxexempts: "It (the State) is not subject to taxation, and the taxes that ordinarily thereafter would have become due can not exist." If the tax, though assessed and listed, does not become due, it can not become a lien.¹⁶

II. PERSONAL PROPERTY

The lien for personal property taxes attaches to personal property and extends to real property in North Dakota. Personal property taxes are a lien upon all of the personal property in the possession of the person assessed at the date when the assessment is made, for the purpose of distraint.¹⁷ If the distraining measures are not accomplished, the lien against the property is lost,¹⁸ and the property will pass to a subsequent purchaser in good faith without subjection to the lien.¹⁹

The lien for personal property taxes may be protected by extending the lien against real estate of the tax debtor.²⁰ In North Dakota, attachment of the lien to the real estate of the tax debtor occurs with the extension and entry of the personal property lien upon the tax books by the county treasurer.²¹

Personal property individually assessed presents a lien situation quite distinct from the general personal property tax lien. Statute provides that the lien shall attach at the time of the assessment and levy, and follow the property into the hands of a purchaser.²² Similarly, taxes of goods, furniture and fixtures when sold in bulk raise a lien which follows the mass, and may be enforced by a lien against the purchaser.²³ Individually assessed personal property and per-

15. 283 N.W. 190 (1938).

16. *State v. Divide County*, *supra*, note 14.

17. N.D. Rev. Code § 57-2213 (1943) provides: "Personal property taxes for the purpose of distraint, shall be a lien upon all the personal property in possession of the person assessed from and after the date when the assessment is made." See *Smith, Inc. v. Mountrail County*, 81 N.W.2d 756 (N.D. 1957).

18. *International Harvester Co. v. Elhard*, 61 N.D. 442, 238 N.W. 551, (1931); *Baird v. Belcher*, 59 N.D. 559, 231 N.W. 548 (1930).

19. *International Harvester Co. v. Elhard*, 61 N.D. 442, 238 N.W. 551 (1931).

20. N.D. Rev. Code § 57-2221 provides for personal property taxes being made lien on real estate; §§ 57-22211, 22212 (Supp. 1957) provide for immediate assessment and collection of personal property taxes of transients or nonresidents with sufficient real property holdings to secure payment of such taxes.

21. *Home Owner's Loan Corporation v. Wright*, 71 N.D. 235, 299 N.W. 860 (1941).

22. N.D. Rev. Code § 57-2217 (1943) provides: "PERSONAL PROPERTY INDIVIDUALLY ASSESSED; PARAMOUNT LIEN. Any person owing personal property taxes shall be liable civilly to the purchaser of any property assessed therefor, but the property purchased or transferred shall be liable in the hands of the purchaser for such taxes if it can be shown that the property transferred was assessed individually. In that case, the taxes shall constitute a paramount lien on any item of property assessed individually, and no sale or transfer shall affect such lien."

23. N.D. Rev. Code § 57-2219 (1943) "LIEN OF TAX FOLLOWS SALE IN

sonalty sold in bulk, are subject to separable tax assessment and the lien so attached to them may not be extended against real estate.

III. STATE INCOME TAX

The tax lien for North Dakota state income taxes attaches to all property and rights to property belonging to the taxpayer upon non-payment of the tax at the time the income tax return must be filed.²⁴ The exact time the lien attaches will vary with the time the tax return must be filed. Generally the time for filing the return is determined by whether the taxpayer files on a calendar year or fiscal year basis.²⁵ For good cause, extension of time for filing a return may be granted by the tax commissioner.²⁶ In this situation, it would seem logical to attach the lien on the extended date.

Subsequent mortgagors, or judgment creditors, for value and without notice are protected by statute requiring filing of the lien with the register of deeds in the county in which the property is located.²⁷ Filing is necessary only to protect subsequent mortgagors or judgment creditors for value and without notice of the lien, and failure to file will not invalidate the lien as to other classes.

