NEW YORK TAX WARRANTS: IN THE STRANGE WORLD OF DEEMED JUDGMENTS

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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) is a potent force 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 that 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

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[1] For a detailed study of money judgment enforcement, see David Gray Carlson, *Critique of Money Judgment Part One: Liens on New York Real Property*, 82 ST. JOHN'S L. REV. 1291 (2008) [hereinafter Carlson, *Pt. 1*]; David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHN'S L. REV. 43 (2009) [hereinafter Carlson, *Pt. 2*].

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 warrants.[4] Taxes for which warrants are not issued are

[2] The DTF collects city and county sales taxes and the income tax for New York City and Yonkers. N.Y. TAX LAW § 1142(8), 1312(a) (McKinney 2011); N.Y.C., N.Y., ADMIN. CODE § 11-683 (2010). The NYCDOF collects all other city taxes, including real property transfer taxes, unincorporated business taxes, the city's business and corporation taxes, the commercial rent occupancy tax, and the mortgage recording tax. *See id.* § 11-2112.

[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. AGRIC. & MKTS. LAW § 250-b(2) (McKinney 2011).
2. To reimburse payments to a producer of milk from the milk producers security fund, the Commissioner may issue warrants. AGRIC. & MKTS. § 258-b(5)(e) (McKinney 2011).
3. To cure a default by an employer to the unemployment insurance fund, the commissioner of labor may issue warrants. LAB. § 573(2) (McKinney 2011). Unlike the other statutes, this provision limits the secretary's tax lien to real property only. *Id.*
4. Tax on Transfers of Stock and Other Corporate Certificates. TAX § 279-b (McKinney 2011) (lien on real property only).
5. Tax on Gasoline and Similar Motor Fuel. TAX § 289 (McKinney 2011).
6. Tax on Alcoholic Beverages. TAX § 431(2) (McKinney 2011).
7. Tax on Cigarettes and Tobacco Products. TAX § 479 (McKinney 2011).
8. Highway Use Tax. TAX § 511(2) (McKinney 2011).
9. Personal Income Tax. TAX § 692(c) (McKinney 2011).
10. Corporate Tax Procedure and Administration. TAX § 1092 (McKinney 2011).
11. Sales and Compensating Use Taxes. TAX § 1141(b) (McKinney 2011).
12. Real Estate Transfer Tax. TAX § 1414(b) (McKinney 2011).

New York City

13. City Unincorporated Business Income Tax. ADMIN. § 11-532(c) (2010).
14. Corporate Tax Procedure and Administration. ADMIN. § 11-683(3) (2010).
15. Commercial Rent or Occupancy Tax. ADMIN. § 11-712(b) (2010).
16. Tax on Commercial Motor Vehicle and Motor Vehicles for Transportation of Passengers. ADMIN. § 11-814(b) (2010).
17. Utility Tax. ADMIN. § 11-1111(b) (2010).
18. Horse Race Admissions Tax. ADMIN. § 11-1210(b) (2010).
19. Cigarette Tax. ADMIN. § 11-1314(b) (2010).
20. Tax on Transfer of Taxicab Licenses. ADMIN. § 11-1410(b) (2010).
21. Tax on Coin Operated Amusement Devices. ADMIN. § 11-1512 (2010) (repealed 2009).
22. Tax on Containers. ADMIN. § 11-1614(b) (2010).
23. City Personal Income Tax on Residents. ADMIN. § 11-1792(c) (2010).
24. Earnings Tax on Nonresidents. ADMIN. § 11-1934(c) (2010).
25. Real Property Transfer Tax. ADMIN. § 11-2111(b) (2010).
26. Tax on Owners of Motor Vehicles. ADMIN. § 11-2211(b) (2010).
27. Tax on Retail Licensees of the State Liquor Authority. ADMIN. § 11-2411(b) (2010).
28. Tax on Occupancy of Hotel Rooms. ADMIN. § 11-2510(b) (2010).
29. Annual Vault Charge. ADMIN. § 11-2711(b) (2010).

[4] These are most notably local property taxes and the mortgage recording taxes of the

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 property.[7] Third, it is a writ of execution to the county sheriffs;[8] 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.[9]

The current study examines all of 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."[10] These transactions are commonly referred to as "bulk sales."[11] 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").

State and City. TAX § 253; ADMIN. § 11-2601.

[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. *E.g.*, Bd. 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* TAX § 6 (describing the formal features of such a filing).

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

[8] Corrigan v. U.S. Fire Ins. Co., 427 F. Supp. 940, 943 (S.D.N.Y. 1977) ("[T]he 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] TAX § 692(c).

[10] *Id.* § 1141(c).

[11] *See, e.g.*, Acres Storage Co. v. Chu, 120 A.D.2d 854, 855–56, 501 N.Y.S.2d 966, 968 (App. Div. 3d Dep't 1986).

