Tax Warrants in New York

by David Gray Carlson[*] and Carlton M. Smith[**]

Federal tax collecting procedure is well known, but collection procedure in New York is shrouded in mystery. Lawyers delving into the field will find that the legal materials consist of short, often incoherent judicial opinions scattered across 100 years of changing laws. Typically, if a court opinion is unsatisfactory, the legislature reacts promptly by amending the New York Tax Law, so that one can never be confident that any given precedent is still valid.

As a result, New York tax law itself is highly confusing, repetitive and contradictory. Much of the problem can be traced to a legislative decision, made many years ago, that tax collection procedure should reflect the law governing collection of ordinary money judgments. The choice has been a disaster in terms of coherence. New York's law of money judgments is itself rife with confusion,[1] and its interaction with tax law is almost completely mystifying.

This Article is a first attempt at systematizing New York tax collection in a rational way. There has never been a study of New York tax collection procedure, although the State (and City of New York) are potent forces in debtor-creditor relations both here and abroad. At the moment, New York tax law is full of potholes. We can do little more than identify some of these and speculate how they might be filled, consistent with common sense, to the extent the statutory materials allow.

The current study is limited to the New York tax warrant. This document issues from various taxing authorities in New York, most notably the State Department of Taxation and Finance (DTF) and New York City's Department of Finance (NYCDOF).[2] Twenty-nine different liens arise from tax warrants issuable on behalf of the State or the City of New York.[3] Other taxes exist that do not involve

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[*] Professor of Law, Benjamin N. Cardozo School of Law.

[**] Clinical Associate Professor and Director, Cardozo Tax Clinic. The authors wish to express their gratitude for support for this project from the James B. Lewis Fund.

[1] For a detailed study of money judgment enforcement, see David Gray Carlson, *Critique of Money Judgment (Part I: Judicial Liens on New York Real Property)*, 82 ST. JOHNS L. REV. 1291 (2008); *Critique of Money Judgment (Part II: Judicial Liens on New York Personal Property)*, 83 ST. JOHNS L. REV. 43 (2009).

[2] The DTF collects city and county sales taxes and the income tax for New York City and Yonkers. The New York City DOF collects all other city taxes, inculding real property transfer taxes, unincorporated business taxes, the city's business and corporation taxes, the commercial rent occpuancy tax and the mortgage recording tax.

[3] The following is a list of such tax liens which involve a warrant:

State

1. To reimburse payments to a producer of agricultural products from the agricultural producers security fund, the Commissioner may issue warrants. N.Y.

warrants.[4] Taxes for which warrants are not issued are excluded from the present study.[5]

The tax warrant is many things. First, it is a judgment, or so the State and City of New York hope when they seek Full Faith and Credit recognition in other states. Second, when docketed with the county clerk and with the Department of State,[6] the tax warrant creates a lien on real and personal[7] property. Third, it is a writ of

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Agr. & Marketing Law § 250-b(2)

2. To reimburse payments to a producer of milk from the milk producers security fund, the Commissioner may issue warrants. N.Y. Agr. & Marketing Law § 258-b(4)(e).

3. To cure a default by an employer to the unemployment insurance fund, the commissioner of labor may issue warrants. N.Y. Labor Law § 573(2). Unlike the other statutes, this provision limits the secretary's tax lien to real property only.

4. Transfer of Stock and other corporate certificates. N.Y. Tax Law § 279-b (lien on real property only).

5. Gas tax. N.Y. Tax Law § 289.

6. Alcoholic beverages. N.Y. Tax Law § 431(2).

7. Cigarette taxes. N.Y. Tax Law § 479.

8. Highway use tax. N.Y. Tax Law § 511(2).

9. Personal income tax. N.Y. Tax Law § 692.

10. Corporate tax. N.Y. Tax Law § 1092.

11. Sales and use tax. N.Y. Tax Law § 1141(b).

12. Real estate transfer tax. N.Y. Tax Law § 1414.

New York City

13. Unincorporated Business Income Tax. N.Y.C. Admin. Code § 11-532(3).

14. Corporate tax. N.Y.C. Admin. Code § 11-683(3).

15. Commercial rent or occupancy tax. N.Y.C. Admin. Code § 11-712(b).

16. Commercial Motor Vehicle tax, N.Y.C. Admin. Code § 11-814(b).

17. Utility tax. N.Y.C. Admin. Code § 11-1111(b).

18. Horse race admissions. N.Y.C. Admin. Code § 11-1210(b).

19. Cigarette tax. N.Y.C. Admin. Code § 11-1314(b).

20. Taxicab license transfer tax. N.Y.C. Admin. Code § 11-1410(b).

21. Coin operated amusement device tax. N.Y.C. Admin. Code § 11-1512(b).

22. Container tax. N.Y.C. Admin. Code § 11-1614(b).

23. City personal income tax. N.Y.C. Admin. Code § 11-1792(d).

24. Nonresident earnings tax. N.Y.C. Admin. Code § 11-1934(d).

25. Real property transfer tax. N.Y.C. Admin. Code § 11-2111(b).

26. Motor vehicle tax. N.Y.C. Admin. Code § 11-2211(b).

27. Retail liquor license tax. N.Y.C. Admin. Code § 11-2411(b).

28. Hotel occupancy tax. N.Y.C. Admin. Code § 11-2510(b).

29. Annual subterranean vault charge. N.Y.C. Admin. Code § 11-2711(b).

[4] These most notably local property taxes and the mortgage recording taxes of the State and City. N.Y. Tax Law § 253, N.Y.C. Admin. Code § 11-2610.

[5] A "tax warrant" may also be issued by county legislature to the tax receiver of a town, authorizing collection of taxes within a town. Board of Educ. v. Rettaliata, 78 N.Y.2d 128, 576 N.E.2d 716, 572 N.Y.S.2d 885 (1991); Saxton v. Hose, 8 N.Y.2d 335, 170 N.E.2d 669, 207 N.Y.S.2d 661 (1960). These warrants are beyond the scope of this Article.

[6] See N.Y. Tax Law § 6 (describing the formal features of such a filing).

[7] The labor commissioner's lien, however, is limited to real property only. N.Y. Labor Law § 573(2).

execution to the county sheriffs.[8] Or, alternatively, it authorizes a designated tax compliance officer (an employee of the DTF or other issuer of the warrant) to pursue collection as a sheriff might.

The current study examines all these features of the tax warrant. Part I describes the procedural minima necessary for a tax warrant to issue. Part II discusses the status of the tax warrant as a judgment worthy of Full Faith and Credit in other courts. Part III examines the tax lien that arises by virtue of the tax warrant. Part IV considers liens that arise even prior to the issuance of the tax warrant. In particular, New York City has pre-warrant rights with respect to its corporate tax. In addition, the DTF has a lien against the property of purchasers of "any part or the whole" of a taxpayer's "business assets, otherwise than in the ordinary course of business".[9] These transactions are commonly referred to as "bulk sales." Part V considers the priority to which a New York tax lien is entitled, as against various other liens that might arise from security agreements, money judgments and federal taxes. Throughout our discussion, we attempt to alert readers when New York state procedures differ from those applicable to the Internal Revenue Service (IRS).

I. The Procedural Aspects of a Tax Warrant

A. Issuance

The chief tax collector for the state of New York is the DTF. This would be far from apparent to anyone who is tempted to learn New York tax law by reading the New York Tax Law.[10] The Tax Law usually refers to the Tax Commission, or to the Tax Commissioner. In fact, the Tax Commission was abolished in 1992, to be replaced by the DTF.[11] In abolishing the Tax Commission, the New York state legislature did not bother to excise from the statutes references to the old Tax Commission. Instead, Tax Law § 2(1) variously defines, "tax department" or "department" or "tax commission" to mean the DTF. Furthermore, when such terms pertain to certain procedural appeal rights of taxpayers, these terms refer to the Division of Tax Appeals--an administrative court created in 1986[12] that is intended to be an independent tribunal like the United States Tax Court. In all other matters (such as collection), these terms mean the Commissioner of the DTF.

The DTF has the power to issue tax warrants for taxes due and owing. The NYCDOF has the ability to issue warrants for some

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[8] Corrigan v United States Fire Ins. Co., 427 F Supp 940 (S.D.N.Y. 1977) ("the State does not have to issue a separate execution to the sheriff. It is clear from the three state statutes involved that the warrant is in effect an execution and has been delivered to the sheriff").

[9] N.Y. Tax Law § § 1141(c) (sales and use tax) (first sentence).

[10] As one commentator foolishly attempted to do. Carlson, Pt. 2, *supra* note ---, at 68.

[11] 1992 N.Y. Laws ch. 760.

[12] N.Y. Tax Law § 2026.

purposes, but when it comes to the city's income tax, the state takes over collection responsibility. The state's arrogation of New York's City right to collect its own taxes dates back to the financial crisis in the mid-1970s, when President Ford invited the City to "drop dead."[13] In connection with the City's financial recovery, the legislature enacted Article 30 of the Tax Law.[14] New York Tax Law § 1312 (part of Article 30) instructs the DTF to administer the New York City personal income tax and incorporates all of the administrative provisions of Article 22 (the *state* personal income tax), including the procedures involving tax warrants into Article 30. The state takeover of the City's income tax seems to have been intended to eliminate duplicative administration as a cost-saving measure.

The commissioners of agriculture and labor also have powers to issue warrants.[15] In the case of agriculture, warrants may issue against a wholesale buyer of agricultural products or milk if the commissioner of agriculture was forced to pay a producer from the agricultural producers (or milk) security fund.[16] The commissioner of labor may issue a warrant if an employer defaults on payments into the unemployment insurance fund.[17] For ease of exposition, however, we shall refer to the DTF as the enforcing party. Unless otherwise indicated, what is true for the DTF will be true for other agencies (such as the NYCDOF) entitled to issue a tax warrant.

B. Assessment and Notifications

At least in recent times, the tax lien arising from a warrant has been made quite uniform across all 29 instances of it.[18] Accordingly, we discuss those concepts that all the state and city tax liens (based on warrants) have in common. We duly note when a specific tax lien varies from the general pattern.

1. Assessment

"Assessment" stands for the time when the DTF records the tax debt as due and owing. Unlike the federal tax lien,[19] assessment

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[13] A notorious headline in the *New York Daily News*, October 30, 1975, was "Ford to NYC: Drop Dead." It was thought to have contributed to President Ford's defeat in 1976.

[14] New York Session Laws of 1975 ch. 881 § 13; *see also*. N.Y.C. Admin. Code § 11-1792(a) (authorizing the "tax commission" to collects City personal income taxes).

[15] *See supra* n.3.

[16] N.Y. Agr. & Marketing Law §§ 250-b(2), 258-b(4)(e).

[17] N.Y. Labor Law § 573(2); see Industrial Commissioner v. Five Corners Tavern, Inc., 47 N.Y. 2d 639, 393 N.E.2d 1005 (1979).

[18] This was not always so. United States v. Herzog (In re Thriftway Auto Rental Corp.), 457 F.2d 409, 411 (2d Cir. 1972) (describing a significant difference in liens for income tax as of 1972).

[19] 26 U.S.C. § 6322. A federal lien arises "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand." 26 U.S.C. § 6321. The demand must be issued within 60 days after the IRS assesses the tax. *Id*. § 6303(a). After

does not give rise to a lien.[20] In New York, lien creation occurs later--when the tax warrant is docketed by the county clerk.[21] When a taxpayer is required to file a return, the tax is assessed as soon as the return is filed, provided a return is indeed filed. Where the return is filed but the tax is not actually paid, the DTF may proceed directly to enforce the assessment. Under these circumstances, the taxpayer in effect admits she owes the money. The collection process may begin.

Where no return is filed, or where the return erroneously calculates the tax, the DTF is authorized to make a "correct" calculation. Upon doing so, it must send the taxpayer a "notice of deficiency" (for personal income tax or franchise tax)[22] or a "notice of determination" (for sales and use tax).[23] This notice sets out the DTF's calculation of any excess over the tax reported by the taxpayer. The DTF usually has only three years after the return is filed to issue such a notice of deficiency or determination.[24] The amount shown in the notice of deficiency or determination becomes an assessment, unless, within (usually) 90 days, the taxpayer files for a hearing with the Division of Tax Appeals ("DTA").[25] If the taxpayer does not timely seek a hearing, the DTF assesses the extra tax and issues a notice and demand for it. Within a limited period after assessment,[26] the DTF may also file a warrant for the assessed amount.

If the taxpayer fully pays a warrant for taxes assessed, the taxpayer is still free to file an administrative refund claim for amounts paid within a look-back refund claim statute of limitations period--usually two or three years.[27] If the claim for refund is not allowed, the

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failure or refusal to pay, the lien is imposed retroactively, as if it arose on the date of assessment. *Id*. § 6322.

[20] Smith v. Meader Pen Corp., 255 A.D. 397, 398, 8 N.Y.S.2d 39, 41 (3d Dept. 1938), *aff'd*, 280 N.Y.2d 554, 20 N.E.2d 13 (1939).

[21] *See infra* text accompanying notes ---.

[22] N.Y. Tax Law §§ 681(a) (personal income tax), 1081 (franchise tax).

[23] N.Y. Tax Law §§ 430 (alcaholic beverages tax), 478 (tobacco sales tax), 510(1) (high use), 1138(a)(1) (sales and use tax).

[24] N.Y. Tax Law § 683 (personal income tax), 1083 (franchise tax), 1147(b) (sales and use tax).

[25] *Id*. § 681(b) (personal income tax), 1081(b) (franchise tax), 1138(a)(1) (sales and use tax); *see* Hodge v. Muscatine Co., 196 U.S. 276, 281 (1905): ("If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi-judicial charatcer, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied").

[26] Six years for personal income and franchise tax. *Id*. §692(c), 1092(c). There is no formal limit under the sales and use tax, *id*. § 1141(b). This period begins to run on the day taxes are assessed. Gura v. Sstate of New York, 121 Misc. 2d 423, 467 N.Y.S.2d 743 (N.Y.C. Cl. 1982).

[27] *Id*. § 687 (personal income tax), 1087(a) (franchise tax), 1139(a) & (c) (sales and use tax). These time periods are borrowed from identical periods in the Internal Revenue Code §6511(a) & (b). Prior to 1996, sale and use taxes, once assessed, could not be paid and then contested. Horne Equipment Corp. v. McGoldrick, 168 Misc. 59, 5 N.Y.S.2d 357 (S. Ct. N.Y. Co. 1938) (city sales tax). In 1996, the legislature conformed procedure for the sale and use tax with the procedure that has always existed for income tax. 1996 N.Y. Laws 267 (amending N.Y. Tax Law § 1138(a)). Therefore, care should be taken in reading sales tax cases involving years

taxpayer may bring suit for a refund with the DTA, thereby contesting the underlying liability for the amount that had, at one time, been shown in a warrant.[28] The issue of whether a notice of deficiency or determination was properly sent to the taxpayer's last known address is one frequently the subject of DTA hearings. It is well settled that if a taxpayer has failed timely to contest a properly addressed notice because the taxpayer never received it or was simply late in doing so, all is not lost. One can always just pay the tax and put in a refund claim, which, if not granted, may be the subject of a DTA hearing.[29]

If a taxpayer timely contests a notice of deficiency or determination by filing a petition for a DTA hearing, an administrative law judge will hold the hearing and issue a ruling.[30] Either party may take exception to that ruling; the exception is heard by a three-member administrative body, the Tax Appeals Tribunal ("TAT"), based in Troy, New York.[31] If the DTF loses before the walls of Troy, the DTF may not appeal but must seek legislative change for future cases, since TAT opinions, like the decrees of Priam, are binding precedents.[32] If the taxpayer loses before the TAT, the taxpayer has four months to take a special Article 78 proceeding directly to the Appellate Division, Third Department (sitting in Albany) to review the TAT ruling.[33] Similar to the procedure involving appeals from the United States Tax Court to the federal circuit courts of appeal, [34]New York law requires that a taxpayer wishing to file in the Third Department either pay the tax or post an appeal bond (if she wishes to suspend the collection mechanisms).[35]

A bankrupt taxpayer may request the federal bankruptcy court to adjudicate the proper amount of tax. According to Bankruptcy Code § 505(a)(1):

> the court may determine the amount or legality of any

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prior to 1997. In those earlier cases, it was impossible to litigate the merits of a sales or use tax warrant once it was docketed.

[28] *Id*. § 689(c) (personal income tax), 1089(c) (franchise tax), § 1139(b) (sales and use tax).

[29] In re Cullen v. DTA, 30 A.D.3d 850, 817 N.Y.S.2d 720 (3d Dept. 2006) (personal income tax).

[30] N.Y. Tax Law § 2006(4), 2010(1) & (3).

[31] *Id*. § 2004, 2006(7), 2010(4).

[32] Unlike DTA opinions. *Id*. § 2010(5).

[33] *Id*. 2016. For review of other administrative agency rulings, Article 78 proceedings are usually commenced in Supreme Court in the local county.

[34] 26 U.S.C. § 7485.

[35] N.Y. Tax Law § 690(c) (personal income tax), 1090(c) (franchise tax), 11398(a)(4) (sales and use tax). Professor Edward Zelinksy of the Benjamin N. Cardozo School of Law took this process through the complete set of administrative bodies and courts. *See* In re Zelinksy, 2000 N.Y. Tax LEXIS 297 (DTA 2000), *aff'd*, 2001 N.Y. Tax LEXIS 334 (TAT 2001), *aff'd*, 301 A.D.2d 42, 753 N.Y.S. 144 (3d Dept. 2002), *aff'd*, 1 N.Y.3d 85, 801 N.E.2d 840, 769 N.Y.S.2d 464 (2003), *cert. denied*, 541 U.S. 1009 (2004). New York City has a number of taxes that it enforces itself through its DOF. Appeals of DOF notices go to a New York City Tax Appeals Tribunal patterned on the state TAT. Appeals from the City's TAT go to the Appellate Division First Department. NY CPLR § 506(b)(4).

> tax . . . whether previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

This provision overrides some of the finality rules that New York state law decrees. But § 505(a)(2) goes on to prohibit re-adjudication "if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case . . . " So the import of § 505(a)(1) is that collateral attacks are permitted only when the debtor, out of apathy or fear of the automatic stay, did not contest the tax assessment.[36]

2. Notice and Demand

Following assessment, whether or not related to an amount that was contested, if the taxpayer has not paid, the DTF must send a notice and demand,[37] warning that, unless payment is forthcoming, the DTF will undertake enforcement procedures. The taxpayer is given 21 days (10 days if the amount due exceeds $100,000) to pay.[38]

3. Issuance of the Tax Warrant

If the taxpayer ignores a notice and demand, the DTF is authorized to instruct the attorney general to obtain a regular money judgment for taxes, to be enforced by the sheriff under the CPLR.[39] This is a rarely used alternative to the tax warrant, and, for that reason, beyond the scope of our discussion.

