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TAXATION—FEDERAL TAX LIENS—FIRST IN TIME DETERMINES PRIORITY BETWEEN STATE AND FEDERAL GENERAL TAX LIENS—The United States brought an action in a federal district court to foreclose a tax lien against a solvent taxpayer. Vermont held a lien against the same taxpayer for unpaid withholding taxes which antedated the federal lien, and was joined as a defendant.¹ The state lien was authorized by a statute² drawn practically verbatim from the federal tax lien statute.³ Thus both liens dated from a refusal to pay assessed taxes on demand, reached all interests in property of whatever nature, and were enforceable either by distraint or civil action.⁴ The state claimed priority as first in time. The United States resisted this claim on the ground that the state lien did not bind specifically identifiable assets, but only the taxpayer's property in general. On cross-motions for judgment on the pleadings the court ordered Vermont's lien satisfied first.⁵ On appeal, *held*, affirmed. Specificity of a state tax lien is not essential when competing with a federal tax lien springing from identical statutory language, and therefore priority is governed by the principle that first in time is first in right. *United States v. Vermont*, 317 F.2d 446 (2d Cir.), *cert. granted*, 32 U.S.L. WEEK 3209 (Dec. 9, 1963).

The Supreme Court has announced that the priority of a federal tax lien as against other liens is controlled by the principle that first in time is first in right.⁶ However, for nonfederal liens, *time* is not simply a chronological event. Rather, it is that moment when the lien conforms to a federally defined⁷ standard euphemistically known as "choateness."⁸ To meet the

¹ INT. REV. CODE OF 1954, § 7403(b). Vermont had moved to judgment and attached taxpayer's bank account. Since the federal lien had been filed prior to entry of the judgment the state could not claim seniority as a judgment creditor. INT. REV. CODE OF 1954, § 6323(a).

² "If any employer required to . . . withhold a tax . . . neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time assessment and demand is made . . . and shall continue until the liability for such sum . . . is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice . . . has been filed. . . ." VT. STAT. ANN. tit. 32, § 5765 (1959).

³ "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." INT. REV. CODE OF 1954, § 6321.

"[T]he lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount . . . is satisfied or becomes unenforceable" INT. REV. CODE OF 1954, § 6322.

"[T]he lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" INT. REV. CODE OF 1954, § 6323(a).

⁴ INT. REV. CODE OF 1954, §§ 6331, 7403. State enforcement procedures are found in VT. STAT. ANN. tit. 32, § 5767 (1959); VT. STAT. ANN. tit. 9, §§ 1791-97 (1958).

⁵ *United States v. Cutting & Trimming, Inc.*, 206 F. Supp. 951 (D. Vt. 1962).

⁶ *United States v. City of New Britain*, 347 U.S. 81, 85 (1954); *accord*, *Rankin v. Scott*, 25 U.S. (12 Wheat.) 177, 179 (1827).

⁷ Priority of the federal tax lien is a federal question. *E.g.*, *United States v. Brosnan*, 363 U.S. 237 (1960); *United States v. Acri*, 348 U.S. 211, 213 (1955). However, determina-

standard, the identity of the lienor must be established, the amount of the lien fixed beyond controversy, and the property subject thereto specifically ascertained.⁹ If personal property is involved, it is probable that the non-federal lienor will be required to have divested the taxpayer of both title and possession.¹⁰ The standard has been so stringently applied that the stated priority principle has been rendered essentially nugatory, for the Supreme Court has only twice¹¹ found a sufficiently specific and perfected lien that could maintain its seniority. On the other hand, the standard is not reciprocal, for the general federal lien arises automatically once unpaid taxes are assessed,¹² and for priority purposes is deemed "choate" at that time.¹³

Thus, the federal tax lien statute, which does not in terms confer priority on the United States, is applied by the Supreme Court as if a provision conferring priority did in fact exist. This result transpired when the "choateness" doctrine, originated judicially to superintend the statutory priority of debts due the United States from insolvents,¹⁴ was carried over to the federal tax lien cases.¹⁵ The propriety of this parallel treatment is extremely dubious in the absence of congressional approval, particularly when it has the effect of vitiating the security a creditor may have acquired months or even years before the federal tax lien arose.¹⁶ Furthermore, the

tion of property interests subject to the federal lien is a state question. *E.g.*, *Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Bess*, 357 U.S. 51 (1958). *But cf.* *United States v. R. F. Ball Constr. Co.*, 355 U.S. 587 (1958), *reversing* 239 F.2d 384 (5th Cir. 1956).

