

THE UNRECORDED SALES TAX LIEN

Almost without exception every state having a general state sales tax has a statute which provides that the amount of any delinquent taxes plus statutory penalty or interest is a lien upon property of the vendor-taxpayer¹ who is responsible to the state for the tax. The Iowa lien provisions contain a feature which appears unusual—the lien is stated to be prior and paramount over any subsequent liens upon or rights to personal property belonging to the taxpayer without the necessity of recording.² A logical conclusion from the statutory language is that any purchaser of personal property runs the risk that his vendor has not satisfied sales tax obligations to the state prior to this sale, and that the title acquired is subject to the unrecorded lien. That the legislature may have intended such a result is suggested by a provision permitting the State Tax Commission to inform persons with legitimate interests in knowing, whether the taxpayer is in fact delinquent.³ It is doubtful that many purchasers or extenders of credit have given

¹ In the case of property subject to use tax, the lien is upon the property of the vendee who is the taxpayer.

² The Iowa Sales Tax is one of several divisions of Iowa Code c. 422 (1954), applying to several classes of taxes. The basic lien provision, which appears in the division relating to income taxes, is § 422.26, as follows:

“Whenever any taxpayer liable to pay a tax and/or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the state upon all property and rights to property, whether real or personal, belonging to said taxpayer. The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied.

“In order to preserve the aforesaid lien against subsequent mortgagees, purchasers or judgment creditors, for value and without notice of the lien, on any property situated in a county, the commission shall file with the recorder of the county, in which said property is located, a notice of said lien.

“ § 422.56 makes the provisions of § 422.26 applicable to the sales tax, in the following manner:

“All the provisions of section 422.26 shall apply in respect to the taxes and/or penalties imposed by this division, excepting that, as applied to any tax imposed by this division, the lien therein provided shall be prior and paramount over all subsequent liens upon any personal property within this state, or right to such personal property, belonging to the taxpayer without the necessity of recording as therein provided. The requirements for recording shall, as applied to the tax imposed by this division, apply only to the liens upon real property. . . .”

By § 423.17, the provisions of § 422.56 are made applicable for purposes of the use tax.

³ Iowa Code § 422.56 (1954): “. . . When requested to do so by any person from whom a taxpayer is seeking credit, or with whom the taxpayer is negotiating the sale of any personal property, or by any other person having a legitimate interest in such information, the commission shall, upon being satisfied that such a situation exists, inform

thought to the effect of the unrecorded sales tax lien, and to their position if the state should attempt thereunder to seize property in which they were interested.

As the Iowa lien provision has not received appellate court construction, its full effect is as yet unknown. This discussion will be directed first to the sales tax liens of other states, and next to cases from other states involving other statutory liens, for such guidance as may be obtained concerning the proper interpretation and application of the Iowa law. It will then be directed toward the administrative handling of the lien.

At the time of writing, thirty-two states and the District of Columbia have retail sales tax laws.⁴ Most provide for some method of recording to preserve the lien over subsequent bona fide liens or purchases. The most frequent method of recording employed requires the commissioner of revenue or equivalent officer to send a warrant for the tax and penalties to the sheriff, who records it in the office of the clerk of the county in which the property is located; the entry of this amount then constitutes a lien in the same manner as a judgment duly docketed and recorded.⁵ As the chart at the end of this article reveals, Iowa and five other states do not conform to the pattern of requiring recording.

The Michigan sales tax law may be further reaching than the Iowa provision, for its statutory lien applies both to real and personal property. Although no statement is made as to necessity or lack of necessity for recording, the lien is said to take precedence over "all other liens and incumbrances whatsoever, irrespective of character or date, except previously recorded bona fide financing."⁶ This may give the sales tax lien precedence from the time the proper return should have been filed except as to the prior bona fide "financing". Whether it would extend to claimants who have judgment liens entered prior to the filing date of the tax return depends on the proper interpretation of the word "financing".

Both Rhode Island and Wyoming also omit any requirement for recording of the tax lien. Rhode Island's lien attaches only to real property, and appears to be the severest because its statute provides: ". . . such lien shall take precedence over any other lien

such person as to the amount of unpaid taxes due by such taxpayer under the provisions of this division. The giving of such information under such circumstances shall not be deemed a violation of section 422.65 as applied to this division."

⁴ These are enumerated in the chart appearing in the Appendix at the end of this article.

