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## Bankruptcy Relief From Secured Tax Liens

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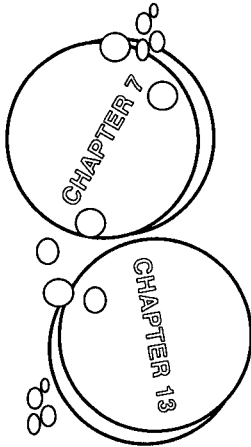
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# BANKRUPTCY RELIEF FROM SECURED TAX LIENS

Veryl Victoria Miles

Little relief for the debtor,  
possible benefit for  
unsecured creditors.



**W**HEN A CLIENT FILES for bankruptcy, there's always a good chance that unpaid tax obligations number among the debts. The debts

may be either secured or unsecured. Dealing with the unsecured tax debts was the focus of our last article, *Discharging Tax Liability in Bank-*

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*ruptcy*, which appeared in the March issue of *The Practical Lawyer*. In this issue, we will examine the treatment of secured tax debt in bankruptcy cases. The parties most likely to benefit from the Code provisions affecting the secured tax claim are the unsecured creditors. This article will discuss the rules of bankruptcy law that are most relevant to the treatment of prepetition secured tax claims. It also will discuss the consequences of these rules and how they affect the various parties to the bankruptcy proceeding: the debtor, the secured tax claimant, and the unsecured creditors.

**TAX LIEN BASICS** • The longer that the tax obligations have gone unpaid, the more likely it is that tax liens have attached against the debtor's property. The tax lien usually attaches to all of the debtor's property and remains effective until either the tax indebtedness is satisfied or lapses pursuant to a statute of limitations. The lien may attach to personal property as well as real property depending on the nature of the tax debt and the statutory provisions.

#### **Public Notice**

To ensure the enforceability of the tax lien against secured creditors of the debtor, as well as subsequent purchasers of the encumbered property or creditors with judicial liens against the property, the government tax authority usually is required to file a public notice of the lien. These de-

scriptions of when a tax lien attaches, becomes enforceable, and achieves priority status reflect the requirements of federal tax lien provisions under the Internal Revenue Code ("IRC"). See 26 U.S.C. §§6321 through 6323.

#### **Enforcing the Lien**

In a nonbankruptcy situation, the tax authority with an enforceable and perfected tax lien against a delinquent debtor's property will be able to enforce the lien against the property by having the property seized and liquidated to pay the outstanding tax indebtedness. However, if there are other liens or secured claims against the property that have priority status over the tax claim, these claims will have to be paid first. As a secured creditor, the tax claimant will have a priority claim in any proceeds from the sale over junior secured claims and over unsecured claims against the debtor's assets.

#### **A Question of Value**

If the encumbered property has sufficient value to pay all of the claims secured by it, all claims will be paid including the secured tax claims. The debtor will thus be released from liability for the tax debts. But if the encumbered assets are not valuable enough to pay the secured tax claim, the debtor will remain liable for the tax debt until it is paid in full, and any property that the debtor subsequently acquires will be subject to the tax lien.

It is usually at this point that the client will want to know what to do about the secured tax debt.

**WHAT RELIEF IS AVAILABLE?** • For the debtor who inquires about the extent of relief he or she will find under the Bankruptcy Code, 11 U.S.C. §101 et seq. ("Code") (all section references are to the Code unless stated otherwise), the actual amount of relief will be rather limited.

#### **Chapter 7 Relief: Lien Survives Bankruptcy**

By filing a petition for relief under a chapter 7 liquidation, the debtor will receive a discharge from prepetition debts and surrender all of his or her nonexempt assets for liquidation to pay the claims of creditors. Although the debtor's discharge will provide relief from personal liability on most prepetition debts, it will not affect the tax lien. That is, the tax lien will survive the bankruptcy and will be enforceable against the property of the bankruptcy estate that is subject to the tax lien, unless otherwise avoided under special Code provisions. See *Wernimont v. Iowa Dept. of Revenue and Finance (In re Wernimont)*, 183 B.R. 181, 186 (Bankr. N.D. Iowa 1994); *In re Street*, 165 B.R. 408 (Bankr. D. Md. 1994); *Leslie v. Internal Revenue Service (In re Leslie)*, 103 B.R. 775, 777 (Bankr. S.D. W. Va. 1989).

