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ATTORNEY GENERAL OPINION NO. 85-1

TO: Commissioner Morgan Munger
Idaho State Tax Commission
Statehouse Mail

Per request for Attorney General Opinion.

QUESTION PRESENTED:

Are personal property tax liens superior to prior perfected purchase money security interests in the same property?

CONCLUSION:

Yes.

ANALYSIS:

Nothing in Article 9 of the Uniform Commercial Code governs the priority between tax liens, which are statutory, and Article 9 security interests. Idaho Code § 28-9-102(2) states: "This chapter does not apply to statutory liens except as provided in Section 28-9-310." Idaho Code § 28-9-310 deals only with the priority of possessory liens in goods subject to security interests where the possessory lien arose from furnishing materials or services with respect to such goods.

The Colorado Supreme Court has considered the priority of personal property tax liens compared to Article 9 security interests. In Moorehead v. John Deere Industrial Equipment Co., 194 Colo. 398, 572 P.2d 1207, 23 UCC Rep. Serv. 505 (1977, Reh. den. 1978), the court held that a tax sale of personal property for delinquent personal property taxes vested clear title in the tax sale purchaser and extinguished all prior liens and encumbrances. The tax sale purchaser was competing with and prevailed over a prior perfected security interest. The Court stated:

> It is an established principle of real property law in Colorado that a treasurer's deed issued pursuant to a valid tax sale extinguishes all prior liens, encumbrances, and other charges against the real property and conveys a new and paramount title to the grantee.
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> In enacting the present personal property tax sale statute in 1964, the General Assembly apparently decided to track the language from its real property counterpart. Colo Sess Laws 1964, ch 94, § 137-10-11(7) at 720. This use of almost identical language indicates a legislative intent that the purchaser at the personal property tax sale should receive the same unencumbered, new, and paramount title as that received by a grantee of a treasurer's deed. We so hold.
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> * * *
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> Important policy considerations support our decision. We note the fundamental necessity for the unimpared collection of general tax revenues for the support of our government. An interpretation of the statute which would render the tax collection provisions less effective should not be adopted unless clearly indicated by the statutory language employed.
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> * * *
>
> Thus, we are irresistibly led to the conclusion that public policy and prior case law dictate that a treasurer's certificate of purchase, issued pursuant to a sale of personal property, extinguishes all prior liens and encumbrances.

194 Colo. at 401, 402.

Although the issue addressed by the court dealt with whether the prior security interests were extinguished by the tax sale, these results were derivative from the lien priorities. At all types of foreclosure sales, higher priority liens are preserved, lower priority liens are discharged. The court was, in essence, holding that the tax liens were first priority. The court looked to the tax statutes to determine the priority.

Pre-Code law looked to the statute imposing the tax lien to determine the tax lien's comparative priority. Generally, the tax laws gave first priority to the tax lien. These issues are discussed in 3 T. Cooley, The Law of Taxation, § 1240, pp. 2467-2472 (4th ed., 1924). Professor Cooley states:

> Not only is it competent for the state to charge property with a lien for the taxes imposed thereupon, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the assessment of tax. . . .
>
> This statutory priority generally extends to prior mortgage liens so as to subordinate such liens to tax liens. So the priority may be given to liens for a personal property tax. When a preference is given, the lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the res without regard to individual ownership, and if enforced by sale of the land the purchaser will take a valid and unimpeachable title. (Cites omitted).

In order to determine the relative priority of personal property tax liens, it is necessary to review the Idaho statutes imposing the lien and the case law interpreting those statutes.

The basic authority to levy ad valorem taxes is given in Article VII, § 2, of the Idaho Constitution which provides in relevant part as follows:

> § 2. Revenue to be provided by taxation.-- The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his, her, or its property, except as in this article hereinafter otherwise provided. . . .

The importance of these taxes in the scheme of state government is declared in Article VII, § 7, of the Idaho Constitution, which provides:

> § 7. State taxes to be paid in full.--All taxes levied for state purposes shall be paid into the state treasury, and no county, city, town, or other municipal corporation, the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for state purposes.

