

170.0012

Memorandum

To: Headquarters – Collection Section (B. R.) Date: July 20, 1995

From: Thomas J. Cooke
Staff Counsel

Subject: REDACTED TEXT

Gary Jugum has requested that I respond to your memorandum to him dated July 6, 1995, concerning the Santa Ana District Office request for a nominee lien.

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 considerations for transfer; and (4) the relationship of the parties. (Operations Memo No. 878, revised June 22, 1987.)

Operations Memo No. 878 cited former Civil Code sections 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 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.”

The taxpayer, REDACTED TEXT, obtained a seller's permit in 1989 to operate a used automobile business. The taxpayer failed to file a return, and pay tax, for the fourth quarter of 1993. The payment of tax was due January 31, 1994. In an audit dated December 22, 1994, the Board estimated a tax due of \$16,024.91 for the fourth quarter of 1993, plus a penalty of \$1,602.51 for that quarter.

On March 18, 1994, the taxpayer recorded a grant deed transferring real property owned by him in Mission Viejo to his brother, REDACTED TEXT. The deed indicated that no documentary transfer tax was paid citing, "Interfamily transfer, no consideration."

The Board issued a Notice of Determination to the taxpayer on January 27, 1995, based on the audit results in the total sum of \$219,774.62. The taxpayer currently has a liability to the Board of over \$247,600.00.

It is our opinion that the taxpayer transferred the property to his brother for no consideration with actual intent to hinder, delay, or defraud the Board within the meaning of Civil Code section 3439.04. A nominee lien should be issued.

TJC/cmm

cc: Mr. Rick Slater (MIC:55)