#### **Lien Enforceable Against Prepetition Property**

The tax lien will be enforceable only against the property that secured the tax claim at the time the petition was filed. It will not attach to or be enforceable against any postpetition property acquired by a debtor who receives a discharge of personal liability from the tax claim. See *United States v. Fuller (In re Fuller)*, 134 B.R. 945, 948-49 (Bankr. 9th Cir. 1992); *United States v. Sanabria*, 424 F.2d 1121, 1123 (7th Cir. 1970); *United States v. McGugin (In re Braund)*, 423 F.2d 718 (9th Cir. 1970), cert. denied, 400 U.S. 823 (1970).

#### **Chapter 13: Present Value from Future Income**

The result will be different if the debtor seeks bankruptcy relief under chapter 13 for debt rehabilitation. One of the requirements for the debt payment plan is to include a proposal to pay the present value of all secured claims, which includes secured tax claims, over a period that usually does not exceed 36 months. Accordingly, the plan must propose the payment of the value of the secured tax claim (that is, the amount of interest in the property that actually secures the tax claim), plus interest to achieve a present value payment of the secured claim during the plan payment period. These payments made under the plan will come from the debtor's future income. Once the debtor has completed making payments for the

secured tax claim under the plan, a discharge from the debt will be ordered.

**H**OW BANKRUPTCY AFFECTS SECURED TAX CLAIMS • In both a chapter 7 liquidation or a chapter 13 rehabilitation, the value of the secured tax claim will be paid either from the proceeds of the liquidated estate or from the debtor's future income, respectively. Consequently, the Code offers very little direct relief to the debtor from secured tax claims. This does not, however, mean that the secured tax claimant is provided any greater protection under bankruptcy law than nonbankruptcy law. In fact, some Code provisions require that secured tax claims be treated differently than other secured claims. One result is that the secured tax claim does not enjoy the same priority status against certain unsecured claims that it would have enjoyed had the client not filed for bankruptcy. In addition, the tax lien may even be subject to avoidance under various Code provisions that would render it unsecured.

**P**Riority STATUS OF SECURED TAX CLAIMS • The general rule in a chapter 7 liquidation is that secured claims usually enjoy priority in the distribution of proceeds from the liquidation of property securing the claim; unsecured claims are entitled to receive any dividend from the liquidated bankruptcy estate only after the secured claims are paid. §725. How-

ever, a tax claim secured by a tax lien does not always enjoy the same priority status in the distribution of the proceeds from the property that secured the tax obligation.

**Section 724(b)(1): Senior Secured Claims Precede Secured Tax Claims**

Section 724(b) of the Code addresses the treatment of secured tax claims in the distribution of proceeds from the encumbered property. Subsection (1) of section 724(b) reflects the general priority rule between secured claims against encumbered property by providing that secured claims that are senior to the secured tax claim shall be first to receive proceeds resulting from the liquidation of the encumbered property.

**Section 724(b)(2): Unsecured Priority Claims Precede Secured Tax Claims**

However, it is under subsection (2) that the departure from the normal rules of priority occurs. This provision provides that the group of claimants to receive a distribution from such proceeds after senior secured claimants have been paid are not the secured tax claimants, but are instead the unsecured *priority* claimants listed under sections 507(a)(1) through 507(a)(7). These unsecured priority claims must be paid before any amounts due on the secured tax claim are to be paid to the secured tax claimant when the proceeds from unencumbered assets of the bankruptcy es-

tate are insufficient to pay the protected unsecured priority claims.