Far more powerful than the money judgment for the DTF is its ability to issue a tax warrant.[40] The warrant is issued to a sheriff or to

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[36] In re Galvano, 116 B.R. 376 (Bankr. E.D.N.Y. 1990) (no collateral attack where the debtor contested tax liability before bankruptcy).

[37] N.Y. Tax Law 692(b) (personal income tax), 1092(b) (franchise tax). There is no similar statutory requirement to issue a notice and demand for sales and use taxes assessed.

[38] *Id*. § 692(c) (personal income tax), 1092(c) (franchise tax). This rule is suspended if the DTF "finds that the collection of the tax or other amount is in jeopardy." *Id*. On jeopardy assessments, see N.Y. Tax Law § 694 (personal income tax). A warrant may be filed for sales and use taxes immediately upon assessmnet, without waiting any period after issuances of a notice and demand. N.Y. Tax Law § 1141(b). With regard to New York City corporate business taxes, the period that the City must wait to file a warrant is ten days. N.Y.C. Admin. Code § 11-683(3).

[39] N.Y. Tax Law § 692(h) (personal income tax) § 1092(h) (franchise tax), 1141 (sales and use tax). The time to bring a suit is up to six years after assessment for the income and franchise taxes, but there is no statutory time limit for the sales and use tax. The attorney general is authorized to hire outside counsel to collect taxes. Gordon v. Urbach, 252 A.D.2d 94, 682 N.Y.S.2d 711 (3d Dept. 1998).

[40] *Id*. § 692(c) (personal income tax), § 1092(c) (franchise tax). As "an additional or alternate remedy," § 1144(b) (sale and use tax) provides that "the tax commission may issue a warrant, directed to the sheriff of any county commanding him to levy upon and sell the real and personal property of any person liable for the

"any officer or employee of the department, commanding him to levy upon and sell such person's real and personal property . . . "[41]

4. Docketing the Tax Warrant

The sheriff or DTF employee who receives the warrant must, within five days, file a copy of the tax warrant with the county clerk.[42] The clerk is directed to docket "the name of the person mentioned in the warrant and the amount of the tax, penalties and interest for which the warrant is issued and the date when such copy is filed."[43] Once this occurs, the existence of the tax warrant is highly searchable by purchasers of a taxpayer's property (not to mention credit reporting agencies). The Tax Law indicates that "such amount shall thereupon be a lien upon the title to an interest in real, personal and other property of the taxpayer. Such lien shall not apply to personal property unless such warrant is filed in the department of state."[44]

Once the tax warrant is docketed, the sheriff or the employee who receives the tax warrant may proceed to levy on property of the taxpayer in order to satisfy the tax obligation. The sheriff is authorized to collect the statutory fees for levying.[45] The DTF employee is not so authorized.

5. Constitutionality of the Tax Warrant Procedure

The constitutionality of the warrant procedure was challenged in *Arthur Treacher's Fish & Chips, Inc. v. New York State Tax Commission*,[46] where a tax warrant issued against a taxpayer.[47] The

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tax, which may be found within his county, for the payment of the amount thereof . . . "

[41] *Id*. § 692(c) (personal income tax).

[42] *Id*. §§ 692(d) (personal income tax), 1092(d) (franchise tax), 1141(b) (sale and use tax) (second sentence).

[43] *Id*. § 1141(b) (sale and use tax) (third sentence).

[44] *Id*. §§ 692(d) (personal income tax), 1092(d) (franchise tax), 1141(b) (sale and use tax) (second sentence). Is there a difference between the lien for income tax and the lien for sales and use tax? In Carlson, *Pt.1*, *supra* note ---, at 68, it is claimed that, for income taxes, docketing the tax warrant does not create a lien. But for the sales and use tax, the lien is created at docketing. Although this position is supported by United States v. Herzog (In re Thriftway Auto Rental Corp.), 457 F.2d 409, 411 (2d Cir. 1972), *Thriftway* was faced with a version of N.Y. Tax Law § 692(d) which provided that the warrant shall be "a binding lien upon the real, personal and other property of the taxpayer *to the same extent as other judgment duly docketed in the office such clerk*." 457 F.2d at 411 (emphasis added). Since *Thriftway*, § 692(d) has been amended to delete the emphasized words, so that the income tax lien conforms to the sales tax lien. Laws 1985, ch.65, §66 (eff. July 16, 1985).

[45] *Id*. §§ 692(f) (personal income tax), 1141(b) (sale and use tax) (fifth sentence). 1092(f) (franchise tax). Fees are described in CPLR § 8011-8014.

[46] 69 A.D.2d 550, 419 N.Y.S.2d 768 (3d Dept. 1979) (sales and use tax).

[47] The taxpayer was the franchisor who agreed to buy back five restaurants from a franchisee. The franchisor was deemed a bulk buyer of assets that did not notify the DTF of the purchase. Under N.Y. Tax Law § 1141(c), a tax warrant can issue against the buyer. On bulk sales, see *See infra* text accompanying notes ---.

taxpayer commenced a proceeding under CPLR Article 78 to enjoin enforcement. The Supreme Court dismissed the matter, but the Appellate Division modified the dismissal cancelling the tax warrant but (confusingly) dismissing the Article 78 proceeding.[48] The creation of the lien by filing the tax warrant did not itself violate due process, because mere creation of a lien, "though it diminishes the economic value of the realty, does not result in the deprivation of any significant property interest."[49] Nevertheless, any levy would have been unconstitutional, because no *prompt* post-levy procedure then existed whereby the issuance of the tax warrant could be challenged.[50] The emphasis in *Arthur Treacher's* seemed to be on the promptness of the procedure as it appears on the books. The fact that an Article 78 proceeding could be filed after the levy was considered not curative of the constitutional problem.[51]

In response to *Arthur Treacher's*, the Tax Commission issued regulations providing for a prompt hearing.[52] Part 2394 of Title 20 of the New York Codes, Rules and Regulations[53] was enacted to provide for a prompt hearing when a "predecision warrant" has been issued.[54] Any taxpayer subject to such a tax warrant "is entitled, upon request, to a prompt hearing to determine the probable validity of the department's claim . . . "[55] Notice of this right must be sent to the taxpayer.[56] The hearing (on whether there should be a prompt hearing)

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[48] 69 A.D.2d at ---. 419 N.Y.S.2d at --- ("The judgment should be modified by vacating the warrant issued November 21, 1977, and, as so modified, affirmed, without costs").

[49] 69 A.D.2d at 554, 419 N.Y.S.2d at 772. In this regard, the court cites Carl A. Morse, Inc. v. Rentar Industrial Development Corp, 56 A.D.2d 30, 391 N.Y.S.2d 425 (3d Dept. 1977), involving the imposition of a mechanic's lien without prior adjudication of debt. There the court wrote:

> Thus, while it cannot be denied that the filing of a mechanic's lien creates a "cloud" on the owner's title, rendering alienation "more difficult," or perhaps "less profitable," the fact remains that the owner is not legally prevented from selling, encumbering, renting or otherwise dealing with the property as he chooses, and once he has found himself a ready and willing buyer, etc., there is nothing in the statute or in the nature of the lien which would preclude him from consummating the transaction.

56 A.D.2d at 35, 391 N.Y.S.2d at 429.

[50] Id.

[51] 69 A.D.2d at 555, 419 N.Y.S.2d at 773.

[52] Laks v. Division of Taxation of the Dep .of Taxation & Fin., 183 A.D. 316, 320, 960, 489 N.Y.S.2d 787 (4th Dept. 1992).

[53] The NYCRR is the collection of administrative rules compiled and published by the secretary of state. N.Y. Exec. Law § 102.

[54] A predicision warrant is defined as a warrant issued "prior to the rendering to that person of a decision or determination of the State Tax Commission." 20 N.Y.C.R.R. § 2394.1(b)(1). It also includes a warrant pursuant to a jeopardy assessment. *Id*. § 2394.1(b)(2).

[55] *Id*. 2394.3.

[56] *Id*. 2394.4.

must be conducted within ten days of the recept of the request,[57] and the "State Tax Commission" (presumably, today, the DTA) must issue its decision within 15 business days from the close of the prompt hearing.[58] Pending such a hearing, any sale is stayed unless "the expenses of conservation and maintenance will greatly reduce the net proceeds or if the property is perishable."[59]

Arthur Treacher's is a decision of the Third Department, which hears all appeals pertaining to state taxes. In the First Department, which has jurisdiction over city tax appeals, *Arthur Treacher's* has been rejected. In *Sea Lar Trading Co. v. Michael*,[60] the Supreme Court had undone a levy of tobacco proceeds because the City's Administrative Code had no prompt hearing procedure, as required by *Arthur Treacher's*. The First Department, however, reversed. New York City law provided for a hearing, but did not indicate how promptly it must occur. Nnevertheless, the *Sea Lar* court "decline[d]" to follow *Arthur Treacher's*.[61]

Is it the case that creation of a lien (without a prompt hearing) gives rise to no constitutional difficulty, so long as the debtor's possession is not disturbed? This seems to be correct. In *Phillips v. Commissioner*,[62] the United States Supreme Court, with regard to the IRS, upheld a procedure whereby a tax was assessed (and, unlike in New York, therefore a lien was created) without a prior hearing. In fact, the procedure put the onus on the taxpayer to seek judicial review, either by appealing the assessment to the Board of Tax Appeals or by paying the tax and later seeking a refund. This was held to create no constitutional difficulty.[63]

Since *Phillips*, however, the United States Supreme Court has issued a famous series of due process cases involving the creation of liens in other contexts. These cases, however, seem entirely distinguishable, suggesting that *Arthur Treacher's* is indeed correct that mere creation of lien is not a due process violation.

In *Sniadach v. Family Finance Corp.*[64] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[65] the Court struck down pre-judgment procedures whereby a creditor could get wages and bank accounts frozen. These cases involved the creation of a lien, but one could also view these procedures as interfering with "use." The hold-back of funds meant that the debtors could not get them and spend them. This is hard to analogize with *Arthur Treacher's*, where,

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[57] *Id*. 2394.6(a).

[58] *Id*. 2394.9(a). Or within 15 days after the date fixed from the close of the submission of evidence or submission of the briefs, if those are later dates. *Id*.

[59] *Id*. 2394.12.

[60] 94 A.D.2d 309, 464 N.Y.S.2d 476 (3d Dept. 1983).

[61] 94 A.D.2d at 313, 464 N.Y.S.2d at 479."

[62] 283 U.S. 589 (1931).

[63] *See also* Rosewell v. LaSalle, 450 U.S. 503 (1981) (where taxpayer could pay county tax and then seek hearing, the tax procedure was constitutional); Flora v. United States, 362 U.S. 145 (1960).

[64] 395 U.S. 337 (1969).

[65] 419 U.S. 601 (1975).

presumably, at least some of the property encumbered was real property and restaurant equipment. These the taxpayer could use, though alienation free and clear of the tax lien was impossible.[66] Where the employer in *Sniadach* withheld wages, the debtor had no possessory rights at all. But, as money was involved, the only way to use it was to spend it, free and clear of the lien. So it is easy to read *Sniadach* as *Arthur Treacher's* did--the law deprived the debtor of possession in those cases, whereas the restauranteur suffered an encumbrance but no loss of "use."[67]

Without question, such a tax lien may compromise or even destroy the opportunity to alienate the property in exchange for its full unencumbered value. The *Arthur Treacher's* court admitted that the pre-levy tax lien "diminishe[d] the economic value of the realty,"[68] but since the tapayer was "depived neither of the use or possession of its property nor of the incidents of ownership,"[69] the pre-hearing existence of the lien was not problematic. "It did not amount to actual deprivation of petitioner's property."[70]

One must admit that the creation of a lien is a transfer of property from debtor to creditor.[71] Still, due process does not prevent pre-hearing transfers. It only requires that the transfer be "fair" in some moral sense.[72] On this basis, the court in *Arthur Treacher's* can be defended as upholding the fairness of the pre-hearing tax lien.

The second aspect of *Arthur Treacher's* that deserves comment was the holding that the absence on the books of an assurance of a prompt post-levy hearing meant that any levy would have been unconstitutional and that this justified vacating the warrant (even though no levy had taken place). This proposition has federal implications, if valid. The Internal Revenue Code permits post-levy applications for refunds following levy or voluntary payment. Yet no limitation is put on the speed by which a court must dispose of the taxpayer's claim for a refund.[73] If *Arthur Treacher's* reading of the

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[66] The tax lien would undoutably attach to food and wrapping materials sold to the public. On the taxpayer's right to sell in the ordinary course of business free and clear of a tax lien, see *See infra* text accompanying notes ---.

[67] Other Supreme Court pronouncements on due process do indeed focus clearly on possession. *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. Grant*, 416 U.S. 600 (1974), involved replevin, mostly of Article 9 collateral. In *Fuentes*, one of the consolidated cases involved a family law replevin of childrens' toys. 407 U.S. at 72.

[68] 69 A.D.2d at 554, 419 N.Y.S.2d at 553.

[69] *Id*.

[70] *Id*.

[71] 11 U.S.C. § 101(54) (transfer defined, *inter alia*, as "creation of a lien").

[72] International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (due process invokes "traditional notions of fair play and substantial justice"); Wisconsin v. Federal Power Commn., 303 F.2d 380, 388 (D.D.C. 1961) (due process conveys a meaning "differing according to the basic nature of the proceeding but always including that which is fair and decent according to the standards of our social order and time").

[73] An exception is made for a jeopardy levy and assessment procedures, where courts are required to determine the propriety of a jeopardy levy within 20 days. 26 U.S.C. § 7479(b).

United States Constitution is correct, the entire federal system of tax liens must fall.

The United States Supreme Court has had ample opportunity to strike down federal tax procedure for its general failure to legsislate the promptness of a hearing. It has never done so, and accordingly it is hard to accept the presmise of *Arthur Treacher's* that promptness of a post-levy hearing must be set forth on the face of the statute.

II. The Warrant as Judgment

According to the United States Constitution, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[74] Contrary to the opinion of Francis Scott Key,[75] this provision means that every state must enforce the judgment of every other state.[76]

When the tax warrant is filed with the county clerk, the DTF is "deemed to have obtained a judgment against the taxpayer for the tax or other amounts."[77] This statement should establish the right to enforce a tax warrant in other states,[78] under the Full Faith and Credit clause of the Constitution.

This much should be apparent ever since *Milwaukee County*

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[74] U.S. Const. Art. IV § 1.

[75] A better anthemizer than lawyer, Key argued to the Supreme Court that judgments were mere evidence of the merits and not final. The Supreme Court thought otherwise. Mills v. Duryee, 11 U.S. 481 (1813). *See* Robert H. Jackson, *Full Faith and Credit--The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 7 (1945).

[76] D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972) (cognovit note worthy of full faith and credit); Hampton v. McConnel, 16 U.S. 234, 235 (1818) ("the judgment of a state court should have the same validity, and effect, in every other court in the United States which it had in the state where it was pronounced").

[77] N.Y. Tax Law § 692(e) (income tax); see also *id*. § 1092(d) (sales tax); NYC Admin Code § 11-683(5) (New York City corporate income taxes).

[78] New York State Dept. Taxation v. Buenaventura, 2004 Conn. Super. LEXIS 1918 (July 19, 2005) (personal income tax warrant enforced as judgment). Florida courts consistently treat New York tax warrant as entitled to Full Faith and Credit. But there is a dispute over the Florida statute of limitations relevant to the DTF's enforcement proceeding in Florida. Two courts have held that a five-year statute of limitations applies. New York State Dept. Taxation v. Klein, 852 So. 2d 866 (Fla. App. 2003) (New York sale and use tax); New York State Dept. Taxation v. Patafio, 829 So. 2d 314 (Fla. App. 2002) (type of tax not stated); see Fla. Stat. § 95.11(2) (five year period for "[a]n action on a judgment or decree of any court, not of record, of this state or . . . any other state . . . in the United States"). In New York State Dept. Taxation v. Friona, 902 So. 2d 864, 866 n.3 (Fla. App. 2005) (New York personal income tax), the court stated that the five-year statute applies only if the DTF were bringing an "action on the judgment" --*i.e.*, seeking a new judgment in Florida based on the old judgment. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 275 (1935) ("A cause of action on a judgment is different from that upon which the judgment was entered"). Where the DTF was enforcing a tax warrant, however, it was not seeking a new judgment. Rather, it was enforcing an old judgment. Therefore, the DTF was subject to a different statute of limitations. Under Fla. Stat. § 95.11(1), the DTF has 20 years to enforce its judgment (or less, if New York law itself had a shorter limitation period, which it doesn't). Fla. Stat. § 95.11(1).

v. M.E. White Co.,[79] where a Wisconsin county obtained a judgment against a taxpayer for an income tax. The county then sought enforcement in the Federal District Court for the Northern District of Illinois. The Full Faith and Credit clause of the Constitution is not applicable to federal courts, but Congress enacted the Full Faith and Credit Act[80] requiring federal courts to give Full Faith and Credit to state judgments. The lower courts had denied the county Full Faith and Credit on the theory that suits for taxes are penal in nature. Indeed, in international law, American courts will not enforce actions by foreign countries to collect taxes from persons present in the United States.[81] Nevertheless, the Supreme Court ruled that the county's judgment was indeed entitled to Full Faith and Credit. The district court was not permitted to look behind the judgment and deny enforcement because it was a tax collection suit. This was so even though part of the county's claim was for penalties.[82]

Milwaukee County ended many decades of controversy over tax collection and Full Faith and Credit. A traditional "exception" to Full Faith and Credit is supposedly the principle that one state need not enforce the "penal" determinations of another. Early on, the Supreme Court[83] had made the analogy between collecting taxes and punishment,[84] seemingly to prevent "original jurisdiction" of the Supreme Court from being invoked every time a state sued a citizen of another state.[85] The *Milwaukee County* court, in contrast, analogized tax collection to debt collection[86] and ruled that a Wisconsin tax judgment was entitled to Full Faith and Credit, even though the judgment included some tax penalties. Since then even tax

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[79] 296 U.S. 268 (1935).

[80] 28 U.S.C. § 1738.

