

N.D.A.G. Letter to Johnson (June 19, 1992)

June 19, 1992

Mr. Dennis E. Johnson
McKenzie County State's Attorney
P.O. Box 1288
Watford City, ND 58854

Dear Mr. Johnson:

Thank you for your February 20, 1992, letter in which you inquire whether the Small Business Administration is liable for penalty and interest under 15 USC § 646 when it satisfies a local property tax lien. I apologize for the delay in responding to your request.

Real property owned by the Small Business Administration is exempt from ad valorem taxation. 1983 N.D. Op. Att'y Gen. 134. However, Congress has granted a partial waiver of this exemption in a case of real property foreclosed upon by the Small Business Administration in enacting 15 USC § 646 which provides:

§ 646. Liens.

Any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property, for taxes due on the property to a State, or political subdivision thereof, in any case where such lien would, under applicable state law, be superior to such interests if such interests were held by any party other than the United States.

You question whether pursuant to this section the Small Business Administration must remit penalty and interest when it satisfies a local property tax lien. A review of the case law reveals that the courts are divided on this issue.

The United States Sixth Circuit Court of Appeals, in United States v. Consumer Scrap Iron Corp., 384 F.2d 62, 65 6th Cir. 1967) held:

"We reject appellees' contention that the phrase in 15 USC § 646 (1964) 'any lien on such property for taxes due' must be considered as authorizing priority for city interest claims, because the state statute creates only a single and indivisible lien for taxes, interest and charges. We hold that where Congress has subordinated the United States' secured interest to 'any lien on such property for taxes due,' but has not similarly waived the sovereign immunity from 'interest' and 'penalties,' that the phrase 'any lien on such property for taxes due' must be construed as referring only to that part of any lien which is for 'taxes due.'"

Likewise, the United States District Court for the district of Montana has held that the Small Business Administration is not liable for penalty and interest under 15 USC § 646. United States v. Christensen, 218 F.Supp. 722 (Dist. Ct. Mont. 1963); United States v. Ravalli Co. Creamery, Inc., 657 F.Supp. 481 (Dist. Ct. Mont. 1987).

However, the United States District Court for the western district of Pennsylvania reached the opposite conclusion and allowed the payment of penalty and interest under 15 USC § 646 in United States v. Cambria Co., 532 F.Supp. 634 (D. Ct. W. D. Pa. 1982). The Pennsylvania court specifically rejected the reasoning articulated in Consumer Scrap Iron, *supra*, that waivers of governmental immunity are to be strictly construed in favor of the government.

The United States District Court for the District of North Dakota, in United States v. Bednar Motors, Inc., 219 F.Supp. 34 (D.N.D. 1963), held that the lien of Griggs County under N.D.C.C. § 57-02-40 for real property taxes, penalties, interest and special assessments had priority over the mortgage indebtedness on the property owed to the SBA. *Id* at 36. The court, without discussion, assumed that the extent of the subordination provided by 15 U.S.C. § 646 included penalties, interest and special assessments. No cases on this issue have been decided by the Eighth Circuit.

Due to the split in authority, I am unable to say how the Eighth Circuit would decide this issue. Therefore, each county will have to determine whether it will pursue the issue.

Sincerely,

Nicholas J. Spaeth

cjs/krb