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IN THE MISSISSIPPI COURT OF APPEALS

No. 2009-CA-1739

IN RE: THE ESTATE OF RANDALL SCOTT DAVIS

UNITED STATES OF AMERICA,

Intervenor-Appellant

v.

MISSISSIPPI STATE TAX COMMISSION,

Intervenor-Appellee

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

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUE

In the probate proceeding of the Estate of Randall Scott Davis, the United States and the Mississippi State Tax Commission filed claims for unpaid taxes. The two governments each argued that their claim was entitled to priority, by virtue of liens arising under statute to secure payment of the taxes. The issue presented is whether the Chancery Court erred in holding that the Mississippi State Tax Commission qualified as a “judgment lien creditor” for purposes of Internal Revenue Code

§ 6323(a) (26 U.S.C.) ("I.R.C."), and that the state's lien therefore has priority over the federal tax lien.

STATEMENT OF THE CASE

The assets of the Estate of Randall Scott Davis are insufficient to satisfy the claims against the estate. In order to determine the priority of claims, the administratrix of the estate filed a petition in interpleader in the probate proceeding. The Chancery Court held that the claim of the Mississippi State Tax Commission had priority over the claim of the United States. The United States now appeals.

STATEMENT OF FACTS

Randall Scott Davis (taxpayer) died on December 6, 2004. (Order 11/21/05 at 1, RE 3.) At the time of his death, taxpayer was delinquent in meeting his federal and Mississippi state income tax obligations for the years 1997 through 2004. (MSTC Br. Ex. A, RE 13-20; Govt Br. Ex. A, RE 21-36.) Between August 8, 2005, and October 3, 2005, the IRS assessed taxpayer's federal tax liabilities for those years. (Govt Br. Ex. A, RE 21-36.)

On October 6, 2005, after the last federal tax assessment was made, the Mississippi State Tax Commission filed in the judgment roll of the Circuit Clerk, Lee County, Mississippi, notices styled "NOTICE OF TAX LIEN (JUDGMENT)" for each

the years 1997 through 2003. (MSTC Br. Ex. A, RE 13-20.) In addition to the taxes, interest, penalties and fees due from taxpayer, each of the notices stated as follows (*ibid.*):

You are hereby commanded to enroll this notice of tax lien upon the judgment roll of your county as a judgment, pursuant to the Mississippi Code of 1972, as amended, which judgment shall be and remain a lien upon all property and rights to property of the judgment debtor until satisfied.

See Miss. Code Ann. § 27-7-55, Addendum, *infra*. On November 15, 2005, the Commission filed a similar notice for the 2004 state tax deficiency. (*Ibid.*)

In February 2006, the IRS filed in the probate of taxpayer's estate in the Chancery Court of Lee County, Mississippi, a proof of claim in the amount of \$209,612.85 for the unpaid federal tax liabilities. (Proof of Claim, RE 4-5.) In January 2007, the Mississippi State Tax Commission filed a proof of claim in the same proceeding in the amount of \$24,768.01. (MSTC Br. at 2, RE 12.)

In November 2006, the administratrix of taxpayer's estate, which had only \$33,254.16 in assets, filed a petition in interpleader in the Chancery Court. (Petition for Interpleader, RE 6-8.) The petition stated that the Mississippi State Tax Commission and the IRS were the only remaining creditors and that the estate's assets were insufficient to satisfy both of them.

(*Id.* at 1-2, RE 6-7.) The administratrix sought to deposit the estate's assets (less \$6,000 for attorney's fees and administrative expenses) into the court so that the court could determine the relative priorities of the two remaining creditors. (*Id.* at 2-3, RE 7-8.)