I. THE PROCEDURAL ASPECTS OF A TAX WARRANT

A. Issuance

The chief tax collector for the state of New York is the DTF.[12] This would be far from apparent to anyone who is tempted to learn New York tax law by reading the New York Tax Law.[13] The Tax Law usually refers to the Tax Commission, or to the Tax Commissioner.[14] In fact, the Tax Commission was abolished in 1986, to be replaced by the DTF.[15] 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 section 2(1) variously defines "tax department" or "department" or "tax commission" to mean the DTF.[16] 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 that is intended to be an independent tribunal like the United States Tax Court.[17] 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.[18] The NYCDOF has the ability to issue warrants for some purposes, but when it comes to the City's income tax, the state takes over collection responsibility.[19] The state's arrogation of New York City's 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."[20] In connection with the City's financial recovery, the legislature enacted Article 30 of the Tax Law.[21] New York Tax Law section 1312 (part of Article 30) instructs the DTF to administer the New York City personal income tax and incorporates all of the

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[12] *See* TAX §§ 2(1), 170.

[13] As one commentator foolishly attempted to do. Carlson, *Pt. 2*, *supra* note 1, at 68–69.

[14] TAX § 2(1).

[15] 1986 N.Y. Laws 595–96, 611.

[16] TAX § 2(1).

[17] *Id.* § 2000; 1986 N.Y. Laws 603.

[18] TAX § 1141(b).

[19] *Id.* § 1312; N.Y.C., N.Y., ADMIN. CODE § 11-1792(a) (2010).

[20] A notorious headline in the *New York Daily News*, October 30, 1975, was "Ford to City: Drop Dead." *See* Sam Roberts, *Infamous 'Drop Dead' Was Never Said by Ford*, N.Y. TIMES, Dec. 28, 2006, at A30. This headline was thought to have contributed to President Ford's defeat in the 1976 election. *Id.*

[21] 1975 N.Y. Laws 34, 38–50; *see also*, ADMIN. § 11-1792(a) (authorizing the "tax commission" to collect city personal income taxes).

administrative provisions of Article 22 (the *state* personal income tax), including the procedures involving tax warrants, into Article 30.[22] 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.[23] 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.[24] The commissioner of labor may issue a warrant if an employer defaults on payments into the unemployment insurance fund.[25] 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 twenty-nine instances of it.[26] 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.[27] Unlike in the federal system,[28] New York State assessment does not give rise to a lien.[29] In New York, lien creation occurs later—when the tax warrant is docketed by the

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[22] TAX § 1312.

[23] *See* N.Y. AGRIC. & MKTS. LAW § 250-b (McKinney 2011); LAB. § 573(2).

[24] AGRIC. & MKTS. §§ 250-b(2), 258-b(4)(e).

[25] LAB. § 573(2); *see* Indus. Comm'r v. Five Corners Tavern, Inc., 47 N.Y.2d 639, 646–47, 393 N.E.2d 1005, 1008, 419 N.Y.S.2d 931, 1008 (1979).

[26] *But cf.* 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).

[27] *See* TAX § 682 (assessment of personal income tax).

[28] *See* 26 U.S.C. § 6303(a) (2010). A federal lien arises "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand." *Id.* § 6321. The demand must be issued within sixty days after the IRS assesses the tax. *Id.* § 6303(a). After failure or refusal to pay, the lien is imposed retroactively, as if it arose on the date of assessment. *Id.* § 6322.

[29] *See* Smith v. Meader Pen Corp., 255 A.D. 397, 398–99, 8 N.Y.S.2d 39, 41 (App. Div. 1st Dep't 1938), *aff'd*, 280 N.Y.2d 554, 20 N.E.2d 13 (1939).

county clerk.[30] 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.[31] Upon doing so, it must send the taxpayer a "notice of deficiency" (for personal income tax or franchise tax)[32] or a "notice of determination" (for sales and use tax).[33] 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.[34] The amount shown in the notice of deficiency or determination becomes an assessment, unless within (usually) ninety days, the taxpayer files for a hearing with the Division of Tax Appeals ("DTA").[35] If the taxpayer does not timely seek a hearing, the DTF assesses the extra tax and issues a notice and demand for it.[36]

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.[37] If the claim for refund is not

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[30] *See* discussion *infra* Part IV.B.

[31] *See* TAX § 697 (for general powers of the tax commission relating to personal income tax), *see also id.* § 1138 (for determination of sales and compensating use tax).

[32] *Id.* § 681(a) (personal income tax); § 1081 (franchise tax).

[33] *Id.* § 430 (alcoholic beverages tax); § 478 (cigarettes and tobacco products tax); § 510(1) (highway use); § 1138(a)(1) (sales and use tax).

[34] *Id.* § 683 (personal income tax); § 1083 (franchise tax); § 1147(b) (sales and use tax).

[35] *Id.* § 681(b) (personal income tax); § 1081(b) (franchise tax); § 1138(a)(1) (sales and use tax); *see also* Hodge v. Muscatine Cnty., Iowa, 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 character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied.").

[36] For personal income tax, see TAX § 681 (notice of deficiency); § 689 (petition to tax commission). For sales and compensating use tax, see *id.* § 1138 (determination of tax).

