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Ohio's Administrative (Not Judicial) Income Tax Liens

A federal tax lien arises when the Internal Revenue Service takes administrative action to note in its records that the taxpayer owes taxes – that is to say, when the tax debt is “assessed.” That lien attaches to all the taxpayer’s property and equitable rights to property as determined by relevant state law. 28 U.S.C. Section 6321. See <https://www.blockchainandbanking.com/irs-liens-after-acquired-property-and-the-doctrine-of-choateness>. Typically, assessment occurs when (i) the taxpayer files a return, (ii) the IRS adjusts a tax liability after an audit / appeal process, or (iii) the IRS files a “substitute return” for a taxpayer who failed to file a required return.^[1]

^[1] See, Internal Revenue Manual section **4.12.1.1** titled “**Nonfiled Returns.**”

The priority of a federal tax lien is controlled by federal law. Generally, the IRS lien has priority, except as provided by 28 U.S.C. Section 6323. There is significant well-developed case law concerning the priority of those federal tax liens. See the above-mentioned blog post.

Ohio and other states have developed their own administrative procedure for creating income tax liens. Mirroring O.R.C. Section 5747.13(A),^[1] 86 Ohio Jur. 3d Taxation § 257, Collection of Assessed Amounts states:

After an assessment becomes final, if any portion of the assessment remains unpaid, including accrued interest, a certified copy of the [Tax] Commissioner’s entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the employer’s, taxpayer’s, or qualifying entity’s place of business is located or the county in which the party assessed resides. . . .

Immediately upon the filing of the entry, the clerk is required to enter a judgment. From the date of the filing, the judgment bears interest at the rate prescribed by statute, and has the same effect

as other judgments. Execution will issue at the request of the [Tax] Commissioner, and all laws applicable to execution sales are applicable. . . .

Ohio's tax lien process also starts after assessment of a tax debt and assessment occurs after a tax return is filed or after an audit. *Gibson v. Levin, Tax Commissioner*, 119 Ohio St.3d 517 (2008) ("The assessment at issue emanates from an audit conducted by the Ohio Department of Taxation that was performed when the Department of Taxation learned from the Internal Revenue Service that the taxpayers' federal tax income had been adjusted.").^[2]

Once an Ohio income tax assessment has been made, the Ohio Tax Commissioner can obtain a "judgment" by administrative action only – no judicial action is required. So, what does the Ohio Tax Commissioner get? For most Ohio judgment-creditors, simply having a recorded "judgment" does not generate a lien either on all a judgment-debtor's property or any specific property:

- Regarding real estate, see O.R.C. Section 2329.02 requiring the filing of a certificate of judgment with the county recorder and *Feinstein v. Rogers*, 2 Ohio App.3d 96 (Franklin Cty. App. 1981);
- Regarding equitable interests in property, see Ohio's law on Creditor's Bill complaints at O.R.C. Section 2333.01 and *Bank of Ohio v. Lawrence*, 161 Ohio St. 543 (1954); and
- Regarding personal property, see Ohio law requiring that specific items of personal property be subject to execution by the sheriff before a lien arises. *Nelson Sand and Gravel, Inc. v. Erie Shores Resort and Marina, Inc.*, 81 Ohio App.3d 649 (Ashtabula Cty. App. 1993) ("However, appellee's lien on the personal property of Erie Shores did not attach under Ohio law until the property was seized in execution . . .")

The IRS faces no such requirements to get a lien on property; but, do the above-listed three regular Ohio same rules apply to the Ohio Tax Commissioner? What must the Ohio Tax Commissioner do to obtain a judgment lien? Those questions were answered in *Reed v. Civiello*, 297 F.Supp.2d 1008 (U.S.D.C. N.D. Ohio 2003) when the IRS and Ohio Tax Commissioner disputed their relative lien priorities.

The requirements for a judicial lien to have priority over a federal tax lien were discussed in <https://www.blockchainandbanking.com/irs-liens-after-acquired-property-and-the-doctrine-of-choateness>. In *Reed*, those requirements were applied to a “judgment” in favor of the Ohio Tax Commissioner as the IRS and Tax Commissioner litigated their priority dispute in a mortgage foreclosure case. Analyzing the Ohio Tax Commissioner’s “judgment lien” against the IRS’ lien using the rules of the 26 U.S.C. Section 6323, the *Reed* court described the rule as follows:

The overriding rule is that “[t]he priority of the federal tax lien ... as against liens created under state law is governed by the common-law rule—‘the first in time is the first in right.’” *United States v. Pioneer American Ins. Co.*, 374 U.S. 84, 87 (1963) (quoting *United States v. City of New Britain, Conn.*, 347 U.S. 81, 85–86 (1954)). The parties also agree that “[i]t is critical, therefore, to determine *when* competing liens, whether federal- or state-created, come into existence or become valid for the purpose of the rule.” *Id.* Put differently, it is critical to determine when each of the competing liens became *choate*—“the priority of a lien depends on the time the lien attached to the property in question and became choate.” *Minnesota Dept. of Revenue v. United States*, 184 F.3d 725, 728 (8th Cir.1999), cert. denied, 528 U.S. 1075, (2000) (citing *New Britain*, 347 U.S. at 84). A lien becomes choate when “there is nothing more to be done ...—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.” *New Britain*, 347 U.S. at 84.