Counsel for the Mississippi State Tax Commission and the United States negotiated an agreed order that was entered by the court. (Agreed Order, 2/12/07, RE 9-10.) The order granted the petition of the administratrix, stated that there were no facts in dispute, and set a briefing schedule for the priority issue. (*Ibid.*)

In its brief, the Commission argued that the Court had to determine whether the insolvency statute, 31 U.S.C. § 3713(a), Addendum, *infra*, which states that the United States is to be paid first when the estate of a decedent is insolvent, trumps I.R.C. § 6323(a), Addendum, *infra*, which accords priority to a "judgment lien creditor" when no notice of federal tax lien has been filed. (Memo. of Law, 4/24/07.) Relying largely on *United States v. Estate of Romani*, 523 U.S. 517 (1998), the Commission argued that § 6323(a) controlled. The Commission further argued that, pursuant to Miss. Code Ann. § 27-7-55, the notices of tax liens that it filed were judgments and that it was a "judgment lien creditor" within the meaning of § 6323(a). Because no notice of

the federal tax lien had been filed, the Commission maintained that it had priority over the federal tax liens. The Commission further argued that the doctrine of choateness was displaced by the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, and that, at all events, its liens were choate at the time the IRS filed its probate claim. (*Ibid.*)

The United States noted that the insolvency statute provided that the United States was to be paid first, but conceded that, if the Commission qualified as a “judgment lien creditor” under § 6323(a), the Supreme Court’s *Romani* decision established that the insolvency statute did not give priority to the claim of the United States. (Memo. of the U.S., 5/21/07.) The United States contested, however, the claim that the Commission was a “judgment lien creditor” within the meaning of § 6323(a). The United States pointed out that the term “judgment lien creditor” is defined in Treas. Reg. § 301.6323(h)-1(g) (26 C.F.R.), Addendum, *infra*, and argued that Commission did not qualify because its notice of tax lien was not based on a court judgment. The United States acknowledged that Miss. Code Ann. § 27-7-55 accords the Commission’s administratively filed tax liens the same force as a court judgment, but argued that a state statute deeming a state administrative tax lien to be a judgment could

not convert something that was not a judgment as defined by the relevant regulation into a “judgment.” The United States further argued that even before the regulation was enacted, the Supreme Court in *United States v. Gilbert Associates*, 345 U.S. 363 (1953), had established that a state could not define a “judgment lien creditor” for federal tax purposes and had interpreted the term “judgment creditor” to require a court judgment. (*Ibid.*)

The Chancery Court ruled for the Commission. Citing *Estate of Romani*, the court held that if a creditor in competition with the United States is entitled to priority under I.R.C. § 6323, the insolvency statute does not govern the question of priority. (Op. 3, RE 39.) The court concluded that the Commission was a judgment lien creditor for purposes of § 6323(a) and was thus entitled to priority (*id.* at 3-4, RE 39-40):

... Miss. Code Ann. § 27-7-55 statutorily makes a Notice of Tax Lien a judgment and the State of Mississippi a creditor, i.e., the amount of the judgment shall be a debt due the State of Mississippi. By statute the Notice of Tax Lien has the effect of an enrolled judgment. Surely a state can define what does or does not constitute judgment lien creditor. In Mississippi, by statute, a Notice of Tax Lien is more than “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).

The Chancery Court accordingly concluded that “the MSTC enjoys a first priority interest in the available assets in the decedent’s estate.” (*Id.* at 4, RE 40.) This appeal followed.

SUMMARY OF ARGUMENT

A lien arises in favor of the United States to secure payment of delinquent federal taxes. Under the insolvency statute, 31 U.S.C. § 3713, the federal tax lien generally gives the tax claim of the United States priority in the assets of an insolvent debtor, such as the Estate here. Under Internal Revenue Code § 6323, however, where notice of the federal tax lien has not been filed, certain interests, including that of a “judgment lien creditor,” are entitled to priority over the federal tax lien.

The Chancery Court below held that the tax claim of the Mississippi State Tax Commission against the Estate of Randall Scott Davis gave the Commission the status of a “judgment lien creditor,” and that, consequently, its lien was entitled to priority over the federal tax lien. The court concluded that a Mississippi statute stating that the Commission’s tax claim had “the same force and like effect as any enrolled judgment of a court of record” rendered the Commission a “judgment lien creditor.”

The Chancery Court’s holding is contrary to a United States Treasury regulation, to the United States Supreme Court case on

which the regulation is based, and to an unbroken line of case law. The Treasury regulation squarely provides that a court judgment is required to qualify as a “judgment lien creditor,” and reinforces that rule, in language directly applicable here, by providing that the actions of state tax authorities, even pursuant to state law purporting to endow such actions with the status of a judgment, do not render the state a “judgment lien creditor.” The regulation is not contrary to the statutory language, and is based solidly on the decisions of the United States Supreme Court, in particular *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 364 (1953), which held, under circumstances essentially identical to those presented here, that state law giving the status of a judgment to a state’s tax claim does not satisfy the requirement, dictated by the need for uniformity in the law of federal tax liens, of an actual court judgment. The regulation is of long standing and has been followed by every court to consider this issue, except the court below. Moreover, our position is in harmony with *United States v. Estate of Romani*, 523 U.S. 517 (1998), in which the Supreme Court held that the lien priority provisions of I.R.C. § 6323 take precedence over the federal insolvency statute.

