

**IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI**

2009-CA-1739

IN RE: THE ESTATE OF RANDALL SCOTT DAVIS

UNITED STATES OF AMERICA,

INTERVENOR-APPELLANT

v.

MISSISSIPPI STATE TAX COMMISSION,

INTERVENOR-APPELLEE

BRIEF OF APPELLEE
MISSISSIPPI STATE TAX COMMISSION

**ON APPEAL FROM THE
MEMORANDUM OPINION AND JUDGMENT OF
THE CHANCERY COURT OF LEE COUNTY, MISSISSIPPI**

ORAL ARGUMENT NOT REQUESTED

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STATEMENT ON ORAL ARGUMENT

Oral Argument Not Requested

The facts and legal issues raised in this case are such that oral argument would not aid the Court in its determination in this matter, therefore the Appellee does not request oral argument in this case.

STATEMENT OF THE ISSUE

The Brief of the United States correctly states the issue before the Court.

STATEMENT OF THE CASE

The Brief of the United States properly states the course of proceedings below and adequately summarizes the facts of the case.

SUMMARY OF THE ARGUMENT

The Mississippi State Tax Commission (hereafter the "Commission") properly enrolled eight (8) Notices of Tax Liens in the Clerk's Office of the Lee County Circuit Court against the Decedent for the subject eight tax periods. The Notices of Tax Liens were entered on the circuit clerk's judgment roles. Pursuant to state statute,

[t]he judgment shall be valid as against mortgagees, pledgees, entrusters, purchasers, judgment creditors, and other persons from the time of filing with the clerk. The amount of the judgment shall be a debt due the State of Mississippi and remain a lien upon all property and rights to property belonging to the taxpayer, both real and personal, including choses in action, with the same force and like effect as any enrolled judgment of a court of record,

Miss. Code Ann. § 27-7-55.

The United States did not file Notices of Tax Liens with the court clerk's office. They rely upon their assessments and probate claim as the basis for their right to recover. This is insufficient to protect its rights under the statutes in question. The federal priority statute does not create a lien and that priority is not the equivalent of a lien for the purpose of displacing a specific and perfected lien of another creditor. The Commission's judgments were properly created and perfected pursuant to Mississippi state law. Accordingly, the Commission is a "judgment lien creditor" entitled to priority over the United States. The judgment of the lower court should be affirmed.

Commission subsequently filed a probate claim against the Estate for the delinquent income taxes on January 5, 2007. (Commission Br. at 2, RE 12).

The Chancellor below rightfully applied Mississippi State Law and found that the liens of the Commission were proper and, once recorded pursuant to Miss. Code Ann. § 27-7-55, made the liens judgments and the Commission a creditor. The lower court found further that by law, the State of Mississippi could determine the Commission satisfied the definition of a “judgment lien creditor.” Finally, the court below found that the Commission “enjoyed a first priority interest in the available assets in the decedent’s estate.” (Mem. Op. and J., RE 37-40).

**Federal Priority Statute versus Antecedent State Tax Lien
Under Federal Tax Lien Act of 1966**

If an entity does not possess enough assets to pay all of its creditors, the creditors receive payment in order of priority. The common law contains the priority principle that “the first in time is the first in right.” *United States v. McDermott*, 507 U.S. 447 (1993). The federal government has passed laws, which supersede the common law rule. One of the oldest is the Federal Insolvency Statute (federal priority statute), 31 U.S.C. § 3713. It provides, in pertinent part, that a federal claim “shall be paid first” when the estate of a deceased debtor is “insolvent” in the sense that its assets are “not enough to pay all debts of the debtor.” In its entirety, the federal priority statute provides:

- (1) A claim of the United States Government shall be paid first when-
 - (A) a person indebted to the Government is insolvent and-
 - (i) the debtor without enough property to pay the debts makes a voluntary assignment of property;
 - (ii) property of the debtor, if absent, is attached; or
 - (iii) an act of bankruptcy is committed; or
 - (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
- (2) This subsection does not apply to a case under title 11.