⁸ The term has no precise counterpart but may be equated with specificity and perfection. As employed by the Supreme Court there is little resemblance to conventional definitions of these terms. See UNIFORM COMMERCIAL CODE § 9-303. See generally Comment, 54 MICH. L. REV. 829 (1956).

⁹ *United States v. City of New Britain*, 347 U.S. 81 (1954); *accord*, *Illinois v. Campbell*, 329 U.S. 362 (1946). See generally PLUMB & WRIGHT, *FEDERAL TAX LIENS* (1961); Plumb, *Federal Tax Collection and Lien Problems* (pts. 1-2), 13 TAX L. REV. 247, 459 (1958); Sarner, *Correlation of Priority and Lien Rights in the Collection of Federal Taxes*, 95 U. PA. L. REV. 739 (1947).

¹⁰ Compare *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953), *with* *United States v. City of New Britain*, 347 U.S. 81 (1954).

¹¹ *United States v. City of New Britain*, *supra* note 10 (real property); *Crest Fin. Co. v. United States*, 368 U.S. 347 (1961) (assigned accounts receivable). The former case gave rise to the hope that less rigid tests would be applied in federal tax lien cases. See *United States v. Williams*, 139 F. Supp. 94 (M.D.N.C. 1956); Plumb, *supra* note 9, at 469. The more recent decisions cast doubt on this. See, *e.g.*, *United States v. White Bear Brewing Co.*, 350 U.S. 1010 (1956), *reversing* 227 F.2d 359 (7th Cir. 1955).

¹² INT. REV. CODE OF 1954, § 6322.

¹³ See *United States v. City of New Britain*, 347 U.S. 81, 84 (1954); *Beeghly v. Wilson*, 152 F. Supp. 726, 734 (N.D. Iowa 1957) (declaring that the "choateness" tests apply only to non-federal liens).

¹⁴ REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1958). For an excellent discussion of this development, see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 YALE L.J. 905 (1954).

¹⁵ *United States v. Security Trust & Sav. Bank*, 340 U.S. 47 (1950). Previously, lower courts had ignored "choateness" in resolving priorities with the federal tax lien. Many such cases are collected by Kennedy, *supra* note 14, at 924 n.115.

¹⁶ In *United States v. R. F. Ball Constr. Co.*, 355 U.S. 587 (1958), the security had been contracted for two years before the federal tax lien arose.

administrative act of assessment is not open to public scrutiny, so that property apparently unencumbered may actually be burdened by a secret federal tax lien. Although the Government's lien is not effective against subsequent mortgagees, pledgees, purchasers, or judgment creditors until recorded, many entirely legitimate secured interests cannot be brought within these classifications.¹⁷

With disarming simplicity, the principal case exposes the incongruities of the "choateness" doctrine as a device for resolving tax lien priorities, for liens created by exactly similar language must themselves be identical. Since the federal lien is deemed "choate" at its inception, must not the same be true of the state lien? If priorities of "choate" liens are determined on a first in time basis,¹⁸ Vermont's claim must then be entitled to satisfaction ahead of the federal government's. But as the United States pointed out, to be "choate" the nonfederal lien must bind specific property.¹⁹ As the court could not escape the congeniality of the syllogism, it therefore held that the requirement of specificity must not be essential. But the weight, if not the mandate, of precedent does not permit this conclusion. In *United States v. Texas*²⁰ a state tax lien binding all the real and personal property used in the taxpayer's business was held inchoate, as the property was "neither specific nor constant."²¹ In *Illinois v. Campbell*²² the state had recorded a tax lien which bound all personal property used in the taxpayer's business. The Court found the lien to be inchoate, as the taxpayer had not filed with the state a required inventory itemizing the property. Although these decisions were explained in the principal case as applying only to priority under the insolvency statute, the Supreme Court made it clear in *United States v. Scovil*²³ that it draws no such distinction. In that case the federal tax lien preceded a landlord's lien and the taxpayer thereafter became insolvent. Although the United States was entitled to priority under any view, the Court made a point of saying that the landlord's lien was not specific because it could be released by substituting other security, namely, a bond.