[81] Pasuantino v. United States, 544 U.S. 349, 352 (2005); The Antelope, 23 U.S. 123 (1825) ("the courts of no country execute the penal laws of another"); *see* CPLR § 5301(b) ("judgment for taxes, a fine or other penalty" excluded from "foreign country judgments" enforceable in state).

[82] 296 U.S. at 279; Milwaukee Co v. M.E. White Co., 17 F. Supp. 759 (N.D. Ill. 1937).

[83] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[84] 127 U.S. at 298-99 ("The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court . . . from ascertain whether the claim is really one of such a nature that the court is authorized to enforce it . . . The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State if Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year").

[85] 127 U.S. at 291 (interpreting § 687 of the Revised Statutes of the United States granting original jurisdiction to the Supreme Court when a state sues the citizen of another state).

[86] 296 U.S. at 271 ("It is a statutory liability, quasi-contractual in nature, enforceable, if there is no exclusive statutory remedy in the civil courts by the common law action of debt or *indebitatus assumpsit*").

penalties have been enforced as a matter of Full Faith and Credit.[87]

Full Faith and Credit for New York tax warrants depends upon the view that, within New York, a taxpayer's due process right have been honored in the warrant procedure.[88] If this has not occurred, New York is not entitled to recognition of its judgments in other states.

It will be recalled that a warrant issues only after (a) the taxpayer files a return and admits that the tax is due (but fails to pay), or (b) the taxpayer is notified that a tax is due, where the return is incorrect or never filed. The tax warrant differs from the ordinary civil money judgment. In the case of a tax warrant, a taxpayer might still litigate the merits of the assessment by paying the amount of the warrant and seeking a refund.[89] Even if this is not done, the tax warrant ought to be enforceable as a judgment in other states. In New York, the tax warrant is enforceable *unless* the taxpayer pays the warrant and seeks a refund. Full Faith and Credit demands that the warrant be similarly treated in other states.

Tax procedure, therefore, does not resemble that which pertains in ordinary civil litigation. In ordinary litigation, if the defendant never answers the plaintiff's complaint, a default judgment will be entered against the defendant. A defendant may not re-litigate a default judgment by paying it. Only if the defendant's due process rights were violated may a defendant obtain relief from a default judgment.[90]

The quotidian civil procedure connected with New York money judgments accords with due process and therefore New York money judgments are entitled to Full Faith and Credit in other states. While the New York tax warrant may not be as final as a defaulted money judgment, the tax warrant conforms with due process and constitutes a "public Act or Record" within the meaning of the Full Faith and Credit clause.

Nevertheless, the New York legislature lacks confidence that this is true. It therefore provides for a procedure applicable to out-of-state residents who owe taxes. Where the taxpayer is not a resident of New York, the DTF may issue a warrant to an employee (but not the sheriff). "Such warrant shall command the officer or employee to proceed in Albany county, and he shall, within five days after receipt of the warrant, file the warrant and obtain a judgment in accordance with this section."[91] Thereafter, collection outside the state of New York may proceed.[92]

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[87] City of Philadelphia v. Smith, 82 N.J. 429, 413 A.2d 952 (1980).

[88] Franklin Nat'l Bank v. Krakow, 295 F. Supp. 910 (D.D.C. 1969).

[89] *See supra* text accompanying notes ---.

[90] Morris v. Jones, 329 U.S. 545 (1947) (default judgment entitled to Full Faith and Credit); Pennoyer v. Neff, 95 U.S. 714, 730 (1877) (relief from default judgment granted for lack of jurisdiction).

[91] N.Y. Tax Law § 692(g) (personal income tax). NYC Admin Code § 11-683(7) (city corporate income taxes).

[92] *See* N.Y. Tax Law § 901 (with regard to any tax, DTF may request attorney general to sue in other states). This provision relates back to the pre-*Milwaukee* age when there were doubts that tax procedures were entitled to Full Faith and Credit. In 1919, the legislature passed an act that consigned warrants to in-state collections.

Suppose New York proceeds directly to a tax warrant without following this procedure. Some courts think the warrant is entitled to Full Faith and Credit. In *Dickstein v. Merrill Lynch Pierce, Fenner & Smith*,[93] New Jersey residents working in New York and owing a New York income tax filed a late return. The DTF sent them a notice and demand for penalties and interest.[94] The taxpayers tendered interest but requested waivers of the late-filing and late-payment penalties. This was denied. No appeal was made to the Tax Commission (as it was then called).[95] The DTF issued a tax warrant, which was docketed in Albany County. Five years later, the taxpayers opened a Merrill Lynch brokerage account in Wayne, New Jersey. The DTF then issued a tax compliance levy[96] to the New York City office of Merrill Lynch (though the tax warrant was docketed in Albany). At the time, the taxpayers had a cash balance in their brokerage account. Merrill Lynch complied with the levy, even though the taxpayers dealt with personnel in New Jersey. The taxpayers then sued Merrill Lynch in New Jersey on the theory that it should not have complied with the levy. The *Dickstein* court ruled that, since Merrill Lynch was "present" in New York, its debt to the taxpayers was located there, under the familiar principle of *Harris v. Balk*,[97] which holds that a debt is located wherever the debtor is located.[98] The *Dickstein* court also indicated that the tax warrant was a "judgment" entitled to Full Faith and Credit: "Once a tax penalty assessment is reduced to judgment, it is treated like any other money judgment."[99]

Regular judgments were also provided for. Laws of New York 1919 §§ 380, 381. In People of New York v. Coe Manufacturing Co., 112 N.J.L. 536, 172 A, 198 (Ct. Errors & App. 1934), *cert. denied*, 293 U.S. 576 (1934), New York did not rely on the warrant alone in pursuing a New Jersey entity but obtained a New York judgment which it then tried to enforce in New Jersey. The taxpayer tried to claim that the judgment was a penalty and therefore not entitled to Full Faith and Credit. The court, however, agreed that the judgment was for collection of a debt and therefore entitled to Full Faith and Credit. *Coe Manufacturing* is cited with approval in *Milwaukee County*, 296 U.S. at 279.

[93] 295 N.J. Super. 550, 685 A.2d 943 (App. Div. 1996).

[94] Today, people like the Dicksteins who file late income tax returns would be obligated not just to pay the tax balance shown due on the returns, but interest and penalties thereon imposed by Article 22 of the Tax Law. Under N.Y. Tax Law § 684(a) and 697(j), until the tax and interest is paid, interest is imposed at a potentially floating rate (like the floating rate imposed on unpaid federal tax liabilities under I.R.C. § 6601 and § 6621). Furthermore, they would pay a late-filing penalty of up to 25% of the unpaid tax, N.Y. Tax Law § 685(a)(1)(A), and a late-payment penalty of 0.5%. *Id*. § 685(a)(2). The late-filing and late-payment penalties are patterned on the federal counterparts at I.R.C. § 6651(a)(1) & (2).

[95] Today, the DTA would not have jurisdiction to hear a dispute about a late-filing or late-payment penalty based on the tax shown on a return unless the taxpayer had first paid the penalty and filed an administrative refund claim. *See* N.Y. Tax Law § 173-a, added by 2004 N.Y.Laws ch. 60, Part F, § 1.

[96] This, presumably, replicates the procedure of CPLR 5232(a), involving the garnishment of property not capable of delivery.

[97] 198 U.S. 215 (1905).

[98] *Id*. at 222 ("The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes").

[99] 295 N.J. Super. at 562, 685 A.2d at 950.

Some cases deny Full Faith and Credit on palpably incorrect grounds. In *Commissioner of Taxation & Finance v. Pelletier*,[100] a Massacusetts court noted that a New York tax warrant authorizes the sheriff to levy on property located within the county. But the taxpayer lived in Massachusetts, not in the New York county where the tax warrant was docketed. Therefore, it supposedly followed that the tax warrant was entitled to no Full Faith and Credit. This fails to distinguish the status of the tax warrant *as a judgment*, which is quite a separate proposition from whether, *as a judgment*, the local sheriff might enforce it. A money judgment might be entered in a New York county against a non-resident, but so long as jurisdiction existed, that judgment would be entitled to Full Faith and Credit, even though the New York sheriff has no authority to travel to Massachusetts and levy property there.

In the alternative, the *Pelletier* court tried to ground its decision in *City of New York v. Shapiro*,[101] where New York City assessed a use tax and a tax on the privilege doing business. Then, as now, the taxpayers had to seek a hearing, in this case to the New York City comptroller. If no hearing was requested, a tax warrant could issue. Unlike today, that tax warrant irrevocably fixed the liability and could not be further contested by payment and request for refund.

The taxpayers in *Shapiro* requested a hearing and appeared through counsel but abandoned the hearing before it was concluded. The controller ruled against the taxpayer. Therefore, a tax warrant was issued based on the ruling, which the City sought to enforce in Massachusetts federal court.[102]

The defendant claimed that the City had no "judgment." The statute in effect in the days of *Shapiro* was not as clear as it is today that the tax warrant is to be considered a *judgment*. Rather, the City's Administrative Code stated that the tax warrant authorized the city to proceed "as if the city had recovered judgment . . . and execution thereon had been returned unsatisfied."[103]

The court nevertheless responded that the Full Faith and Credit clause does not even mention judgments. Rather, it refers to "public Acts, Records, and judicial Proceedings of every other State."[104]

> Both the Constitution and the statutes thus make it plain that it is of no consequence whether the proceeding before the Comptroller be regarded as a 'judicial proceeding' or his determination as a 'record' within the meaning of the Full Faith and Credit clause and the Acts of Congress . . . [T]he total impact of the Administrative Code and the New York State cases

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[100] 16 Mass. L. Rep. 584 (Mass. Sup. Ct. 2002).

[101] 129 F. Supp. 149 (D Mass. 1954).

[102] Although only states are subject to the Full Faith and Credit clause, a statute requires federal courts to recognize state judgments. 18 USC § 1738.

[103] 129 F. Supp. at 154.

[104] U.S. Const. Art IV § 1.

> goes far enough to require a conclusion that an uncontested or unappealed Comptroller's determination . . . is more than an assessment; it is a new obligation . . . This obligation would be res judicata. Indeed it would seem that the original obligation of the taxpayer under the tax law would have disappeared and have merged in the obligation expressed in the determination.[105]

The *Shapiro* court, however, did not award the City all that it sought. After the hearing at which the taxpayer defaulted, the comptroller made a final determination of the taxes, interest, and penalties in fixed dollar amounts. Time then elapsed before a warrant was docketed, so additional interest and penalties provided in the tax laws accrued between those dates and were included in the warrants.[106] The court refused to allow enforcement of the additional interest and penalties under the tax laws attributable to this post-hearing period, stating:

> Under the theory accepted by this Court . . . plaintiff is allowed to sue and recover here upon the basis of administrative determinations which are analogized to judgments. Plaintiff is not being allowed to recover on the warrants. Those warrants are not determinations or judgments of any kind; they are merely instructions to the equivalents of deputy sheriffs; they tell the agents receiving them what to do by way of execution, docketing, and the like.[107]

This part of the opinion can be questioned. First, at least modernly, New York law contains a direct statement that tax warrants *are* judgments.[108] Today, the City's Administrative Code states plainly that, upon docketing a tax warrant, the City is "deemed to have obtained a judgment against the taxpayer for the tax or other amounts."[109] Though the matter was perhaps less clear at the time *Shapiro* was cited, the law has been legislatively clarified. Second, even if the hearing officer's finding (not the tax warrant) is the "judgment," post-hearing interest can accrue (as the court recognized), but post-hearing penalties are just as mechanically calculated. They cannot properly be distinguished from interest.

On this last point, perhaps the *Shapiro* court had in mind the doctrine of "merger," whereby the obligation giving rise to the judgment "merges" with the judgment, so that, once entered, the law of judgments is the only governing authority. "[T]he doctrine of merger and bar . . . precludes the sequential pursuit not only of claims

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[105] 129 F. Supp. at 153.

[106] Interest under teh New York Tax Law was 12% at that time. 129 F. Supp. at 152. Interest on general judgments was only 6%. *Id*. at 155.

[107] *Id*. at 155.

[108] *See supra* text accompanying notes ---.

[109] N.Y.C. Admin. Code § 11-683(5) (New York City corporate income taxes).

actually litigated, but those that could have been litigated."[110] Since the penalties are to be found in tax law, not in the law of judgments, so the theory goes, the City became disentitled to add penalties to the amount of the judgment. Interest, however, could be added.

The doctrine of merger, however, is governed by the law of New York.[111] And certainly in modern times, the warrant, contrary to the *Shapiro* court, is the judgment, not the warrant-plus-hearing. Therefore, if the warrant contains penalties, courts in other states must honor the warrant as issued. In modern times, the warrant itself commands the tax compliance offer to collect post-issuance interest at a designated rate plus penalties.[112] This command should be entitled to Full Faith and Credit.

The *Pelletier* court seized upon the above-quoted language from *Shapiro* that New York tax warrants are not judgments. *Pelletier* was a case in which the Massachusetts resident sought no hearing from the DTF. It understandably read *Shapiro* to mean that, where there is no hearing, there is no judgment. But if the notice of determination is analogized to an ordinary complaint in civil litigation, the tax warrant in *Pelletier* should have been viewed as the equivalent of a default judgment.[113] The analogy would entitle the DTF tax warrant to Full Faith and Credit, so long as there was personal jurisdiction over the Massachusetts resident. In short, *Pelletier* wrongly denied the DTF Full Faith and Credit for an uncontested notice of determination.

At the time the *Pelletier* warrant was issued, a person owing a sales and use tax could not reopen the underlying merits by paying the amount of the warrant and seeking a refund. After 1996, such debtors are permitted to avail themselves of this option.[114] But this should not change the law of Full Faith and Credit. A tax warrant, once docketed, is proclaimed a judgment by New York law and must be respected as such by other states. That the taxpayer could return to New York, pay the tax, and litigate the merits is an option that a taxpayer may choose to exercise. But the mere existence of this option cannot become the vehicle for other state courts to maintain that the tax warrant is no judgment.

An Ohio court has reached the same conclusion as *Pelletier*. In *Tax Commissioner of New York State v. Special Service Transportation, Inc.*,[115] the court noted that "foreign judgments" may

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[110] Garcia v. Village of Mount Prospect, 360 F.3d 630 (7th Cir. 2004).

[111] Rest 2d Conflict of laws § 95 com. e ("The local law of the State where the judgment was rendered determines, subject to constitutional limitations, what claims are extinguished by the judgment. This law determines the extent of the claim which is extinguished by merger when the judgment is for the plaintiff.")

[112] N.Y. Tax Law § 692 Appendix (income tax). On interest and penalties under the New York Tax Law, see *supra* note ---.

[113] *See* Note, 69 HARV. L. REV. 378 (1955) ("New York City provides procedures for the enforcement of tax determinations similar to those available for the enforcement of court judgments").

[114] *See infra* n. 25.

[115] 2005 Ohio 2563, 2005 Ohio Apll. LEXIS 2437 (Ct. App. May 25, 2005).

be filed in Ohio with the same effect as local judgments,[116] but "foreign judgment" means "any judgment, decree, or order of a court . . . of another state, that is entitled to full faith and credit in this state." The *Special Service* court remarked: "In the case at hand, the warrant was issued by the New York State Commissioner of Taxation and Finance. We find no evidence to suggest that the Tax Commissioner of New York State is a 'court of another state . . . '"[117] True, the Commissioner is not a court, but the tax warrant is docketed as a judgment by the clerk of the court. The New York statutes proclaim the tax warrant *is* a judgment, and it appears in the court records the tax warrant as if it were a judgment. On *Special Service* logic, a foreign judgment docketed in New York by the court clerk is not a New York judgment, because no "judge" ordered the ministerial act to be performed.[118] Just because court involvement in New York is ministerial and mechanical does not mean that the tax warrant is not a judgment of a court or not a court order requiring the sheriff to levy.

Other examples of disrespect for the New York tax warrant may be found. A Connecticut court has ruled that, in general, docketing a warrant creates no judgment for the DTF unless it files notice with the department of state.[119] As we shall see, the DTF has no lien on personal property until this filing is made. But just because the DTF has not yet qualified for a lien on personal property does not mean that we must conclude that the DTF has no judgment. Such a conclusion is clearly erroneous. A private creditor with a money judgment in New York has no lien on personal property until she serves an execution on the sheriff[120] or obtains a turnover order or appointment of a receiver.[121] But this does not mean that the creditor has no judgment worthy of Full Faith and Credit. Docketing a tax warrant is expressly defined as the equivalent of a judgment, which should be enforceable in other states, regardless of whatever local liens it engenders.

Bankruptcy cases need not accord Full Faith and Credit to New York tax warrants. In *Mead v. United States (In re Mead)*,[122] the DTF docketed a tax warrant in New York and then docketed it in Virginia where the debtor had real property. In a subsequent Florida bankruptcy, the debtor disputed the tax debt set forth in the tax warrant. The bankruptcy court ruled that the tax debt was only half what the tax warrant claimed.[123] In short, the tax warrant was denied Full Faith and Credit. But the bankruptcy courts are not subject to the Full Faith and Credit clause. Only state institutions are so bound. In

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[116] O.R.C. § 2329.022.

[117] *Id*. at *3-*4.

[118] CPLR 5018(a) & (b) (clerk authorized to docket judgments from other courts without a judge's involvement).

[119] New York State Dept. Taxation v. Boone, 2005 Conn. Super. LEXIS 126 (January 11, 2005).

[120] CPLR 5202(a).

[121] CPLR 5202(b).

[122] 374 B.R. 296 (Bankr. M.D. Fla. 2007).

[123] *Id*. at 307.

bankruptcy proceedings, Bankruptcy Code § 505(a)(1) invites a re-examination of claims made in tax warrants, provided the tax was not "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the [bankruptcy] case . . . "[124]

It is of some embarrassment that the New York Court of Appeals does not not consider the tax assessments of the City of Philadelphia to be worthy of Full Faith and Credit. In *City of Philadelphia v. Cohen*,[125] the city sought recognition of an "alleged liability, *not reduced to judgment*,"[126] of a city excise tax.[127] City procedure required that notice of an assessment be mailed to the taxpayer. The taxpayer had 60 days to institute a review of such determination. The Philadelphia taxpayer did not appeal the assessment and so the liability had become "perfect and complete."[128] Nevertheless, the New York Court of Appeals denied Philadelphia Full Faith and Credit for its assessment. To add insult to injury, the court refused to give the comity of enforcement to Philadelphia, since Pennsylvania gave no comity to New York.[129]

It is not possible to distinguish the Philadelphia assessment from the New York tax warrant. It is true that, in New York, the tax warrant must be docketed by the county clerk, and only then does it become a judgment. But, as the *Shapiro* court emphasized, the Full Faith and Credit clause by no means requires a judgment.[130] It refers to "public Acts, Records, and judicial Proceedings." What should count, said the *Shapiro* court, is the *finality* of the obligation.[131] How the law clerk records the obligation should have no constitutional dimension whatsoever.