⁵ Although recording is required by IOWA CODE §§ 422.26 and 422.56 (1954) to preserve the lien against real property, this is accomplished by direct notice from the State Tax Commission to the county recorder. The Commission does have power to issue a distress warrant that is sent to the sheriff for collection purposes, but the warrant has no relation to recording of the lien and it can be used for seizure of both real and personal property even though no notice of lien has been recorded. IOWA CODE §§ 422.26, 445.6, 445.7 (1954).

⁶ 6 MICH. STAT. ANN. § 7.534 (1950). See also MICH. ADM. CODE Rule 205.18 (1954). The phrase "except previously recorded bona fide financing" was added to the section by Mich. Laws 1953, Act 204, § 205.63.

or encumbrance on such property."⁷ The Wyoming provision is quite brief, and its effect as to recording is not clear.⁸

Comparison of Iowa with Michigan, Rhode Island and Wyoming shows that while all four have statutes making no requirement for recording of the lien, only the Iowa statute expressly states that recording is unnecessary. The others make no mention of recording, but may give the state priority over some liens, at least, which were recorded at the time the sales tax became due and was unpaid.

Two other states, Georgia and Maine, are considered to be in a separate category. Each refers to delinquent sales taxes as personal debts owing to the state, but it is not clear that the state acquires any lien therefor. The Georgia situation appears more uncertain⁹ than does that of Maine.¹⁰ However, in view of an early but frequently cited maritime lien decision, *The Menominie*,¹¹ these two states may have acquired a lien even though the term is not used in their sales tax statutes.

There appear to be no reported decisions from any of these six states which interpret the cited statutory provisions with respect to the effect of lack of recordation of the sales tax lien.

Cases involving the rights of purchasers, mortgagees, and the like, who are unaware of unrecorded statutory liens are few. Two conflicting approaches can be found, however. One view is that notice of the statutory lien derives from the statute itself where recording is not required, and if recordation has not been specified it is unnecessary. The other is that such a lien is a secret lien, and to give the lien priority over the rights of the unwary third party

⁷ R. I. Acts & Resolves c. 1887, art. II, § 43 (Jan. 1947).

⁸ Wyo. Comp. Stat. § 32-2511 (1945): "A tax due and unpaid under this Act shall constitute a debt due the State from the vendor and is hereby made a lien on all the property of the vendor. The tax due, together with interest, penalties and costs, may be collected by appropriate judicial proceedings. . . ."

⁹ Ga. Laws 1951, No. 409, § 41 (p. 617), entitled "State Revenue Commission and Deputy", provides that, "all taxes are hereby made a personal debt of the person required hereunder to file the returns or to pay the taxes imposed hereby", and authorizes attachment of or levy upon the property of the debtor.

Ga. Laws 1937-38 Ex. Sess., No. 296, § 42 (p. 98), entitled "Administration of Taxing Laws", provides that: "Lien for taxes, whether ad valorem, specific, or occupation, due the State, any county thereof, or municipal corporation therein, shall cover the property of taxpayers liable to tax, from the time fixed by law for valuation of the same in each year until such taxes are paid. Such liens for taxes are hereby declared superior to all other liens. . . ." In the remaining part of the section a specific exemption is provided with respect to the lien imposed under the Motor Fuel Tax Law, Ga. Laws 1937, § 92-1415 (p. 199).

Does § 42, above, impose a lien for all delinquent taxes, or must the specific acts governing specific taxes expressly create liens, as the Motor Fuel Tax Law does in § 92-1415? No such provision can be found in the Georgia Sales and Use Tax Act, Ga. Laws 1951, No. 240, (p. 360 et seq.).

¹⁰ ME. REV. STAT. c. 17, § 16 (1954).

¹¹ 36 Fed. 197 (D. Minn. 1888). At 199, the court stated: "It is the right to hold or subject the property to the payment of the claim or debt that constitutes the lien, and the mere words used in the statute are immaterial as long as the substantial right itself is created."

is against public policy. It has also been suggested that extending priority to the lien would violate constitutional due process requirements.