***Which Claims Are Unsecured Priority Claims?***

As explained in the legislative history of the Code, this special exception to the rule has the effect of allowing "the [unsecured] priority claimants to step into the shoes of the [secured] tax collector." H.R. Rep. No. 595, 95th Cong., 1st Sess. 382 (1977), *reprinted in* 1978 U.C.C.A.N. 5963, 6338. Thus, although the tax claim is a secured claim, it is subordinate both to senior secured claims against the encumbered property and to protected unsecured priority claims such as:

- Administrative expense claims incurred during the administration of the bankruptcy estate;
- Wage claims of employees of the debtor for unpaid wages; and
- Alimony and child support claims.

These are just a few examples. The list of unsecured priority claims that subordinate secured tax claims under section 724(b)(2) is quite comprehensive. It includes *all* of the unsecured priority claims listed under section 507(a), except for unsecured priority tax claims and capital asset claims that a financial regulatory institution would have against a debtor. See §§507(a)(8) and (9).

***Subordination: Insufficient Assets and Limited to Value of Secured Tax Claim***

Secured tax claims are subordinated under section 724(b) only when the unencumbered assets are insufficient to pay the specially protected unsecured priority claims. This subordination of the secured tax claim prevents the tax claim from depleting the bankruptcy assets, and assures some payment of the protected unsecured priority claims.

However, because the unsecured priority claimant is stepping into the shoes of the secured tax claimant under this provision, the amount from the proceeds of the liquidated property that the unsecured priority claim is entitled to receive under section 724(b)(2) is limited to the amount of the allowed secured tax claim.

***Section 724(b)(3): Secured Tax Claim Receives a Limited Remainder***

If the total amount of the unsecured priority claims is less than the amount of the allowed secured tax claim, and there are monies remaining from the proceeds of the encumbered property after paying the unsecured priority claims, the amount the tax claimant is entitled to receive under section 724(b)(3) is the difference between the value of the secured tax claim and the unsecured priority claims.

#### **Section 724(b)(4): Junior Secured Claimant Comes Next**

This limitation on the amount the secured tax claimant may receive after unsecured priority claims have been paid preserves the expectation of the junior secured claimant against the secured tax claim. Thus, secured claims that are junior to the tax claimant's are paid next if proceeds from the encumbered property remain. §724(b)(4).

#### **Section 724(b)(5): Tax Claimant Gets Amount Remaining on its Claim**

To the extent the secured tax claim was not paid under section 724(b)(3), proceeds remaining after paying junior secured claims may be remitted to the tax claimant. §724(b)(5).

#### **Section 724(b)(6): General Unsecured Claimants Get What's Left**

Any remainder is then paid back into the bankruptcy estate for distribution to general unsecured claimants. §724(b)(6). See H.R. Rep. No. 595, 95th Cong., 1st Sess. 382 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6338.

#### **Here's How It Works**

For an illustration of how this provision works, assume that at the time a debtor files a petition for relief under chapter 7 of the Code, the debtor's primary asset is a parcel of real property which has an estimated

value of \$100,000. There is an \$80,000 mortgage against the debtor's property, an outstanding tax lien to secure the payment of \$15,000 in unpaid federal taxes, as well as a junior equity mortgage to secure an outstanding loan for \$4,000. Administrative expenses incurred in the sale of the property were \$1,000, and there are outstanding alimony and child support payments against the debtor for \$5,000. These two unsecured claims qualify as priority claims under sections 507(a)(1) and (7), respectively. There are general unsecured claims valued at \$50,000.

