

OPINION NO. 87-075**Syllabus:**

When a debtor in possession of real property voluntarily dismisses a bankruptcy action brought for reorganization under the federal Bankruptcy Act (11 U.S.C. Chapter 11), the lien for real estate taxes, penalties, and interest created by R.C. 323.11 attaches to land that was part of the bankruptcy estate. Dismissal of the bankruptcy action revives the obligation to pay interest on delinquent taxes and penalties in accordance with R.C. 323.121, including interest that would have accrued during the pendency of the bankruptcy but for the bankruptcy filing. The obligation of the debtor to pay such taxes, penalties, and interest is secured by the lien created under R.C. 323.11. If the debtor transfers the property after dismissing the bankruptcy action, the land remains subject to the lien, and the lien continues until the taxes, penalties, and interest are fully paid.

To: Phillip Brumbaugh, Darke County Prosecuting Attorney, Greenville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 15, 1987

I have before me your request for my opinion regarding the effect of an 11 U.S.C. Chapter 11 bankruptcy proceeding on real property taxes. You asked:

Where an owner, as debtor in possession, is subject to Chapter 11 Bankruptcy Proceedings, are the penalty and interest provisions of R.C. 323.121 upon delinquent real estate taxes abated during the pendency of such bankruptcy proceedings?

Your letter also included the following description of the facts:

As a factual background upon the foregoing question, we are presently concerned with three separate parcels of real estate located in Darke County, Ohio, and owned by a single individual. On November 24, 1981, this individual filed for relief under 11 U.S.C. Chapter 11, with these parcels listed as assets of the estate, and the County Treasurer being set forth as a creditor. In that the real

estate taxes on each of these parcels had been delinquent since the 1979 tax year, at the time of the filing of the Bankruptcy Petition, there were already delinquent taxes and penalties due. There would not have been any interest charges due on the delinquencies at that time in that the amendment to R.C. 323.121 adding the interest provisions did not become effective until September 21, 1982. Although the delinquent taxes were listed as debts in the original schedule set forth by the Debtor in possession, no penalties, and of course no interest, were so listed; nor was a proof of claim ever filed on behalf of the Treasurer setting forth such penalties and interest.

Some time in the first part of 1985, the Debtor voluntarily terminated his Chapter 11 plan and thus there were no specific discharges of any delinquent real estate taxes, penalties or interest, which had continually accumulated throughout this period. After the termination of the bankruptcy proceedings, the Debtor voluntarily conveyed these parcels to the presently concerned taxpayer who has since tendered payment of all delinquencies, but claims that neither the penalties nor the interest should have accrued during the term of the bankruptcy proceedings of his predecessor in title. Considering such an attempted partial payment, such tender was refused by the County Treasurer.

I have also received additional correspondence from your staff which indicates that no Chapter 11 reorganization plan was actually filed or approved by the bankruptcy court. Instead, the debtor voluntarily terminated the bankruptcy action prior to filing a reorganization plan.

At the outset, I am mindful of the general rule that real property taxes are taxes upon the land, not upon the owner of the land. Therefore, such taxes run with the land. See Southern Ohio Savings Bank & Trust Co. v. Bolce, 165 Ohio St. 201, 135 N.E.2d 382 (1956). Also, the lien for such taxes secures not only the tax itself but also any penalties, interest or other charges which may accrue. R.C. 323.11. Your question makes specific reference to R.C. 323.121. That section establishes formulae for the calculation of interest on delinquent real property taxes, and the placement of the interest charges upon the county tax duplicate and tax list. There is no express provision in R.C. 323.121 which suggests that interest and related charges upon delinquent taxes should be abated during the pendency of a bankruptcy proceeding.¹

¹ R.C. 343.121(B)(3) does make allowance for abating certain interest charges and penalties where a taxpayer has entered a "valid undertaking" with the county treasurer under R.C. 323.31. R.C. 323.31 is a special remedial provision which allows a delinquent taxpayer to arrange for an installment plan to pay delinquent taxes, and thus avoid foreclosure. The statute imposes very specific requirements upon establishment of such an undertaking, and I will assume, for purposes of this opinion, that no such undertaking was entered with respect to the three parcels of land in question.

