

Opinion No. 65-220

November 2, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

TO: Mr. Don Hanock, Assistant District Attorney, County Courthouse, Alamogordo, New Mexico

QUESTION

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May County Clerks record notices of federal tax liens under Section 61-1-1, et seq., N.M.S.A., 1953 Compilation (P.S.), as amended in 1965 although such notice is not acknowledged by a notary public, as provided by Article 71-1-3, N.M.S.A., 1953 Compilation?

CONCLUSION

Yes.

OPINION

{*358} ANALYSIS

Section 61-1-1, N.M.S.A., 1953 Compilation (P.S.) provides:

"NOTICE OF LIEN AND CERTIFICATE OF DISCHARGE. -- Notices of lien for taxes payable to the United States and certificates discharging the liens shall be **recorded** in the office of the county clerk of the county in this state within which the property subject to the lien is situated." (Emphasis added).

This section was amended during the 1965 session of the state legislature at which time the word "recorded" was inserted in place of the word "filed".

Federal Tax liens are filed pursuant to 26 U.S.C.A., Section 6323, as amended. The applicable portions of that section provide:

"Section 6323. VALIDITY AGAINST MORTGAGEES, PLEDGES, PURCHASERS, AND JUDGMENT CREDITORS

(a) INVALIDITY OF LIEN WITHOUT NOTICE. -- Except as otherwise provided in subsections (c) and (d), the lien imposed by section 6321 shall not be valid as against

any mortgagee, pledgee,, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate --

* * *

(1) UNDER STATE OR TERRITORIAL LAWS. -- In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated {*359} an office within the State or Territory for the filing of such notice; or

* * *

(b) FORM OF NOTICE. If the notice filed pursuant to subsection (a) (1) is in such form as would be valid if filed with the clerk of the United States district court pursuant to subsection (a), (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien."

The above sections of the federal statutes have been the subject to much litigation. The question litigated is whether a state by its enactments may prescribe the content and form of the tax liens to be filed pursuant to 26 U.S.C.A., Section 6323 (a) (1) as amended. The question was finally considered by the United States Supreme Court in **United States v. Union Central Life Insurance Company**, 368 U.S. 291 (1961). The Court held that the states were authorized to designate the offices in which the liens could be filed but had no authority to make provisions as to the form or content of the liens to be filed.

The apparent problem under consideration here is caused by the fact that federal tax liens must now be "recorded" and are not acknowledged. Section 71-1-3, N.M.S.A., 1953 Compilation, provides:

"ACKNOWLEDGMENT NECESSARY FOR RECORDING DECREES. -- Any instrument of writing, duly acknowledged and certified, may be filed and recorded. Any instrument of writing, not duly acknowledged and certified, may be filed and recorded. Any instrument of writing, not duly acknowledged and certified, may not be filed and recorded, nor considered of record, though so entered; **Provided, however, that judicial decrees or certified copies, patents, land office receipts, certified copies of foreign wills duly authenticated, and instruments of writing in any manner affecting lands in the state, when these instruments have been duly executed by an authorized public officer, need not be acknowledged but may be filed and recorded;** and, Provided further, any financing agreement or security agreement required to be filed under the provisions of the Uniform Commercial Code is not required to be acknowledged in order to be filed and recorded." (Emphasis added).

If federal tax liens do not fall within the exception emphasized in the above quotation, it would appear that by amending Section 61-1-1, N.M.S.A., 1953 Compilation (P.S.), the legislature has attempted to impose provisions as to form and content of federal tax

liens. It may not do this according to the holding of the Supreme Court in the **Union Central Life Insurance** case, supra.

According to our information federal tax liens are signed by the officers of the Collection Division of the District Office of the Internal Revenue Service. It is our Opinion that it may be assumed that these are "authorized public officers" and that the liens may be filed without acknowledgment.

We trust that this will answer your question.