[37] TAX § 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. I.R.C. § 6511(a), (b). Prior to 1996, sale and use taxes, once assessed, could not be paid and then contested. Horne Equip. Corp. v. McGoldrick, 168 Misc. 59, 60, 5 N.Y.S.2d 357, 358 (Sup. Ct. N.Y. County 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. Sess. Laws 429 (amending TAX § 1138(a), (c)). Therefore, care should be taken in reading sales tax cases involving years 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.

allowed, the 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.[38] The issue of whether a notice of deficiency or determination was properly sent to the taxpayer's last known address is a frequent subject of DTA hearings. It is well settled that if a taxpayer has failed to timely 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.[39]

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.[40] Either party may take exception to that ruling; the exception is heard by a three-member administrative body, the Tax Appeals Tribunal ("TAT"), based (as of January 30, 2012) in Albany, New York.[41] If the DTF loses in the TAT, it may not appeal but instead must seek legislative change for future cases since TAT opinions are binding precedents, unlike DTA opinions.[42] If the taxpayer loses before the TAT, the taxpayer has four months to take a special Article 78 proceeding directly to the Appellate Division of the Supreme Court, Third Department (sitting in Albany) to review the TAT ruling.[43] Similar to the procedure involving appeals from the United States Tax Court to the federal circuit courts of appeal,[44] 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).[45]

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[38] TAX § 689(c) (personal income tax); § 1089(c) (franchise tax); § 1139(b) (sales and use tax).

[39] Cullen v. N.Y. State Div. of Tax Appeals, 30 A.D.3d 850, 817 N.Y.S.2d 720 (App. Div. 3d Dep't 2006) (personal income tax).

[40] TAX §§ 2006(4), 2010(1), (3).

[41] *Id.* §§ 2004, 2006(7), 2010(4); DIVISION OF TAX APPEALS AND TAX APPEALS TRIBUNAL, http://www.nysdta.org/whoarewe.htm (last visited Feb. 1, 2012).

[42] TAX § 2010(5).

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

[44] 26 U.S.C. § 7485 (2010).

[45] TAX § 690(c) (personal income tax); § 1090(c) (franchise tax); § 1141 (sales and compensating 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* Zelinsky, No. 817065, 2000 N.Y. Tax LEXIS 297, at *48 (N.Y. Div. Tax App. Nov. 2, 2000), *aff'd*, No. 817065, 2001 N.Y. Tax LEXIS 334, at *80 (N.Y. Tax App. Trib. Nov. 21, 2001), *aff'd sub nom*. Zelinsky v. Tax Appeals Tribunal of the State of N.Y., 301 A.D.2d 42, 47, 753 N.Y.S.2d 144, 148 (App. Div. 3d Dep't 2002), *aff'd*, 1 N.Y.3d 85, 97, 801 N.E.2d 840, 849, 769 N.Y.S.2d 464, 473 (2003), *cert. denied*, 541 U.S. 1009 (2004). New York City has a number of

A bankrupt taxpayer may request the federal bankruptcy court to adjudicate the proper amount of tax. According to Bankruptcy Code section 505(a)(1), "the court may determine the amount or legality of any tax . . . whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction."[46]

This provision overrides some of the finality rules that New York State law decrees. But section 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."[47] So the importance of section 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.[48]

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,[49] warning that, unless payment is forthcoming, the DTF will undertake enforcement procedures. There is no similar statutory requirement to issue a notice and demand for sales and use taxes assessed.

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 New York Civil Practice Law and Rules ("CPLR").[50] This is a rarely used alternative to the tax warrant and, for that reason, beyond the

taxes that it enforces itself through its Department of Finance ("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 of the Supreme Court, First Department. N.Y. C.P.L.R. 506(b)(4) (McKinney 2011).

[46] 11 U.S.C. § 505(a)(1) (2011).

[47] *Id.* § 505(a)(2)(A).

[48] *In re* Galvano, 116 B.R. 367, 375 (Bankr. E.D.N.Y. 1990).

[49] TAX § 692(b) (personal income tax); § 1092(b) (franchise tax).

[50] TAX § 692(h) (personal income tax); § 1092(h) (corporate tax); § 1141 (sales and compensating 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 compensating use tax. *Id.* The attorney general is authorized to hire outside counsel to collect taxes. Gordon v. Urbach, 252 A.D.2d 94, 97–98, 682 N.Y.S.2d 711, 713–14 (App. Div. 3d Dep't 1998).

scope of our discussion.

Far more powerful than the money judgment for the DTF is its ability to issue a tax warrant.[51] The warrant is issued to a sheriff or to "any officer or employee of the department, commanding him to levy upon and sell such person's real and personal property."[52]

When is the earliest time a tax warrant can issue? With regard to the personal income tax and franchise tax, the warrant may issue twenty-one days after notice and demand, if the amount due is less than $100,000.[53] If more than $100,000, the warrant can issue ten days after notice and demand.[54] With regard to the New York City corporate business tax, the warrant may issue in all cases ten days after the notice and demand.[55] For sales and use tax, no waiting period is prescribed, and the warrant can issue immediately; no twenty-one-day or ten-day waiting period is imposed on the Commissioner.[56]

A "jeopardy" situation justifies a warrant immediately after the taxpayer refuses to pay the personal income tax (or fails to pay the tax). No suggestion is made for the amount of time that must pass before a warrant may issue against a non-responding jeopardy taxpayer.[57]

These rules have become pertinent to calculating the period during which a tax warrant might be enforced. In the summer of 2011, the legislature enacted Tax Law section 174-b to limit the general enforceability of an *in personam* obligation to pay New York taxes. But for new section 174-b, this question would be answered by the analogy between tax warrants and judgments. When a 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."[58] According to the required analogy to judgment, we

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[51] TAX § 692(c) (personal income tax); § 1092(c) (corporate tax). "As an additional or alternate remedy," section 1141(b) (sales and compensating 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 tax, which may be found within his county, for the payment of the amount thereof." *Id.* § 1141(b).