The court in the principal case focused on the homogeneity of the state and federal liens, thereby emphasizing the disparate treatment that non-federal liens have received where the "choateness" concept was been utilized to resolve priorities. Further evidence of this lies in the fact that federal tax liens retain their "choateness" although subject to the very same *defects* that render competing liens inchoate. Thus, although demand on the taxpayer is a condition precedent to the formation of the federal lien, once

¹⁷ INT. REV. CODE OF 1954, § 6323(a). Thus, mechanic-lienors, landlords, attaching creditors, sureties, vendors, factors, and state and local taxing units are not protected.

¹⁸ *United States v. City of New Britain*, 347 U.S. 81, 85 (1954).

¹⁹ Principal case at 450.

²⁰ 314 U.S. 480 (1941).

²¹ *Id.* at 487.

²² 329 U.S. 362 (1946).

²³ 348 U.S. 218 (1955).

the demand is made the lien relates back to the date of assessment as far as its priority is concerned;²⁴ the federal lien can be released by furnishing a bond conditioned on payment of the amount assessed;²⁵ and finally, the federal lien embraces property acquired by the taxpayer after the lien has arisen.²⁶ Alternatively, the court could have argued that the state lien was specific because, covering all of the taxpayer's property, no selection or identification was necessary.²⁷ By not doing so the court was able to focus attention more distinctly on the specious and unwarranted process by which nonfederal liens are subordinated to the federal tax lien when Congress has exhibited no such intention.²⁸

In an era of multibillion dollar budgets, collection of the federal revenue is a vital and enormous task.²⁹ Be that as it may, state and local governments are equally dependent on tax receipts to meet their expanding obligations. Furthermore, there is scant justice in taking from business creditors the assurance of security which the law otherwise provides. The "choateness" doctrine has enabled the federal tax lien to gain ascendancy over equally legitimate claims without an intimation by Congress that the national interest requires such a result. The course of decision has run too far and too long for the Court now to re-examine the premises of the doctrine. The uneasy foundation on which the decision in the principal case rests is additional evidence of the need for congressional revision of the tax lien statutes. Unless and until Congress acts to alleviate the imbalance,³⁰ state

²⁴ INT. REV. CODE OF 1954, §§ 6321-22. Competing liens were denied the privilege in *United States v. Reese*, 131 F.2d 466 (7th Cir. 1942); *Streeter Bros. v. Overfelt*, 202 F. Supp. 143 (D. Mont. 1962); *Brown v. General Laundry Serv.*, 113 A.2d 601 (Conn. Super. Ct. 1955), *on remand of United States v. City of New Britain*, 347 U.S. 81 (1954); *cf. United States v. Security Trust & Sav. Bank*, 340 U.S. 47 (1950).

²⁵ INT. REV. CODE OF 1954, § 6325(a)(2). In *United States v. Scovil*, 348 U.S. 218 (1955), property subject to a landlord's lien lacked specificity where it could be released by substituting a bond.

²⁶ *Glass City Bank v. United States*, 326 U.S. 265 (1945); *Treas. Reg. § 301.6321-1* (1954). But a mortgagee, protected by § 6323(a), who, pursuant to a mortgage covenant, has satisfied a lien for local property taxes accruing after the federal lien has arisen, is denied priority for that amount. *United States v. Bond*, 279 F.2d 837 (4th Cir.), *cert. denied*, 364 U.S. 895 (1960); *United States v. Christensen*, 269 F.2d 624 (9th Cir. 1959); *cf. United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84 (1963). *But see Chicago Fed. Sav. & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 185 N.E.2d 670 (1962); *Fischer v. Hoyer*, 121 N.W.2d 788 (N.D. 1963).