Pursuant to section 724(b), the \$100,000 of proceeds from the sale of the property would be distributed in the following order:

- In accordance with section 724(b)(1), a distribution of \$80,000 would be paid to the senior mortgage holder;
- The next claim to be paid would be the \$1,000 of administration expenses incurred to repair the property for sale and a payment of \$5,000 would go toward the unpaid alimony and child support payments as provided under section 724(b)(2);
- Although there would be \$14,000 remaining from the proceeds of the liquidated property after paying the senior mortgage and the unsecured priority claims, as required under section 724(b)(3), the secured tax claimant would only be entitled to receive

the value of its secured tax claim (\$15,000) less the amounts paid to the unsecured priority claims (\$1,000 + \$5,000), which would be \$9,000;

- Based on section 724(b)(4), \$4,000 of the remaining \$5,000 of proceeds would be distributed to the junior equity mortgage holder to pay the equity loan that was secured by the property;
- Since \$1,000 remains from the proceeds after paying the junior equity loan, and the secured tax claim was not fully paid under section 724(b)(3), the remaining \$1,000 may be applied toward the unpaid portion of the secured tax claim pursuant to section 724(b)(5);
- Because all of the proceeds from the encumbered property have been exhausted in the distribution in accordance with sections 724(b)(1)-(5), the tax claim would remain unpaid to the extent of \$5,000 and the general unsecured claimants would receive nothing.

This treatment of secured tax claims in relation to the unsecured priority claims under section 724(b) reflects the Code's concern for the need to provide preferential treatment to creditors of the debtor that may be the most adversely affected by the debtor's bankruptcy and least protected against such an event. It also reflects a recognition of the vast reach of the tax liens over all of a debtor's assets and a choice by Congress to

limit their impact in the interest of unsecured priority claimants. The effect of the provision is precise and very limited, however, and leaves the expectations of the junior secured claimant against the secured tax claim undisturbed. See generally *Hargrave v. Township of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 859-60 (Bankr. D. N.J. 1994); *King v. Board of Supervisors of Fairfax County (In re A.G. Van Metre, Jr. Inc.)*, 155 B.R. 118, 122 (Bankr. E.D. Va. 1993); *In re Dowco Petroleum, Inc.*, 137 B.R. 207, 210-11 (Bankr. E.D. Tex. 1992).

**A**VOIDING THE LIEN: PROVISIONS AND CONSEQUENCES • As noted above, if a tax lien against property of the estate is not voided under the special lien avoidance provisions of the Code, the lien will survive bankruptcy and be enforceable against the encumbered property or its proceeds. Although the secured tax claim may lose some of its priority in the chapter 7 distribution, it still retains priority over any junior secured claims and general unsecured claims. However, one of the duties of the trustee is to retain as much property of the estate for the benefit of the *unsecured* creditors as possible. To increase the bankruptcy estate assets available for distribution to unsecured creditors, the trustee is given the authority to avoid certain liens held by secured creditors against specific assets of the estate.



### Trustee Can Void Liens for Benefit of Bankruptcy Estate

Section 551 enables the trustee to increase the assets of the estate for distribution to unsecured creditors by automatically preserving any liens voided by the trustee for the benefit of the bankruptcy estate. Thus, the trustee steps into the shoes of the lien creditor. See *Staats v. Barry (In re Barry)*, 31 B.R. 683, 686 (Bankr. S.D. Ohio 1983).

### Priorities Unaffected

Accordingly, creditors with claims that enjoy priority status over the voided lien will retain that priority against the rights the trustee will acquire from the voided lien, and creditors with claims that were junior to the voided lien will be subordinate to the trustee's rights in the voided lien.

To the extent that any dividend remains from the liquidated property after the senior claims have been paid and the bankruptcy estate has been paid the value of the voided lien, the trustee will be able to make the remaining dividends available for distribution to claims that were junior to the voided lien, including junior secured claims against the proceeds of the encumbered property. Monies the trustee preserves for the benefit of the estate through the lien avoidance can be made available for distribution to unsecured claimants in a chapter 7 liquidation; or the trustee can request an increase in the amounts unsecured

claimants must receive under a chapter 13 rehabilitation plan.

### Lien Avoidance Provisions

There are several sections of the Code that are particularly relevant to the trustee's ability to avoid tax liens, and they include section 724(a), as well as sections 544 and 545. In fact, one of the most frequently used avoidance rules for tax liens is found under subsection (a) of section 724. It provides that *any* lien that secures a claim or debt that is punitive in nature may be avoided.