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

[53] *Id.* § 692(c) (personal income tax) (first sentence); *id.* § 1092(c) (franchise tax) (first sentence).

[54] *Id.*

[55] N.Y.C., N.Y., ADMIN. CODE § 11-683(3) (2010).

[56] TAX § 1141(b) (first sentence).

[57] TAX §§ 692(c) (personal income tax) (second sentence); § 1092(c) (franchise tax) (second sentence). On jeopardy assessments, see *id.* §§ 173-a, 270-a (stock transfer tax), § 288-a (gasoline tax), § 694 (personal income tax), § 1094 (franchise tax), § 1038 (sales and use tax).

[58] TAX § 692(e) (personal income tax); *see also id.* § 1092(d) (sales and use tax); N.Y.C., N.Y., ADMIN. CODE § 11-683(5) (New York City corporate income taxes).

would have examined the quasi-limitation period for judgments in CPLR section 211(b), which provides:

> A money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recording it was first entitled to enforce it. This presumption is conclusive, except as against a person who within the twenty years acknowledges an indebtedness, or makes a payment, of all or part of the amount recovered by the judgment, or his heir or personal representative, or a person whom he otherwise represents. . .

This period is not a true statute of limitations but is merely a presumption or payment, though eventually a conclusive one.[59]

New section 174-b sweeps aside this analogy,[60] creating a true statute of limitations. It provides that "every tax liability shall be extinguished after twenty years *from the first date a warrant could be filed by the commissioner*,[61] without regard to whether the warrant is filed."[62] This "first date" is carefully defined:

> The first date a warrant could be filed means the day after the last day specified for payment by the notice and demand issued for the tax liability where there is no right to a hearing with respect to such notice and demand. The first day a warrant could be filed shall be determined without regard to subsection (c) of section six hundred ninety or subsection (c) of section one thousand ninety of this chapter, unless the commissioner assesses the liability under either such subsection (c). When there is a right to a hearing with respect to a notice and demand for a tax liability, the first date a warrant could be filed means the day that opportunity for a hearing or review has been exhausted.[63]

This hypothetical event was not the wisest choice, in that the tax warrant itself need not recite what date this is. Nor is the actual historical filing relevant to this hypothetical date. We will suggest

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[59] Jimenez v. Shippy Realty Corp., 163 Misc. 2d 121, 618 N.Y.S.2d 983 (Sup. Ct. Westchester County 1994).

[60] *See* TAX § 174-b(1) ("Notwithstanding *any provision of law* to the contrary and except as otherwise provided in this section . . . .").

[61] Oddly, the Commissioner does not file warrants. Rather, the sheriff or the tax compliance officer does so. *See infra* text accompanying notes 55–59.

[62] TAX § 174-b(1) (emphasis added); *see id.* §174-b(2) ("This section shall apply to any tax that is administered by the commissioner. Any reference to 'tax' in this section shall be deemed also to refer to special assessments, fees, interest, additions to tax, penalties and other impositions that are administered by the commissioner.").

[63] *Id.* § 174-b(1).

later on that the DTF would do a public service if it listed a date by which this twenty-year period might be calculated. New section 174-b(4) invites (but does not require) the DTF to do just that.[64]

When is the *latest* time a warrant might issue? With regard to the personal income and franchise taxes, the applicable limitation period is six years.[65] The period begins to run on the day taxes are assessed[66] (even though the warrant may not issue immediately after assessment). Obviously, new section 174-b's twenty-year period presupposes that the warrant has issued within the six-year period just discussed.[67]

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.[68] 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."[69] 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."[70]

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[64] TAX § 174-b(4) (fifth sentence) ("When a warrant is filed, the commissioner may include a date on that warrant indicating when such warrant expires and tax liability is extinguished.").

[65] *Id.* §§ 174-b(4), 192(c), 1092(c).

[66] Gura v. New York, 121 Misc. 2d 423, 423, 467 N.Y.S.2d 743, 744 (Ct. Cl. 1982).

[67] TAX § 174-b(4) ("For purposes of subsection (c) of section six hundred ninety-two and subsection (c) of section one thousand ninety-two of this chapter, if the commissioner does not file a warrant within six years of assessment, the time limitations in this section shall not apply and the tax liability is extinguished.").

[68] *Id.* § 692(d) (personal income tax); § 1092(d) (franchise tax); § 1141(b) (sales and use tax).

[69] *Id.* § 1141(b) (sales and use tax).