This section has been held to be self-implementing. Cunningham v. Moody, 3 Idaho 125, 28 P. 395 (1891). In Kieldsen v. Barrett, 50 Idaho 466, 297 P. 405 (1931) (hereafter, Kieldsen) the Idaho Supreme Court held, in part, that this section mandated first priority for tax liens. The court stated:

> Tax liens on real property cannot be made subordinate to other liens without disregarding sec. 7, Art. VII, of Idaho Const.

50 Idaho at 472.

The court went on to hold that the maximum priority the legislature could grant to other state liens was co-equal priority with tax liens.

The constitutional authorizations have been implemented and augmented by statute. Idaho Code § 63-102 is the statutory foundation for the ad valorem tax system. The relevant part of that statute reads:

> 63-102. Lien of taxes--All property subject to assessment shall be assessed annually for taxation . . . under the provisions of this act, . . . on the first day of January . . . All taxes levied upon real estate under the provisions of this act, shall be a lien upon the real property assessed, and all taxes levied upon personal property shall be a lien upon the personal property assessed and upon any other personal or real property of the owner thereof within the county where assessed, . . . which several liens attach as of the first day of January in that year, and shall only be discharged by the payment, cancellation or rebate of the taxes as provided in this act: . . . (Emphasis added).

Idaho Code § 63-102 gives priority to all ad valorem taxes for all state, county or local purposes. The authority to extend priority to county and local taxes was upheld in Bosworth v. Anderson, 47 Idaho 697, 280 P. 227 (1929).

> The state taxes, by the constitution, and the county and city taxes, by legislative declaration, are prior to the special assessment, and this court has, in effect, so held. (cites omitted).

47 Idaho at 707.

The Kieldsen case dealt with ad valorem taxes on real property. However, the constitutional provision regarding priority and the statutory language limiting discharge to payment, cancellation or rebate apply equally to personal property ad valorem taxes. As the underlying policies are identical, there should be no difference between the treatment of real and personal property ad valorem taxes. In Scottish American Mortgage Co., Ltd., v. Minidoka County, 47 Idaho 33, at 41, 272 P. 498 (1928), the Idaho Supreme Court indicated that if faced with the issue it would declare the personal property tax lien to be first priority over antecedent encumbrances.

Scottish American Mortgage goes on to hold that where uncollected personal property taxes are extended on the real property rolls, the lien that arises is governed by first-in-time, first-in-right priorities. The court discussed, but did not decide, the relative priority of the tax lien that arises when one item of personal property is encumbered for the taxes accruing on other items of personal property.

Determining that personal property tax liens are entitlted to first priority is consistent with the structure of ad valorem taxes. The taxes are a direct charge on the property rather than security for a personal liability. As no personal liability is involved, no determination of the taxpayer's interest in the property is necessary. The tax is attached to the res. This rule prevents private parties from defeating the tax by allocating the entire equity in the property to a prior lienholder.

CONCLUSION

In Idaho, personal property tax liens are entitled to first priority, even over antecedent encumbrances, including prior perfected purchase money security interests. Idaho tax statutes provide this priority and are not contradicted by Article 9 of the UCC or any Pre-Code law.

AUTHORITIES CONSIDERED:

1. Id. Const. art VII §§ 2, 7.

2. Idaho Code § 63-102.

3. Kieldsen v. Barrett, 50 Idaho 466, 297 P. 405 (1931)

4. Bosworth v. Anderson, 47 Idaho 697, 280 P. 227 (1929).

5. Scottish American Mortgage Co., Ltd., v. Minidoka County, 47 Idaho 33, 272 P. 498 (1928).

6. Cunningham v. Moody, 3 Idaho 125, 28 P. 395 (1891).

7. Moorehead v. John Deere Industrial Equipment Co., 194 Colo. 398, 572 P.2d 1207, 23 U.C.C. Rep. Serv. 505 (1977, Reh. den. 1978).

8. 3 T. Cooley, The Law of Taxation, § 1240, pp. 2467-2472 (4th ed., 1924).

DATED this 27th day of February, 1985.

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Supreme Court Law Library
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