

Memorandum

To: Mr. Rick Slater
Supervisor, Collections Unit

Date: May 25, 1990

From: Gordon P. Adelman
Tax Counsel

Subject REDACTED TEXT

You requested review of the facts of the above-captioned account and a determination of whether a nominee lien may be issued in this case.

A nominee lien is an instrument that is recorded against certain property to allege that the property is being held by another, the "nominee," for the benefit and usage of the debtor taxpayer. The filing of the nominee lien is proper where title is held by a nominee third party as a result of a fraudulent conveyance by a delinquent tax debtor. Whether a conveyance is fraudulent involves a review of the following elements and factors: (1) the intent of the parties; (2) the financial conditions of the transfer; (3) the consideration or lack of consideration for the transfer; and (4) the relationship of the parties. (Operations Memo No. 878, revised June 22, 1987.)

Operations Memo No. 878 cited former Civil Code Section 3439.04 and 3439.07 of the Uniform Fraudulent Conveyance Act as to what circumstances to look for in determining whether a fraudulent conveyance has been made. These code sections were subsequently amended by the revamped Uniform Fraudulent Transfer Act, and consolidated into Civil Code Section 3439.04. (Stats. 1986, Ch. 383 § 2.) Civil Code Section 3439.04, as amended, provides that:

"A transfer made or obligation incurred by the debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

"(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

"(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, the debtor:

(1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.”

Subdivision (a) of Civil Code Section 5120.110 states:

“Except as otherwise expressly provided by statute, the community property is liable for a debt incurred by either spouse before or during marriage, regardless which spouse has the management and control of the property and regardless whether one or both spouses are parties to the debt or to a judgment for the debt.”

Civil Code Section 5110.710 states, in pertinent part, that subject to Civil Code Section 5110.720, married persons may by agreement or transfer, with or without consideration, transmute community property to separate property of either spouse. Civil Code Section 5110.720 states that a transmutation is subject to the laws governing fraudulent transfers.

As a preface to our analysis, a nominee lien may be warranted in a situation where there is an apparent transmutation of community property to a spouse as his or her separate property. If a nominee lien were not filed in this type of situation, the community property lien would only reach the community property interest of the spouse in that particular piece of property. However, if upon the sale of that property the escrow company felt that no community property interest existed, but rather that the interest were the spouse’s separate property, the Board’s lien would go unpaid. Thus, a nominee lien is appropriate in a transmutation situation because of Civil Code Section 5110.720 which states that transmutions are subject to the laws governing fraudulent transfers.

Facts presented in this case are as follows:

REDACTED TEXT has a use tax liability of \$105,749.69 from his purchase of a Grumman Aircraft (Number -REDACTED TEXT). It has been determined that the use tax properly applies to the purchase (Opinion of March 27, 1989, R.L. Dick). A Notice of Determination was issued August 29, 1986. A Demand for Immediate Payment was sent on October 14, 1986. On December 12, 1986, REDACTED TEXT quitclaimed his interest in property located at REDACTED TEXT , Thousand Oaks, California as a gift to REDACTED TEXT, a single woman. The property had been purchased August 14, 1986 by REDACTED TEXT and REDACTED TEXT. REDACTED TEXT is also identified as REDACTED TEXT, taxpayer’s spouse.

The REDACTED TEXT occupy the property as a residence, claim the mortgage interest as a deduction on state and federal joint income tax returns, take the homeowner’s property tax exemption and a Deed of Trust dated January 23, 1989 indicates that REDACTED TEXT and REDACTED TEXT are the same person.

Mr. REDACTED TEXT claims he was induced by fraud into the purchase of the aircraft. He has testified in a Grand Jury investigation and is a witness for the FBI in its case against the group of individuals whom he claims defrauded him as well as defrauding Wells Fargo Bank (the moving party in the case). Mr. REDACTED TEXT is not a target of the investigation in the federal suit. Notwithstanding these contentions, the facts are that Mr. REDACTED TEXT was the purchaser of the aircraft, is liable for the use tax, was the recipient of a Determination and a Demand and then quitclaimed the property interest as a gift to his spouse.

In quitclaiming his interest in the property, Mr. REDACTED TEXT attempted to shield his assets and hinder collection of the use tax. His actions indicate intent to frustrate collection activities through the divestiture of the property by fraudulent conveyance while still engaging the benefit of the property as his own. His actions have satisfied the requirements necessary to support a fraudulent conveyance.

A nominee lien should be issued against REDACTED TEXT as nominee for REDACTED TEXT.

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