**SECTION 724(a): PENALTY AVOIDANCE PROVISION** • The policy behind this provision is "to [protect] unsecured creditors from the debtor's wrongdoing." H.R. Rep. No. 595, 95th Cong. 1st Sess. 382 (1977), reprinted in 1978 U.C.C.S.A.N. 5963, 6338. The avoidable tax penalty must be a charge against the debtor that is "not compensation for actual pecuniary loss suffered by the holder of such claim." See §726(a)(4). A type of claim that would constitute such an avoidable penalty under section 724(a) would be one assessed against a debtor for the nonpayment of taxes. See *Burden v. United States (In re Burden)*, 917 F.2d 115, 120 (3rd Cir. 1990); *Bank of Lyons v. Cavanaugh (In re Cavanaugh)*, 153 B.R. 224, 226 (Bankr. N.D.Ill. 1993).

### Accrued Interest Not a Penalty

Interest that accrues against unpaid taxes does not constitute a penalty charge under section 724(a) because it is regarded as compensation for losses the government suffers when taxes go unpaid. *See In re Reich*, 66 B.R. 554, 556-557 (Bankr. D.Colo. 1986) *rev'd on other grounds*, 107 B.R. 299 (D. Colo. 1989); *In re Palmer*, 53 B.R. 545, 548-549 (Bankr. N.D. Tex. 1985) *aff'd*, 88 B.R. 101 (N.D. Tex. 1988); *In re New England Carpet Co., Inc.*, 26 B.R. 934, 936-37 (Bankr. D.Vt. 1983).

**H**OW LIEN PRESERVATION AND AVOIDANCE WORK • The following example illustrates how the lien preservation provision of section 551 works, as well as the lien avoidance rule of section 724(a). Assume a debtor has property against which there is a senior mortgage outstanding, as well as a tax lien with a value of \$12,000, which not only secures unpaid taxes but also a tax penalty valued at \$2,000. Pursuant to section 724(a), the tax lien may be voided by \$2,000, that being the extent to which the tax lien secures a penalty. Under section 551, the trustee will be able to preserve this \$2,000 for the benefit of the estate by stepping into the shoes of the tax lien holder.

However, the claims that are prior to the voided lien will retain that priority. Thus, the \$2,000 of the proceeds from the encumbered property would still be subject to the claims of

the senior mortgagee and the secured tax claim to the extent it was not voided. *See, e.g., In re Barry*, *supra*, at 687. That portion of the secured tax claim that was voided would become unsecured and would participate in the distribution of assets as an unsecured penalty tax claim pursuant to section 726(a)(4) and receive payment after general unsecured claims. If the unsecured tax penalty claim is not paid in full because of insufficient assets from the liquidated estate, the debtor may find the remaining claim to be a nondischargeable tax claim under section 523(a)(7) depending on the nature and age of the tax penalty.

**S**ECTION 545: STATUTORY LIEN AVOIDANCE PROVISION • Section 545 of the Code specifically addresses when statutory liens, including tax liens, may be avoided at bankruptcy. Subsection (1) of section 545 provides that statutory liens are voidable if the lien has arisen *solely* because of the debtor's bankruptcy filing, or the commencement of other insolvency proceedings, or because of the debtor's financial condition. Such a lien is not viewed as a "true lien," but as a "springing lien" and is regarded as a nonbankruptcy priority rule that attempts to protect the interest of the taxing authority in the event the debtor experiences adverse financial conditions.

### **Section 545(1) Applies to Some State Statutes**

Although there are no federal tax lien statutes that fall within the scope of this provision, a few state tax lien statutes do. A subject tax lien statute might provide that a tax lien automatically arises against property on which taxes have been assessed but not paid and the owner of the property voluntarily surrenders the property to another or files a petition in bankruptcy. If the owner doesn't surrender the property and files for bankruptcy, the lien would arise solely because the debtor filed a bankruptcy petition; it is not created through a pre-bankruptcy agreement or recordation of lien notice. Thus, the lien falls within the avoidance rule of section 545(1). See *In re Knights Athletic Goods, Inc.*, 128 B.R. 679, 683-684 (D. Kan. 1991).