The Treasury regulation is controlling here. It compels the conclusion that the State does not qualify as a judgment lien

creditor. Accordingly, the insolvency statute dictates that the claim of the United States has priority. The judgment of the Chancery Court should be reversed.

ARGUMENT

The claim of the United States has priority over the claim of the Mississippi State Tax Commission because the state is not a “judgment lien creditor” under § 6323 of the Internal Revenue Code

A. Introduction

1. The lien provisions of the Internal Revenue Code are intended to ensure prompt and certain enforcement of the tax laws. *United States v. National Bank of Commerce*, 472 U.S. 713, 721 (1985). When a person liable to pay a tax fails to do so after a demand for payment is made, the amount of the tax (together with interest, additions, penalties, and costs) becomes a lien in favor of the United States upon all real and personal property and rights to property belonging to the delinquent taxpayer. I.R.C. § 6321; *Bremen Bank & Trust Co. v. United States*, 131 F.3d 1259, 1262-63 (8th Cir. 1997). The lien arises when the assessment is made and continues until the taxpayer’s liability either is satisfied or becomes unenforceable due to lapse of time. I.R.C. § 6322. An assessment is “a bookkeeping notation . . . made when the Secretary [of the Treasury] or his delegate establishes an

account against the taxpayer on the tax rolls.” *Laing v. United States*, 423 U.S. 161, 170 n.13 (1976); *see* I.R.C. § 6203.

State law determines the nature and extent of a taxpayer’s interests in “property.” *Aquilino v. United States*, 363 U.S. 509, 513 (1960); *United States v. Bess*, 357 U.S. 51, 55 (1958); *Little v. United States*, 704 F.2d 1100, 1105 (9th Cir. 1983). Federal law, however, governs the relative priority accorded to the federal tax lien and claims asserted by third-party creditors of the delinquent taxpayer. *Aquilino v. United States*, 363 U.S. at 513-14; *Bremen Bank*, 131 F.3d at 1263. Absent an express federal statutory provision to the contrary, the priority of a federal tax lien in competition with a state-created lien is governed by the common-law rule that “the first in time is the first in right.” *United States v. McDermott*, 507 U.S. 447, 449 (1993); *United States v. Equitable Life Assurance Soc’y*, 384 U.S. 323, 327, 330 (1966); *United States v. City of New Britain*, 347 U.S. 81, 87 (1954).

Section 6323(a) of the Code provides an exception to the common law rule. Under § 6323(a), “the 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.” I.R.C. § 6323(a). Section (f)

generally provides that the notice is filed on a form created by the IRS, but that state law governs the place where the form is to be filed.

2. When the delinquent taxpayer is insolvent, an additional statute comes into play. The insolvency statute, 31 U.S.C. 3713, provides:

§ 3713. Priority of Government claims

(a)(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 all 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.

11. (2) This subsection does not apply to a case under title

* * * *

Despite its sweeping language, the insolvency statute does not completely override the general scheme for the enforcement of

federal tax liens. The Supreme Court in *United States v. Estate of Romani*, 523 U.S. 517 (1998), held that the insolvency statute does not apply in situations where the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125, 26 U.S.C. § 6321, *et seq.*, provides that the federal tax lien “shall not be valid” (I.R.C. § 6323(a)).

Here, the Chancery Court concluded (op. 3, RE 40) that § 6323 governs the priority question *if* the Mississippi State Tax Commission qualifies as a judgment lien creditor within the meaning of that statute. That conclusion is correct. But if the Commission does not qualify as a judgment lien creditor, *Estate of Romani* does not control this case. Rather, because the Estate is insolvent, the insolvency statute dictates that the claim of the United States has priority. As we demonstrate below, the court erred in concluding that the Commission was a “judgment lien creditor” entitled to priority under the Federal Tax Lien Act of 1966, *i.e.*, I.R.C. § 6323.

