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Liens: Federal Tax Liens and Oklahoma Homestead

Prompt and certain collection of federal tax is essential to the maintenance of the nation. For this reason, Congress has given the federal government a formidable arsenal of collection tools. If a person fails to pay his federal tax liability, the Commissioner may pursue one of three methods for collection¹: he may bring suit for the unpaid amount, and, upon obtaining a judgment, exercise the usual rights of a judgment creditor;² he may proceed by the summary method of distraint and levy against the taxpayer's nonexempt property and sell it to satisfy the amount of assessment;³ or he may proceed by court action to enforce the tax lien, which attaches to the delinquent taxpayer's property.⁴ Allowing the federal government to reach a delinquent taxpayer's property seems justified because the person has failed or refused to contribute his share to the maintenance of the country.

Often, however, a delinquent taxpayer owns an interest in property concurrently with a nondelinquent third party. The third party, who has paid his tax, should not lose his property simply because a co-owner has failed to do so. Yet, attaching and selling the property may be the only method by which the federal government can ever collect the delinquent liability. This raises an interesting conflict between two imperatives: collecting federal taxes and protecting state-created property rights.

The conflict is especially pointed when the interest owned by a nondelinquent third party is a state-created homestead.⁵ Homestead laws vary from state to state, but they all have the same general purpose of promoting the security of the home by protecting the homestead property from the consequences of a homeowner's economic misfortune.⁶ Pursuant to a public policy that opposes pauperizing widows and children, states withdraw certain properties from creditors' reach.⁷ The federal government, however, is not an ordinary creditor.⁸ Therefore, when the interests protected by tax collection laws conflict with the interests protected by state homestead laws, the former will generally prevail.

When the federal government seeks property of a delinquent spouse that is encumbered with a homestead interest claimed by a nondelinquent spouse, a variety of situations may result. The resolution of the conflict requires an

1. J. CHOMMIE, *FEDERAL INCOME TAXATION* § 302 (2d ed. 1973).

2. *See also* CHOMMIE, *supra* note 1, at 910; I.R.C. §§ 7401, 7402 (1982).

3. CHOMMIE, *supra* note 1, at 910; I.R.C. §§ 6331-6340 (1982).

4. CHOMMIE, *supra* note 1, at 910; I.R.C. §§ 6321, 7403 (1982).

5. The federal homestead law exempts from debts lands homesteaded from the public domain until the issue of a patent therefore, while state homestead laws authorize the head of the family to designate property to be exempt from future debts. Thus there are two distinct forms of homestead legislation. 4A THOMPSON ON REAL PROPERTY § 1932, at 196 (J. Grimes ed. 1979).

6. *Id.* at 199.

7. *Id.* at 200.

8. The Internal Revenue Service has been said to derive its creditor position from the constitutional mandate to "lay and collect taxes." *United States v. Pilla*, 711 F.2d 94 (8th Cir. 1983) (*citing* *United States v. Rodgers*, 461 U.S. 677 (1983)).

understanding of the federal tax lien and a determination of the nature of the respective homestead interest.

Federal Tax Lien

If a person refuses to pay taxes, or fails to pay through neglect, a lien in the amount of the unpaid taxes may arise in favor of the United States government. Three prerequisites must be met.⁹ First, there must be an assessment for tax.¹⁰ Assessment is merely a recordation of the acknowledged tax liability¹¹ on a list kept in the Internal Revenue Service Regional Service Center.¹² Second, there must be a demand for payment.¹³ By statute, the Service is required to make a demand as soon as practicable after assessment and, in any event, within sixty days.¹⁴ Third, the taxpayer must fail to pay through refusal or neglect.¹⁵

Upon the occurrence of these events, a lien in the amount of the unpaid taxes automatically arises, by statute, in favor of the United States government.¹⁶ The lien is valid against the delinquent taxpayer regardless of whether it is filed of record.¹⁷ The lien mandatorily attaches to all property or rights to property, real or personal, belonging to the taxpayer.¹⁸

Once the lien arises the federal government may enforce the lien by filing a civil action in a federal district court.¹⁹ In this proceeding, any property in which the delinquent taxpayer has any right, title, or interest may be subject to foreclosure in order to satisfy the tax liability.²⁰ If others persons have a lien upon the same property, or claim an interest therein, they are made a party to the action.²¹

9. W. PLUMB, *FEDERAL TAX LIENS* 11 (3d ed. 1972) [hereinafter cited as PLUMB].

10. Assessment for taxes is made pursuant to I.R.C. § 6203 (1982).

11. A taxpayer acknowledges a tax liability when he files a return showing tax liability in excess of remittances. PLUMB, *supra* note 9, at 11.