It is true that New York proclaims its tax warrants to be judgments, whereas the Philadelphia statute (as described by the *Cohen* court) did not. But given that Full Faith and Credit does not require a judgment, this self-serving characterization in New York law should have no import. Rather, the finality of the assessment and its accord with due process should be the only considerations. Nevertheless, there seems to be an assumption that the addition of a "judgment" makes a difference.

Just prior to *Cohen*, the New York legislature added a "reciprocity" statute. According to N.Y. Tax Law § 902:

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[124] 11 U.S.C. § 505(a)(2).

[125] 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188, *cert. denied*, 371 U.S. 934 (1962).

[126] 11 N.Y.2d at 403-04, 184 N.E.2d at 168, 230 N.Y.S.2d at 189 (emphasis added).

[127] *Cf.* Philadelphia v. Austin, 86 N.J. 55, 56, 429 A.2d 568, 568-69 (1980) (giving Full Faith and Credit to "a Pennsylvania civil court judgment for a fine for failure to fule tax returns required by the Phildelphia Wage Tax Ordinance").

[128] 11 N.Y.2d at 405, 184 N.E.2d at 169, 230 N.Y.S.2d at 191.

[129] 11 N.Y.2d at 406-07, 184 N.E.2d at 169-70, 230 N.Y.S.2d at 191-92 (1962).

[130] 129 F. Supp. at 153.

[131] As we have seen, a New York taxpayer, in imitation of federal procedure, can pay and seek a refund on the merits later. But pending the exercise of this option (by no means required), the tax warrant is final.

> The courts of this state shall recognize and enforce liabilities for taxes lawfully imposed by any other state, or any political subdivision thereof, which extends a like comity to this state, and the duly authorized officer of any such state or a political subdivision thereof may sue for the collection of such a tax in the courts of this state.[132]

The assumption of this statute seems to be that a state might have a claim not reduced to judgment. The merits of the claim thus not being adjudicated, the foreign state must bring its suit for the first time in a New York court in order to satisfy the taxpayer's right to due process.[133]

After *Quill Corp. v. North Dakota*,[134] it is not even clear that a state with a New-York-like tax warrant procedure need ever bring an action pursuant to the reciprocity statute. *Quill* suggests that a state's power to tax is exactly the state's power to insist that a foreign taxpayer stand suit in the tax state for the tax owed. If so, a tax warrant always complies with due process and therefore is always entitled to Full Faith and Credit.[135] But even if this were not true, the reciprocity statute cannot overrule the Full Faith and Credit clause of the Constitution. Thus, a state that accords no reciprocity is still entitled to have its *judgment* for taxes enforced. Similarly, since Full Faith and Credit is not limited to judgments, this statute cannot be the

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[132] Florida has a similar statute that applies to sales, use, corporate income, or fuel taxes of other states. According to this provision, Florida will enforce a foreign tax only if the taxing state reciprocates and permits Florida to enforce like Florida taxes in the taxing state. Fla. Stat. § 72.041(1). That provision also requires that any tax warrant be obtained "as a result of a judgment entered by a court of competent jurisdiction in the in the taxing state," unless, reciprocally, the taxing state will enforce Florida warrants without a judgment. Fla. Stat. § 72.041(3).

The Florida provision in question goes on to provide that "[a]ll tax liabilities owing to this state or any of its subdivision shall be paid first and shall be prior in right to any tax liability arising under the laws of other states." Fla. Stat. § 72.041(3). This provision is of questionable constitutionality. If Florida were to decree in general that any Florida judgment generates liens that are senior to judgments from other states, Florida would surely be withholding "Full Faith and Credit." If indeed the New York tax warrant is a judgment, Florida is denying New York its constitutional rights. In any case, the statute does not apply to income tax, and for those tax liens, New York receives no constitutional insult from the state of Florida.

[133] Charles F. Midkiff, Note, *Extraterritorial Enforcement of Tax Claims*, 12 WM. & MARY L. REV. 111, 120 (1970) ("The significance of state reciprocal legislation is that it has removed a tremendous burden from state tax administration. It is no longer necessary to obtain a judgment in the taxing state before filing suit in states which have reciprocity acts").

[134] 504 U.S. 298 (1992).

[135] The *Quill* court held that a mail order business sending merchandise by mail to North Dakota buyers was minimally present in North Dakota for due process jurisdiction and tax nexus purposes. But it went on to strike down the North Dakota tax as a violation of the "substantial nexus" requirement of the dormant Commerce Clause of the Constitution for lack of any physical presence. Our comment in the text presupposes that the tax itself is constitutionally applied to persons outside New York.

basis for denying *any* state Full Faith and Credit if it has assessed taxes consistent with due process and if the assessment is final (insofar as the state may enforce it to the extent the taxpayer has not paid).

The *Cohen* holding would seem to be unconstitutional, if the Philadelphia assessment is a "public Act." In such a case, lack of comity cannot be a ground for denying Philadelphia access to New York courts.[136] Given its unconstitutionality, courts outside New York should ignore New York's own bad example and give New York tax warrants the recognition they deserve. Undoubtedly it will go hard on the New York attorney general to claim abroad that the highest court in New York acted unconstitutionally in *Cohen*, but either the Court of Appeals acted unconstitutionally, or the democratically elected legislature was wrong to proclaim tax warrants to be judgments, once they are docketed. The attorney general should hold his breath and side with legislative judgment (and the United States Constitution) in this regard.

III. The Lien That Results From Docketing the Tax Warrant

Upon being filed, the tax warrant usually becomes "a lien upon the title to and interest in real, personal and other property of the taxpayer."[137] In spite of this categorical statement, the tax warrant is usually *not* a lien on personal property after all. In 1985, the legislature required the DTF to file notice of the lien with the department of state.[138] So the statutes typically grant a lien on personal property upon docketing a tax warrant and then deny that such a lien arises, until such time as the department of state filing is accomplished.[139]

The requirement of filing with the department of state does not apply to many New York City tax liens.[140] But it does apply to the

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[136] This was the position of Judge Fuld in dissent. *See also* Robert H. Jackson, *Full Faith and Credit--The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 15 (1945) ("And if, as has been indicated, administrative determinations are entitled to the same standing as judgments, the way is open for each state to protect its revenue acts into all other states to some considerable degree").

[137] N.Y. Tax Law § 692(d) (personal income tax), 1141(b) (sale and use tax) ("Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued").

[138] N.Y. Tax Law § 6.

[139] N.Y. Tax Law § 1141(b) (sale and use tax) (fifth sentence). This limitation was added in 1985.

[140] NYC Admin Code § 11-683(4). In City of New York v. Panzirer, 23 A.D.2d 158, 259 N.Y.S.2d 284 (1st Dept. 1965), the city docketed a tax warrant. Thereafter, a bank served an execution on a garnishee. Inexplicably, the court awarded priority to the bank. The court pursued a red herring: the city had served a restraining notice on the garnishee. This, the court thought, could not create a lien. But so what, when the tax warrant was docketed prior to the bank's execution lien? United States v. Herzog (In re Thriftway Auto Rental Corp.), 457 F.2d 409, 412 n.5 (2d Cir. 1972) (pointing out the error).

New York City personal income tax.[141] This tax is not collected by the City but is rather collected by the DTF.

Once the tax lien is created, the sheriff or DTF officer may enforce the warrant "with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record . . . "[142] The meaning of "like effect" is rank with ambiguity. We examine "like effect" in the separate contexts of real property and personal property.

A. Real Property

A lien on real property arises when the tax warrant is docketed. In this respect, the tax lien resembles the ordinary judgment lien that creditors obtain upon docketing the judgment.[143]

One important ambiguity with regard to this moment of lien creation is whether, once the tax warrant is docketed, the lien pertains to only real property located in that county, or whether the lien attaches to property outside the county. According to the first sentence of § 1141(b) (sale and use tax), the warrant itself directs the sheriff to levy on real and personal property "which may be found within his county." Yet in the fourth sentence, the lien-creative moment does not refer to any geographical limitation.[144]

Shall we say that a docketing in Nassau County creates a lien on the taxpayer's real property in Erie County? Here is a possibility that would deeply upset the title insurance companies, because it means that they must search fifty county dockets before they can be absolutely sure that the land in Erie County is unencumbered.

One sensible answer to this ambiguity is to note that the sheriff or compliance officer must enforce the warrant "with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record . . . "[145] Where a private creditor has a money judgment docketed, CPLR § 5203(a) is quite clear that the real property encumbered must be located in the county where the docketing occurs. Since regular money judgments not docketed (or levied) in

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[141] N.Y.C. Admin. Code § 11-1792(d).

[142] N.Y. Tax Law §§ 692(f) (personal income tax), 1141(b) (sale and use tax) (seventh sentence); NYC Admin. Code § 11-683(6).

[143] CPLR 5203(a).

[144] The Tax Law sometimes permits employees of the DTF to "proceed in any county or counties of this state and shall have all the powers of execution conferred by law upon sheriffs . . . " N.Y. Tax Law § 692(f) (personal income tax); 1092(f) (corporate tax); *see also* N.Y. Gen. City Law Appendix §§ 25-a(f) (city income tax); §83(6) (city corporate tax), § 140 (unincorporated business tax); N.Y.C. Amin. Code §§ 11-532(f) (unincorporated business tax), 11-683(6) (corporate tax), 11-792(f) (city income tax). This sentence, however, does not prove that a tax warrant filed in Albany County encumbers real property throughout the state. A tax compliance officer might well travel to another county and be authorized to act, but may have no lien when he gets there.

[145] N.Y. Tax Law §§ 692(f) (personal income tax), 1141(b) (sale and use tax) (seventh sentence); NYC Admin. Code § 11-683(6).

Erie County cannot be enforced there, a similar rule applies to tax warrants not docketed in Erie County.

This is a sensible limitation, but until the court of appeals declares that this limitation is somehow implicit in tax lien statutes, the title searchers have a worry. This is especially so because, in 1985 the legislature added the fourth sentence to § 1141(b): "Such lien shall not apply to personal property unless such warrant is filed in the department of state." Filing with the secretary of state suggests an intent to make the personal property tax lien valid throughout the state, not just locally. One can argue that the legislature intended for a broad application for all liens generally but, in the fourth sentence, restricted a state filing to liens for personal property *only*. The real estate lien, so the argument goes, remains broad. Though consistent with a standard interpretive cannon, such a result defies common sense and wreaks havoc on title searches. And one way to avoid the result is to note that the tax legislation typically states that the rights of the DTF are whatever the rights of a judgment creditor are. Since judgment creditors must docket locally, the DTF is similarly limited.

One statute, added to the New York Tax Law in 1997,[146] implies that docketing the tax warrant creates a lien only on local real estate. According to New York Tax Law § 174-a(1) (entitled "Duration of warrant liens on real property"):

> Notwithstanding any provision of law to the contrary, the provisions of the civil practice law and rules relating to the *duration* of a lien of a docketed judgment in and upon real property of a judgment debtor, and the extension of any such lien, shall apply to any warrant filed on behalf of the commissioner against a taxpayer with the clerk of a county *wherein such taxpayer owns or has an interest in real property*, whether such warrant is being enforced by a sheriff or an officer or employee of the department.[147]

The emphasized language at least reflects an assumption that docketing affects local real property only. But it is possible to read this provision "literally" to destroy any such inference. The quoted statute deals only with duration of a real property lien. The reference to locality makes clear that locality is relevant only if the DTF seeks to extend the duration of the lien.[148] But such arguments more effectively militate against following the plain meaning of obscure statutes, rather than for the proposition that docketing in a county creates real estate liens throughout the state. This provision, therefore, should be viewed as providing evidence that the legislature intends for tax warrants to encumber real property only in those counties

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[146] L 1997, ch. 176, § 1.

[147] Emphasis added.

[148] On extension of real estate liens, see Carlson, *supra* note ---, at 1307-13.

where the warrant is docketed.[149]

The purpose of Tax Law § 174-a is to assure that a tax warrant creates a lien that, in duration, matches up with the duration of a judicial lien on real property. Under CPLR § 5203(a), a lien commences upon docketing a judgment where the judgment debtor owns real property.[150] The lien terminates ten years after the judgment roll is filed in the county where the judgment was entered.[151] So a docketing lien on real property can last no more than 10 years (and perhaps a good deal less than that).[152]

The Tax Law, however, often states that "[t]he provision of the [CPLR] relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action to . . . enforce the collection of any tax or penalty prescribed by this article . . . "[153] Section 174-a makes clear that the CPLR *does*, after all, supply the rule for the duration of tax liens on real estate.

But if § 174-a serves to clarify the rule of local docketing, it adds other ambiguities. Liens stemming from money judgments may be created upon local docketing but they die ten years after the judgment roll is filed. With regard to taxes, there is no equivalent of a judgment roll. So courts will have to find an analogous time by which to measure the death of the real property tax lien.

At first impression, it may seem that, since filing the judgment roll is supposed to be simultaneous with entry of the judgment,[154] perhaps the best analogy to entry of the judgment (as a stand-in for filing the judgment-roll) is the *assessment* of the taxes, which either occurs at the end of an administrative proceeding or (where the tax

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[149] N.Y. Tax Law § 174-a(2) goes on to state that subbparagraph one applies to "any tax which is administered by the commissioners and which is imposed . . . by this chapter . . . " (among others). "This chapter" refers to the entire Tax Law § 1 ("This chapter shall be known as the 'Tax Law'"). Section 174-a(2) additional applies to § 27-0923 of the Environmental Conservation Law and to the Racing, Pari-mutuel Wagering and Breeding Law. Neither the cited section of the Environmental law nor the entire Racing, Pari-mutuel Wagering and Breeding Law makes any reference to tax warrants.

[150] CPLR 5203(a) (preamble). Where the docketing lien has died but the judgment still lives, CPLR § 211(b) (twenty year life, at least), a lien may also be created by "levying" on the real property. *Id*. § 5235. A levy consists of the sheriff filing notice in the real estate records that a sale is pending.

[151] The judgment roll is described in CPLR 5017. It must be prepared and filed by the attorney for the party whose instance the judgment is entered. *Id*. § 5017(a). It contains the principal documents of the litigation, such as the summons, pleadings and court orders, and the like. *Id*. § 5018(b). The judgment roll is to be filed at the time the judgment is entered. *Id*. § 5018(a). Entry of a judgment is defined as the time a judgment if signed and filed by the clerk. *Id*. § 5016(a); *see id* § 9702 (clerks of all courts, except the clerk of the appellate division, is to keep a "judgment book" wherein "entered" judgments are recorded).

[152] *See* Carlson, *supra* note ---, at 1305-07.

[153] N.Y. Tax Law § 207 (corporation tax), 219 (franchise tax), 281 (transfers of stock), 313 (gas tax), 1147(b) (sales and use tax), 1420(a) (real estate transfer tax); *see also* Gen. City Law Ap. § 10 (city business tax), 64(2) (transportation corporation tax).

[154] CPLR 5017(a).

return admits the tax debt) upon filing of the return.[155]

We think, however, that this analogy should be rejected. Docketing a judgment formally includes "the date and time the judgment-roll was filed"[156] and "the court and county in which judgment was entered . . . "[157] These clues will lead the title searcher to the county where the judgment was entered, so that the duration of a judicial lien on real estate can be calculated. The date of assessment, however, is not included on a tax warrant. Rather, a tax warrant need only recite that "a tax has been found due to the Commissioner of Taxation and Finance . . . from the debtor named . . . "[158] The date of assessment therefore does not appear in the docket, and it would be impossible, from the record, to calculate the duration of the tax lien on real property.

A better choice is the date on which the tax warrant is *first docketed*. According to the New York Tax Law, when the tax warrant is filed with the county clerk, the DTF is "deemed to have obtained a judgment against the taxpayer for the tax or other amounts."[159] The Tax Law itself directly equates docketing the tax warrant with entry of a judgment. To be sure, in the CPLR, docketing a judgment is *not the same* as entering the judgment.[160] But the Tax Law states the opposite conclusion: insofar as tax warrants are concerned, docketing *is the same* as entry of a judgment. The *first* docketing, then, becomes the best analogy to the filing of the judgment-roll, for purposes of calculating the duration of a tax lien on real property.

To round out this interpretation, we have argued that docketing a tax warrant creates a lien on real property located in the county where the docketing occurs, but it creates no lien on real property located in some other county. Imagine, therefore, that in 2007 the DTF dockets a tax warrant in Albany County, but the taxpayer owns real property only in Westchester County. The DTF has no lien on the Westchester property. Suppose now that the DTF obtains a Westchester docketing in 2011. A lien is thereby created in Westchester. But this lien will terminate in 2017, which is ten years after the Albany docketing.[161] To be sure, the Albany docketing

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[155] *See supra* text accompanying notes ---.

[156] CPLR § 5018(c)(1)(iv).

[157] *Id*. § 5018(c)(1)(vi).

[158] *E.g.*, N.Y. Tax Law § 692 (Official Form) (sales and use tax).

[159] N.Y. Tax Law § 692(e) (income tax); see also *id*. § 1092(d) (sales tax); N.Y.C. Admin. Code § 11-683(5) (New York City corporate income taxes).

[160] *Compare* CPLR § 5016 (Entry of Judgment) and CPLR § 5018 (Docketing of Judgment).

[161] One disadvantage the DTF will have is that a tax warrant must issue within six years of assessment. *E.g.*, N.Y. Tax Law § 692(c). Therefore, the question arises whether a *new* tax warrant could issue in 2014, which could then be docketed in Westchester. The answer should be that, since the DTF has an *Albany* judgment by virtue of Albany docketing, a transcript from Albany could issue any time before 2017, as Albany judgments are valid for at least 20 years. CPLR 211(b). This transcript could be docketed in Westchester to create a lien in 2014 for the DTF, even is a tax warrant could not issue in 2014. CPLR § 5018(a) (governing "docketing elsewhere by transcript").

creates a judgment that can be enforced even after the Westchester lien has terminated in 2017;[162] New York money judgments endure at least twenty years after they are "entered."[163] The Westchester *lien*, however, would terminate ten years after the Albany docketing. After that point, the DTF would have to "levy" the Westchester property.[164]

Admittedly, we have not solved, nor can we solve, the dilemma that eliminated "assessment" as the best analogy to filing the judgment roll. We observed that the date of assessment never appears in the tax warrant and therefore never appears in the docket, making calculation of lien duration impossible. Under our suggestion, the calculation still remains difficult, though at least it is possible. If the title searcher examines all 50 counties in New York, the searcher will find the Albany docketing and can calculate lien duration.

