

(Cite as: 1996 WL 332061 (Bankr.D.Vt.))

In re Harriet BOURQUE, Debtor.

Harriet BOURQUE, Plaintiff

v.

UNITED STATES of America and Internal Revenue Service Defendants.

Bankruptcy No. 95-10652.

Adv. No. 95-1086.

United States Bankruptcy Court. D. Vermont.

June 10, 1996.

J.B. Anderson, Ryan Smith & Carbine, Ltd., Rutland, Vermont, for Harriet Bourque (Debtor).

C. Baril, Assistant U.S. Attorney, Rutland, Vermont, for the United States on behalf of the Internal Revenue Service (IRS).

K. Purcell, Office of the U.S. Trustee, for the U.S. Trustee.

MEMORANDUM DECISION GRANTING THE IRS' MOTION FOR SUMMARY JUDGMENT

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** Before us [FN1], on cross-motions for summary judgment, comes a tax question of first impression for this court: May the IRS file duplicate notices of tax liens? We hold that nothing prohibits the IRS from so doing.

FACTS

Debtor's tax liabilities mounted during her late husband's seven year battle with cancer. Several notices of tax lien were filed against her property, two of which are the subject of debate in this proceeding. Both parties agree that the relevant facts are as follows:

The \$36,305.46 lien dated January 29, 1994...[and recorded February 7, 1994] secures the same tax deficiencies for the same years as the \$39,677.03 lien dated January 29, 1994 and... [recorded February 15, 1994]. The only difference is the [larger] lien...includes one additional tax year ending December 31, 1992 and an additional lien in the amount [sic] \$3,371.57. In all other respects, the two liens are identical and were recorded eight days apart.

Debtor contends that the IRS may not file two notices covering the same tax assessment. The duplicate notice being improper, Debtor seeks to avoid the lien under her §522(h) powers to avoid certain liens that impair her exemptions, in this case, her late husband's life insurance proceeds. The IRS counters that it is permitted to file duplicative notices of tax liens. It argues that the lien is valid and was properly recorded. No claim is being made here by the IRS that it should be paid for both notices.

Both parties have moved for summary judgment, contending that there are no issues of material fact in dispute. We agree. The question of law before us is solely whether the IRS lien is avoidable by Debtor because it is not a "tax lien, notice of which is properly filed." [FN2]

DISCUSSION

Debtor contends that the IRS lien in question is avoidable because it violates the plain language of 26 USC §6321, which authorizes IRS liens. The statute states in pertinent part:

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.

Debtor believes that Congress' use of the singular form of the words "tax" and "lien" precludes the IRS from filing two notices for the same tax delinquency. This preclusion from filing duplicate notices is essential to Debtor's ability to avoid such liens. Ordinarily, a debtor may not avoid IRS liens on exempt property because 11 USC §522(c)(2)(B) states that property exempted under the code is no longer liable for any pre-bankruptcy debt EXCEPT a "tax lien, notice of which is properly filed." In this instance, Debtor claims that because the IRS violated §6321 by filing two liens for the same delinquency, the lien is not technically a "tax lien, notice of which is properly filed" and thus may be avoided.

Debtor's argument, while creative, has a major flaw, one which the IRS exposed in its brief. Debtor has confused the term "lien" with the phrase "notice of lien." Section 6321 does not pertain to the filing of the notice of tax liens; it only refers to the creation of a lien. Under that section, liens are automatically created in the United States' favor whenever a delinquency arises. There is no prohibitive language in that section. The use of the singular follows the phrase "any tax" because each and every delinquent tax automatically creates a

lien.

***2** The IRS is not protected, however, by the mere existence of a lien. While the lien created by §6321 is valid against the debtor, it is not valid against certain third parties unless and until notice of the lien is properly filed. 26 USC §6323. Also, as noted above, 11 USC §522(c)(2)(B) only protects the IRS from avoidance in bankruptcy if the notice of lien is properly filed. Section §6323 prescribes a procedure for filing notices to make the liens valid as against purchasers and certain lienholders. The section requires that notices be filed in the form prescribed by the Secretary of the Treasury and in the location that is customary for the state where the property is located. 26 USC §6323(f). The regulations merely provide that the notice of lien must identify the taxpayer, the amount of the tax and the date of the assessment. 26 CFR §301.6323(f)-1(c). Minor defects in the above requirements can be overlooked because the main purpose of the section is to give constructive notice of a tax assessment, not to give an accurate picture of the taxpayer's liability. *United States v. Schroeder*, 900 F2d 1144, 1149 (7th Cir. 1990).