12. I.R.C. § 6203 (1982). *See also* United States v. Coson, 286 F.2d 453 (9th Cir. 1961). Assessment may also be based upon a determination of additional tax by the Internal Revenue Service. Plumb, *Federal Tax Collection and Lien Problems*, 13 *TAX. L. REV.* 247 (1957).

13. Demand for payment is the event that causes the lien to take effect. However, technically, the lien arises upon assessment and, upon demand, it relates back to the date of assessment. 9 J. MERTENS, *FEDERAL INCOME TAX* § 54.40, at 139 (rev. ed. 1982).

14. I.R.C. § 6303 (1982); PLUMB, *supra* note 9, at 11. However, a belated demand will apparently suffice. *Id.* at 13, *citing* Treas. Reg. § 301.6303-1(a) (1954). Also, the demand need not be a written demand. PLUMB, *supra* at 14.

15. Any failure to pay may be regarded as refusal or neglect. 9 MERTENS, *supra* note 13, § 54.38, at 127.

16. I.R.C. § 6321 (1982).

17. 9 MERTENS, *supra* note 13, § 54.40, at 140. *See also* PLUMB, *supra* note 9, at 10. However, the lien will not be valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until it has been filed. Even after filing, the lien will not affect ten delineated claims. *See* I.R.C. § 6323(b) (1982). *See also* 9 MERTENS, *supra* note 13, § 54.42.

18. I.R.C. § 6321 (1982); United States v. Mitchell, 403 U.S. 190 (1971); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970).

19. I.R.C. § 7403(a) (1982).

20. *Id.*

21. I.R.C. § 7403(b) (1982).

After all parties are notified of the action, the court proceeds to adjudicate all matters involved and determine the merits of all claims to and liens upon the property.²² When the court determines that the federal government has a claim or interest in the property, it may order that the property be sold and the proceeds be distributed among the parties according to their respective interests as determined by the court.²³

In *United States v. Rodgers*,²⁴ the Supreme Court set forth guidelines for the application of section 6321²⁵ and section 7403²⁶ in situations where third parties claim an interest in property concurrently with a delinquent taxpayer. The government's lien under section 6321 mandatorily attaches to any property in which a delinquent taxpayer owns an interest, regardless of other concurrent owners.²⁷ However, the lien cannot extend beyond the delinquent taxpayer's interest.²⁸ Although the government cannot ultimately collect more than the value of the taxpayer's interest, section 7403 gives the district courts the power to authorize a sale of the entire property in order to collect.²⁹ Unlike attachment of the lien, foreclosure of the property is discretionary.³⁰ This, however, does not give a district court unbridled discretion. The district courts should exercise their equitable discretion sparingly, keeping in mind the government's paramount need for prompt and certain tax collection.³¹ In the event of a sale, the nondelinquent third party is entitled to complete compensation for his interest.³²

22. I.R.C. § 7403(c) (1982).

23. *Id.* See also I.R.C. § 6323(b)(d) (1982) (sets forth claims that have priority over a federal tax lien); 9 MERTENS, *supra* note 13, § 54.42.

24. 461 U.S. 677 (1983). Although this decision dealt specifically with the effect of a Texas homestead interest upon a delinquent taxpayer's property, the court set forth a number of rules that apply anytime a third party claims an interest in property in which a delinquent taxpayer also has an interest.

25. I.R.C. § 6321 (1982).

26. I.R.C. § 7403 (1982).

27. See generally *id.* Attachment of a tax lien will, realistically, hinder the concurrent owner's ability to alienate his interest. However, because the tax lien only extends to the delinquent owner's interest and does not encumber the nondelinquent owner's interest, the nondelinquent owner would not be able to maintain an action to quiet title. See *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964). See also 9 MERTENS, *supra* note 13, § 54.38, at 126.

