

Opinion No. 62-112

September 4, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Albert I. Cornell, Attorney for Bureau of Revenue, Capitol Building, Santa Fe, New Mexico

QUESTION

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May a school tax lien filed against real or personal property of a taxpayer for delinquent school tax payments, be released by the State in favor of the holder of a prior recorded judgment, lien, security interest or encumbrance,, where no legal action or proceeding involving such school tax lien is pending and wherein the State is not a party?

CONCLUSION

No. Not unless payment has made in full, or a legal proceeding involving such tax lien of the State has been filed, naming the State as a party.

OPINION

ANALYSIS

Section 72-16-31, N.M.S.A., 1953 Compilation, authorizes the commissioner of the bureau of revenue to file a tax notice against the personal or real property of any person who is delinquent in the payment of the amount of the emergency school tax owed by him. This section provides in part as follows:

"If any tax, penalty or interest imposed under this Act, is not paid within thirty (30) days after the same is due, the commissioner of revenue may issue a notice setting forth the name of the taxpayer, the amount of tax, penalties and interest, date of accrual thereof and that the state of New Mexico claims a lien therefor. Said notice shall be verified by the commissioner of revenue or by the director of the emergency school tax division of the bureau of revenue and may be filed of record in the records of liens in any county in the state in which the tax debtor owns property.

"After the notice is filed, the taxes, penalties and interest in the amount specified therein shall be a lien on all personal property of the tax debtor, superior to all other liens, encumbrances, mortgages, judgments and assessments filed or placed of record subsequent to the filing of such notice, except liens for ad valorem taxes as now provided by law.

"Upon all real property, the notice filed shall constitute a lien in said county superior to all other liens and assessments placed of record subsequent to the filing of such notice, except liens for ad valorem taxes . . .

"Any lien perfected pursuant to the provisions of this act, shall upon payment of taxes, penalties and interest covered thereby, be released by the commissioner of revenue in the manner as mortgages and judgments are released . . ."

Under the above section, authority to release a lien filed thereunder is granted to the commissioner of revenue only after the amount of the lien, penalties and interest shall have been paid in full.

Section 17-1-15, N.M.S.A., 1953 Compilation, empowers the attorney general and district attorneys of this state to compromise or settle civil proceedings when such actions "may be pending in their respective districts, in the district court, in which the state or any county may be a party." Under this section, it is specifically provided in part that the attorney general or a district attorney:

". . . shall have the power to compromise or settle said suit or proceedings, or grant a release or enter satisfaction in whole or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right . . ."

In **State v. Investment Company**, 30 N.M. 491, 239 P. 741 and **Lyle et al v. Luna, et al**, 65 N.M. 429 338 P. 2d 1060, it was recognized that in a tax suit, the attorney general or district attorney may, under the provision of Section 17-1-15, N.M.S.A., 1953 Compilation, compromise or settle a suit or proceeding pending in the district court court, and that the authority granted under such statute was not restricted by Article IV, Section 32 of the New Mexico State Constitution.

Article IV, Section 32 of the State Constitution as Amended, provides in part:

"No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the legislature, **nor shall any such obligation or liability be extinguished except by payment thereof into the proper treasury, or by proper proceeding in court . . ."**

The New Mexico Supreme Court in **State v. State Investment Company**, supra, held in interpreting Article IV, Section 32 of the State Constitution and Section 17-1-15, supra, that:

"It is to be observed that the first clause is a restriction on the Legislature itself, and not upon taxing officers. The latter part of the act provides two methods of extinguishment of the obligation or liability -- **one, payment; and, the other, a proper proceeding in court.** (Emphasis supplied)

Under the above authorities it is obvious that the authority to release a lien filed upon property to insure the payment of delinquent school taxes, is invested pursuant to Section 72-16-31, supra, in the commissioner of revenue only after the amount of the lien, penalties and interest may have been fully paid. The attorney general or a district attorney under Article IV, Section 32 of the State Constitution, and Section 17-1-15, N.M.S.A., 1953 Compilation, may in the event a proper proceeding is filed in court, and wherein the state is a proper party, compromise or settle such suit in the interests of the state. It is patent, however, that in the absence of payment of such lien in full, or a pending judicial proceeding, placing at issue the validity of such lien or interest of the state, the attorney general or a district attorney has no authority to release or compromise such tax lien in favor of another party in interest.