The DTF recently sponsored legislation to make taxes uncollectible twenty years after "the first date a warrant could be filed."[165] If this legislation passes, our suggested analogy would have to be revisited. It is hoped that, if this legislation passes, the tax warrant itself would recite information pertinent to the calculation of the period of both collectability and lien. If such information is included in the tax warrant, docketing the tax warrant would publicize what is needed to determine lien duration.

We have said that the Tax Law often makes the timing rules of the CPLR irrelevant to enforcement. Sometimes (but not always) the relevant provision goes on to state:

> as to real estate in the hands of persons who are owners thereof who would be purchasers in good faith but for such tax or penalty and as to the lien on real estate of mortgages held by persons who would be

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[162] Smith v. Commissioner of Taxation & Fin., 798 N.Y.S. 713 (Surr. Ct. Nassau Co. 2004).

[163] CPLR 211(b). This period is not a true statute of limitations but is merely a presumption, though eventually a conclusive one. Jimenez v. Shippy Realty Corp., 163 Misc. 2d 121, 618 N.Y.S.2d 983 (S. Ct. Westchester Co. 1994). In addition, the period for enforcing a judgment may exceed twenty years, where an earlier partial payment or acknowledgement of the debt exists, though, after twenty years, a judgment creditor will have to prove that the judgment remains unpaid.

[164] CPLR 5235 (levying possible "[a]fter the expiration of ten years after the filing of the judgment-roll . . . "). A levy requires the filing "with the clerk of the county in which the property is located a notice of levy describing the judgment, the execution and the property." *Id*. Significantly, the DTF could not issue a tax warrant more than six years after assessment. *See supra* note ---. The DTF would have to issue an "execution," and this execution could only be issued to the Westchester sheriff. Tax compliance officers are not authorized to enforce executions--only tax warrants. Presumably, since the Albany tax warrant *is* a judgment, an execution could issue to the Westchester sheriff.

[165] S3946-2011. Where the taxpayer has no right to a hearing (because the taxpayer's return admits the tax is due), then "the first day a warrant could be filed" is "the day after the last day specified for payment by the notice and demand." If there is a right to a hearing (typically 90 days to petition the DTA), then "the first day a warrant could be filed" is "the day that opportunity for a hearing or review has been exhausted." Unlike CPLR 211(b), the new legislation prohibits the extension of the 20-year period (except by taxpayer agreement).

> holders thereof in good faith but for such tax or penalty, all such taxes and penalties shall cease to be a lien on such real estate as against such purchasers or holders at the expiration of ten years from the date such taxes became due and payable.[166]

Arguably, § 174-a overrules such sentences, just as it overrules that part of the sentences that admonish courts to pay no attention to the CPLR on time limits. Section 174-a, after all, begins with the sweeping remark, "[n]otwithstanding any provision of law to the contrary . . . "

Another Tax Law provision that could be superseded by § 174-a is the rule that tax warrants must be filed within six years of the assessment. For example, Tax Law § 692(c) (income taxes) provides:

> If any person liable under this article for payment of any tax . . . neglects or refuses to pay the same within twenty-one calendar days after notice and demand therefor is given to such person under subsection (b) of this section (ten business days of this section (ten business days if the amount for which such notice and demand is made equals or exceeds one hundred thousand dollars, the commissioner may *within six years after the date of such assessment* issue a warrant . . . [167]

Can it be argued that § 174-a overrides such sentences as these? Under the CPLR, a judgment creditor may arrange to docket a judgment any time before ten years after the judgment roll was filed.[168] If so, the tax lien is entitled to "like effect."

The argument against any such inference is that § 174-a was intended to protect title insurers against tax warrants that are older than ten years. Since extending the just-cited six year statute is unrelated to that legislative purpose, § 174-a was not intended to overrule it. Such a narrowing of the statute based on the legislative history would preserve the six-year rule for issuing warrants.

At least one other anomaly can be attributed to the "like effect" rule. The first sentence of § 1141(b) (sales and use tax) states that the tax warrant command the sheriff to *levy* real property (as well as personal property). This is an odd command, in that, when a private creditor has docketed a judgment, a levy is not required so long as the

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[166] N.Y. Tax Law § 207 (corporation tax), 219 (franchise tax), 313 (gas tax); *see also* Gen. City Law Ap. § 10 (city business tax), 64(2) (transportation corporation tax).

[167] *See also* N.Y. Tax Law § 1092(c) (corporate tax).

[168] CPLR 5018(a) (describing docketing of transcripts of judgments from other courts).

docketing lien lives.[169] In fact, courts have held that a levy on behalf of a private creditor is not even permitted during this period.[170] Yet, insofar as a tax warrant is concerned, a levy seems always to be required. If a levy is indeed required, then the sheriff cannot proceed "in the same manner" as required by Article 52 of the CPLR, since levies of real property, during the life of the docketing lien, are not even permitted. The best policy would be to chalk up this analogy to mistake and to bar the levy for the ten year period a docketing lien exists, so that real estate sales *sans* levy can occur, so long as there is a docketing lien on the real property.

B. Personal Property

Generally, the DTF has a tax lien on personal property once two filings are achieved. First, the tax warrant must be docketed. Second, the DTF must file with the secretary of state.

Once the tax lien is created, the sheriff or DTF officer may enforce the warrant "with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record . . . "[171] Ordinary judgment creditors with docketed judgments have no lien on personal property unless they deliver an execution to the sheriff[172] or unless they obtain a turnover order or appointment of a receiver from a court. Is the DTF similarly limited? The answer is no. "Like effect" takes effect, as it were, only after the lien is definitely created. So the warrant *is* the execution, and the sheriff may enforce it, even though she has received no separate document entitled "execution."[173]

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[169] CPLR § 5236(a) (emphasis added) requires the sheriff to sell a judgment debtor's "interest of the judgment debtor in real property which has been levied upon under an execution delivered to the sheriff *or* which was subject to the lien of the judgment at the time of such delivery . . . " Assuming, as is fair, that "lien of the judgment" refers to docketing the judgment pursuant to CPLR § 5203(a), then the sheriff need not levy, so long as the ten-year docketing lien of § 5203(a) is still alive.

[170] Community Capital Corp. v. Lee, 58 Misc. 2d 34, 294 N.Y.S.2d 336 (S. Ct. Nassau Co. 1968).

[171] N.Y. Tax Law §§ 692(f) (personal income tax), 1141(b) (sale and use tax) (seventh sentence); NYC Admin. Code § 11-683(6).

[172] CPLR 5202(a).

[173] Corrigan v. United States Fire Ins. Co., 427 F. Supp. 940 (S.D.N.Y. 1977). In United States v. Herzog (In re Thriftway Auto Rental Corp.), 457 F.2d 409 (2d Cir. 1972), the court rejected the claim that "like effect" meant that the lien was not created at the moment of docketing. Its holding was with regard to a New York City lien. Significantly, it suggested the result would have been otherwise under the state liens for income and sales tax. At that time, the income tax lien was governed by this language: "such amount [of the warrant] shall thereupon be a binding lien . . . to the same extent as other judgments duly docketed in the office of such clerk." N.Y. Tax Law § 692(d) (personal income tax). This language has since been amended. Today, § 692(d) reads, "and such amount *shall thereupon be a lien upon the title to and interest in real, personal and other property of the taxpayer*." Emphasis added. The "like effect" language is now disassociated from the birth of the lien, suggesting that the state lien now resembles the city lien at stake in *Thriftway*.

It is possible to locate ambiguity in the legislation that governs the sales tax lien. When the *sheriff* files the tax warrant with the clerk and the clerk dockets it, there is a lien on real estate and (once a filing is made with the secretary of state) personal property throughout the state. But when someone *other* than the sheriff files the tax warrant on behalf of the DTF, then the DTF has the same remedies "as if the state had recovered judgment therefor."[174] Ordinary judgment creditors have no lien on personal property until they also serve an execution on the sheriff. Shall we conclude that, where the sheriff has not performed the ministrerial duty of docketing the tax warrant, the DTF must issue an execution to the sheriff in order for its lien on personal property to arise?

Whereas the sheriff is commanded to file the tax warrant with the clerk, a DTF employee is not so commanded. But if such a docketing occurs, the DTF is deemed to have a judgment. The statute does not quite succeed in saying that when a non-sheriff dockets, there is a lien on personal property. It is open to argue, then, that when the DTF bypasses the sheriff and uses one of its own employees, docketing creates no lien on personal property, even when the DTF files notice with the department of state. The implication might be that the DTF has a lesser right when its own employee (not the sheriff) is responsible for the ministerial act of docketing. Of course, this makes no sense whatsoever. Why should the lien rights of the DTF change based on the identity of the party instigating the docketing? If they are sensible, courts will chalk up the matter to legislative carelessness and will rule that the DTF's lien is equally strong, whether the sheriff or a tax compliance officer files the tax warrant. At least one court seems to assume that the rules applicable when the sheriff files are also applicable when someone other than the sheriff files.[175]

This ambiguity does not arise under the state personal income tax lien. New York Tax Law § 692(c) instructs both the sheriff and the DTF employee to file the warrant with the clerk,[176] and thereafter the lien arises when the tax warrant is filed with the department of state.[177]

Under the CPLR, executions must be returned in sixty days (though their lives may be extended).[178] Tax warrants too must be returned in sixty days (with no opportunity for renewal).[179] According to § 1141(b) (sale and use tax), the sheriff (and, presumably, an

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[174] N.Y. Tax Law § 1141(b) (sale and use tax) (seventh sentence).

[175] Arthur Treacher's Fish & Chips, Inc. v. New York State Tax Commn., 69 A.D.2d 550, 419 N.Y.S.2d 768 (3d Dept. 1979).

[176] N.Y. Tax Law § 692(d) (personal income tax) (first sentence).

[177] N.Y. Tax Law § 692(d) (personal income tax) (second and third sentences).

[178] CPLR § 5230(c).

[179] N.Y. Tax Law §§ 279-b (stock transfer tax), 289 (gas tax), 431(2) (alcoholic beveraag tax), 479 (tobacco tax), 511(2) (highway use tax), 692(b) (personal income tax), 1092(a) (franchise tax), 1141(b) (sales and use tax), 141(b) (real estate transfer tax).

employee of the DTF to whom a tax warrant is addressed)[180] are expected "to return such warrant to the tax commission and to pay it the money collected by virtue thereof within sixty days after the receipt of such warrant."

When an execution is returned (in the absence of a levy), the lien that arose upon delivery of the execution is considered dead.[181] To be sure, the CPLR nowhere says this, but this was the ancient New York rule, and modern courts assume that it is still true.[182] Does this imply that the lien associated with the tax lien is dead upon its return in sixty days? Nothing in the New York Tax Law says so. Indeed, nothing in the CPLR says so with regard to execution liens. Lapse after 60 days is simply assumed to be true, because that was the old rule. The better view is that the tax lien does *not* lapse just because a return has been made. Even though the warrant is "returned" to the DTF, a copy of it still remains in the records, warning the world that the lien continues on after the date of return. It should also be noted that judicial lien arise under pre-judgment orders of attachment.[183] There is no requirement that orders of attachment be returned at all. They continue to be valid after sixty days.[184] This should serve as

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[180] Arthur Treacher's Fish & Chips, Inc. v. New York State Tax Commn., 69 A.D.2d 550, 419 N.Y.S.2d 768 (3d Dept. 1979) (so presuming).

[181] New York City Transit Authority v. Paradise Guard Dogs, Inc., 565 F. Supp. 388 (E.D.N.Y. 1983); United States v. Fleming, 474 F. Supp. 904 (S.D.N.Y. 1979); Walker v. Henry, 85 N.Y. 130 (1881); Garro v. Republic Sheet Metal Works, Inc., 284 A.D. 660, 134 N.Y.S.2d 151 (4th Dept. 1954) (prior to the CPLR); Vance Boiler Works v. Co-operative Feed Dealers, Inc., 46 Misc. 2d 654, 260 N.Y.S.2d 303 (S. Ct. Wayne Co. 1965).

[182] The Court of Appeals has recently ruled in another context that, where the CPLR is silent, pre-CPLR rules are presumed to continue in effect. Prior to the CPLR, the rule had been that the judgment debtor had a right to redeem real property even *after* an execution sale occurred. In 1964, the legislature repealed this post-sale right by deleting all reference to redemption whatever. Wandschneider v. Bekeny, 75 Misc. 2d 32, 36, 346 N.Y.S.2d 925, 929 (S. Ct. Westchester Co. 1973). In Rondack Construction Servs., Inc. v. Kaatsbaan Int'l Dance Ctr., Inc., 13 N.Y.2d 580, 923 N.E.2d 561, 896 N.Y.S.2d 278 (2009), the court sensibly reasoned that the legislature did not intend to obliterate all rights of redemption--only redemption after the sale. Therefore, a sheriff must call off an execution sale upon receiving a cashier's check for the amount of the judgment, because that was the rule prior to the enactment of the CPLR.

[183] CPLR § 6203.

[184] According to Fireman's Fund Ins. Co. v. D'Ambra, 766 F.2d 95 (2d Cir. 1985):

> Although section 6214(e) provides, with certain exceptions not relevant here, that "at the expiration of ninety days after a levy is made by service of the order of attachment . . . the levy shall be void", the section contains no reference to the underlying order of attachment. Section 6211(a), on the other hand, empowers the sheriff to levy "at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the amount specified in the order of attachment. " A fair reading of these two sections leads ineluctably to the conclusion that an order of attachment survives the expiration of a levy under section 6214(e) and will support such additional levies as are

indirect support for the proposition that tax warrants do not die after sixty days.

Nevertheless, the court in *Marine Midland Bank-Central v. Gleason*[185] implied that tax liens on personal property die when the warrant is returned. In *Gleason*, three tax warrants were docketed before a security interest was perfected. A levy occurred within 60 days of the third tax warrant but not within 60 days of the first two. The court ruled that the tax warrant died at the end of sixty days. In so ruling, the court did not emphasize the duty to return the tax warrant. Rather, it emphasized the fifth sentence of § 1141(b) (sale and use tax), which indicates that the sheriff "shall proceed upon the warrant 'in the same manner, and with like effect' as that provided by law in respect to judgment executions . . . "[186] Since executions die when they are returned (or perhaps due to be returned), so do tax warrants, reasoned the court.

Although the courts of appeals affirmed the result in *Gleason*,[187] it stated in dictum that the tax lien does not die when the return is due: "we reject the conclusion reached by the Appellate Division that State tax liens, although perfected upon docketing, may be extinguished if a levy is not made within the lifetime of a judgment execution."[188] This view is quite justified. CPLR Article 52 never explicitly says that execution liens die when actually returned or due to be returned. This is merely something courts assume to be true about executions. But executions are never docketed as a matter of public record. Docketing implies that the lien is like the docketing lien, except that it extends to personal property as well as real property. Docketing liens are enforced by execution, but delivery of the execution does not create the lien. Nor does return of an execution on real property end the docketing lien. There is no reason why the

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necessary to satisfy the amount specified in the order.

Id. at 96. Subsequent state cases suggest that multiple levies are not permitted and that the creditor is strictly limited to *nunc pro tunc* motions to extend an earlier levy. 2000); Kitson & Kitson v. City of Yonkers, 10 A.D.2d 21, 778 N.Y.S.2d 503 (3d Dept. 2004); New York State Commissioner of Taxation & Fin. v. Bank of New York, 275, A.D.2d 287, 712 N.Y.S.2d 543 (3d Dept. 2000). But it still is the case that orders of attachment need not be returned and permenantly ground motions to extend the levy *nunc pro tunc* after the levy has died. Bizarrely, § 5234(b) (last sentence) suggests that, *if* a sheriff returns an order of attachment, the order of attachment forfeits its place in the priority scheme.

[185] 62 A.D. 2d 429, 405 N.Y.S.2d 434 (4th Dept. 1978), aff'd 47 N.Y.2d 758, 417 N.Y.S. 458, 391 N.E.2d 294 (1979).

[186] 62 A.D. 2d at 438, 405 N.Y.S.2d at 436.

[187] *Gleason* is actually a legal malpractice case, based on a law firm's failure to file a financing statement with the secretary of state (as well as locally). Three tax warrants and a federal tax lien took seniority over the unperfected security interest. The appellate division had ruled that two of the three New York tax liens had "died," but that the federal and the surviving New York lien were enough to justifiably absorb the proceeds of the tax sale. On appeal, the court of appeals suggested in dictum that New York tax liens do not die after sixty days, as the Appellate Division had assumed. Rather, the tax liens alone were enough to guarantee that the proceeds could be kept away from the junior secured party.

[188] 47 N.Y.2d at 760-61, 391 N.E.2d at 294, 417 N.Y.S.2d at 458-59.

New York tax lien cannot be compared to the docketing lien, rather than to the execution lien, of Article 52. It may be noted that the pre-judgment order of attachment pursuant to Article 62 need never be returned; therefore the attachment lien never lapses.[189] This is properly the attribute of the New York tax lien.

Under the CPLR, delivery of the execution to the sheriff creates a lien on personal property. Separately, the CPLR makes execution liens defeasible until the sheriff actually levies.[190] And even the levy is defeasible if the property levied is not capable of delivery.[191] Are tax warrants likewise defeasible? The answer to this question is unknown. The tax lien does not come from the execution. It comes from docketing the tax warrant. Therefore, the defeasibility of an execution lien on personal property does not necessarily imply the defeasability of the tax lien.

Nevertheless, defeasibility of the tax warrant allows for the sensible conclusion that a taxpayer can make transfers free of the lien in the ordinary course of business. For example, in *Arthur Treacher's Fish & Chips, Inc. v. New York State Tax Commission*,[192] the court ruled that a tax warrant might constitutionally encumber the property of a restaurant without notice and a hearing because the debtor suffered no intereference with the right of possession or use.[193] But for this to be true, a way must be found to explain how the debtor might sell meals to the public. After all, the tax warrant encumbers inventory as well as equipment and real property. The answer might be that, pursuant to CPLR 5202(a)(1), a judgment debtor can make transfers for fair consideration, even if the transferee knows of the judicial lien. As applied to tax warrants, § 5202(a)(1) would authorize authority of a taxpayer business to continue to make ordinary course sales.[194]

There is, however, another solution to the problem of the ordinary course sale. According to UCC § 2-403(2):

> Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.