28. *United States v. Rodgers*, 461 U.S. 677, 689 (1983).

29. *Id.* at 690-92.

30. I.R.C. § 6321 states that a lien "shall" attach, where I.R.C. § 7403(c) states that the district court "may" decree a sale. "Shall" has been interpreted to be a mandate, whereas "may" has been interpreted to allow the district courts the ability to exercise equitable discretion. See *Rodgers*, 461 U.S. at 704-08.

31. The Court noted that where innocent third party interests are at stake, a limited set of factors should be considered by the district courts. These factors are as follows: The extent to which the government's interest would be prejudiced by a forced sale of the debtor's partial interest only; whether the third party with a nonliable separate interest in the property has a legally recognized expectation that the property would not be subject to forced sale by the delinquent taxpayer; the likely prejudice to the third party in terms of relocation costs; and the relative character and value of the nonliable and liable interests held in the property. *Rodgers*, 461 U.S. at 708-10.

32. The Court noted that had section 7403 allowed for gratuitous confiscation of one person's property interests in order to satisfy another person's tax liability, it may be violative of

The creation and enforcement of a federal tax lien is a matter of federal law and state law cannot bar the operation of these sections.³³ However, federal courts must look to state law to determine the nature of property interests owned by a delinquent taxpayer and any innocent third parties.³⁴ For this reason, before the *Rodgers* decision, a line of cases held that where state homestead laws expressly provide for a present property interest, conferring more than merely an exemption,³⁵ the government may not enforce its tax lien against the property while the nondelinquent spouse is still in possession thereof.³⁶ These courts seem to have deemed the presence of such homestead interests as situations when district courts should automatically exercise their equitable discretion.

This line of cases was expressly refuted in *Rodgers*.³⁷ The Court of Appeals for the Fifth Circuit had concluded that if the homestead estate constituted a property right under state law and was claimed by a nondelinquent spouse, then it would bar the federal government from pursuing a forced sale of the entire property.³⁸ The Supreme Court disagreed, holding that section 7403 was intended to reach the entire property in which a delinquent taxpayer had any right, title, or interest.³⁹ No exception for a homestead interest appears on the face of the statute and the Court declined to frustrate the policy of the statute by reading in an exception.⁴⁰ Furthermore, property rights that attach to a homestead, of whatever nature, are adequately discharged by the payment of compensation. No further deference to state law is required by section 7403 or the Constitution.⁴¹

Therefore, the Supreme Court made it clear that a homestead interest, in and of itself, will not necessarily create an appropriate situation for a district

the fifth amendment, i.e., taking of property without just compensation. However, to the extent a third party's interests are taken, section 7403 provides compensation for that taking by requiring the district court to distribute the proceeds of the sale "according to the findings of the court in respect to the interests of the parties and the United States." *Rodgers*, 461 U.S. at 695.

33. *United States v. Hershberger*, 475 F.2d 677 (10th Cir. 1973); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); *United States v. Trilling*, 328 F.2d 699 (7th Cir. 1964); *United States v. Heffron*, 158 F.2d 657 (9th Cir. 1947).

34. *Aquilino v. United States*, 363 U.S. 509 (1960); *United States v. Bess*, 357 U.S. 51 (1958).

35. It is well settled that state exemption laws do not protect property from federal tax liens and foreclosure. 9 MERTENS, *supra* note 13, § 54.52, at 213. See also *Michigan v. United States*, 317 U.S. 338 (1943); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964); *Weitzner v. United States*, 309 F.2d 45 (5th Cir. 1962); *United States v. Heffron*, 158 F.2d 657 (9th Cir. 1947).

36. *United States v. Hershberger*, 475 F.2d 677 (10th Cir. 1973); *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964); *United States v. Morgan*, 554 F. Supp. 582 (D. Colo. 1982); *Morgan v. Moynahan*, 86 F. Supp. 522 (S.D. Tex. 1949).

37. 461 U.S. 677 (1983).