[70] *Id.* § 692(d) (personal income tax); *see also id.* § 1092(d) (franchise tax); § 1141(b) (sales and use tax). Is there a difference between the lien for income tax and the lien for sales and use tax? In *Critique of Money Judgment Part One: Liens on New York Real Property*, it is claimed that, for income taxes, docketing the tax warrant does not create a lien. Carlson, *Pt. 2*, *supra* note 1, at 68. But for the sales and compensating use tax, the lien is created at docketing. TAX § 1141. This position is supported by *United States v. Herzog*. United States v. Herzog (*In re* Thriftway Auto Rental Corp.), 457 F.2d 409, 411 (2d Cir. 1972). However, *Thriftway* was faced with a version of New York personal income tax law section 692(d) which provided that the warrant shall be "a [binding] lien upon the *title to and interest in* real, personal and other property of the taxpayer [*to the same extent as other judgments duly*

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.[71] The sheriff is authorized to collect the statutory fees for levying.[72] 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*,[73] where a tax warrant issued against a taxpayer.[74] The taxpayer commenced a special proceeding under CPLR Article 78 to enjoin enforcement.[75] The Supreme Court dismissed the matter, but the Appellate Division modified the dismissal by cancelling the tax warrant and (confusingly) dismissing the Article 78 proceeding.[76] 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."[77] 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.[78] The emphasis in *Arthur*

docketed in the office of such clerk]." 1985 N.Y. Laws 1835 (emphasis added). Since *Thriftway*, section 692(d) has been amended to delete the emphasized words, so that the income tax lien conforms to the sales tax lien.

[71] *See Thriftway*, 457 F.2d at 411; N.Y. C.P.L.R. 5230 (McKinney 2011).

[72] TAX § 692(f) (personal income tax); § 1141(b) (sales and use tax); § 1092(f) (franchise tax). Fees are described in C.P.L.R. 8011–14.

[73] Arthur Treacher's Fish & Chips, Inc. v. N.Y. State Tax Comm'n, 69 A.D.2d 550, 553, 419 N.Y.S.2d 768, 771 (App. Div. 3d Dep't 1979) (sales and use tax).

[74] 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 Tax section 1141(c), a tax warrant can issue against the buyer. On bulk sales, see discussion *infra* Part IV.B.

[75] *Arthur Treacher's*, 69 A.D.2d at 553, 419 N.Y.S.2d at 773.

[76] *Id.* at 556, 419 N.Y.S.2d at 773 ("The judgment should be modified by vacating the warrant issued November 21, 1977, and, as so modified, affirmed, without costs.").

[77] *Id.* at 554, 419 N.Y.S.2d at 772. In this regard, the court cites *Morse, Inc. v. Rentar Indus. Dev. Corp.*, 56 A.D.2d 30, 391 N.Y.S.2d 425 (App. Div. 2d Dep't 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.

Morse, 56 A.D.2d at 35, 391 N.Y.S.2d at 429 (citation omitted).

[78] *Arthur Treacher's*, 69 A.D.2d at 554, 419 N.Y.S.2d at 772.

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.[79]

In response to *Arthur Treacher's*, the Tax Commission issued regulations providing for a prompt hearing.[80] Part 2394 of Title 20 of the New York Codes, Rules and Regulations[81] ("NYCRR") was enacted to provide for a prompt hearing when a "predecision warrant" has been issued.[82] 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."[83] Notice of this right must be sent to the taxpayer.[84] The hearing (on whether there should be a prompt hearing) must be conducted within ten days of the receipt of the request,[85] and the "State Tax Commission" (presumably, today, the DTA) must issue its decision within fifteen business days from the close of the prompt hearing.[86] 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."[87]

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*,[88] 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*.[89] The First Department, however, reversed.[90] New York City law provided for a hearing, but did not

[79] *Id.* at 556, 419 N.Y.S.2d at 773.

[80] Laks v. Div. of Taxation of the Dep't of Taxation & Fin., 183 A.D.2d 316, 319–20, 590 N.Y.S.2d 958, 960 (App. Div. 4th Dep't 1992).

[81] The NYCRR is the collection of administrative rules compiled and published by the secretary of state. N.Y. EXEC. LAW § 102 (McKinney 2011).

[82] A predecision warrant is defined as a warrant issued "prior to the rendering to that person of a decision or determination of the State Tax Commission." N.Y. COMP. CODES R. & REGS. tit. 20, § 2394.1(b)(1) (2011). It also includes a warrant pursuant to a jeopardy assessment. *Id.* § 2394.1(b)(2).

[83] *Id.* § 2394.3.

[84] *Id.* § 2394.4.

[85] *Id.* § 2394.6(a).

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

[87] *Id.* § 2394.12.

[88] Sea Lar Trading Co. v. Michael, 107 Misc. 2d 93, 433 N.Y.S.2d 403 (Sup. Ct. N.Y. County 1980).

[89] *Id.* at 97–98, 433 N.Y.S.2d at 406–07.

[90] Sea Lar Trading Co. v. Michael, 94 A.D.2d 309, 464 N.Y.S.2d 476 (App. Div. 1st Dep't

indicate how promptly it must occur.[91] Nevertheless, the *Sea Lar* court "decline[d] to follow" *Arthur Treacher's*.[92]

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 of Internal Revenue*,[93] 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.[94] 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.[95]

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 a lien is not a due process violation.

In *Sniadach v. Family Finance Corp. of Bay View*[96] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[97] 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 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.[98] 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

1983).

[91] *Id.* at 315, 464 N.Y.S.2d at 480.

[92] *Id.* at 314, 464 N.Y.S.2d at 480.

[93] Phillips v. Comm'r of Internal Revenue, 283 U.S. 589 (1931).

[94] *Id.* at 593–94, 596–97.

[95] *Id.* at 597.

[96] Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 341–42 (1969).

[97] N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606–07 (1975).