Entrusting is defined to include "acquiescence in retention of possession" of goods by the merchant. The DTF, by virtue of its tax

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[189] Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 652, 653 (2d Cir. 1979) ("but the order granting the attachment was never itself void. It subsisted so that a new levy. . . could be made under it").

[190] CPLR 5202(a)(1).

[191] CPLR 5202(a)(2).

[192] 69 A.D.2d 550, 419 N.Y.S.2d 768 (3d Dept. 1979) (sales and use tax).

[193] *See supra* text accompanying notes ---.

[194] IRC § 6323(b)(3), in contrast, makes clear that a federal tax lien "[w]ith respect to tangible personal property purchaser at retail, as against a purchaser in the ordinary course of the seller's trade or business" is invalid, "unless at the time of such purchase such purchaser intended such purchaser (or knows such purchase will) hinder, evade, or defeat the collateral of any tax under this title").

warrant, is entitled to repossess and sell goods encumbered by its tax lien, but, until it levies, it "acquiesces" to the merchant's continued possession and so is a possessor. We can think of no reason why the UCC should not apply to goods encumbered by a state tax lien.

To summarize, it is obviously necessary for New York law to describe the features of a tax lien, but the device of "like effect" and "in the same manner" are not very shrewd policy choices to get the job done. The impediments on sheriffs enforcing ordinay money judgments are poorly understood, and it is unfortunate that courts considering the scope of New York tax liens must consider whether state tax collection is impeded in the same manner as sheriffs are impeded in enforcing ordinary money judgments.

IV. Liens that Precede the Tax Warrant

A. City Corporate Taxes

New York City creates a lien for itself that exceeds the power of a state tax lien. The lien applies only to certain corporate taxes.[195] The City obtains the usual lien upon docketing the tax warrant, but, unlike state liens, an "additional" lien pre-exists the tax warrant.[196] This lien exists from the time at which "the return is required to be filed (without regard to any extension of time for filing such return) . . . "[197] But there is an additional rule: "such tax shall become a lien not later than the date the taxpayer ceases to be subject to the tax imposed by any of the named subchapters, or to do business in this state in a corporate or organized capacity."[198] This lien can therefore come into existence in the middle of a fiscal year--long before a return is due--if the business leaves the state or liquidates.

The pre-warrant lien extends to all real and personal property. Unlike the state tax lien, there is no need to file anything with the department of state.

Significantly, bona fide purchasers for value are protected against the pre-warrant lien if the transfer occurred before the notice of deficiency has been sent to the taxpayer.[199] There is no such protection, once the notice of deficiency is sent, even if the tax warrant is not yet filed. Furthermore, it is not enough for the purchaser to be in good faith. It also must be true that the transferor must have transferred "in good faith."[200] Accordingly, the city might

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[195] N.Y.C. Admin. Code refers to "taxes imposed by the named subchapters." N.Y.C. Admin. Code § 11-683. "Named subchapters" means subchapters 2-4. N.Y.C. Admin Code 11-671(2)(a). These refer to taxes on general corporations, financial corporations, and transportation corporations.

[196] N.Y.C. Amin. Code § 11-683(10) (lien is "in addition" to other liens). The state may have a setoff right that precedes filing the tax warrant, because the tax is due when the return is filed. In re City of New York, 12 N.Y.2d 1051, 190 N.E.2d 1051, 190 N.E.2d 240, 239 N.Y.S.2d 880 (1963). But this yields value to the state only if the taxpayer has some sort of claim against the state.

[197] N.Y.C. Amin. Code § 11-683(10) (first sentence).

[198] N.Y.C. Amin. Code § 11-683(10) (first sentence).

[199] N.Y.C. Amin. Code § 11-683(1) (second sentence).

[200] N.Y.C. Amin. Code § 11-683(1) (second sentence).

still defeat the rights of a bona fide purchaser because, unbeknownst to the purchaser the transferor was in bad faith.

There is limited protection for mortgage lenders. The pre-warrant lien is subject to a mortgage lien that pre-exists the city's lien. But this protection apparently does not exist if the proceeds of the mortgage lien went to any officer or stockholder of the corporation owning the real property.[201] The city might beat the mortgage lender, for example, in the case of a leveraged buyout, where the corporation's real property is collateral for a loan theatultimately pays out the exiting shareholders.

The pre-warrant tax lien is also subject to any pre-existing or later-arising lien for "local taxes and assessments."[202] This is confusing. One would think that the New York City tax is a local tax. What, within New York City, could be more local than a New York City tax? Perhaps the meaning of this rule is that New York City property tax primes the lien for New York City corporate taxes.

Suppose an incorrect return is filed and the amount of the inaccurately-calculated tax is paid. The pre-warrant lien is then not enforceable against any subsequent bona fide purchaser, so long as the transfer is prior to the issuance of the notice of deficiency.[203] How is this different from a case where no payment is made, or where no return is filed? Apparently, the bona fides of the transferor are not at issue when the ostensible tax debt is paid. Rather, only the bona fides of the purchaser are relevant. Once again, this protection does not apply if the proceeds of the loan went to an officer or shareholder of the corporation.[204]

The taxpayer may obtain title to real property which is subject to a mortgage granted by the taxpayer's predecessor-in-interest. In such a case, the city's lien attaches only to the equity.[205] This would appear to be so even where the mortgage is unrecorded. Indeed, unrecorded mortgages are good against ordinary judgment creditors;[206] the City is treated no differently.

A sentence exists in the City's Administrative Code with regard to a senior mortgage or senior local tax lien.[207] If the City is

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[201] N.Y.C. Amin. Code § 11-683(1) (third sentence). This rule is modified with the words, "whether as a purchase money mortgage or otherwise." These words seem to indicate that where an officer or shareholder has sold real property to the corporation and is paid by a purchase money loan to the corporation, the city's lien is senior to the purchase money lien of the lender.

[202] N.Y.C. Amin. Code § 11-683(1) (third sentence).

[203] N.Y.C. Amin. Code § 11-683(1) (fourth sentence).

[204] N.Y.C. Amin. Code § 11-683(1) (fourth sentence).

[205] N.Y.C. Amin. Code § 11-683(1) (fourth sentence).

[206] Federal Deposit Insurance Corp. v. Malin, 802 F.2d 12, 20 (2d Cir. 1986); United States v. Certain Lands Located in Hempstead, 41 F. Supp. 636, 637 (E.D.N.Y. 1941); Sullivan v. Corn Exchange Bank, 154 A.D.2d 292, 139 N.Y.S. 97 (2d Dept. 1912).

[207] Presumably the sentence refers to senior mortgages. The language refers to "such mortgage." Prior sentences refer to mortgages that are and are not senior to the city. It seems hard to believe, however, that the city is submitting to foreclosure by a junior mortgage.

made a party to the foreclosure proceeding (or if no tax lien existed at the time the foreclosure proceeding commenced and the filing of the related notice of pendency), the City may be foreclosed, and it obtains a substitute junior lien on the proceeds of the sale.[208]

Both the tax warrant lien and the pre-warrant lien live for 20 years from the time the taxes are due.[209] This would appear to be a different rule from the state tax lien, which has at most a 10 year period from the time of docketing (not from the time when taxes are due).[210] Also, where real property has been transferred subject to the lien to a good faith purchaser, the City's tax lien lasts for only 10 years.[211] These limitations are repealed if transfers are made in bad faith to avoid the taxes.[212] The rule is otherwise for ordinary judgment creditors, who, at least in real property cases, can never be defeated by the bona fides of a subsequent purchaser.

Income taxes by cities are authorized if the city has a population of 1 million or more.[213] Practically speaking, this law only applies to New York City. The authorizing statute includes as an appendix a model city law. The enabling act requires that the municipal law "be substantially the same" as the model law.[214] The model law provides for a tax lien upon docketing a warrant,[215] but it does not expressly authorize the expansion of the lien. With regard to municipal corporate taxes[216] and unincorporated business taxes, however, an improved lien is directly authorized.[217]

B. Bulk Sales

Sometimes, in circumstances where the DTF might issue a tax warrant, legislation gives a lien for sales tax in supplement to the lien arising from the warrant. This occurs when the taxpayer sells in bulk "any part or the whole of his business assets, otherwise than in the ordinary course of business."[218]

Bulk sales law is elsewhere a fading presence in commercial law. Formerly, it was ensconced in Article 6 of the UCC, but, in 1989, the American Law Institute recommended the repeal of Article 6.[219] New York followed this recommendation in 2001,[220] so that Article 6 is no longer the law for ordinary creditors. If ordinary creditors wish

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[208] N.Y.C. Amin. Code § 11-683(1) (fifth sentence).
[209] N.Y.C. Amin. Code § 11-683(10)(c) (first sentence).
[210] *See supra* text accompanying notes ---.
[211] N.Y.C. Amin. Code § 11-683(10)(c) (first sentence).
[212] N.Y.C. Amin. Code § 11-683(10)(c) (second sentence).
[213] N.Y. Gen. City Law § 25-a.
[214] N.Y. Gen. City Law § 25-a.
[215] N.Y. Gen. City Law § 25-a Appendix § 72.
[216] N.Y. Gen. City Law Appendix § 83.
[217] N.Y. Gen. City Law Appendix § 140.
[218] N.Y. Tax Law § 1141(c) (sale and use tax) (first sentence).
[219] Steven L. Harris, *Article 6: The Process and the Product--An Introduction*, 41 ALA. L. REV. 549 (1990).
[220] L. 2001 ch. 84, § 20, effective July 1, 2001.

to avoid a bulk sale today, they must show that the debtor intended to hinder, delay or defraud creditors,[221] and that the buyer was not a bona fide purchaser for value.[222] Nevertheless, the bulk sale concept lives on in New York's tax law.

The way Article 6 worked formerly was that bulk buyers had to require the seller to furnish a list of creditors.[223] The buyer had to send notice ten days in advance of the sale.[224] For states adopting the "strong" version of Article 6, buyers had a duty to use the sales proceeds to pay the creditors of the seller.[225] New York, however, never enacted the strong version of this provision.

The DTF, however, continues to have a bulk sale right with regard to the sales and use tax only, even if ordinary creditors do not. Section 1141(c) requires the buyer to notify the DTF of the sale "at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor . . . "[226] If the DTF notifies the buyer that sales taxes are due from the seller, or if the buyer fails to notify the DTF of the sale, the proceeds of the bulk sale are encumbered by a sales and use tax lien, even though no tax warrant has issued.

The regulations indicate that the term "bulk sale" does *not* include "sales, transfers or assignments of business assets in settlement or realization of a valid lien, mortgage, or other security interest."[227] The fact that a bulk sale is free and clear of a security interest does not, however, bring the bulk sale within the exception.[228]

A lien on the proceeds of a bulk sale exists irrespective of a tax warrant. In *Bayard Shirt Co v. Raymar*,[229] the buyer failed to give

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[221] N.Y. D. & C. Law § 276.

[222] N.Y. D. & C. Law § 278.

> Bulk Sales Acts were passed in many states during the early period of this century, largely at the urging of the National Association of Credit Men. The statutes sought to overcome the peril caused by the unscrupulous, but nonetheless poor merchant who, anticipating the insolvency of his going buysiness, sold every chattel on the premsies for whatecer price the traffic would bear and then vanished from the sceien, leaving his creditors empty-handed. Since the good were often bought from the failing merchant by bona fide purchasers, the creditors had no recourse under the usual fraudulent conveyance laws.

Gordon v. Motel City "B" Assocs., 403 F.3d 90 (2d Cir. 1968). Prior to 2001, aggrieved creditors routinely alleged a violation of fraudulent conveyance law *and* the bulk sales law. Official Comm. of Unsecured Creditors of FMI Forwarding Co. v. Union Transp. CVorp. (In re FMI Forwarding Co.), 2005 U.S. Dist. LEXIS 941 (S.D.N.Y. 2005).

[223] UCC § 6-104 (repealed).

[224] UCC § 6-105 (repealed).

[225] UCC § 6-106 (repealed).

[226] *See also* 20 N.Y.C.R.R. § 537.0(b).

[227] 20 N.Y.C.R.R. § 537.1(4)(i).

[228] North Shore Cadillac-Oldsmobile, Inv. v. Tax Appeals Tribunal of the State of New York, 13 A.D.2d 994, 787 N.Y.S.2d 463 (3d Dept. 2004).

[229] 75 Misc. 2d 354, 347 N.Y.S.2d 764 (Civ. Ct. N.Y. Co. 1973).

timely notice. Subsequently, a judgment creditor sought a turnover order aimed at the withheld purchase price of the bulk sale. The court ruled that the DTF had priority over the judgment creditor because the DTF had levied pursuant to a tax warrant. In fact, the DTF's priority properly existed even if no tax warrant or levy was pending at the time of *JC*'s turnover proceeding.

If the buyer remits funds directly to the DTF, "such purchaser . . . shall be relieved of all liability for such amounts to the seller . . . and such amounts paid to the state shall be deemed satisfaction of the tax liability of the seller . . . to the extent of the amount of such payment."[230]

Oddly, the buyer is made subject to an injunction. She may not transfer the purchase price to the seller if she has notified the DTF of the sale. Or, if she has notified the DTF, she may not convey the purchase price if the DTF notifies the purchaser that the sellers owes the sales tax.[231] The DTF has ninety days to notify the purchaser of any sales tax debt. Therefore, as a general proposition, bulk buyers must hold back payment for ninety days after the DTF is notified of the sale.

What are the consequences of paying too early? The statute's fourth sentence still indicates that the buyer is subject to the bulk sales provisions of the UCC. Unhappily, as we have seen, these the state legislature repealed in 2001.[232] Section 1141(c)'s fourth sentence goes on to say that the buyer "shall be personally liable" for the seller's sales tax obligation."[233] So no tax lien arises against any property of the buyer. Rather, the DTF will have to obtain a money judgment under the CPLR. Or, alternatively, the fourth sentence of § 1141(a) indicates that "such liability may be assessed and enforced in the same manner as the liability for tax under this article." Therefore a new tax warrant may issue against the buyer, and a lien will arise in the manner previously described.

Section 1141(c)'s fourth sentence also provides:

> the liability of the purchaser . . . shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold . . . to such purchaser . . . whichever is higher . . .

This sentence gives the DTF the option of valuing the assets transferred if higher than the purchase price. In *Myers v. State Tax Commission*,[234] a retired restauranteur bought the equipment and

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[230] N.Y. Tax Law § 1141(c) (sale and use tax) (fifth sentence).

[231] N.Y. Tax Law § 1141(c) (sale and use tax) (second sentence).

[232] L 2001, ch. 84, § 20 (effective July 1, 2001).

[233] This liability includes interest or penalties due from the seller. Lorenz v. Division of Taxation of Dept. of Taxation, 212 A.D.2d 992, 547 N.Y.S.2d 444 (3d Dept. 1989). The liability arises even if the buyer relied upon the seller's representation that no sales tax was owing. Harcel Liquors, Inc. v. Evsam Parking, Inc., 48 N.Y.2d 503, 399 N.E.2d 503, 423 N.Y.S.2d 873 (1979).

[234] 101 A.D.2d 650. 475 N.Y.S.2d 560 (3d Dept. 1984).

inventory of the restaurant in exchange for assuming liability on a secured loan. The DTF issued a tax warrant against the buyer for the full amount of the unpaid sales tax. This the buyer challenged in an Article 78 action.[235] The appellate court affirmed that the DTF could not collect more than the higher of either the price paid or the value of the assets in question.[236]

V. The Tax Warrant Versus Other Transferees

The worth of a tax lien is best assessed in terms of its priorities against other transferees of the encumbered property. To date, the tax lien has encountered priority contests against Article 9 secured parties, judgment creditors, local property tax liens and federal tax liens.

A. Secured Parties

Since a lien arising from a tax warrant is of the first-in-time mode, it is clear that, where a secured party has a *perfected* security interest prior to the docketing of the warrant, the secured party prevails.[237] The mystery is whether an unperfected secured party also prevails over the tax warrant.

Marine Midland Bank-Central v. Gleason[238] is an attorney malpractice case that nevertheless provides important information on the nature of the state tax lien. In *Gleason*, the DTF filed sales tax warrants with the county clerk. These created liens against the personal property of the debtor, pursuant to Tax Law § 1141(b) (sale and use tax). After the docketing, a secured party filed a financing statement perfecting a security interest on the equipment. The DTF levied the equipment by placing a padlock on the restaurant,[239] at a time when the security interest was perfected. Nevertheless the DTF

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[235] An action under Article 78 can generally be brought to challenge whether the DTF's actions are lawful. Hall v. New York State Tax Commissioner, 108 A.D.2d 488, 489 N.Y.S.2d 787 (3d Dept. 1985). But this cannot occur until the state actually tries to levy under a tax warrant. Keslow v. State Tax Commn., 125 A.D.2d 294, 508 N.Y.S.2d 578 (2d Dept. 1986).

[236] Where the price paid is assumption of debt, the price equates with the amount of the debt assumed. Spandau v. United States, 73 N.Y.2d 832, 534 N.E.2d 37, 537 N.Y.S.2d 120 (1988). Had the buyer notified the DTF as required, presumably the DTF would have informed the buyer of the sales tax, but the buyer would not have been in a position to withhold the purchase price in order to pay the tax, as the price took the form of assuming primary liability on the seller's debt. Perhaps the deal would not have gone through if the buyer had followed the dictates of § 1141(c).

[237] IMFC Professional Servs., Inc. v. State of New York, 59 A.D.2d 1047, 399 N.Y.S.2d 804 (3d Dept. 1977).

[238] 62 A.D. 2d 429, 405 N.Y.S.2d 434 (4th Dept. 1978), aff'd 47 N.Y.2d 758, 417 N.Y.S. 458, 391 N.E.2d 294 (1979).