Therefore, resolution of your question requires examination of the bankruptcy law.²

The goal of a Chapter 11 reorganization is to avoid liquidation of the debtor's assets, and thus allow the debtor to repay creditors over time. One commentator has described the process as follows:

The Chapter 11 remedy envisions the debtor filing a petition for relief with the United States Bankruptcy Court and through its processes...giving the debtor a breathing spell free of hostile litigation for awhile to reorganize by such methods as selling some assets, borrowing money or changing methods of operation. A plan of reorganization is to be prepared and submitted to creditors which plan must promise creditors at least as much and probably more than they would receive upon Chapter 7 liquidation. If the plan meets necessary statutory standards the court orders it confirmed and it becomes binding upon creditors even if they voted against it.

Cowans, Bankruptcy Law and Practice, §20.1 p. 246 (1986).

11 U.S.C. §301 (1985) states, in part, that "[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter...." You indicate that the debtor filed such a petition for financial reorganization under 11 U.S.C. Chapter 11. One consequence of this filing is the creation of the bankruptcy estate. This estate is created by virtue of 11 U.S.C. §541 (1985),³ which provides in pertinent part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such

² I will be citing to the 1985 edition of the Bankruptcy Code, the year in which the proceeding was terminated. Although the Bankruptcy Code was amended in 1984, see Pub. L. No. 98-353. 98 Stat. 333 (1984), no significant changes were made in any of the portions cited in this opinion. Thus, the analysis in this opinion applies for periods before and after these amendments. However, for purposes of comparison, I have included in the notes the earlier language of those code sections in which amendments were made.

³ Prior to 1984, 11 U.S.C. §541 provided in pertinent part:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. (Emphasis added.)

The legislative history of paragraph 541(a)(1) indicates that "[t]he scope of this paragraph is broad. It includes all kinds of property, including tangible and intangible property...." S. Rep. No. 989, 95th Cong., 2d Sess. 82 (1978). Thus, upon filing, the three parcels of land became property of the bankruptcy estate.⁴

The bankruptcy filing also had the effect of staying creditors from taking action to enforce their rights against the property in the bankruptcy estate. This stay arose by virtue of 11 U.S.C. §362 (1985)⁵ which provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, ...operates as a stay, applicable to all entities, of--

...

(4) any act to create, perfect, or enforce any lien against property of the estate;

....(Emphasis added.)

This stay bars, inter alia, efforts to create, perfect or enforce any lien arising from delinquent property taxes. See In Re Stack Steel & Supply Co., 28 Bankr. 151 (Bankr. W.D. Wash. 1983). §362(c)(1) goes on to provide that "the stay of an act against the property of the estate under subsection (a) of this section continues until such property is no longer property of the estate." Thus, any liens upon the three parcels that arose prior to the bankruptcy filing could not be enforced, and liens on the three parcels that would otherwise arise after filing could not be created, so long as the parcels remained in the bankruptcy estate.

⁴ In a Chapter 11 reorganization, the debtor generally maintains much of the control over the bankruptcy estate. In such a situation, the debtor is known as the "debtor in possession." See 11 U.S.C. §§1101, 1107, and 363. However, control may also be given to a trustee. See 11 U.S.C. §1104. The analysis in this opinion applies in either situation.

⁵ Prior to 1984, 11 U.S.C. §362 provided in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of --

....

(4) any act to create, perfect, or enforce any lien against property of the estate;

....

Although liens may not be created or enforced during the pendency of the bankruptcy estate, it is evident from the language of 11 U.S.C. §503 (1985) that taxes and penalties continue to accrue during that period.⁶ This section reads in part as follows:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)

....