B. The Chancery Court erred in concluding that the Mississippi State Commission is a “judgment lien creditor” with the meaning of I.R.C. § 6323

1. Section 6323(a) of the Internal Revenue Code provides that (emphasis added):

The 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.

The term "judgment lien creditor" is not defined in the statute. Rather, the regulations implementing the statute provide the definition. In this regard, Treas. Reg. § 301.6323(h)-1(g) states (emphasis added):

(g) Judgment lien creditor. The term "judgment lien creditor" means *a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. 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.*

The Mississippi State Tax Commission did not obtain a judgment from any court and thus is not "a person who has

obtained a valid judgment, in a court of record and of competent jurisdiction.” Consequently, it did not satisfy the regulation’s threshold requirement for judgment-lien-creditor status. *See In re South Independence, Inc.*, 256 B.R. 861, 867 (Bankr. E.D. Va. 2000) (Virginia statute declaring state fuel tax liens to be judgments did not satisfy regulation because “anything less than a judgment in a court of record with competent jurisdiction will not suffice”).

The Chancery Court did not address the regulation’s requirement that there be a court judgment. It instead focused on the express exclusion in the regulation which states that “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.” The court concluded that Miss Code Ann. § 27-7-55 deemed the tax lien to have the effect of an enrolled judgment and that, consequently, the tax lien did not come within the exclusion. As an initial matter, the court’s conclusion that the Mississippi statute makes the regulation’s exclusion inapplicable is contrary to the language of the exclusion. The state taxing authority’s determination is that of a quasi-judicial body or an individual acting in a quasi-judicial capacity. Thus, the regulation – the governing federal

law – provides that the state’s tax claim does not constitute a judgment for purposes of qualifying as a “judgment lien creditor.” Attaching the label of “judgment” to the determination does not change the status of the body or individual that rendered the determination.

Moreover, even if the Mississippi statute could make the regulatory exclusion inapplicable, all that the court’s holding demonstrates is that the exclusion does not apply. It does not demonstrate that the regulation’s threshold requirement of a court judgment is satisfied. In other words, the exclusion provision confirms what the first sentence of the regulation states: nothing less than a “valid judgment, in a court of record and of competent jurisdiction” suffices to qualify a creditor competing with the federal tax lien as a “judgment lien creditor.” To hold in favor of the Commission, as the court below did, contravenes both the first and last sentences of the regulation.

2. The Chancery Court’s erroneous conclusion appears to have resulted from a misunderstanding of the role of state law in determining federal tax lien priorities. According to the court, “a state can define what does or does not constitute a judgment lien creditor.” (Op. 4, RE 40.) The status of “judgment lien creditor,” however, is a creature of a federal statute, *viz.*, I.R.C. § 6323(a).

The meaning of “judgment lien creditor” thus is determined, for purposes relevant here, as a matter of federal law.¹ See *United States v. Craft*, 535 U.S. 274, 288 (2002) (“The interpretation of 26 U.S.C. § 6321 is a federal question, and in answering that question we are in no way bound by state courts’ answers to similar questions involving state law”); *Drye v. United States*, 528 U.S. 49, 58 (1999) (“We look . . . to federal law to determine whether the taxpayer’s state-delineated rights qualify as ‘property’ or ‘rights to property’ within the compass of the federal tax lien legislation”); *United States v. Acri*, 348 U.S. 211, 213 (1955) (“The relative priority of the lien of the United States for unpaid taxes is . . . always a federal question . . . The state’s characterization of its liens, while good for all state purposes, does not necessarily bind this Court.”); *United States v. Gilbert Associates, Inc.*, 345 U.S. 361, 364 (1953) (“the meaning of a federal statute is for this Court to decide”); *United States v. Security Trust and Savings Bank of San Diego*, 340 U.S. 47, 49 (1950) (“The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a

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This rule does not prevent the Mississippi legislature from defining what does or does not constitute a judgment lien creditor for any *state-law* purpose.

federal question”); *Air Power, Inc. v. United States*, 741 F.2d 53, 57 (4th Cir. 1984) (the meaning of the term “judgment lien creditor” in § 6323(a) is governed by federal law).