²⁷ *State v. Woodroof*, 253 Ala. 620, 46 So. 2d 553 (1950). Compare *Gower v. State Tax Comm'n*, 207 Ore. 288, 295 P.2d 162 (1956); *United States v. South Carolina*, 227 S.C. 187, 87 S.E.2d 577 (1955). *But see Glenn, LIQUIDATION* 734 (1935).

²⁸ Congress has specified priorities in other areas: INT. REV. CODE OF 1954, § 5004 (distilled spirits); REV. STAT. § 3466 (1875), 31 U.S.C. § 191 (1958) (insolvent debtors); BANKRUPTCY ACT § 64, 30 Stat. 563 (1898), as amended, 11 U.S.C. § 104(a) (Supp. IV, 1963).

²⁹ At the end of fiscal 1962 there were 1.056 million delinquent tax accounts totalling \$1.036 billion. During the year \$1.152 billion were collected by direct enforcement. 1962 COMM'R OF INT. REV. ANN. REP. 46-48.

³⁰ Various remedial proposals have been made: AMERICAN BAR ASS'N, FINAL REPORT OF THE COMMITTEE ON FEDERAL LIENS (1959); Kennedy, *supra* note 14, at 932; *see, e.g., S. 1347, H.R. 4952, 4953, 88th Cong., 1st Sess. (1963)*. *See generally Plumb, What Ever Happened to the A.B.A. Federal Tax Lien Legislation?*, 18 BUS. LAW 1103 (1963).

legislatures can well consider reformulating their tax enforcement statutes to take advantage of the equality accorded the Vermont tax lien in this case.

James B. Goodbody

¹ It is not clear whether the beneficiary was to receive only the trust income or a fixed annuity payable out of income and principal. Other cases involving annuities have not distinguished them from a right to receive income. See, e.g., *Fortner v. Phillips*, 124 Ark. 395, 187 S.W. 318 (1916); *Sherman v. Havens*, 94 Kan. 654, 146 Pac. 1030 (1915).

² For discussion of a creditor's right to attach a beneficiary's future interest in the corpus of a trust, see 6 AMERICAN LAW OF PROPERTY §§ 26.96 to .100 (Casner ed. 1952).

³ Although most spendthrift trusts have involved restraints upon an equitable life interest, the same considerations have been held to apply to the right of a beneficiary to receive income until another person shall have attained a certain age. *Beemer v. Challas*, 224 Iowa 411, 276 N.W. 60 (1937); *Weller v. Noffsinger*, 57 Neb. 455, 77 N.W. 1075 (1899). See generally 6 AMERICAN LAW OF PROPERTY § 26.94 (Casner ed. 1952).

⁴ The court in the principal case expressly withheld opinion on the validity of the restraint against voluntary alienation of the beneficiary's right to receive income. While the courts have generally upheld both types of restrictions, the reasoning which has been found to invalidate restraints upon involuntary alienation is inapplicable to restrictions upon voluntary alienation. *Brahmey v. Rollins*, 87 N.H. 290, 179 Atl. 186, 191-92 (1935) (dictum). However, where creditors may reach a *cestui's* interest, a valid restraint upon voluntary alienation will be largely ineffectual, since the *cestui* may incur debts capable of being satisfied by execution. Cf. 1A BOCERT, TRUSTS AND TRUSTEES § 222, at 470 (2d ed. 1951).

⁵ See GRISWOLD, SPENDTHRIFT TRUSTS §§ 2-9 (2d ed. 1947).

⁶ *Brandon v. Robinson*, 18 Ves. 429 (Ch. 1811). For a discussion of the current English practice, see GRISWOLD, *op. cit. supra* note 5, § 429.