IV. SUNDRY TAX LIEN PROVISIONS

Liens are also provided for sundry taxes affecting rather defined groups of taxpayers. The lien for sales tax, imposed upon retail merchants; the lieu tax lien imposed on bank and trust companies; oil and gas gross production tax, imposed upon the producer and purchaser of the product; and the estate tax lien are the miscellaneous liens rising on a delinquency in tax payments.

The North Dakota sales tax²⁸ becomes a lien upon all property and rights to property belonging to the taxpayer when the taxpayer liable refuses or neglects to pay.²⁹ The tax levied becomes due and payable on or before the last day of the month next succeeding each quarterly period, the first period commencing July 1, 1957.³⁰ Similar to the income tax, the sales tax provision for subsequent purchasers, mortgagors, and judgment creditors requires the filing of the lien.³¹

Bank and trust companies are subject to a lieu tax in North Da-

BULK. Taxes upon a stock of goods of merchandise of any nature, and upon furniture and fixtures in any type of business or industry, shall continue to constitute a lien thereon when sold in bulk, and may be collected from the owner or purchaser, who shall be liable personally therefor."

24. N.D. Rev. Code § 57-3848 (1943).

25. *Ibid.* § 57-3834 (Supp. 1957) establishing time returns must be filed.

26. *Langer v. Gray*, 73 N.D. 732, 15 N.W.2d 732 (1944).

27. N.D. Rev. Code § 57-3849 (Supp. 1957).

28. *Ibid.* § 57-3902 (Supp. 1957) provides for the sales tax levy.

29. *Ibid.* § 57-3911 (Supp. 1957).

30. *Ibid.* § 57-3910, as amended, N.D. SESS. L., c. 212 (1959).

31. *Ibid.* § 57-3911 (Supp. 1957).

kota.³² Assessment of the tax is made by the tax commissioner on or before the first day of August of each year.³³ The lien attaches at the time the assessment is made.³⁴

The oil and gas production tax lien attaches as to both the producer and purchaser of refined oil products in North Dakota.³⁵ The lien attaches when the tax becomes due, following a complicated pattern of assessment.³⁶

Estate taxes attach as a lien upon the property of the estate of the decedent on his death.³⁷ The lien does not affect any tangible or intangible personal property passing to a bona fide purchaser for value.³⁸

V. FEDERAL TAX LIENS

An exhaustive critique of the Federal tax lien situation would be impossible in this note.³⁹ However, the lien must be filed at the county register of deeds in the county in which the property subject to the tax lien is located before it will attach as to mortgagees, pledgees, purchasers, or judgment creditors in North Dakota.⁴⁰

VI. CONCLUSIONS

The tax lien is an effective weapon in the arsenal of the governmental unit collecting a tax. It may be uniquely fitted to the individual situation calling for measures other than the volition of the taxpayer, because it is a creature of statute and not restrained by common law rigor.

Though presently the lien appears to be neglected as a subject of judicial decision, it is likely to play a more important role with the future incidence of heavier tax assessment. Until the court defines the individual lien provisions, the attorney faced with the probability of a tax lien arising on his client's interest would do well to closely scrutinize the various legislative provisions surrounding the lien.

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32. *Ibid.* §§ 57-3502, 3506 (1943).

33. *Ibid.* § 57-3509 (1943).

34. *Ibid.* § 57-3516 (1943).

35. *Ibid.* § 57-5111 (Supp. 1957).

36. *Ibid.* § 57-5105 (Supp. 1957).

37. *Ibid.* § 57-3723 (1943).

38. *Id.*

39. See Reeve, *Those Troublesome Federal Tax Liens*, TITLE NEWS, Oct. 1956, for an interesting and informative picture of the difficulties in the Federal Tax lien situation.

40. INT. REV. CODE OF 1954, § 6323. (a) "Except as otherwise provided in subsection (c), 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 . . ."

(1) Under state or territorial laws . . . In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice, . . ." N.D. SESS. L., c. 272 (1959) designates such office.