[98] The tax lien would undoubtedly 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 *infra* text accompanying notes 262–67.

deprived the debtor of possession in those cases—whereas the restaurateur suffered an encumbrance but no loss of "use."[99]

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,"[100] but since the taxpayer was "deprived neither of the use or possession of its property nor of the incidents of ownership,"[101] the pre-hearing existence of the lien was not problematic. "It did not amount to actual deprivation of petitioner's property."[102]

One must admit that the creation of a lien is a transfer of property from debtor to creditor.[103] Still, due process does not prevent pre-hearing transfers. It only requires that the transfer be "fair" in some moral sense.[104] 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).[105] This proposition has federal implications, if valid. The Internal Revenue Code permits post-levy applications for refunds following levy or voluntary payment.[106] Yet no limitation is put on the speed by which a court must dispose of the taxpayer's claim for a refund.[107] If *Arthur Treacher's* reading of the United States Constitution is correct, the entire federal system of tax liens must fall.

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[99] Other Supreme Court pronouncements on due process do indeed focus clearly on possession. *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *Mitchell v. W.T. Grant Co.*, 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 children's toys. *Fuentes*, 407 U.S. at 72.

[100] Arthur Treacher's Fish & Chips, Inc. v. N.Y. State Tax Comm'n, 69 A.D.2d 550, 554, 419 N.Y.S.2d 768, 772 (App. Div. 3d Dep't 1979).

[101] *Id.*

[102] *Id.*

[103] 11 U.S.C. § 101(54) (2011) (defining transfer, inter alia, as "creation of a lien").

[104] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating due process invokes "traditional notions of fair play and substantial justice"); *see also* Wisconsin v. Fed. Power Comm'n, 303 F.2d 380, 388 (D.C. Cir. 1961) (stating 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").

[105] *Arthur Treacher's*, 69 A.D.2d at 554, 419 N.Y.S.2d at 772.

[106] *See* 28 U.S.C. § 6402(a) (2010) (providing for refunds of voluntary overpayment); § 7429 (providing for the review of a levy).

[107] An exception is made for a jeopardy levy and assessment procedures, where courts are required to determine the propriety of a jeopardy levy within twenty days. *Id.* § 7429(b)(3).

The United States Supreme Court has had ample opportunity to strike down federal tax procedure for its general failure to legislate the promptness of a hearing. It has never done so, and, accordingly, it is hard to accept the premise 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."[108] Contrary to the opinion of Francis Scott Key,[109] this provision means that every state must enforce the judgment of every other state.[110]

When the tax warrant is filed with the county clerk, the DTF is "deemed to have obtained judgment against the taxpayer for the tax or other amounts."[111] This statement should establish the right to enforce a tax warrant in other states,[112] under the Full Faith and

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[108] U.S. CONST. art. IV, § 1.

[109] 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. *See* Mills v. Duryee, 11 U.S. 481, 484 (1813); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 7 (1945). In Key's defense, the idea that judgments were mere evidence of the merits of previous litigation was arguably the intent of the founding fathers. Charles M. Yablon, *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 CARDOZO L. REV. 125, 136 (2011).

[110] *See* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187–88 (1972) (cognovit note worthy of full faith and credit); Hampton v. McConnel, 16 U.S. 234, 235 (1818) ("[T]he judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced.").

[111] N.Y. TAX LAW § 692(e) (McKinney 2011) (personal income tax); § 1092(e) (franchise tax); *see also* N.Y.C., N.Y. ADMIN. CODE § 11-683(5) (2010) (New York City corporate taxes).

[112] *See* N.Y. State Dep't Taxation v. Buenaventura, No. CV020820189, 2004 WL 1832940, at *1 (Conn. Super. Ct. July 19, 2004) (personal income tax warrant enforced as judgment). Florida courts consistently treat New York tax warrants 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. *See* N.Y. State Dep't Taxation & Fin. v. Klein, 852 So. 2d 866, 869 (Fla. Dist. Ct. App. 2003) (New York sales and use tax); N.Y. State Dep't Taxation v. Patafio, 829 So. 2d 314, 317 (Fla. Dist. Ct. App. 2002) (type of tax not stated); FLA. STAT. § 95.11(2) (2011) (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 *N.Y. State Department Taxation & Finance v. Friona*, 902 So. 2d 864, 866 (Fla. Dist. Ct. App. 2005) (New York personal income tax), the court stated that the five-year statute applies only if the DTF were bringing an "action concern[ing] a judgment or decree"—i.e., seeking a new judgment in Florida based on the old judgment. *See also* Milwaukee Cnty. 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

Credit Clause of the Constitution.

This much should be apparent ever since *Milwaukee County v. M.E. White Co.*,[113] 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.[114] The Full Faith and Credit Clause of the Constitution is not applicable to federal courts, but Congress enacted the Full Faith and Credit Act[115] 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.[116] Indeed, in international law, American courts will not enforce actions by foreign countries to collect taxes from persons present in the United States.[117] Nevertheless, the Supreme Court ruled that the county's judgment was indeed entitled to full faith and credit.[118] The district court was not permitted to look behind the judgment and deny enforcement because it was a tax collection suit.[119] This was so even though part of the county's claim was for penalties.[120]

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[121] made the analogy between collecting taxes and punishment,[122] seemingly to prevent "original jurisdiction" of the

subject to a different statute of limitations. Under section 95.11 of the Florida Code, the DTF has twenty years to enforce its judgment (or less, if New York law itself had a shorter limitation period, which it does not). FLA. STAT. § 95.11(1); *see also Friona*, 902 So. 2d at 866.