### **Lien Avoidance Under Section 545(2) Frequently Applied**

Subsection (2) of section 545 also provides that a statutory lien, like a tax lien, may be voided by the trustee if the lien is unperfected or would not be enforceable against a "bona fide purchaser" under nonbankruptcy law at the time of the bankruptcy filing. Under this provision, the trustee is given all rights of avoidance the hypothetical bona fide purchaser would have over the tax lien holder under applicable federal, state, or local law. Thus, if the bona fide purchaser would have had priority over the tax

lien at the time of the filing of the petition in bankruptcy under the relevant nonbankruptcy law, the lien may be avoided.

This is the most frequently used avoidance rule for tax liens. In fact, the avoidance rule of section 545 governs the determination of whether a tax lien should be avoided as a preferential transfer of property under section 547. See §547(b) and (c)(6).

### **Avoidance Possible if Lien Not Properly Recorded**

Accordingly, if a tax lien notice has not been properly recorded, and providing notice of the tax lien is necessary under nonbankruptcy law for the tax claimant to have superior rights in the encumbered property over a bona fide purchaser, the lien would be subject to avoidance by the trustee under section 545(2). See *City of Boerne v. Boerne Hills Leasing Corp.* (*In re Boerne Hills Leasing Corp.*, 15 F.3d 57 (5th Cir. 1994) (the tax authority failed to file a public notice of the tax lien); *Fandre v. Internal Revenue Service* (*In re Fandre*), 167 B.R. 837, 840 (Bankr. E.D. Tex. 1994) (the tax lien was properly perfected at the commencement of the case as was not avoidable); *Ducote v. United States* (*In re De La Vergne*), 156 B.R. 773, 779 (Bankr. E.D. La. 1993) (the tax authority misfiled the public notice so that it would not have disclosed the existence of the lien to interested parties making a search).

**Avoidance Possible if  
Tax Lien Subordinate to  
Rights of Bona Fide Purchaser**

It may also be possible to avoid the tax lien when nonbankruptcy law provides that recorded tax liens are subordinate to bona fide purchasers of certain property. For example, under federal tax law, perfected tax liens are subordinate to the claims of purchasers of securities, motor vehicles, or household goods in casual sales for less than \$250, who have made the purchases without actual notice or knowledge of the tax lien. 26 U.S.C. §6323(b). The purpose of this provision under the IRC is to protect the transactions that these special purchasers have entered into with the debtor without knowledge of the tax lien. See S. Rep. No. 989, 95th Cong., 2d Sess. 86 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5872.

***Is the Trustee  
a Bona Fide Purchaser?***

Accordingly, when a federal tax lien is filed against securities, automobiles, or household goods of a debtor, the lien would be subject to avoidance by the trustee as the hypothetical bona fide purchaser. (One of the difficult issues the courts face in applying this provision is addressing the question of whether the trustee qualifies as a bona fide purchaser under the relevant nonbankruptcy law. See *United States v. Hunter (In re Walter)*, 45 F.3d 1023 (6th Cir. 1995) (see the court's discussion of this issue and its treat-

ment among other courts); see also *United States v. Battley (In re Berg)* 188 B.R. 615, 619 (Bankr. 9th Cir. 1995)).

**SECTION 544: THE "STRONG-ARM" PROVISION** • Tax liens also are potentially avoidable under section 544, the strong-arm avoidance provision of the Code. Subsection (a)(1) gives the trustee priority as a "hypothetical lien creditor," and essentially provides that the trustee can void the tax lien if nonbankruptcy law (federal, state, or local) renders tax liens nonenforceable against judicial lien holders.