38. *United States v. Rodgers*, 649 F.2d 1117 (5th Cir. 1981), *rev'd & remanded*, 461 U.S. 677 (1983).

39. *United States v. Rodgers*, 461 U.S. 677, 699 (1983).

40. *Id.* at 700.

41. *Id.*

court to invoke its discretion and refuse a sale of the property.⁴² However, the presence and nature of a homestead interest is not totally irrelevant. One of the factors that a district court should consider is the relative character and value of the liable and nonliable interests held in the property.⁴³ The Court suggested that where the nonliable party had a possessory interest of a high proportionate value, the district court would be justified in refusing to allow a forced sale.⁴⁴ Thus, while the exact nature of the homestead interest is no longer determinative, it will still be important.

Oklahoma Homestead

Oklahoma law creates two distinct homestead interests, often referred to as the "constitutional homestead"⁴⁵ and the "probate homestead."⁴⁶ The constitutional homestead exists during the life of both spouses and is intended to protect the family from creditors only.⁴⁷ Probate homestead vests upon the death of one of the spouses.⁴⁸ It gives the surviving spouse (and/or minor children)⁴⁹ a special, individual right of lifetime possession that is intended to protect the survivor against all persons.⁵⁰

The exact nature of the interest created by each type of homestead is not clear; the Oklahoma Supreme Court has referred to them in various ways. The court has expressly stated that neither is an estate in land.⁵¹ The constitu-

42. Read narrowly, *Rodgers* applies only to Texas homestead in that the Supreme Court did not explicitly state that all states' homestead rights are subject to the decision. However, the only argument to take a case out of the scope of the decision would be that a state's homestead laws create stronger property rights than do Texas homestead laws. Texas is one of the few states that define their homestead interest as an actual estate in property. *Johnson v. Commissioner*, 718 F.2d 1303 (5th Cir. 1983) (*citing* *Woods v. Alvarado State Bank*, 118 Tex. 586, 594, 19 S.W.2d 35, 37 (1929)); *Crews v. General Crude Oil Co.*, 287 S.W.2d 243 (Tex. Civ. App. 1955). No homestead statute could be more protective than this. Therefore, *Rodgers* should apply to all states' homestead interest.

43. *Rodgers*, 461 U.S. at 709. See also *supra* note 31.

44. *Rodgers*, 461 U.S. at 709-10.

45. OKLA. CONST. art. XII, §§ 1-3; 31 OKLA. STAT. §§ 1-5 (1981).

46. 58 OKLA. STAT. § 311 (1981).

47. *Mercer v. Mercer*, 365 P.2d 554 (Okla. 1961), *citing In re Gardner's Estate*, 122 Okla. 25, 250 P. 490 (1926); *In re Carothers' Estate*, 196 Okla. 640, 167 P.2d 899 (1946); *Mitchell v. Quinton*, 189 Okla. 329, 116 P.2d 995 (1941); *Gooch v. Gooch*, 38 Okla. 300, 133 P. 242 (1913).

48. Two contingencies must occur before a probate homestead will vest; (1) A survivor with the statutory family status—a spouse or minor child; and (2) an existing occupation of the premises the survivor intends to continue. *In re Wallace*, 648 P.2d 828, 832 (Okla. 1982), *citing In re Cole's Estate*, 85 Okla. 69, 205 P. 172 (1922).

49. Homestead rights of minor children will not vest until the death of the surviving spouse. *Hembree v. Magnolia Pet. Co.*, 176 Okla. 524, 531, 56 P.2d 851, 860 (1935).

50. *Mercer v. Mercer*, 365 P.2d 554, 556 (Okla. 1961); *Ringer v. Byrne*, 183 Okla. 46, 48, 80 P.2d 212, 214 (1938); *In re Gardner's Estate*, 122 Okla. 26, 29, 250 P. 490, 492 (1926).