Here, as discussed above, there is a federal regulation defining the statutory term at issue. Such regulations are controlling unless unreasonable or plainly inconsistent with the statute. *Cottage Savings Ass’n v. Commissioner*, 499 U.S. 554, 561 (1991); *Khan v. United States*, 548 F.3d 549, 554 (7th Cir. 2008). The regulation at issue has been in effect since 1976. *See* T.D. 7429, 1976 WL 191525, 1976-2 C.B. 396. A regulation that 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.” *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001). The Chancery Court did not hold that the regulation was unreasonable or plainly inconsistent with I.R.C. § 6323(a), nor did the Commission contend that it was. Thus, the Treasury Regulation should control the outcome of this case. *See C.I.T. Corp. v. United States*, 344 F. Supp. 1272, 1276 (D. Cal. 1972) (a state statute cannot create “judgment lien creditor” status under § 6323(a)); *United States v. Zuetell*, 138 F. Supp. 857, 858 (S.D. Cal. 1956); *Mercantile Acceptance Corp. v. Dostinisch*, 51 A.F.T.R.

1219 (S.D. Cal. 1956); *United States v. McGehee*, 237 Ark. 698, 375 S.W.2d 365 (Ark. 1964).

3. An issue not meaningfully distinguishable from the one presented here was decided in favor of the United States in *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953). The Chancery Court did not address the argument of the United States based on *Gilbert*. That case predates the enactment of the Federal Tax Lien Act of 1966 and it provided the underpinning for the definition of “judgment lien creditor” adopted in Treas. Reg. § 301.6323(h)-1(g). *See Reed v. Civiello*, 297 F. Supp. 2d 1008, 1014 (N.D. Ohio 2003) (describing IRS regulation as “codifying the holding of *Gilbert*”).

Gilbert involved a tax lien priority issue between the United States and the Town of Walpole, New Hampshire. The statute relevant there was Section 3762 of the Internal Revenue Code of 1939, the predecessor of current I.R.C. § 6323(a). Section 3762 provided that the lien of the United States “shall not be valid as against any . . . judgment creditor until notice thereof has been filed by the collector” The central issue in *Gilbert* was whether the competing state taxing authority was a “judgment creditor” under the relevant Internal Revenue Code provision. The Supreme Court of New Hampshire held that the Town’s tax

assessments are “in the nature of a judgment” under the law of New Hampshire and that consequently the Town was a judgment creditor within the meaning of § 3672.

The Supreme Court of the United States reversed. The Court initially observed that the “meaning of a federal statute is for this Court to decide.” 345 U.S. at 363. It then discerned that Congress was concerned with uniformity and intended that the term “judgment creditor” “should have the same application in all the states.” *Id.* at 364. The Court stated that “Congress used the words ‘judgment creditor’ in § 3672 ‘in the usual, conventional sense of a judgment of a court of record, since all states have such courts.’ *Id.* (footnote omitted). The Court further explained that Congress, in defining a judgment lien creditor, did not “have in mind the action of taxing authorities who may be acting judicially as in New Hampshire and some other states, where the end result is something ‘in the nature of a judgment,’ while in other states the taxing authorities act quasi-judicially and are considered administrative bodies.” *Id.* (footnotes omitted). The Court concluded that “whatever the tax proceedings of the Town of Walpole may amount to for the purposes of the State of New Hampshire, they were not such proceedings as resulted in making

the Town a judgment creditor within the meaning of § 3672.” *Id.* at 365.

Having resolved that § 3672 was not applicable, the Court then noted that the taxpayer was insolvent and looked to the version of the insolvency statute (§ 3466 of the Revised Statutes) then in effect. The Court held that “[w]here the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States.” *Id.* at 366.