There is neither permissive nor prohibitive language in this section with regard to duplicative notices of an original lien that arose automatically when the tax became delinquent. The IRS contends that its authority to file duplicative notices stems from subsection (g) of §6323 [FN3] which pertains to refiling of notices. IRS argues that because it may refile a notice of tax lien before the original notice expires and because it may have that refiled notice relate back to the original notice, duplicative notices must be treated as valid refiled notices that relate back to the original notice. See 26 CFR 301.6323(g)-1(a)(1) &(2). Debtor, on the other hand, argues that §301.6323(g)-1(a)(2) applies only to the mandatory refiling of notices described in § 301.6323(g)-1(a)(1) that takes place when a debtor relocates or when the original lien is about to expire, not to duplicative notices filed within a week of each other. We agree with Debtor in this respect because properly refiled notices that meet the requirements of §301.6323(g)- 1(b)&(c) are those notices which are filed within the refiling period and those which follow a debtor's relocation. We nonetheless find authority to file duplicative notices elsewhere.

Section 301.6323(g)-1(a)(4) of title 26 of the Code of Federal Regulations states:

If a notice of lien is not refiled, and if the lien remains in existence, the Internal Revenue Service may nevertheless file a new notice of lien either on the form prescribed for the filing of a notice of lien or on the form prescribed for refiling a notice of lien. This new filing must meet the requirements of section 6323(f) and §301.6323(f)-1 and is effective from the date on which such filing is made.

This language authorizes the IRS to file new notices of an existing lien at any time as long as the notice meets the requirements for filing original notices of tax liens. Also, any new notice filed is effective on the date of such new notice. Thus, the second notice that the IRS filed in

this case does not, as the IRS contends, relate back to the original notice because the notice in question was filed as an original notice; it was not a properly refiled notice that would relate back to the original notice. This directive is clear.

***3** Another source of authority for the IRS exists in §301.6323(g)- 1(a)(1). It states:

In the event that two or more notices of lien are filed with respect to a particular tax assessment, the failure to comply with the provisions of paragraphs (b)(1)(i) and (c) of this section in respect of one of the notices of lien does not affect the effectiveness of the refiling of any other notice of lien.

This section appears to pertain to the refiling of a notice when there already exists two notices, not merely the interaction between refiled notices. Other sections handle how a refiled notice affects the original notice. In simpler terms, it states that if there already exist two notices of the same tax assessment and a refiling of one of the original notices is improper, a proper refiling of the other notices would be valid. This section is quite understandable in light of the complex refiling requirements involved when a debtor relocates. See 26 CFR §301.6323(g)-1(b)(3), ex's 1-7. It clearly contemplates multiple filings. The IRS can and probably should protect itself in instances of a debtor's relocation by filing and refiling multiple notices.

Both of the above cited sections suggest that the IRS has the authority to file multiple notices of lien. Indeed the sections would be unnecessary without the existence of multiple notices. Further, there are no statutory sections prohibiting such an action by the IRS.

Our case law search shows no other cases with the precise challenge that Debtor has presented today. In one case, a debtor made a "conclusory allegation" that a duplication of liens by the IRS should render the duplicates void, but the court ruled that such allegations were insufficient to forestall summary judgment against the debtor. *Rochowicz v. United States*, 1993 WL 596262, *6 (C.D.Cal.1993). Other cases either described duplicate liens without questioning their validity or simply concluded that since the IRS did so, it must have been permitted to do so. See *Griswold v. United States*, 59 F3d 1571, 1578 (CA 11, 1995); *Bell v. Agents for International Monetary Fund*, 1995 WL 783672, *5 (E.D.Cal.1995); *In Re Lassiter*, 104 B.R. 119, 120 (Bkcty.S.D.Iowa 1989). Although our statutory search delved a bit deeper into the bowels of IRS authority, we nonetheless similarly conclude that the IRS can file duplicate notices of its statutory liens.

The IRS' motion for summary judgment is **HEREBY GRANTED**. IRS is to submit an order within five days.

FN1. Our subject matter jurisdiction over this controversy arises under 28 USC §1334 (b) and the General Reference to the Court under Part V of the Local District Court

Rules for the District of Vermont. This is a core matter under 28 USC §157(b)(2)(A). This Memorandum of Decision constitutes findings of fact and conclusions of law under F.R.Civ.P. Rule 52, as made applicable by Fed.R.BkrctyP. Rule. 7052.

FN2. 11 USC §522(c)(2)(B) allows avoidance of liens upon exempt property except "a tax lien, notice of which is properly filed."

FN3. 26 CFR §301.6323(g)-1 provides that a notice of lien filed within the refiling period "is effective as of the date on which the notice of lien to which it relates is effective."

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