51. *Chase v. Chase*, 387 P.2d 491, 493 (Okla. 1963) (probate homestead is not an estate in land); *Evans v. Evans*, 301 P.2d 232, 234 (Okla. 1956) (neither constitutional nor probate homestead is an estate in land); *Kemp v. Turnbull*, 198 Okla. 27, 30, 174 P.2d 385, 386 (1946) (probate homestead is not an estate in land); *Mercer v. McKeel*, 188 Okla. 280, 284, 108 P.2d 138, 141 (1940) (constitutional homestead is not an estate in land).

tional homestead, though a special right vested in both spouses regardless of who owns title to the property,⁵² appears to be merely a privilege of exemption.⁵³ However, the probate homestead seems to be more than a mere exemption right. It has been referred to as a right to continue to occupy and possess the whole homestead⁵⁴ for the remainder of the survivor's life.⁵⁵ This seems to define the probate homestead as a possessory interest in property.⁵⁶

According to this interpretation, if the federal government institutes a foreclosure action *before* the death of the delinquent spouse, a homestead interest in the nondelinquent spouse would not affect the action.⁵⁷ However, if the foreclosure action is not instituted until *after* the delinquent spouse's death, assuming a proper vesting of the probate homestead,⁵⁸ the nondelinquent spouse may be able to prevent a forced sale of the property.

Mere ownership of a possessory interest, such as a probate homestead, will probably not be sufficient to prevent a sale.⁵⁹ However, if the nondelinquent surviving spouse can show other factors in addition to a possessory interest,

52. *Keel v. Jones*, 413 P.2d 549, 551 (1966) (per curiam) (citing *Ludeman v. Armbruster*, 196 Okla. 452, 165 P.2d 835 (1946); *Van Meter v. Field*, 195 Okla. 555, 159 P.2d 546 (1945)).

53. *In re Wallace*, 648 P.2d 828, 832 (Okla. 1982); *Evans v. Evans*, 301 P.2d 232, 234 (Okla. 1961); *Mercer v. McKeel*, 188 Okla. 280, 284, 108 P.2d 138, 141 (1940).

54. 31 OKLA. STAT. § 1 (1981) defines what property may constitute homestead property. 58 OKLA. STAT. § 311 (1981) states that the survivor may continue to occupy and possess the "whole homestead." This refers to the homestead as set forth under 31 OKLA. STAT. § 1.

55. *Woods v. Biggs*, 424 P.2d 59, 60 (Okla. 1967); *Mercer v. Mercer*, 365 P.2d 554, 556 (Okla. 1961); *Oklahoma State Bank v. Van Hassel*, 189 Okla. 48, 50, 114 P.2d 912, 913 (1941); *Ringer v. Byrne*, 183 Okla. 46, 48, 80 P.2d 212, 214 (1938); *In re Gardner's Estate*, 122 Okla. 26, 29, 250 P. 490, 492 (1926).

56. The Oklahoma Supreme Court, when construing the nature of the probate homestead, has stated that "homestead laws are statutes of exemption." *In re Wallace*, 648 P.2d 828, 832 (Okla. 1982), citing *In re Wineland* 3 F. Supp. 796 (D. Okla. 1933), *Preston v. Ottawa County Nat'l Bank*, 138 Okla. 133, 280 P. 581 (1929); *Rockwood v. St. John's Estate*, 10 Okla. 476, 62 P. 277 (1900). However, the cited authority does not support the statement. In *Wineland* and *Preston* the court was construing constitutional, not probate, homestead. In *Rockwood* the court was construing probate homestead, but the court simply stated that all exemption laws should be liberally construed. Although one may infer from this that the court considered the probate homestead as merely an exemption statute, the issue of the *Rockwood* case was *not* what nature of interest is created by probate homestead. Furthermore, when the court made the statement in *Wallace*, it was doing so to draw a distinction between statutes of succession and homestead. Therefore, even though the court has referred to probate homestead as merely an exemption statute, it seems to have done so inadvertently.

57. The nondelinquent spouse would still only have a constitutional homestead. Since this is merely a right of exemption, not rising to the level of a possessory interest, it would have no effect. See *supra* notes 35, 43-44 and accompanying text. However, the spouse would be entitled to complete compensation for the value of his homestead interest. See *supra* note 32 and accompanying text. See also *infra* note 63 and accompanying text.