(B) any tax--

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title;

....

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

See also Berryhill v. Gerstel, 196 F.2d 304 (5th Cir. 1952)(taxes and penalties continue to accrue during the pendency of the bankruptcy proceeding). Conversely, interest on overdue claims, including taxes, does not generally accrue during the pendency of the bankruptcy action. 11 U.S.C. §502(b)(2)(1985); City of New York v. Saper, 336 U.S. 328 (1949); Sword Line v. Industrial Commissioner of State of New York, 212 F.2d 865 (2nd Cir.) cert. denied, 348 U.S. 836 (1954); In re Stack Steel & Supply Co., supra. But see Bruning v. United States, 376 U.S. 358 (1964)(delinquent federal taxes are not discharged in bankruptcy by statutory exemption and therefore interest on such delinquent taxes accrues even after filing of bankruptcy petition). Although "interest ceases after inception of bankruptcy, nevertheless the obligation to pay interest is deemed revived and is reinstated where the bankrupt estate is solvent, or where collateral is sufficient to meet the cost of principal and interest. [Citations omitted.]" In Re Busman, 5 Bankr. 332, 336 (Bankr. E.D.N.Y. 1980). See 11 U.S.C. 506(a); Sword Line v. Industrial Commissioner of State of New York, 212 F.2d at 870 ("interest [including interest on overdue taxes] ceases upon bankruptcy in the general and usual instances...unless the bankruptcy bar proves eventually nonexistent by reason of the actual solvency of the debtor"). See also In Re Stack Steel & Supply Co., supra. According to your letter, no liquidation of the estate occurred. Rather, the estate remained solvent and the bankruptcy petition was voluntarily dismissed. Therefore, under the facts you present, not only real property taxes and penalties, but interest, continued to accrue during the existence of the bankruptcy estate. The obligation to pay interest was fully revived when the debtor voluntarily dismissed his case.

Having concluded under the facts presented in your letter that real property taxes, penalties, and the interest thereon, continued to accrue during the pendency of the bankruptcy action, I next consider the impact of the stay. In Chapter 11 reorganization actions the debtor normally files a

⁶ The court in In re Stack Steel & Supply Co. observed that under 11 U.S.C. §503 taxes and penalties, but not interest, could be paid during pendency of the bankruptcy action as administrative expenses.

reorganization plan in accordance with 11 U.S.C. §§1121-1129 (1985). The effect of such a plan, when approved by the court, is detailed in 11 U.S.C. §1141 (1985). However, according to your letter, the debtor did not file a plan, but simply dismissed the case. The effect of such a dismissal is specifically addressed in 11 U.S.C. §349 (1985), which provides in pertinent part:

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--

(1) reinstates--

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

(Emphasis added.)

Thus, when the debtor dismissed his case the bankruptcy estate ended, and ownership of the three parcels of land reverted to the debtor. As noted above, under 11 U.S.C. §362(c)(1)(1985), the stay of actions by creditors against property of the bankruptcy estate terminates when the property is no longer property of the estate. Therefore, when the bankruptcy estate ended, not only did ownership of the three parcels revert to the debtor, but the stay against creation and enforcement of real property tax liens was lifted. This conclusion is reinforced by the legislative history of 11 U.S.C. §349(b)(1985), which indicates that "[t]he basic purpose of this subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position they were found at the commencement of the case." S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1979).

I next consider the effect that lifting the stay had on the statutory lien. A lien for enforcement of real property taxes, penalties, and interest is established by R.C. 323.11, which provides in pertinent part:

The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate for each year shall attach to all real property subject to such taxes on the first day of January, annually, or as provided in section 5727.06 of the Revised Code, and continue until such taxes, including any penalties, interest, or other charges accruing thereon, are paid.