[113] *Milwaukee Cnty.*, 296 U.S. at 270, 280.

[114] *Id.* at 269.

[115] 28 U.S.C. § 1738 (2011).

[116] *See Milwaukee Cnty.*, 296 U.S. at 279–80.

[117] Pasquantino v. United States, 544 U.S. 349, 352 (2005); Antelope, 23 U.S. 66, 123 (1825) ("The Courts of no country execute the penal laws of another"); N.Y. C.P.L.R. 5301(b) (McKinney 2011) (stating that a "judgment for taxes, a fine or other penalty" excluded from "[f]oreign country judgments" is enforceable in state).

[118] *See Milwaukee Cnty.*, 296 U.S. at 279.

[119] *See id.*

[120] *Id.* at 279; Milwaukee Cnty. v. M.E. White Co., 17 F. Supp. 759, 760 (N.D. Ill. 1937).

[121] *See generally* Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[122] *Id.* at 292, 299 ("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 ascertaining 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 of Wisconsin without having deposited with the proper

Supreme Court from being invoked every time a state sued a citizen of another state.[123] The *Milwaukee County* court, in contrast, analogized tax collection to debt collection[124] 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 penalties have been enforced as a matter of full faith and credit.[125]

Full faith and credit for New York tax warrants depends upon the view that, within New York, a taxpayer's due process rights have been honored in the warrant procedure.[126] 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.[127] 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.[128] 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 relitigate 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.[129]

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officer of the State a full statement of its property and business during the previous year.").

[123] *Id.* at 297 (interpreting section 687 of the Revised Statutes of the United States as granting original jurisdiction to the Supreme Court when a state sues the citizen of another state).

[124] *Milwaukee Cnty.*, 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*.").

[125] City of Philadelphia v. Smith, 413 A.2d 952, 954 (Sup. Ct. N.J. 1980).

[126] Franklin Nat'l Bank v. Krakow, 295 F. Supp. 910, 916–17 (D.D.C. 1969).

[127] *See generally supra* Part I.

[128] *See generally supra* text accompanying notes 37–40.

[129] 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); *see also* John R. Higgitt, *A Nullity or Not—The Status of a Default Judgment*

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.[130]

Nevertheless, the New York legislature lacks confidence whether 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."[131] Thereafter, collection outside the state of New York may proceed.[132]

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*,[133] 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.[134] The taxpayers tendered interest but

Entered Absent Compliance with CPLR 3215(F), 73 Alb. L. Rev. 807 (2010) (discussing the status of insufficiently plead default judgments in New York).

[130] U.S. CONST. art. IV, § 1.

[131] N.Y. TAX LAW § 692(g) (McKinney 2011) (personal income tax); N.Y.C., N.Y., ADMIN. CODE § 11-683(7) (2010) (city corporate income taxes).

[132] *See* TAX § 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. 1919 N.Y. Laws 1654–55. Regular judgments were also provided for. *See id.* In *New York v. Coe Manufacturing Co.*, 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. New York v. Coe Mfg. Co., 172 A. 198 (Ct. Err. & App. N.J. 1934), *cert. denied*, 293 U.S. 576 (1934). The taxpayer tried to claim that the judgment was a penalty and therefore not entitled to full faith and credit. *Id.* at 537. The court, however, agreed that the judgment was for collection of a debt and therefore entitled to full faith and credit. *Id.* at 539. *Coe Manufacturing* is cited with approval in *Milwaukee Cnty*. Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268, 278–79 (1935).

[133] Dickstein v. Merrill Lynch, 685 A.2d 943, 945 (N.J. Super. Ct. App. Div. 1996).

[134] *Id.* 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. TAX §§ 684, 697. Under Tax Law sections 684(a) and 697(j), until the tax and interest are paid, interest is imposed at a potentially floating rate (like the floating rate imposed on unpaid federal tax liabilities under I.R.C. section 6601 and section 6621). I.R.C. §§ 6601, 6621 (2011); TAX §§ 684, 697. Furthermore, they would pay a late-filing penalty of up to 25% of the unpaid tax, TAX § 685(a)(1)(A), and a

requested waivers of the late-filing and late-payment penalties.[135] The requests were denied.[136] No appeal was made to the Tax Commission (as it was then called).[137] The DTF issued a tax warrant, which was docketed in Albany County.[138] Five years later, the taxpayers opened a Merrill Lynch brokerage account in Wayne, New Jersey.[139] The DTF then issued a tax compliance levy[140] to the New York City office of Merrill Lynch (though the tax warrant was docketed in Albany).[141] At the time, the taxpayers had a cash balance in their brokerage account.[142] Merrill Lynch complied with the levy, even though the taxpayers dealt with personnel in New Jersey.[143] The taxpayers then sued Merrill Lynch in New Jersey on the theory that Merrill Lynch should not have complied with the levy.[144] 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*,[145] which holds that a debt is located wherever the debtor is located.[146] The *Dickstein* court also indicated that the tax warrant was a "judgment" entitled to full faith and credit: "[o]nce a tax penalty assessment is reduced to judgment, it is treated like any other money judgment."[147]

Some cases deny full faith and credit on palpably incorrect grounds. In *Commissioner of Taxation & Finance v. Pelletier*,[148] a Massachusetts court noted that a New York tax warrant authorizes the sheriff to levy property located within the county. But the taxpayer lived in Massachusetts, not in the New York county where

late-payment penalty of 0.5%. *Id.* § 685(a)(2). The late-filing and late-payment penalties are patterned on the federal counterparts found at I.R.C. § 6651(a)(1), (2).