58. See *supra* note 48.

59. See *United States v. Molina*, 584 F. Supp. 1011 (S.D. Tex. 1984); *United States v. Bachman*, 584 F. Supp. 1002 (S.D. Iowa 1984). In both *Molina* and *Bachman*, the district courts allowed the sale of the entire property, notwithstanding a nondelinquent spouse's homestead interest. In both cases, the nature of the homestead interest was at least a possessory interest. The courts held that the homestead interest was not, by itself, sufficient to prevent a forced sale.

the district court may refuse to order foreclosure.⁶⁰ A number of relevant factors were suggested in the *Rodgers* decision. Factors that may be relevant in this context are:

(1) showing that the delinquent spouse's indebtedness could be satisfied out of property other than the homestead property;⁶¹

(2) showing that the surviving spouse's homestead interest would be expected to expire in the relatively near future;⁶²

(3) showing that the homestead interest constitutes a high proportion of the value of the entire property;⁶³ and

(4) showing that the surviving spouse would have a legally recognized expectation that the property would not be subject to foreclosure to satisfy the deceased's debts.⁶⁴

Few district courts have decided cases involving these issues since the *Rodgers* decision.⁶⁵ Therefore, exactly how much evidence will be necessary to prevent foreclosure is not clear. The only guideline currently available is that the presence of a homestead interest alone, of whatever nature, will not be sufficient.⁶⁶ Also, the prejudice to the nondelinquent spouse must outweigh any possible prejudice to the government. Merely striking a balance will not be sufficient.⁶⁷

Initially, the ability of the federal government to force the sale of property notwithstanding a nondelinquent spouse's homestead interest may seem a bit

60. See *supra* note 31.

61. *Rodgers*, 461 U.S. at 708 n.40.

62. *Id.* at 709 n.41. A homestead interest lapses upon abandonment or death of the surviving spouse. *In re Wallace*, 648 P.2d 828, 832 (Okla. 1982). Therefore, where the surviving spouse is an elderly person, this fact may persuade a district court to postpone foreclosure.

63. The homestead interest is to be valued at the present discounted value of a life estate using life expectancy tables. *Rodgers*, 461 U.S. at 710. For an extensive review of the method of valuation, see Note, *U.S. v. Rodgers; The Effect of Federal Tax Liens, Foreclosure upon Texas Homestead*, 35 BAYLOR L. REV. 858 (1983). A surviving spouse who has a long life expectancy may be able to establish that the value of the homestead interest is high enough, proportionately, to prevent foreclosure. However, this will necessarily mean, assuming the spouse intends to occupy the homestead for the remainder of his life, that the homestead interest may not be expected to expire in the relatively near future. Thus the second and third factors listed herein may be at odds with each other in some circumstances.

64. *Rodgers*, 461 U.S. at 709. The Court noted that homestead interests are on the extreme end of a continuum with regard to the expectations of nondelinquent cotenants. Therefore, the fact that homestead owners would normally expect their interest to be protected from forced sale will give them at least a stronger argument against foreclosure than many other concurrent interests, i.e., joint tenants. *Id.* at 710.

65. See *Indiana Nat'l Bank v. Gamble*, No. 83-C-0403 (N.D. Ill. Oct. 19, 1984) (available Jan. 2, 1985, on LEXIS, Genfed library, Dist. file); *United States v. Molina*, 584 F. Supp. 1011 (S.D. Tex. 1984); *United States v. Bachman*, 584 F. Supp. 1002 (S.D. Iowa 1984). The *Rodgers* case was remanded to the district court for consideration in light of the Supreme Court's decision. As of the writing of this note, the district court has not reached a decision on remand.

66. See *supra* note 59.

67. See *United States v. Bachman*, 584 F. Supp. 1002, 1005 (S.D. Iowa 1984). See also *Indiana Nat'l Bank v. Gamble*, No. 83-C-0403 (N.D. Ill. Oct. 19, 1984) (available Jan. 2, 1985, on LEXIS, Genfed library, Dist. file).

harsh and inequitable. However, section 7403 provides adequate safety devices to prevent unjust results. Before a sale, there is a judicial determination of all parties' interests and anyone whose property interest is "taken" is entitled to complete compensation.⁶⁸ Furthermore, a district court may exercise its discretion and, in appropriate cases where a forced sale would be especially prejudicial, may refuse to order a sale.⁶⁹ Therefore, the ultimate resolution of conflicts between section 7403 and state homestead interests is a fair solution to a delicate problem.