The case commonly cited for the proposition that recording of a statutory lien is unnecessary is *Albert Pipe Supply Co., Inc. v. Callanan*.¹² This was an action to determine whether money admittedly due to a subcontractor from a prime contractor should be paid to plaintiff, to whom the subcontractor's claim had been assigned for consideration, or to defendant, the state industrial commissioner who claimed that under section 34 of the Workmen's Compensation Law¹³ the state had a lien for compensation awarded one of the subcontractor's employees prior to the assignment to plaintiff. The trial court rejected the theory that an effective lien had been created, in these words:

"A statutory lien to be valid and effective against property must be made a matter of public record by filing, recording, or docketing the lien in a public office.

"The declaration by the Legislature that a lien exists without providing for the proper filing, recording, and docketing of the lien in a designated public office fails to create a lien effective against the rights of a third party."¹⁴

On appeal this holding was reversed in a per curiam decision, as follows:

"It is not necessary that lien be recorded, docketed or filed in order to be effective. See *Engelhardt v. Alvino Realty Co.*, 248 N.Y. 374, 162 N.E. 287."¹⁵

The only authority cited in either opinion, the *Engelhardt* case, may perhaps not be directly in point. It is an action for breach of covenant brought by a purchaser of real estate against his vendor. The land involved was at one time owned by a corporate predecessor in title which was subject to a franchise tax for which the law provided a lien on the corporate property if not paid.¹⁶ The court held that although no notice was given to the corporation, the annual tax became a lien upon the corporate property when due and payable, and was an incumbrance at the time of plaintiff's purchase; therefore plaintiff, having discharged the tax lien by payment, was entitled to recover for breach of covenant. The *Engelhardt* opinion, which was per curiam, cites no authority, and does not discuss the effect of lack of recordation. Neither does

¹² 159 Misc. 547, 288 N.Y.S. 307 (1st Dept. 1936), *rev'd.* 157 Misc. 136, 283 N.Y.S. 716 (N.Y. Munic. Ct. 1935).

¹³ Section 34 provided: "Compensation shall be a lien against the assets of the carrier or employer without limit of amount subordinate, however, to claims for unpaid wages and unrecorded liens." It states nothing concerning recording of the claimed lien.

¹⁴ 157 Misc. 136, 139, 283 N.Y.S. 716, 718 (N.Y. Munic. Ct. 1935).

¹⁵ 159 Misc. 547, 288 N.Y.S. 307 (1st Dept. 1936).

¹⁶ The case points out that the tax was imposed by statute and was a lien from the time it was due and payable; a lien upon and binding all the real and personal property of the corporation liable to pay the tax. The corporation had failed to make annual reports to the tax commission, and the commission had not stated any account of taxes due nor had it served notice upon the corporation of any audit and statement of a tax, during the years the corporation owned the property involved.

it indicate that plaintiff could have been compelled by the state to pay the delinquent taxes, nor state specifically that the lien could have been enforced against the property after acquisition thereof by plaintiff.¹⁷

The Nebraska court, dealing with a similar corporation occupation tax, has taken the position that prior to a 1943 amendment requiring recordation, a lien did arise upon assessment of the tax and that it was valid and effective against subsequent parties without recordation. The court uses the following language to state its position:

"It is undoubtedly desirable that the legislature provide that notice of such tax be filed in some office of the county wherein such property is located, as was provided by the 1943 legislature in its amendments. . . .

"However, we find no constitutional provision requiring it to do so. Prior to this amendment all that was necessary, in order to establish the lien, was for the state to assess the tax in the Secretary of State's office. All parties who, after the tax was assessed, dealt with the property of the corporation against which the tax was a lien must, for their protection, consult the records of the Secretary of State's office at Lincoln."¹⁸

Several other decisions have upheld unrecorded statutory liens as against subsequent purchasers or mortgagees, often in broad language. These decisions deal primarily with two types of situations, special assessments for municipal improvements,¹⁹ and landlords liens,²⁰ that may, however, be considered to be different from the sales tax lien.

Other courts have refused to accord priority to unrecorded statutory liens by characterizing them as "secret", and against public policy. In one case the court stated: "Secret liens upon chattels are an obstruction and a menace to trade, and as such are against the policy of the law."²¹ The cases following this view appear primarily to involve possessory-type liens where the lien-holder has surrendered possession of the property to the owner

¹⁷ If the amount due the state for sales taxes has not been ascertained, though due and payable, at the time a federal tax claim against taxpayer is recorded, it is possible that the lien is not sufficiently specific (or assessed and liquidated), to prevail over the federal claim. *People v. Maclay*, 288 U.S. 292 (1933); *In re Ivel Displays, Inc.*, 74 F.2d 703 (2d Cir. 1935).