[239] *See also* Marrano v. State of New York, 80 Misc. 2d 768, 364 N.Y.S.2d 751 (Ct. Claims 1975) (state does not owe rent to the landlord when it padlocks premises to protect levied personal property).

prevailed as to one of its tax warrants.[240] Accordingly, the secured party's law firm was rendered guilty of malpractice for not perfecting the security interest in time. Clearly, the tax lien arose when the tax warrant was docketed. After 1985, however, the lien would have arisen only when the DTF filed notice with the department of state.[241]

The possibility of the DTF prevailing over an unperfected security interest presupposes that the New York tax lien is a judicial lien. UCC § 9-317 sets forth a compendium of persons capable of taking priority over a security interest. If the DTF is not described there, then the unperfected security interest falls to the so-called Golden Rule of Article 9:

> Except as otherwise provided in the [UCC], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

Among those listed in § 9-317 are "a person entitled to priority under Section 9-322" (*i.e.*, a competing secured party who was the first to perfect or file a financing statement) and "a person who becomes a lien creditor" before perfection of the security interest or before a security agreement is signed and a financing statement is filed (whichever is later). Also listed are buyers who give value and receive delivery without knowledge of the security interest and before it is perfected[242] and a lessee of goods who takes delivery without knowledge, licensees of a general intangible.

The DTF is certainly no secured party, buyer, lessee, or licensee. Its only chance to prevail is if it is a lien creditor, by virtue of having docketed a tax warrant where judgments are also docketed. The result in *Gleason* presupposes that this is true. Yet, as we shall see, the DTF is deemed *not* a lien creditor when it comes up against a federal tax lien.[243]

What is a lien creditor for Article 9 purposes? According to UCC § 9-102(52), a lien creditor is:

> (a) a creditor that has acquired a lien on property

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[240] Two of them had "died" before the DTF managed to levy. *See infra* text accompanying notes ---.

[241] Accord, York-Hoover Corp. v. United Casket Co. (In re United Casket Co.), 449 F. Supp 261 (E.D.N.Y. 1978), *aff'd mem*., 608 F.2d 1370, *cert. denied*, 444 U.S. 967 (1979) .

[242] UCC §9-317(b). Buyers who are also defined as secured parties are excluded from this protection and must win priority under 9-322. According to § 9-102(72)(D), these include buyers of accounts, chattel paper, payment intangible, or promissory notes. Notice that since buyers of chattel paper are always secured parties, they can never benefit from the protection of § 9-317(b) purports to give them. A similar contradiction exists in § 9-317(d). There, buyers of accounts and electronic chattel paper are supposed to take free of later-perfected security interests, but only if they are not sheriff parties. But they are *always* sheriff parties and so they get no protection, unless §9-322 provides for it.

[243] *See infra* text accompanying notes ---.

> involved by attachment, levy, or the like;
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> (b) an assignee for the benefit of creditors from the time of assignment;
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> (c) a trustee in bankruptcy from the date of filing the petition; or
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> (d) a receiver in equity from the time of appointment.

Obviously, if the DTF is a lien creditor for Article 9 purposes, it must have acquired its lien by "attachment, levy, or the like." These are not defined terms. Presumably, attachment refers to pre-judgment liens as created in New York under CPLR Article 62. The reference to "levy" is mysterious in New York, because a lien on personal property never arises solely from a levy. For private creditors, they arise when an execution is delivered to the sheriff[244] or when a turnover or receivership is procured.[245] For the DTF, levy is not the moment of lien creation. Rather, it is when the tax warrant is docketed. So, if the DTF is a judgment creditor, it is so under the grab-bag phrase, "or the like."

A state tax lien benefits when a secured party lets the filing lapse after five years.[246] Such a conclusion requires that a New York tax lien makes the DTF a lien creditor within the meaning of the UCC.[247] This rule can be criticized with regard to lien creditors, who are not reliance creditors, and if so, the criticism would also apply to state tax liens.[248]

A separate issue, not really related to the tax lien, is whether the state can set off tax against an amount it owes to a taxpayer, where a secured party has a perfected security interest on the payment intangible. Under UCC § 9-404(a):

> Unless an account debtor has made an enforceable agreement not to assert defenses of claims . . . the rights of an assignee are subject to
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> . . .
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> (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the

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[244] CPLR 5202(a).

[245] CPLR 5202(b).

[246] Colonial Ins. Co. v. PB & JB Cafe Ltd., 1989 U.S. Dist. LEXIS 4513 (S.D.N.Y. April 24, 1989).

[247] *Id*. at *6 ("So too, [SP's] interest is junior to New York's and the United States's. [sic] Since [SP's] interest became unperfected, it is junior to all holders of . . . those who became lien creditors before it is re-perfected.") The court also announces that New York takes priority under § 9-312(1)(b). This doesn't make sense at all. That provision deals with the priority between two secured parties. Clearly the State of New York is not an Article 9 secured party.

[248] David Gray Carlson, *Debt Collection as Rent Seeking*, 79 MINN. L. REV. 817 (1995); but see Barry L. Zaretsky, *Lapse of Perfection in Secured Transactions: A Search for a Consistent Approach*, 22 B.C. L. REV. 247, 286 (1981) (defending this promotion because it is easier for courts to calculate priorities in case of litigation).

> assignment authenticated by the assignor or assignee.

So where the tax arises before the secured party notifies the state of its secured claim, the state may set off the tax against what it owes the taxpayer.[249] The fact that the state maintains the UCC index does make perfection into the notification referred to in § 9-404(a)(2).[250]

B. Judgment Creditors

1. Real Property

The status of a tax lien on real property *vis-a-vis* a competing lien arising from the docketing of a money judgment is rife with ambiguity, mainly because the judicial lien is itself rife with ambiguity.

Judgment liens are basically "first in time" liens, as are tax liens, which certainly does not seem like it would be complicated. But sales procedure under the CPLR greatly complicates the picture.

Significantly, a junior judgment lien forecloses senior judgment liens--not what one usually expects when it comes to liens. For example, if JC_1 dockets a judgment at t_1 and JC_2 dockets at t_2, and if JC_2 commences the sales procedure by serving an execution on the sheriff, the sale eliminates the liens of both JC_1 and JC_2.[251] Ordinarily, a senior lien is not foreclosable by a junior lien. For instance, if the IRS holds a perfected federal tax lien, the IRS is not foreclosable by JC_1.[252]

Although JC_1 is foreclosable by JC_2, the matter is mitigated by the fact that JC_1 is supposed to be notified of the sale and is expected to serve an execution on the sheriff prior to the sale. If JC_1 does this, JC_1 has priority to the cash proceeds.[253] If JC_1 does not do so, JC_1 forfeits the cash to JC_2.

The DTF may find itself in the position of either JC_1 or JC_2. If the DTF is in the position of JC_1, is it foreclosable if JC_2 delivers an execution to the sheriff and commences the sale procedure. State legislation states that the DTF may enforce its lien "in like manner" as an ordinary judgment creditor.

An ordinary judgment creditor must it deliver an execution to the sheriff in order to share in the cash proceeds upon being foreclosed. Must the DTF also do so? The tax legislation typically says that the DTF's rights are to be adjudged "in the same manner" as the rights of JC_1. Yet the DTF is usually excused from serving an execution. It is said that the warrant itself is an execution, in that it

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[249] Central State Bank v. State of New York, 73 Misc. 2d 128, 341 N.Y.S.2d 322 (Ct. Cl. 1973).

[250] Chase Manhattan Bank. (N.A.) v. State of New York, 40 N.Y.2d 590, 357 N.E.2d 366, 388 N.Y.S.2d 896 (1976).

[251] CPLR 5203(a)(3).

[252] Berlin v. United States, 535 F. Supp. 298 (E.D.N.Y. 1982).

[253] CPLR 5236(g).

authorizes either the sheriff or a tax compliance officer to sell taxpayer assets. Therefore, if "in the same manner" is ignored, the DTF does not forfeit its right to cash proceeds by failing to submit an execution prior to the sale, provided the tax warrant was delivered to the sheriff. But where a tax compliance officer has received the tax warrant, it is very unclear whether the state may collect from JC_1's sale where the sheriff never received the tax warrant.

What if the DTF is in the position of JC_2? JC_2 can foreclose JC_1. If we pay attention to "in the same manner" (which we we were just counselled to ignore), then the DTF can foreclose JC_1. CPLR 5236(a), however, requires a judgment creditor to submit to the sheriff a list of comepting claimaints to the real property, including JC_1. Must the DTF submit this list to the sheriff? Or may the DTF send notice without implicating the sheriff, in satsifaction of CPLR 5236(a)? The answer to questions such as these has yet to be faced by the courts.

2. Personal Property

The status of a tax lien on personal property is sketchy because the status of a judicial lien on personal property in New York is likewise sketchy. In New York, judicial liens on personal property arise when the execution is delivered to the sheriff, but such liens are often defeasible.[254] The DTF's tax lien, however, does not arise under an execution at all. Is it defeasible? "To the same effect" and "in like manner" suggest that it is. Yet the CPLR's defeasance of an execution lien perhaps does not apply because an execution plays no part in the life of the DTF's tax lien.

As with real estate cases, ambiguity arises between the DTF and a judicial lien creditor. Suppose JC_1 serves an execution on the sheriff and the sheriff levies. Thereafter JC_2 delivers an execution to the sheriff. According to the CPLR, so long as JC_2 delivers before the funds are dissipated, the sheriff must distribute funds to JC_1, then to JC_2, and then return the surplus to the debtor. The DTF, however, may never serve an execution to the sheriff. If the DTF dockets its warrant first and the sheriff levies second persuant to an execution delivered by JC_2, it is highly unclear what the sheriff should do, or whether the buyer at the sheriff's auction even takes free and clear of the DTF's senior lien. Similarly, if JC_1 first delivers an execution and then the DTF dockets its tax warrant, the sheriff is not instructed by the CPLR to make distributions to the DTF, though the DTF is invited to make an adverse claim under CPLR § 5239. In such a proceeding, a court "may at any time, on its own inititiative or the motion of any interested person, and upon such notice as it may require, make an order . . . modifying the use of any enforcement procedure."[255] Persumably this unbelievably broad grant of power suffices to authorize a court to vindicate the DTF's junior position.

Case law on the priority between judicial liens and the tax

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[254] CPLR 5202(a)(1), (2).
[255] CPLR 5240.

warrant is scant. In *Security Trust Co. v. West*,[256] sketchy facts are presented in the appellate division's too-short opinion. Tax warrants had been issued against the taxpayer, who owned a restaurant. Presumably these were docketed, though the court does not say so. Thereafter, a judgment creditor (*JC*) docketed a judgment against the taxpayer. Apparently, the taxpayer did not own the real estate on which the restaurant was located. Otherwise *JC* would have had a docketing lien on real property, which would have been junior to most of the tax warrants. Since real property is not mentioned, "the restaurant" presumably means equipment, inventory and perhaps some intellectual property.

The DTF then released its liens against the restaurant in order to sell it. The price included deferred payments from the buyer. At the time of the sale, *JC* had served an execution to the sheriff. Delivery of an execution creates an unperfected lien against the taxpayer's personal property, but this execution lien would have been junior to all tax liens of the DTF.

There is no evidence that the sheriff ever levied for *JC* prior to the sale. Indeed, to the extent the restaurant was equipment and inventory, these the sheriff can levy only by taking them into his possession.[257] Such an action would have no doubt prevented the sale. So it is fair to conclude the sheriff never levied for *JC*. If so, the sale of the restaurant to the buyer was free and clear of the tax lien (because the DTF released them) but also free and clear of the execution lien, since the buyer was a transferee of the restaurant. Such persons take free of an execution lien if the conveyance is prior to the levy.[258]

The buyer's consideration was a deferred payment (making the buyer what Article 9 calls an "account debtor"-- the debtor of a debtor).[259] Even though the payment intangible was proceeds of personal property on which the DTF had senior liens, there is no evidence in the Tax Law or in the CPLR of a "proceeds" security interest of the sort that Article 9 specifies. If Article 9 somehow applied, the DTF would clearly have a senior claim to proceeds of the collateral. But one cannot say with confidence that the DTF has the benefit of a proceeds theory with regard to *AD*'s obligation to pay the price.

If this is right, then, when the buyer's promise to pay came into existence, *JC*'s execution lien and the DTF's tax liens attached simultaneously to "after-acquired property." So the court concluded.

But there are some impediments to this conclusion. Although tax warrants last for twenty years, execution liens last for sixty days unless they are extended. There is no evidence of extension. If none, then the execution lien lapsed on October 16. In that case, the DTF

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[256] 120 A.D.2d 84, 507 N.Y.S.2d 546 (3d Dept. 1986), *app. denied*, 70 N.Y.2d 601, 518 N.E.2d 1023, 512 N.Y.S.2d 549 (1987).

[257] CPLR 5232(b).

[258] CPLR 5202(a)(1).

[259] UCC § 9-102(1)(3) ("'Account debtor' means a person obligated on an account, chattel paper, or general intangible").

clearly wins because JC's lien has lapsed.

We learn also that, on October 19, 1984, JC "obtained an order directing [the buyer] to pay money owed to [the taxpayer] directly to [*JC*]."[260] If this refers to an order for the payment of a debt pursuant to CPLR 5227, then JC obtains a lien only on October 19,[261] in which case *JC* is junior to the tax liens. Such an order also extends the life of a levy on property not capable of delivery past its natural life of 90 days.[262] But there could not have been any such levy. For such a levy to be valid, it must occur after the buyer already owed the money. But by this time the tax liens would have attached to the payment intangible.

Although it is quite unlikely *JC* had a lien equitemporal to the tax liens, the court assumed the simultaneous attachment of liens. Nevertheless, the court ruled that the DTF prevailed:

> It is well established that the State enjoys a common-law prerogative right to priority in the payment of the debts owned to it from the assets of an insolvent debtor. This prerogative right can be defeated by a creditor with a prior specific lien or by an express statutory provision. The State is therefore entitled to a preference over a private creditor whose claim is on the same footing as the State's claim.[263]

This rationale makes no sense. The court cites a doctrine concerning distributions to unsecured creditors with no liens. For example, in a probate action where the decedent is insolvent and no one (including the state) has a lien, the state does indeed have a priority.[264] But the doctrine does not apply when a creditor claims a "specific lien."[265] By virtue of the payment order, JC *did* have a specific lien. Ergo, the state's prerogative right cannot be invoked.[266] Nevertheless, the case

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[260] 120 A.D.2d at 85, 507 N.Y.S.2d at 547.

[261] CPLR 5202(b).

[262] CPLR 5232(a) (seventh sentence).

[263] 120 A.D.2d at 86, 507 N.Y.S.2d at 547.

[264] Marshall v. New York, 254 U.S. 380 (1920); In re Gruner, 295 N.Y.2d 510, 520, 68 N.E.2d 514, 520 (1946).

[265] According to the court in Bloomfield v. New York City Health & Hosp. Corp., 53 N.Y.2d 118, 423 N.E.2d 32, 440 N.Y.S.2d 609 (1981):

> At early common law, the Crown of Great Britain enjoyed a prerogative right over its subjects which entitled it to property in the payment of the debts owed to if from assets of an insolvent debtor. This prerogative right could only be defeated by the passing of title to a creditor, either absolutely or by the procurement of lien, before the sovereign sought to enforce its claim against the debtor.

53 N.Y.2d at 121, 423 N.E.2d at 34, 440 N.Y.S.2d 611.

[266] The principle of state law just described also exists at the federal level. 31 U.S.C. § 3713. This federal statute is of ancient lineage and was enacted shortly after the adoption of the United States Constitution. In federal law, tax lien

was rightly decided because it seems impossible that JC's lien and the tax liens were simultaneously created.

C. Local Property Tax Liens

In New York, counties are authorized to grant themselves superpriority liens capable of trumping prior conveyances. Suppose for example, Suffolk County assesses a property tax against property on which *A* holds a mortgage. In the foreclosure sale, the county sells free and clear of *A*, even though *A* was first in time.

State tax liens, however, are not subject to local foreclosure power. Where the DTF dockets its warrant before the county's foreclosure sale, the tax lien survives the sale and encumbers the property that the buyer has purchased from the county.[267] The reason given for this is pure supremacy of the state over the locality.

D. The Federal Tax Lien

A federal tax lien arises when a federal tax is assessed.[268] A New York tax lien that arises from docketing a warrant is therefore senior to the federal lien if docketing occurs before federal assessment.[269]

Until the IRS files notices in a statutorily designated office, the federal lien is unperfected against various transferees, including judgment creditors.[270] Some courts hold that the DTF is a judgment creditor for this purpose, because its lien arises when a tax warrant is filed (even though no judgment from a court has been entered).[271] Other courts state that the DTF is no judgment creditor and therefore

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priorities, 26 U.S.C. § 6323, trump §3713. *See* United States v. Estate of Roman, 523 U.S. 517, 524-26 (1998).

[267] Riverhead Estates Civic Assn. v. Gobron, 206 Misc. 405, 134 N.Y.S.2d 13 (S.Ct. Suffolk Co. 1954).

[268] 26 U.S.C. § 6321. More precisely, as noted previously, the lien arises later but is retroactive to the assessment if a notice and demand for the amount assessed is not paid. *Id*. § 6322.

[269] Dior v. Stephen Lion, Inc., 1978 U.S. Dist. LEXIS 7099, at *5. At the time of the *Dior* case, it was open to argue that the state income tax lien did not arise upon docketing the warrant but upon delivery of an execution. *Id*. at *5 n.2 (noting that this question need not be addressed, given that the state levied prior to the federal assessment).

[270] 26 U.S.C. § 6323(a).

[271] Corrigan v. United States Fire Ins. Co., 427 F. Supp. 940 (S.D.N.Y. 1977); State Tax Commn. v. Brooklyn Prop. Clerk of the New York City Police Dept., 1981 N.Y. Tax LEXIS 43 (December 31, 1981). Although beyond the scope of this Article, *Corrigan* was wrongly decided for a different reason. The case involved proceeds of a fire insurance policy. These funds should have been granted to the mortgage lender, who had an equitable lien on proceeds of fire insurance. Nor-Shire Assocs., Inc. v. Commercial Union Ins. Co., 25 A.D.2d 868; 270 N.Y.S.2d 38 (2d Dept. 1966). As neither the IRS nor the DTF is a bona fide purchaser for value, they should not have taken free and clear of this equitable lien. Safeco Ins. Co. v. State, 89 Misc. 2d 864, 392 N.Y.S.2d 976 (Ct. Claims 1977). The *Corrigan* court, however, refused to recognize any equitable lien, noting only that no express assignment of the insurance proceeds to the mortgage lender had occurred.

is junior even if its tax warrant is docketed before the IRS assessment.[272]

This latter view gives rise to a circular priority. Where the IRS has not filed its notice, a judgment creditor is senior to the IRS. The IRS is senior to the DTF (if it has assessed the tax before the tax warrant). The DTF is senior to the judgment creditor if it has filed its tax warrant before the judgment creditor has obtained a lien. In *Rheingold Breweries, Inc. v. Lantner*,[273] the court broke this circle by awarding victory to the DTF. the judgment creditor was senior to the IRS and so was awarded the amount of its judgment. But this amount was withheld from the judgment creditor and paid to the DTF instead. This, of course, ignores the IRS priority over the DTF.