However, there is a logical extension of the *Rodgers* decision that would not yield such an equitable result. Attachment of a lien under section 6321 and foreclosure under section 7403 is not the only means the federal government has for converting a delinquent taxpayer's property into proceeds for satisfaction of a tax liability. The federal government can also resort to levy and distraint under sections 6331 through 6340.⁷⁰

Levy and Distraint

Section 6331 authorizes the federal government to collect delinquent taxes by levy upon all property and rights to property belonging to a delinquent taxpayer or on which a lien has attached.⁷¹ Section 6335 provides the procedural methods for selling such property.⁷² If any property subject to levy is not divisible, the entire property may be sold.⁷³ Section 6334(a) lists property that is exempt from levy.⁷⁴ No other property, or rights to property, are exempt except those specifically listed.⁷⁵

Applying the *Rodgers* rationale, if the government sought to enforce its lien on property owned by a delinquent spouse, but subject to a homestead interest of a nondelinquent spouse, under section 6331, levy and distraint, the property would most likely be sold. A homestead interest does not affect the attachment of a tax lien,⁷⁶ and because the government may levy upon any property subject to a lien, homestead would not affect a levy either. If the property subject to levy is not divisible, the whole of the property may be sold in order to collect the tax.⁷⁷ Therefore, as with section 7403, the entire property may be sold notwithstanding a homestead interest.⁷⁸ The only pro-

68. See *supra* text accompanying notes 21-23 & 32.

69. See *supra* notes 31, 62 and accompanying text.

70. I.R.C. §§ 6331-6340 (1982). See 5 J. RABKIN & M. JOHNSON, FEDERAL INCOME GIFT AND ESTATE TAXATION § 73.02 (1984).

71. I.R.C. § 6331 (1982).

72. I.R.C. § 6335 (1982).

73. I.R.C. § 6335(c) (1982).

74. I.R.C. § 6334(a) (1982).

75. I.R.C. § 6334(c) (1982). State-created homestead interests are not within the property interests expressly exempted by this statute.

76. See *supra* text accompanying note 27.

77. I.R.C. § 6335(c) (1982).

78. However, unlike a sale under section 7403, the property owner retains a right of redemption under I.R.C. § 6337 when property is sold pursuant to section 6335. See 5 RABKIN & JOHNSON, *supra* note 70, § 73.02, at 7311(a).

erty exempt from levy is expressly set out by statute.⁷⁹ State-created homestead interests are not among the property exempted. Where state law creates an exemption and federal law does not, the supremacy clause allows the federal government to prevail.⁸⁰ Therefore, state-created homestead interests would not prevent levy or sale of property in which a delinquent taxpayer has any interest.

Although this appears to be the exact result reached in the *Rodgers* decision, it is not. Unlike section 7403, judicial foreclosure, sections 6331 through 6340, the levy and distraint provisions, do *not* provide for either a judicial determination of all parties' interests or complete compensation for the property interest of a nondelinquent third party that may be taken to satisfy delinquent taxes of another.⁸¹

The ramifications of this distinction are evident in *Herndon v. United States*.⁸² In *Herndon*, Doris Herndon had a homestead interest in property held in her husband's name. The federal government had a lien on the same property for delinquent taxes owed by Mr. Herndon. Pursuant to a levy, the United States proceeded by nonjudicial steps to foreclose its lien by selling the real property at a public auction. Mrs. Herndon sought an injunction against the federal government, claiming that her Arkansas homestead interest precluded a sale to satisfy her husband's federal tax liability. The district court and the Court of Appeals for the Eighth Circuit denied Mrs. Herndon's request for an injunction.⁸³ The Eighth Circuit's ultimate holding was that under section 6331 the property was subject to tax levy and sale.⁸⁴ The court further decided that a state-created homestead interest could not exempt the property because homestead interests are not among the exemptions listed in section 6334, and federal law controls over state law.⁸⁵ Finally, the court concluded that the federal government would be selling the property subject to Mrs. Herndon's homestead rights and any prospective buyer must be advised accordingly.⁸⁶

The critical distinction between *Herndon* and *Rodgers* is that under section 7403, a nondelinquent spouse who owns a homestead interest in a delinquent spouse's property will be afforded a judicial determination of his interest and

79. I.R.C. § 6334(a) (1982).

80. *Rodgers*, 461 U.S. at 699. See also Treas. Reg. § 301.6334-1(c) (1954). Here, the Commissioner expressly states that property exempted under state homestead laws is nevertheless subject to levy by the United States for collection of its taxes.