This section does not require that any action be taken to create the lien. Instead, the lien simply attaches on the first day of January each year. In the situation you present, creation of the lien was stayed due to the existence of the bankruptcy estate. Termination of the bankruptcy estate removed the sole obstacle to creation of the lien, and it was

automatically created and attached to the property. Moreover, upon dismissal of a Chapter 11 reorganization proceeding, the lien for all unpaid real property taxes, interest, and penalties could be enforced. See generally R.C. Chapter 5721.

As you have indicated in your letter, the provisions of R.C. 323.121(B) that impose interest charges upon delinquent real property tax and penalty payments were enacted in 1982, during the pendency of the bankruptcy stay. 1981-1982 Ohio Laws, Part II, 2589 (Am. Sub. H.B. 379, eff. Sept. 21, 1982). In the context of the facts recited in your letter, it is clear that once the debtor voluntarily dismissed the bankruptcy action, all property in the bankruptcy estate reverted to him. At that point, the stay was lifted, and not only taxes and penalties, but interest were subject to full enforcement. See Sword Line v. Industrial Commissioner of State of New York, supra. In Re Busman, supra. With respect to interest charges, since the debtor himself could not have been charged interest prior to the enactment of R.C. 323.121(B), no interest could be retroactively imposed for periods prior to the effective date of that statute. See R.C. 1.48 ("[a] statute is presumed to be prospective in its operation unless expressly made retrospective"). However, after the effective date of R.C. 323.121, interest would have been imposed but for the bankruptcy action. See Patterson Foundry & Machine Co. v. Ohio River Power Co., 99 Ohio St. 429, 124 N.E. 241 (1919)(as a general rule the operative provision of a statute becomes effective on the effective date of the act enacting or amending the statute). Since the dismissal of the bankruptcy proceeding by the debtor in possession revived the obligation for interest, In re Busman, supra, the interest could be added to delinquent taxes and penalties due upon the lands formerly held by the bankruptcy estate. Interest which would have been imposed under R.C. 323.121 but for the bankruptcy proceedings thus became due. See generally, Sword Line v. Industrial Commissioner of State of New York, supra.

Subsequent transfer of the property did not affect the lien. As stated, real property taxes are taxes upon the land, not upon the owner. Southern Ohio Savings Bank & Trust Co. v. Bolce, supra. Transfer of the land from the debtor to the bankruptcy estate, back to the debtor, and then to the current owner, did not affect the liens on the properties. Makley v. Whitmore, 61 Ohio St. 587, 56 N.E. 461 (1900)(lien for taxes and assessments on real estate is unaffected by sales or transfers); Long v. Moler, 5 Ohio St. 272 (1855)(lien created by a statutory predecessor of R.C. 323.11 is not affected by subsequent transfer of real estate); Berryhill v. Gerstel, supra (real property tax due a county on property held as part of a bankruptcy estate, and which is secured by a lien upon the property, remains a charge on the property even though held by a taker in reorganization so long as the tax goes unpaid). Instead, the liens remain enforceable, and secure any unpaid tax, penalties and interest. Under the express terms of R.C. 322.11, the liens continue until the taxes, penalties, and interest are paid.

It is, therefore, my opinion and you are so advised that when a debtor in possession of real property voluntarily dismisses a bankruptcy action brought for reorganization under the federal Bankruptcy Act (11 U.S.C. Chapter 11), the lien for real estate taxes, penalties, and interest created by R.C. 323.11, attaches to land that was part of the bankruptcy estate. Dismissal of the bankruptcy action revives the

obligation to pay interest on delinquent taxes and penalties in accordance with R.C. 323.121, including interest that would have accrued during the pendency of the bankruptcy but for the bankruptcy filing. The obligation of the debtor to pay such taxes, penalties, and interest is secured by the lien created under R.C. 323.11. If the debtor transfers the property after dismissing the bankruptcy action, the land remains subject to the lien, and the lien continues until the taxes, penalties, and interest are fully paid.