¹⁸ *Licking v. Hays Lumber Co.*, 146 Neb. 240, 244, 19 N.W.2d 148, 151 (1945).

¹⁹ See, e.g., *Hesig v. Vaughan & Gardner*, 15 S.W.2d 113, 115 (Tex. Civ. App. 1929): "It is well settled that, unless the statute requires it, liens created by law need not be recorded in the office of the county clerk, in order to preserve their priority over subsequent purchasers without actual notice."

²⁰ See e.g., *Murphree v. Brown*, 12 Ariz. 268, 277, 100 Pac. 801, 804 (1909): "Where a lien enforceable at law has attached to property, the purchaser takes the property subject to the lien, irrespective of notice, except where notice, real or constructive, is made essential by registration laws or of the statute whereunder the lien arises."

²¹ *Lanterman v. Luby*, 96 N.J.L. 255, 259, 114 Atl. 325, 326 (1921).

who then transferred it to an unsuspecting third party.²² They read the statutes involved as not indicating a legislative intent to prefer the statutory lien over the subsequent bona fide purchaser, but refuse to pass upon the question whether according superiority to the unrecorded lien would constitute deprivation of property without due process of law in contravention of Section 1 of the 14th Amendment to the Constitution of the United States. The Minnesota court, considering a similar statutory possessory lien, decided that it showed no intent on the part of the legislature to protect the rights of subsequent innocent purchasers, and therefore upheld the lien even though possession had been surrendered by the lienholder before the transfer to the unlucky purchaser.²³

Another case bearing upon the problem is *Commonwealth v. Central Realty Co.*²⁴ In this case the court held that as long as a certificate showing all the tax liens of record in the state auditor general's office could be obtained, the former requirement that the liens had to be filed in an office in the county in which the property was located was unnecessary, for the lien could not be construed as secret and against public policy.

Thus it would seem that on the basis of the foregoing cases there is no case or constitutional inhibition against the Iowa unrecorded sales tax lien, especially as the intending purchaser or mortgagee can ascertain from the State Tax Commission whether it is aware of any delinquency on the part of the property owner.²⁵

As was noted, the Iowa statute has not provoked appellate litigation, which is suggestive that the lien has not been asserted to the widest extent possible under a literal reading of the statute. Otherwise, every bona fide purchaser of goods from an Iowa merchant would be seriously concerned with the possibility that his vendor is delinquent,²⁶ and a probable consequence of the concern would be to inhibit the number of sales in this state.

²² *Ibid.* (garage keeper's lien); *Bell v. Dennis*, 43 N.M. 350, 93 P.2d 1003 (1939) (attempt to assert statutory agistor's lien; lienholder had recorded his lien but court held the statute did not provide for recordation so his act was without authority and gave no notice).

²³ *Pratt v. Armstrong*, 192 Minn. 14, 255 N.W. 91 (1934).

²⁴ 338 Pa. 172, 12 A.2d 312 (1940).

²⁵ *Iowa Code* § 422.56, quoted in note 3, *supra*. However, suppose taxpayer has filed his quarterly reports and paid the tax thereon shown to be due, but subsequent audits disclose that a larger tax should have been reported and paid. An inquiry from the Commission prior to the audit would not show the purchaser or mortgagor that the property was subject to lien.

This article makes no comment as to another problem which is present—the right of the state to assert a lien when the property subject thereto has been removed from Iowa either by the taxpayer or by a successor in interest.

²⁶ There can, of course, be no lien for the tax due in connection with the sale of the personal property at retail itself, as that tax is not due and payable to the state until the end of the quarter (or at the latest thirty days following the end of the quarter) in which the sale was made. *Iowa Code* § 422.52(1), as amended by Iowa Laws 1955, 56th G.A., c. 214. The lien arises because of delinquencies as to taxable sales made in previous periods.