The Commission argued in the court below that the *Gilbert* decision was inapposite because it was issued prior to the Federal Tax Lien Act of 1966. That argument is unpersuasive. First, as a general matter, Congress is presumed to be aware of the contemporary legal context when it enacts a statute. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 188 (1996). Thus, absent some indication that Congress rejected *Gilbert*, the decision remains precedential. Moreover, relevant legislative history demonstrates that when Congress enacted the current version of § 6323(a), it was well aware of the predecessor statute interpreted in *Gilbert* and indicated that the new statute generally retained the “basic rule of Federal law” provided by the prior provision. H.R. Rep. No. 89-1884 at 35 (1966); *cf.* Hearings

on H.R. 11256 and 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 45 (1966) (Treasury official explains that in two initial bills “[t]he terms ‘purchaser’ and ‘judgment creditor’ are retained without change”). If anything, Congress through the Federal Tax Lien Act of 1966 restricted the types of creditors that were protected by substituting the narrower term “judgment lien creditor” for the broader term “judgment creditor.” See 5 Laurence F. Casey, *Federal Tax Practice* § 14:40 (2009); see also *Air Power, Inc.*, 741 F.2d at 56 n.3 (addition of the word “lien” did not alter the definition courts had traditionally given to “judgment creditor” in the prior statutes).

In keeping with *Gilbert*, every court to have considered the question, with the exception of the Chancery Court here, has agreed that federal law controls, and that the term “judgment lien creditor” (or “judgment creditor” under the earlier version of the statute) cannot depend on the vagaries of state law. See, e.g., *Air Power, Inc. v. United States*, 741 F.2d at 57 (“Courts have confirmed congressional intent in this area by holding uniformly that judgment lien priority is governed by federal law and federal concerns”); *Reed v. Civiello*, 297 F. Supp. 2d at 1014 (filing of state tax assessment in court of common pleas did not endow state with status of judgment lien creditor; citations collected); *In re South*

Independence, Inc., 256 B.R. 861, 866 (E.D. Va. 2000) (“The [Virginia] state statute, however, is not determinate of whether it is a judgment, because federal law governs the actual legal effect of the judgment for tax priority purposes”; internal quotation marks and citation omitted); *United States v. R & E Corp.*, 1999 WL 680376 at *6 (E.D. Pa. 1999) (state did not qualify as “judgment lien creditor” by virtue of statute providing that notices of tax liens were “entered of record and indexed as judgments”); *Marriage of Foust v. Foust*, 1997 WL 1037872 at *7 (S.D. Ind. 1997) (although state’s tax claim was deemed a “judgment lien” under state law, without a court judgment, state did not qualify as a judgment lien creditor); *Brown v. Maryland*, 699 F. Supp. 1149, 1153 (D. Md. 1987) (“The term ‘judgment creditor’ must have the same application in all states, and the uniform definition adopted by the I.R.S. is the one to be applied here”), *aff’d on other grounds*, 862 F.2d 869 (4th Cir. 1988) (table); *United States v. State of New York*, 1987 WL 9392 at *4-*5 (W.D.N.Y. 1987) (filing of state tax warrant in judgment docket of county clerk did not make state a “judgment lien creditor”); *United States v. Zuetell*, 138 F. Supp. 857, 858 (S.D. Cal. 1956) (statute providing that State’s lien for unpaid taxes “has the force, effect, and priority of a judgment lien” did not render the state a

“judgment creditor” under federal law); *Mercantile Acceptance Corp. v. Dostinisch*, 51 A.F.T.R. 1219, 1956 WL 10407 (S.D. Cal. 1956) (same); *United States v. McGehee*, 237 Ark. 698, 702, 375 S.W.2d 365, 368 (1964) (a “state may make whatever provisions it desires for the internal administration of its own tax laws,” but “the interpretation of federal statutes is a federal question”).

In sum, the Treasury Regulation expressly provides that a court judgment is required before a creditor can qualify as a “judgment lien creditor,” and reinforces that rule, in language directly applicable here, by explaining that the actions of state tax authorities do not render the state a “judgment lien creditor,” notwithstanding state law attempting to elevate such actions to the status of a court judgment. The Regulation is of long standing, is not contrary to the statutory language, and is based solidly on the case law of the United States Supreme Court, in particular *Gilbert*, which held, under circumstances essentially identical to those presented here, that state law giving the status of a judgment to a state’s tax claim does not satisfy the uniform federal requirement of an actual court judgment. The Regulation, therefore, is controlling here. Because the Commission does not qualify as a judgment lien creditor, the insolvency statute governs

the priority question. Under that statute, the federal tax claim must be paid first.