Reviewing the various lien filing dates and applying Section 6323(a & f)’s protection for judgment lien creditors, the *Reed* court determined: (i) the six IRS’ liens do not have priority *as against a judgment lien creditor* until the date on which the IRS filed notices of those liens with the Stark County recorder; (ii) the IRS filed notices of the IRS’ liens *after* the dates on which Ohio Tax Commissioner assessed his tax debts; and (iii) the IRS filed notices of the IRS’ liens after the Ohio Tax Commissioner filed its own notices with the Stark County Court of Common Pleas in accord with O.R.C. Section 5747.13(A). Summarizing the *Reed* court said: “[I]n other words, if [the Ohio Tax Commissioner] became a judgment lien creditor when it filed its notices of lien in the Court of

Common Pleas, then the [Ohio Tax Commissioner's liens] would have priority over the IRS–Liens.”

Unfortunately for the Ohio Tax Commissioner, the *Reed* court held that the Ohio Tax Commissioner was not a “judgment lien creditor” for purposes of the protections of 26 U.S.C. Section 6323 because no “court of record” determined that the Ohio Tax Commissioner was owed money and entitled to a judgment. Discussing *United States v. Gilbert Assocs., Inc.*, 345 U.S. 361 (1953), the *Reed* court noted that in *Gilbert*: (i) a New Hampshire local government administratively obtained a tax lien on property owned by a taxpayer who was also subject to an IRS lien; (ii) the local government argued that its lien was “in the nature of a judgment,” so that it was a judgment lien creditor and protected from the IRS lien; and (iii) the United States Supreme Court ruled for the IRS.

Quoting the United States Supreme Court in *Gilbert*, the *Reed* court said “. . . Congress used the words ‘judgment creditor’ [in the protections of Section 6323] in the usual, conventional sense of a judgment of a court of record, since all states have such courts. We do not think Congress had in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states, . . .”

Bolstering its *Gilbert* case analysis, the *Reed* court noted that in 1976 the IRS issued a regulation codifying the holding of *Gilbert*. The regulation explains that the term “judgment lien creditor” who is protected by Section 6323 means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction. “The term ‘judgment’ does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.” 26 C.F.R. § 301.6323(h)–1(g).[3]

The *Reed* case was cited affirmingly by the Mississippi State Supreme Court in *Davis v. Mississippi State Tax Commission*, 45 So.3d 274 (Miss. 2010) (“The [Mississippi Tax] Commission argues that *Gilbert*, which was written in 1953, is not relevant caselaw because it was superseded by the Federal Tax Lien Act of 1966 [which enacted sections 6321 and 6323] . . . The Court disagrees for two reasons. First, *Gilbert* remains fully viable after *Romani*.[4] ...

Second, 26 C.F.R. § 301.6323(h)–1(g) was enacted after the Federal Tax Lien Act of 1966, and preserved the distinction in *Gilbert* between a judgment of a court of record, which is a “judgment” for the purposes of defining “judgment lien creditor” under Section 6323, and a determination of a quasi-judicial body, which is not a “judgment” for the purposes of defining “judgment lien creditor” under Section 6323. ... The notices of tax lien filed by the [Mississippi Tax] Commission were determinations by an administrative body, not judgments obtained from a court of record. Therefore, the [Mississippi Tax] Commission was not a judgment lien creditor . . .”)

In sum, the Ohio Tax Commissioner’s administratively obtained “judgment” does not automatically create a judgment lien the priority of which is protected from subsequent IRS liens by 26 U.S.C. Section 6323.

[1] That section states in part “[A]fter an assessment becomes final, if any portion of the assessment remains unpaid, including accrued interest, a certified copy of the tax commissioner’s entry making the assessment final may be filed in the office of the clerk of the court of common pleas Immediately upon the filing of the entry, the clerk shall enter a judgment against the party assessed in the amount shown on the entry. The judgment shall be filed by the clerk The judgment shall have the same effect as other judgments. Execution shall issue upon the judgment upon the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment.

[2] O.R.C. Section 5747.10 requires an Ohio income taxpayer to file an amended return when an adjustment is made at the federal level, and the statute mandates that taxpayers accomplish the filing no later than 60 days after the adjustment has been agreed to or the final determination at the federal level.

[3] According to the *Reed* court, “[T]his regulation, because it has ‘long continued without substantial change’ and ‘appl[ies] to unamended or substantially reenacted statutes,’ is deemed to have received congressional approval and have the effect of law.”

[4] *United States v. Estate of Romani*, 523 U.S. 517 (1998) (harmonizing the Federal Tax Lien Act of 1966 codified at 26 U.S.C. Section 6321 *et seq.* and the federal priority statute of 31 U.S.C. Section 3713). This footnote added by blog author.

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