81. The nondelinquent taxpayer's interest technically may not be taken by a levy and distraint action. In *Herndon v. United States*, 501 F.2d 1219 (8th Cir. 1974), the court, addressing this issue, held that only the delinquent taxpayer's interest was being sold. See *infra* note 86. But see *infra* note 87.

82. 501 F.2d 1219 (8th Cir. 1974).

83. *Id.* at 1220.

84. *Id.* at 1223.

85. *Id.* at 1221-24.

86. The court found it unnecessary to determine the nature of Mrs. Herndon's homestead interest because the government was only claiming to sell Mr. Herndon's right, title, and interest, thereby leaving Mrs. Herndon's homestead interest unimpaired. Thus, the land would be sold subject to the homestead claim. *Id.* at 1223.

awarded compensation if his interest is taken before the federal government can collect. However, under section 6331, the nondelinquent spouse is not entitled to a judicial determination of his interest, nor to any compensation for any encroachment thereon by a forced sale.⁸⁷ Yet, the government will still be able to collect. Furthermore, a party buying such property is at best buying a lawsuit. This will certainly diminish the price that the government will be able to obtain from a sale.⁸⁸

Simply stated, the federal government is authorized to force a sale of such property (at a certainly lowered price), to collect the delinquent taxes, and to leave the purchaser and the nondelinquent spouse to proceed to the courts and fight over exactly what rights each party has to the property. This is clearly an unjust result, especially when the federal government could have proceeded under section 7403 and allowed all parties involved to have their rights fairly and equitably determined and settled in one proceeding, with all the safeguards against injustice afforded.⁸⁹

Conclusion

Overall, the Supreme Court promulgated limited certainty by its decision in *Rodgers*. Stated very generally, a federal lien *shall* attach, and *may* be foreclosed, notwithstanding a homestead interest. Collateral issues, such as valuation of a homestead and what is necessary to trigger a district court's equitable discretion, were left relatively flexible, and rightfully so. Each case involving a tax lien and a homestead may pose the same general issues. However, the specific details will vary infinitely. Cases of this nature are best governed by flexible rules.

Homestead owners must be acutely aware that they are not on equal footing with the federal government. Although the foreclosure statutes are flexible, *Rodgers* and succeeding decisions definitely favor foreclosure. Nevertheless, homestead owners are given their day in court and, even if they lose the foreclosure issue, all is not lost. They will be compensated for their loss at the same time the government collects its debt.

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87. A question raised, but not answered, in *Herndon* was whether the homestead interest would in fact survive the auction sale. A sale of real property under levy and distraint discharges all liens, encumbrances, and titles upon the property that do not have priority over the federal tax lien. I.R.C. § 6339(c) (1982). The claims having priority over a federal tax lien are specifically set out by statute. I.R.C. § 6323(a)(b) (1982). Homestead interests are not listed among these interests. Therefore, arguably, the homestead interest would not have priority over the federal tax lien and would be extinguished by a sale of the property pursuant to levy and distraint. In this event, it seems the nondelinquent spouse would have a strong fifth amendment argument for taking of property without just compensation. See *supra* note 32.

88. *Herndon*, 501 F.2d at 1223-24 (Ross, J., concurring). See also Plumb, *Federal Tax Collection and Lien Problems*, *supra* note 12, at 278 n.206.

89. The federal government appears to have an option to enforce its lien under either foreclosure or levy. However, it has been suggested that where nondelinquent third parties claim an interest in the property, the foreclosure method is the most appropriate. See Plumb, *Federal Tax Collection and Lien Problems*, *supra* note 12, at 278 n.206.