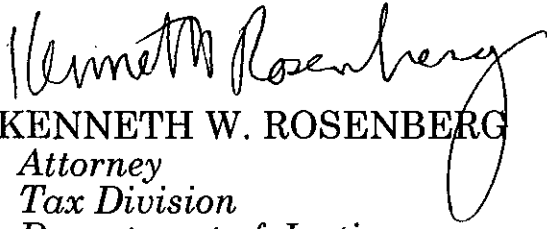
The Chancery Court accordingly erred in holding that the claim of the Mississippi State Tax Commission is entitled to priority over the federal tax lien.

CONCLUSION

For the foregoing reasons, the judgment of the Chancery Court should be reversed.

Respectfully submitted,

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ADDENDUM

Internal Revenue Code (26 U.S.C):

§ 6323. Validity and priority against certain persons

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors.--The 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.

Mississippi Code :

§ 27-7-55. Tax collection; enrolling judgment

If any taxpayer, liable for the payment of income taxes, penalties or interest, fails or refuses to pay them after receiving the notice and demands as provided in Sections 27-7-49, 27-7-51 and 27-7-53, and if the taxpayer has not filed a timely appeal to the board of review as provided by law, the commissioner shall file a notice of tax lien for the income taxes, penalties and interest with the circuit clerk of the county in which the taxpayer resides or owns property, which shall be enrolled on the judgment roll. Immediately upon receipt of the notice of tax lien for income taxes, penalties and interest, the circuit clerk shall enter upon the judgment roll, in the appropriate columns, the name of the taxpayer as judgment debtor, the name of the commissioner or State Tax Commission as judgment creditor, the amount of the taxes, penalties and interest, and the date and time of enrollment. The 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, and shall continue until satisfied; however, the

judgment shall not be a lien upon the property of the taxpayer for a longer period than seven (7) years from the date of the filing of the notice of tax lien for income taxes, penalties and interest unless an action is brought on the lien before the expiration of such time or unless the commissioner refiles the notice of tax lien before the expiration of such time. The judgment shall be a lien upon the property of the taxpayer for a period of seven (7) years from the date of refileing such notice of tax lien unless an action is brought on the lien before the expiration of such time or unless the commissioner refiles such notice of tax lien before the expiration of such time. There shall be no limit upon the number of times that the commissioner may refile notices of tax liens. The judgment shall serve as authority for the issuance of writs of execution, writs of attachment, writs of garnishment or other remedial writs. The commissioner may issue warrants for collection of income taxes from such judgments in lieu of the issuance of any remedial writ by the circuit clerk.

31 U.S.C. § 3713. Priority of Government claims

(a)(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 all 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.

Treasury Regulations on Procedure and Administration (26

C.F.R.):

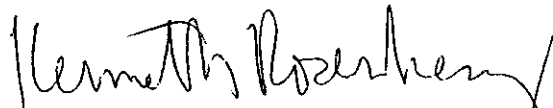
§ 301.6323(h)-1 Definitions.

(g) Judgment lien creditor. The term “judgment lien creditor” means a person who has obtained a valid judgment, in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money. In the case of a judgment for the recovery of a certain sum of money, a judgment lien creditor is a person who has perfected a lien under the judgment on the property involved. A judgment lien is not perfected until the identity of the lienor, the property subject to the lien, and the amount of the lien are established. Accordingly, a judgment lien does not include an attachment or garnishment lien until the lien has ripened into judgment, even though under local law the lien of the judgment relates back to an earlier date. If recording or docketing is necessary under local law before a judgment becomes effective against third parties acquiring liens on real property, a judgment lien under such local law is not perfected with respect to real property until the time of such recordation or docketing. If under local law levy or seizure is necessary before a judgment lien becomes effective against third parties acquiring liens on personal property, then a judgment lien under such local law is not perfected until levy or seizure of the personal property involved. 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.

CERTIFICATE OF SERVICE

It is hereby certified that four copies of these record excerpts were filed with the court on this 12th day of February, 2010. It is further certified that on this 12th day of February, 2010, the record excerpts was served on counsel for the appellee, via First-Class Mail, by sending him two copies thereof in an envelope properly addressed as follows:

James L. Powell, Esq.
Mississippi State Tax Commission
P.O. Box 1033
Jackson, Mississippi 39215-1033

A handwritten signature in black ink, appearing to read "Kenneth W. Rosenberg", written over a horizontal line.

KENNETH W. ROSENBERG
Attorney