For example, section 6323(a) of the IRC provides that federal tax liens will not be valid against any "purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor" until a proper notice has been filed in the appropriate office. Thus, when the Internal Revenue Service ("IRS") has failed to file a proper notice under the name of a taxpayer pursuant to the notice requirements under IRC section 6323(f), the lien will be voidable by the trustee under section 544(a)(1). If, for example, the IRS initially files a proper tax notice against a delinquent taxpayer as required under IRC section 6323, but fails to file a new public notice against the debtor after the debtor's name changes in accordance with the filing statute of the relevant state, the initial notice will become invalid and subject the lien to avoidance by the trustee under section 544. See *U.S. v. LMS*

*Holding Company*, 161 B.R. 1020 (N.D. Okl. 1993) *rev'd*, 50 F.3d 1526 (10th Cir. 1995).

**A**VOIDANCE PROCEDURES GENERALLY BENEFIT THE ESTATE • Regardless of the provision used by the trustee to avoid the tax lien, it is important to remember that the value of the lien voided against the debtor's property is preserved for the benefit of the estate. §551. Thus, the benefits to the estate from the lien avoidance will go toward the payment of the claims of unsecured creditors. The only time the avoidance of the tax lien will serve the interests of the debtor is if the tax lien that is voided is against exempt property.

**Avoidance To Preserve Exempt Assets for Debtor's Benefit Possible if Notice Not Properly Filed**

Section 522(h) grants the debtor authority to employ some of the avoiding powers of the trustee to preserve encumbered exempt assets for the debtor's benefit. However, most courts have interpreted the avoidance authority granted the debtor under section 522(h) not to include a debtor's right to avoid tax liens. This interpretation is based on the language in section 522(c)(2)(B) which specifically states that perfected tax liens remain enforceable against exempt property. See *DeMarah v. United States* (*In re DeMarah*), 62 F.3d 1248, 1251-52 (9th Cir. 1995); *Walkup v. First Interstate* (*In re Walkup*), 183

B.R. 884, 887 (Bankr. E.D. Cal. 1995); *In re Robinson*, 166 B.R. 812, 815 (Bankr. D. Vt. 1994). Accordingly, the debtor may avoid the tax lien against exempt property under section 522 only if the tax lien is unperfected, because proper notice of the tax lien has not been filed. §522(c)(2)(B). See *Suarez v. United States* (*In re Suarez*), 182 B.R. 916, 923 (Bankr. S.D. Fla. 1995).

**Stripping Down Liens Against Exempt Property**

Debtors have attempted to use section 506(d) of the Code to "strip down" tax liens against exempt property when the tax claim is undersecured; that is, the amount of the tax claim exceeds the value of the assets securing the tax claim. See §506(a) and (d). However, recent case law has held that section 506(d) may not be used by the debtor in a chapter 7 liquidation to avoid the tax lien to the extent the claim is unsecured. Thus, the tax lien will not be avoidable under this provision and will survive the bankruptcy. See *Walkup v. First Interstate* (*In re Walkup*), *supra* (an undersecured tax lien against a debtor's homestead may not be stripped down under chapter 7 pursuant to the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992)); see also *In re Doviak*, 161 B.R. 379, 382 (Bankr. E.D. Tex. 1993); *In re Swafford*, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993).

This result is significant when the unsecured portion of the tax claim qualifies as a nondischargeable debt under section 523(a). In such cases, not only will the tax lien survive bankruptcy, but the debt will survive the bankruptcy as well. For the debtor, this will mean that the surviving tax lien can attach to any postpetition property acquired by the debtor to secure the nondischargeable tax claim. See *Leavell v. United States (In re Leavell)*, 124 B.R. 535, 540 (Bankr. S.D. Ill. 1991) (“[u]nlike liens securing dischargeable debts, which survive bankruptcy only as to the debtor’s prepetition property, liens securing nondischargeable debts attach to the debtor’s postpetition or after-acquired property”).