Information from the Commission indicates that the lien is being asserted in instances where a delinquent is in financial difficulty and other creditors are claiming liens of various types.²⁷ In addition, the theory of the lien appears to be in part the foundation of several Commission Rules relating to tax due in connection with construction contracts. These Rules indicate that the tax is due in connection with the contractor's purchase or use of materials, that if sales or use tax was not paid the contractor is liable therefor and money due him is a right to personal property to which a lien has attached,²⁸ that the "sponsor" of the contract (the one for whom the construction was performed) is required to withhold payment of any final estimate until the contractor has obtained a release from the Commission with respect to sales and use tax liability,²⁹ and that a sponsor who pays in full without complying with the release provision becomes liable for the unpaid taxes.³⁰ Although these rules have been in effect for a number of years, there is no indication that they have been the subject of consideration by any Iowa court.

It may be appropriate in closing to repeat the comment of the Florida court, in upholding a state claim to certain property over the objection of a party who asserted he was without notice of the claim:

"Tax liens are creatures of statute and have no constitutional recognition as such."³¹

ROBERT E. DREY (June 1956)

²⁷ It is possible that landlords' liens under leases entered into prior to the tax delinquency would have priority over the tax lien, even for rent accruing after the tax lien becomes effective. Another question that may arise is whether the tax lien prevails over a prior in time but unrecorded conditional sale or chattel mortgage, in view of the provisions of Iowa Code §§ 556.3, and 556.4 (1954) and the many decisions interpreting these sections, among them the case of *Yetley v. Irons*, 238 Iowa 23, 25 N.W.2d 677, 168 A.L.R. 1159, 32 Iowa L. Rev. 760 (1947). This latter issue has been presented to a district court in connection with approval of the final report of an assignee for benefit of creditors. The court held that the conditional vendor prevailed despite his failure to record, but intimated that had the tax notice been filed before the assignment a different result might follow. This position seems erroneous. The State Tax Commission does not acquiesce in the district court's decision, but the amount involved was too small to justify any appeal.

²⁸ 1954 I.D.R. 474-480, Rules 138, 138.7, 154, 160.

²⁹ 1954 I.D.R. 474, 478-9, Rules 138.4, 152, 155, 161.

³⁰ 1954 I.D.R. 479, Rules 156, 157, 161, 162.

³¹ State ex rel. Hurner v. Calbreath, 140 Fla. 634, 643, 192 So. 814, 818 (1939).

APPENDIX

STATES HAVING GENERAL SALES TAX; WHETHER MADE LIEN; WHETHER ON REALTY OR PERSONALTY; WHETHER RECORDING REQUIRED.

State	Lien	Realty	Personalty	Recordation
Alabama.....	Yes	Yes	Yes	Yes
Arizona.....	Yes	Yes	Yes	Yes
Arkansas.....	Yes	Yes	No	Yes
California.....	Yes	Yes	No	Yes
Colorado.....	Yes	Yes	Yes	Yes
Connecticut.....	Yes	Yes	No	Yes
District of Columbia.....	Yes	Yes	Yes	Yes
Florida.....	Yes	Yes	Yes	Yes
Georgia.....	No Lien?			
Illinois.....	Yes	Yes	Yes	Yes
Iowa.....	Yes	Yes	Yes	Realty only
Kansas.....	Yes	Yes	No	Yes
Louisiana.....	Yes	Yes	Yes	Yes
Maine.....	No Lien?			
Maryland.....	Yes	Yes	Yes	Yes
Michigan.....	Yes	Yes	Yes	No
Mississippi.....	Yes	Yes	Yes	Yes
Missouri.....	Yes	Yes	Yes	Yes
Nevada.....	Yes	Yes	No	Yes
New Mexico.....	Yes	Yes	Yes	Yes
North Carolina.....	Yes	Yes	Yes	Yes
North Dakota.....	Yes	Yes	Yes	Yes
Ohio.....	Yes	Yes	Yes	Yes
Oklahoma.....	Yes	Yes	Yes	Yes
Pennsylvania#.....	Yes	Yes	No	Yes
Rhode Island.....	Yes	Yes	No	No
South Carolina.....	Yes	Yes	Yes	Yes
South Dakota.....	Yes	Yes	Yes	Yes
Tennessee.....	Yes	Yes	Yes	Yes
Utah.....	Yes	Yes	Yes	Yes
Washington.....	Yes	Yes	Yes	Yes
West Virginia.....	Yes	Yes	Yes	Yes
Wyoming.....	Yes	Yes	Yes	No

#—The Pennsylvania Law expired July 1, 1955.

In addition, many states have an entirely different procedure if the delinquent taxpayer is insolvent or in bankruptcy.