31 U.S.C. § 3713.

This act had been in existence and virtually unchanged for more than 200 years. However, in 1966 Congress passed the Tax Lien Act, 26 U.S.C. § 6321 *et seq.* Section 6321 provides:

[i]f any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) 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.

The next section of the Tax Lien Act confirms that this lien arises “at the time the assessment is made” by the United States. *Id.* § 6322.

This notwithstanding, Section 6323(a) provides that “[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic’s lienor, or *judgment lien creditor* until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary” of the Treasury. 26 U.S.C. § 6323(a)(emphasis added). Section 6323(f)(1), in turn, provides in pertinent part that the notice shall be filed in an office designated by the state “in which the property subject to the lien is situated.” Section 6323(f)(2) provides that real property is situated “at its physical location” and that personal property is deemed to be situated “at the residence of the taxpayer” when the notice is filed.

The United States Supreme Court in the matter of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), recognized that by enacting the Tax Lien Act of 1966, Congress modified the Federal Government’s preferred position in the tax area and recognized the priority of many state claims over federal tax liens. *Id.* at 738.

The conflict between the federal priority statute and the tax lien act, which is the heart of the matter currently before this Court, was more fully addressed by the United States Supreme Court in *United States v. Estate of Romani*, 523 U.S. 517 (1998). In *Romani*, the Government (IRS) argued that it was entitled to priority over a judgment lien creditor under the federal

priority statute, notwithstanding that it lacked priority under the Federal Tax Lien Act of 1966. The Supreme Court held that a latter recorded federal tax lien did not have priority over a judgment lien that had been perfected under state law, finding that the Federal Tax Lien Act controlled the priority of the competing liens, not the federal priority statute. *Id.* at 534.

In *Romani*, the judgment creditor acquired a valid lien on the judgment debtor's property by recording the judgment in accordance with Pennsylvania law. In the instant matter, the Commission acquired its valid liens on the judgment debtor's property by recording the liens in accordance with Mississippi law. As noted above, pursuant to Miss. Code Ann. § 27-7-55, upon recordation, the judgment is "valid as against mortgagees, pledgees, entrusters, purchasers, judgment creditors, and other persons from the time of filing." The judgment shall be a debt due the State of Mississippi and remain a lien upon all property and rights to property belonging to the taxpayer "with the same force and like effect as any enrolled judgment of a court of record." Miss. Code Ann. § 27-7-55.

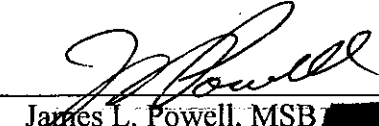

In the instant case, the United States did not file Notices of Tax Liens with the court clerk's office. They rely upon their assessments and probate claim as the basis for their right to recover. This is insufficient to protect its rights under the statutes in question. The federal priority statute does not create a lien and that priority is not the equivalent of a lien for the purpose of displacing a specific and perfected lien of another creditor. *Romani* at 525.

To borrow from Justice Hawkins, "[i]f no notice of lien was filed of public record, then the United States was no more than an unsecured creditor. Insofar as this record is concerned, this is not a case of priority of filing, but no filing whatever of any notice." *See International Harvester Co. v. Peoples Bank and Trust Co.*, 402 So. 2d 856 (Miss. 1981).

Accordingly, the Commission liens should receive priority over the probate claim of the United States and the judgment of the lower court should be affirmed.

Respectfully submitted this 15th day of April, 2010.

MISSISSIPPI STATE TAX COMMISSION

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CERTIFICATE OF SERVICE

I, James L. Powell, attorney of record for the Mississippi State Tax Commission, hereby certify that I have this day caused to be served a true and correct copy of the foregoing Brief of the Appellee, via First Class United States mail, postage prepaid, to the following:

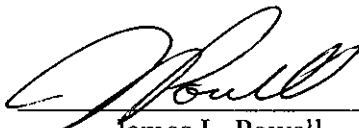
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This the 15th day of April, 2010.



James L. Powell