E. Proceeds

If a lien has priority to some collateral, and that collateral is converted to proceeds, it certainly makes sense that the lien attaches to the proceeds and that its priority against other liens is preserved. The UCC spells that out for secured parties. But how does this work when no statutory proceeds theory is set out?

One possible (but problematic) answer is that equity views the debtor as holding the collateral in trust for a lien creditor. When the debtor sells the collateral free and clear of the lien, it does so for the benefit of the lien creditor, who now has an equitable claim to the property received. Where there are multiple liens, the equitable liens on the proceeds could easily be seen as priority preserving, in that the debtor's fiduciary duty is first owed to the senior lien, then to the second lien, etc. The difficult with this is that, in lien regimes that set forth no statuary proceeds theory, there is typically no right to sell free and clear of liens. But this can be explained. Where the lien creditor claims the cash, the lien creditor *ex post* authorizes the debtor to sell free of the lien. The buyer therefore takes free of the lien, and the lien creditors right is transferred to the cash paid.

Something like this happens in mortgage law, where the premises are insured for damage. Equity insists that the debtor takes out the insurance for the benefit of the mortgage lender. Accordingly, when the damage occurs, the mortgage lender is deemed to have an equitable lien on the proceeds of the insurance.[274] This too can be seen as priority-preserving in the case of multiple liens.

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[272] Rheingold Brweries, Inc. v. Lantner, 100 Misc. 2d 897, 420 N.Y.S. 582 (Civ. Ct. N.Y. Co. 1978); State Tax Commn. v. Union General Corp., 208 Misc. 133, 135, 144 N.Y.S.2d 75, 78 (S. Ct. N.Y. Co. 1955). In Marine Midland Bank-Central v. Gleason, 62 A.D. 2d 429, 405 N.Y.S.2d 434 (4th Dept. 1978), aff'd 47 N.Y.2d 758, 417 N.Y.S. 458, 391 N.E.2d 294 (1979), the court assumed that a federal tax outranked the DTF's lien. In the case of two warrants, the DTF lien was thought to have "died." The third DTF tax lien was docketed after the IRS filed the proper perfecting notices. So the court never reached the status of the DTF as a judgment creditor, within the meaning of IRC §6323(a).

[273] 100 Misc. 2d 897, 420 N.Y.S. 582 (Civ. Ct. N.Y. Co. 1978).

[274] Nor-Shire Assocs., Inc. v. Commercial Union Ins. Co., 25 A.D.2d 868; 270 N.Y.S.2d 38 (2d Dept. 1966).

Applying these thoughts to New York tax warrants, at first impression the result in *Long Island Insurance Co. v. S&L Delicatessen*[275] is defensible. In this case, the DTF had docketed a tax warrant against a taxpayer who had insured real property. Docketing the tax warrant creates a lien on the real property. Thereafter, the IRS obtained a perfected federal lien. Fire ensued, and insurance proceeds were generated.

The IRS claimed that, whereas the DTF was senior to the real property, the insurance payout was personal property that did not come into existence until the fire occurred. Already this can be questioned. The insurance company had a contingent obligation to pay even before the fire. In any case, the IRS figured that its lien simultaneously attached to the insurance proceeds, at the same time as the DTF. The IRS further insisted that, in cases of simultaneous liens, the IRS prevails as a matter of federal law.[276]

The court in *S&L* held for the DTF. It thought the UCC's rule was expressive of the general theory of liens (though of course the UCC does not apply directly to tax warrants). Although it did not quite absolutely refute the concept that the IRS and the DTF had simultaneous liens, the rationale we have set forth certainly suffices to explain the result.[277]

F. Effect on Account Debtors

The DTF has a lien on all personal property when its tax warrant has been docketed locally and with the secretary of state. This

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[275] 102 Misc. 2d 853, 424 N.Y.S.2d 849 (S. Ct. Co. 1980).

[276] This questionable position was later adopted by the United States Supreme Court in United States v. McDermott, 507 U.S. 477 (1993). For criticism, see Carlson, Critique (Pt.1), *supra* note ---, at ---.

[277] The *S&L* court relied on Fischer-Hansen v. Brooklyn Heights R. Co., 173 N.Y. 492, 66 N.E. 395 (1903), which at best provides shaky support. In *Fischer-Hansen*, an attorney had a statutory lien on a cause of action. the client settled, and the account debtor claimed that the settlement was separate from the cause of action, such that the lien did not attach to the settlement proceeds. The court ruled that clients have the right to settle cases in good faith, in spite of the statutory attorney's lien. In addition, the court ruled that the settlement agreement was "proceeds" of the cause of action, and the attorney's lien attached to the settlement. In the course of so deciding, the court remarked:

> the general rule is that a lien upon property attaches to whatever the property is converted into and is not destroyed by changing the nature of the subject. Thus a lien upon timber ordinarily extends to the shingles made out of it; a lien upon domestic animals to their young subsequently born, and a lien upon a mortgage to the land into which the mortgage is converted by foreclosure. It follows its subject and cannot be shaken off by a change of form or substance. It clings to any property or money into which the subject can be traced, until it reaches the hands of a *bona fide* purchaser.

173 N.Y. at 501, 66 N.E. at 398. But none of this quite explains why, in the case of multiple liens, the appearance of proceeds creates simultaneous liens. A constructive trust theory is capable of explaining that result.

would include payment intangibles owned by the taxpayer. But the taxpayer still retains the power to collect the payment intangible until the sheriff or tax compliance agent actually levies.

Relevant to this proposition is *State Tax Commission v. Blanchard Management Corp*.[278] In this case, the taxpayer owed sales tax and the DTF had a tax lien on all of the taxpayer's personal property. One of these properties was a judgment against an account debtor (AD_1). Pursuant to that judgment, the taxpayer served an execution on the sheriff, who garnished a bank (AD_2), who paid the sheriff, who paid AD_1. The DTF then sought to have AD_2 pay again. Properly, AD_2 was protected by CPLR § 5209, which provides:

> A person who, pursuant to an execution . . . pays . . . to . . . a sheriff . . . money . . . in which the judgment debtor has . . . an interest . . . is discharged from his obligation to the judgment debtor to the extend of payment . . .

Accordingly, AD_2 no longer owed money to AD_1 and did not have to pay anyone a second time. The court, however, decided the case on a different rationale. The levy on behalf of the DTF did not sufficiently explain the connection of the taxpayer to AD_1's checking account. Therefore, there was no valid levy. Such reasoning, however, is defective. It invited the DTF to levy once again, this time with an adequate description. The true rationale is that AD_2 had extinguished its obligation to AD_1 by paying the sheriff. And, it follows, AD_1 had, to the extent of the payment, extinguished its obligation to the taxpayer

G. Equitable Property Interests

Often a taxpayer has legal title for the benefit of another. When property is held (in trust) in this fashion, the classic understanding is that the owner of legal title may convey free and clear of the beneficial interest to a bona fide purchaser for value. A "purchaser" is a transferee who takes title in a voluntary conveyance. The formulation therefore excludes judgment and tax lien creditors.

New York law, however, is wobbly on this matter. In the notorious case of *City of New York v. Bedford Bar & Grill, Inc*.,[279] the taxpayer assigned to a secured party (*SP*) its contingent right to a refund from the state comptroller if *JD* chose to cancel its liquor license. The taxpayer did cancel its license, so that the comptroller had a fixed obligation to pay. The City of New York then filed a tax warrant against the taxpayer. Only thereafter did the State Liquor Authority advise the comptroller that the refund was due and owing. The *Bedford* court remarked, "Hence the refund did not come into existence until that date."[280]

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[278] 91 A.D.2d 501, 456 N.Y.S.2d 364 (1st Dept. 1982).

[279] 2 N.Y.2d 429, 141 N.E.2d 67, 161 N.Y.S.2d 67 (1957).

[280] 2 N.Y.2d at 1202, 141 N.E.2d at 763, 161 N.Y.S.2d at 57.

Did not the obligation to refund arise earlier? Surely before the taxpayer chose to cancel the obligation, the comptroller's obligation to pay was contingent. In New York, contingent debts cannot be subject to judicial liens.[281] But contingent debts are contingent property,[282] and this can be encumbered by judicial liens.[283] In any case, the court decided that the earlier assignment to *SP* was "equitable" in nature. The city's tax lien was held to be senior to the rights of *SP*.

One would have thought that the equitable lien, arising when the comptroller's obligation to pay became vested, would have been completely good against a subsequent judicial lien. The whole point of the equitable lien is to foreclose subsequent creditors.[284] Nevertheless, *JC* prevailed.[285] As a result, New York law seems to permit tax liens to attach to constructive trusts.[286]

H. Versus the Bankruptcy Trustee

The federal tax lien arises upon assessment,[287] but it must be perfected against subsequent lien creditors and purchasers. For this reason, unperfected federal tax liens are subordinated to the trustee's status as a hypothetical lien creditor on the day of the bankruptcy petition (*i.e.*, the trustee's "strong arm power")[288] and perhaps also under Bankruptcy Code § 545(2), which applies to "statutory liens."[289]

One is tempted to conclude that the New York tax lien is self-perfecting. That is, the tax lien is created when the warrant is docketed (and, in personal property cases, when the DTF files with the secretary of state). But for the instances described above,[290] there is no pre-docketing life to the tax lien. But appearances deceive. Thanks to the "like effect" rule in the New York Tax Law,[291] the

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[281] According to CPLR 5201, "[a] money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor . . . "

[282] According to CPLR 5201(b), "[a] money judgment may be enforced against any any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested . . . "

[283] ABKCO Industries, Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).

[284] Eisenberg v. Mercer Hicks Corp., 199 Misc. 52, 101 N.Y.S.2d 662 (S.Ct. New York Co. 1950), *aff'd mem.*, 278 A.D.2d 806, 104 N.Y.S.2d 804 (1st Dept. 1951).

[285] For scathing criticism, see Grant Gilmore. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 7.12, 12.9 (2000).

[286] Securities & Exchange Commn. v. Levine, 881 F.2d 1165 (2d Cir. 1989) (IRS lien could attach to property held in trust for cheated investors).

[287] 26 U.S.C. § 6321.

[288] 11 U.S.C. § 544(a)(1); United States v. LMS Holding Co., 50 F.3d 1526 (10th Cir. 1995).

[289] *See infra* text accompanying notes ---.

[290] *See supra* text accompanying notes ---.

[291] That is, once the tax lien is created, the sheriff or DTF officer may enforce the warrant "with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record . . . "

trustee will frequently have an avoidance theory against a New York tax lien, even after the warrant is docketed.

In terms of the strong arm power, the trustee may observe that if a sheriff levies under an execution before a tax compliance official levies, the sheriff prevails.[292] Or alternatively, a trustee could hypothetically obtain a turnover order against the possessor of debtor property; if this is obtained before the tax compliance officer levies, the trustee's hypothetical turnover order takes priority over the New York tax lien.[293] Both of these points indicate that, prior to a levy, the tax lien is avoidable in bankruptcy. Even after the levy of intangible property, the tax lien is voidable.

In terms of § 545(2), the trustee may have an avoidance theory, although the matter has become unclear. According to § 545:

> The trustee may avoid the fixing of a statutory lien[294] on property of the debtor to the extent that such lien
>
> . . .
>
> (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, *except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law*.

The emphasized words were added by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), and they are profoundly mystifying.[295] At least one court reads these words to mean that § 545(2) can no longer be used against an unperfected federal tax lien.[296] Such a reading is not implausible, but since the trustee also prevails as a hypothetical lien creditor under § 544(a)(1), this de-fanging of § 545(2) is unimportant.

For the record, at least before BAPCPA, the trustee could

N.Y. Tax Law §§ 692(f) (personal income tax), 1141(b) (sale and use tax) (seventh sentence); NYC Admin. Code § 11-683(6).

[292] CPLR 5234(b).

[293] CPLR 5234(c); *see generally* Carlson, Pt. 2, *supra* note ---, at 169-70 (analyzing execution liens under Bankruptcy Code § 547(b)).

[294] "Statutory lien" is defined as a "lien arising solely by force of a statute on specified circumnstances or conditions . . . but does not include security i or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute . . . 11 U.S.C. § 101(53).

[295] The legislative history simply deepens the mystery, according to which the amendment "prevents the avoidance of unperfected liens against a bona fide purchaser, if that purchaser qualifies as such under section 6323 of the Internal Revenue Code or a similar provision under state or local law." House Report No. 109-31, 109th Cong., 1st Sess 102 (2005).

[296] In re Krummel, 427 B.R. 711 (Bankr. W.D. Ark. 2010).

argue that a docketed tax warrant could be defeated by even bad faith purchasers (before a levy)[297] or good faith purchasers (after a levy).[298] Therefore, mere docketing of a tax warrant does not guarantee that the DTF will be a secured creditor in the debtor's bankruptcy. The BAPCPA amendment, however, may divest the trustee of this theory since a "purchaser" is "described in [a] similar provision of State . . . law." Or, to be more precise, the CPLR gives rights to "transferees,"[299] but this phrase includes both voluntary and involuntary transferees.[300]

Even if the DTF survives these theories, the DTF faces more problems pursuant to Bankruptcy Code § 724(b)(2), which subordinates tax liens to unsecured priority claims in a bankruptcy.[301] This subordination rule relates relates back to the Bankruptcy Act of 1898[302] and reflects the fear that tax liens are so powerful that tax collectors would take all the assets, leaving nothing for administrative expenses. Obviously such a rule much disadvantages the DTF.

The rule should apply equally in chapter 11 cases in a shadowy sort of way, since, in chapter 11, the DTF's minimum entitlement is defined by what the DTF would have received in a hypothetical chapter 7 liquidation,[303] although early cases proclaim §724(b)(2) to be a chapter 7 rule not applicable in chapter 11 cases.[304] The notorious BAPCPA may have intended to changes this assumption. Bankruptcy Code § 724(b) now reads that tax liens are subordinated to administrative expenses[305]

> except that such expenses, other than claims for wages salaries, or commissions that arise after the date of the filing of the petition, shall be limited to expenses incurred under chapter 7 of this title and shall not include expenses incurred under chapter 11 of this title.

This provision does not quite function, in that chapter 11 still sets a creditor's minimum entitlement to what the creditor would receive in a hypothetical liquidation. This minimal test means that the tax lien could face a reduction in a chapter 11 case.

More helpful to tax collectors is new § 724(e), which

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[297] CPLR 5202(a)(1).

[298] CPLR 5202(a)(2).

[299] CPLR 5202(a)(1) & (2).

[300] Or so the Bankruptcy Code assumes. 11 U.S.C. § 101(54)(D). The CPLR does not attempt to define the word "transferee."

[301] 11 U.S.C. § 726(b)(2). United States v. Herzog (In re Thriftway Auto Rental Corp.), 457 F.2d 409, 412 (2d Cir. 1972).

[302] *See* Pearlstein v. United States Small Bus. Admin., 719 F.2d 1169, 1174 (D.D.C. 1983).

[303] 11 U.S.C. § 1129(a)(7)(A).

[304] In re Buy-Rite Oil Co., 87 B.R. 905 (Bankr. E.D. Mich. 1988); In re Roamer Linen Supply, Inc., 30 B.R. 932B.R. (Bankr. S.D.N.Y. 1983).

[305] That is to "any holder of a claim specified in section . . . 507(a)(2)." 11 U.S.C. § 724(b)(2).

provides:

> Before subordinating a tax lien on real or personal property of the estate, the trustee shall--
>
> (1) exhaust the unencumbered assets of the estatel and
>
> (2) in a manner consistsent with section 506(c), recover from property securing an allowed sheriff claim the reasonable, necessary costs and expenses of preserving or disposing of such property.

This new rule basically guarantees that the subordination of tax liens will occur in administratively insolvent cases. Such cases, however, are common enough in chapter 7, and so the DTF may find itself financing a chapter 7 trustee who has nowhere else to turn to pay administrative expenses.

Under the old Bankruptcy Act, this rule did not apply where the government had obtained possession.[306] Today, even where a taxing authority has levied, the trustee may obtain a turnover and impose subordination on the hapless taxing authority.[307]

BAPCPA largely exempts "a properly perfected unavoidable tax lien arising in connection with an ad valorem tax on real or personal property of the estate."[308] An ad valorem tax is a tax on the value of property that is not an excise tax. The most common is local real property taxes. This exception will not aid the DTF, however. None of the taxes for which a warrant issues is an ad valorem tax. New York Constitution Article XVI(3) specifically prohibits these kinds of taxes on intagibles to assure people that they can safetly keep their stocks and bonds with trust companies and brokers in New York.[309]

The DTF, therefore, may be vulnerable to outright avoidance or subordination to unsecured priority claims, but it should still be observed that tax claims generally obtain a relatively high priority in chapter 7 liquidations.[310] Furthermore, they are typically nondischargeable (if not stale).[311] In chapter 13 cases, priority claims (including tax claims) must be paid in full over the life of the plan.[312] These entitlements should mitigate somewhat the loss of the tax lien,

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[306] City of New York v. Hall, 139 F.2d 935 (2d Cir. 1944).

[307] United States v. Whiting Pools, 462 U.S. 198 (1983).

[308] 11 U.S.C. § 724(b) (preamble). This exception is partially repealed by § 724(f), which invites the trustee to subordiate ad valorem tax liens for wages and pension claims.

[309] According to Article XVI(3), "Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income thejreforom may be taken into consideration in computing any excise tax measured by income generally."

[310] 11 U.S.C. §§ 502(a)(8), 726(a)(1).

[311] 11 U.S.C. § 523(a)(1).

[312] 11 U.S.C. § 1322(a)(2).

though they will do no good in corporate liquidation cases, where the taxpayer does not continue in business.

Conclusion

In this Article, we have attempted to set forth the contours of tax liens in New York, insofar as they arise from the docketing of a tax warrant. The single greatest obstacle to clarity is the legislature's choice that the tax lien should be given "like effect" as a civil money judgment. The New York law of the civil money judgment is most unsatisfactory, and its incorporation by reference into tax lien law opens up a prodigious opportunity for confusion to make its masterpiece. We hope our efforts have at least not exacerbated the situation.