#### **Different Result in Chapter 13 Cases**

However, the results are different in a chapter 13 rehabilitation. If the tax claim against the exempt property is undersecured, the debtor may divide the tax claim into a secured claim to the extent there is value in the encumbered property to pay the claim, and into an unsecured claim to the extent that the amount of the tax claim exceeds the value of the property. Under chapter 13, the debtor may petition the bankruptcy court to void the tax lien to the extent of the unsecured portion of the claim pursuant to section 506(d). *Internal Revenue Service v. Campbell*, 180 B.R. 686, 687 (M.D. Fla. 1995). This will permit the debtor to propose the full payment of only

the secured portion of the tax claim and to treat the unsecured portion as an unsecured claim, which does not have to be paid in full under the chapter 13 plan and for which the debtor will receive a discharge, except when the unsecured claim would qualify as an unsecured priority tax claim.

**STANDING ISSUES** • As noted above, the Code gives the trustee the power to avoid liens in chapter 7 and chapter 13 cases; an issue considered by many courts is whether the debtor has standing to invoke these powers in bankruptcy to avoid tax liens. The courts have been sharply divided on this question of standing. For a discussion of how the various courts have addressed this question, see *In re Robinson*, supra, at 815-186; *In re Henderson*, 133 B.R. 813, 816 (Bankr. W.D. Tex. 1991); and *In re Mattis*, 93 B.R. 68, 69 (Bankr. E.D. Pa. 1988).

#### **Intervention by Trustee**

Although the debtor may lack standing to avoid a tax lien against exempt property under section 522(h), the trustee may intervene and do so under its general avoiding powers. In *United States v. Branch*, 170 B.R. 577, 579 (Bankr. E.D. N.C. 1994), a trustee intervened on behalf of a chapter 13 debtor to avoid a tax lien against exempt property pursuant to section 545, which the debtor lacked standing to do. This avoidance by the trustee allowed the debtor to keep

property that was exempt under section 522 for a fresh start.

**C**ONCLUSION • The results for the debtor in bankruptcy are clear when a secured tax claim is indefeasible: the tax lien will survive the debtor's discharge and will be enforced against the property securing the claim, regardless of whether the property is exempt or nonexempt. For the secured tax claimant, the Code rules governing the distribution of assets and subordination of the secured tax claim demand contribution from the tax claimant for the benefit of the most vulnerable of unsecured credi-

tors in the interest of equity. This adjustment of priority rights in favor of the unsecured priority claims confronts the reality of the tax lien and the vast reach the lien can have over the debtor's property. It also assures some payment to the unsecured priority claimants through the subordination of the tax claim. The powers granted to the trustee to avoid the tax lien at bankruptcy and to preserve the assets for the benefit of the estate (and the general unsecured creditors) reflect an objective of the bankruptcy law that all creditors of the bankrupt debtor have an opportunity to share in the assets of the bankruptcy estate.

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## THE WEB-WISE LAWYER

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*(Continued from page 34)*

solely to sell things. The best sites are value-added sites offering the browser something useful to take away. Many of these sites contain journals, newsletters, articles, and searchable data bases. The Qui Tam Information Center presented by The Bauman & Rasor Group, Inc., is a good example of a value-added site (<http://www.quitam.com/>). The site presents general information about qui tam and speaks to current or potential qui tam whistleblowers and their attorneys. Attorneys involved with religious liberty matters would be well advised to visit the site maintained by the Center for Law and Religious Freedom

(<http://www.iclnet.org/clsnet/Maps/center.html>).

With great style, Court TV (<http://www.courtvtv.com/>) offers voluminous material on sensational subjects such as the O.J. Simpson and Menendez Brothers trials, but it also offers much of interest to attorneys interested in matters such as lawsuits involving tobacco companies.

The goal should be to become aware of the decent corporate sites in your area of practice and add them to your bookmarks so you can check back easily from time to time. Some sites even allow you to register with

*(Continued on page 80)*