135 *Dickstein*, 685 A.2d at 945.

136 *Id.*

137 *Id.* Today, the DTF 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* TAX § 173-a (effective Aug. 20, 2004).

138 *Dickstein*, 685 A.2d at 945.

139 *Id.*

140 *Id.* at 946. This, presumably, replicates the procedure of section 5232(a) of the CPLR involving the garnishment of property not capable of delivery. N.Y. C.P.L.R. 5232 (McKinney 2011).

141 *Dickstein*, 685 A.2d at 945.

142 *Id.* at 945–46.

143 *Id.* at 946.

144 *Id.* at 945.

145 *Id.* at 948–49.

146 Harris v. Balk, 198 U.S. 215, 222 (1905) ("The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes.").

147 *Dickstein*, 685 A.2d. at 949 (citation omitted).

148 Comm'r of Taxation & Fin. v. Pelletier, No. 020589B, 2002 WL 32156923, at *1 (Mass. Super. Ct. Feb. 26, 2002).

the tax warrant was docketed.[149] Therefore, it supposedly followed that the tax warrant was not entitled to 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 nonresident, 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*,[150] 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 before 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.[151] The Comptroller ruled against the taxpayer.[152] Therefore, a tax warrant was issued based on the ruling, which the City sought to enforce in Massachusetts federal court.[153]

The defendant claimed that the City had no "judgment."[154] 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."[155]

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."[156]

> Both the Constitution and the statutes thus make it plain that it is of no consequence whether the proceeding before

[149] *Id.* at *1.

[150] City of New York v. Shapiro, 129 F. Supp. 149 (D. Mass. 1954).

[151] *Id.* at 151–52.

[152] *Id.* at 152.

[153] *Id.* at 152. Although only states are subject to the Full Faith and Credit Clause, a statute requires federal courts to recognize state judgments. 28 U.S.C. § 1738 (2011).

[154] *Shapiro*, 129 F. Supp. at 153.

[155] *Id.* at 154 (citation omitted).

[156] U.S. CONST. art. IV, § 1.

> 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 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.[157]

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.[158] 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.[159] 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.[160]

This part of the opinion can be questioned. First, at least modernly, New York law contains a direct statement that tax warrants *are* judgments.[161] Today, the City's Administrative Code states plainly that, upon docketing a tax warrant, the City is "deemed to have obtained judgment against the taxpayer for the tax or other amounts."[162] Though the matter was perhaps less clear at

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[157] *Shapiro*, 129 F. Supp. at 153–54.

[158] *Id.* at 155.

[159] *Id.* Interest under the New York Tax Law was 12% at that time. *Id.* at 152. Interest on general judgments was only 6%. *Id.* at 155.

[160] *Id.*

[161] *See supra* note 111 and accompanying text.

[162] N.Y.C., N.Y., ADMIN. CODE § 11-683(5) (2010) (corporate taxes).

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.[163] "[T]he doctrine of merger and bar . . . precludes the sequential pursuit not only of claims actually litigated, but of those that could have been litigated."[164] 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.[165] Certainly in modern times the warrant, contrary to the *Shapiro* court, is the judgment and 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 officer to collect post-issuance interest at a designated rate plus penalties.[166] 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.[167] *Pelletier* was a case in which the Massachusetts resident sought no hearing from the DTF.[168] 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.[169] The analogy would entitle

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[163] *Shapiro*, 129 F. Supp. at 153.

[164] Garcia v. Vill. of Mount Prospect, 360 F.3d 630, 639 (7th Cir. 2004) (citations omitted).

[165] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 cmt. e (1969) ("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 cause of action which is extinguished by merger when the judgment is for the plaintiff . . . .").

[166] N.Y. TAX LAW § 692 (McKinney 2011). On interest and penalties under the New York Tax Law, see *supra* note 134.

[167] Comm'r of Taxation & Fin. v. Pelletier, No. 020589B, 2002 WL 32156923, at *1 (Mass. Super. Ct. Feb. 26, 2002).

[168] *Id.* at *1.

[169] *See* Note, *Constitutional Law—Full Faith and Credit—Administrative Determination of City Tax Deficiency and Penalties Entitled to Full Faith and Credit*, 69 HARV. L. REV. 378, 379

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.[170] 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.*,[171] the court noted that "foreign judgment[s]" may be filed in Ohio with the same effect as local judgments, 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."[172] The *Special Service* court further remarked that "[i]n 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' . . . ."[173] True, the Commissioner is not a court, but the tax warrant is docketed as a judgment by the clerk of the court.[174] The New York statutes proclaim the tax warrant *is* a judgment, and the tax warrant appears in the court records as if it were a judgment.[175] 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.[176] Just because court involvement in New York is

(1955) ("New York City provides procedures for the enforcement of tax determinations similar to those available for the enforcement of court judgments . . .". (citations omitted)).

[170] *See supra* note 38 and accompanying text.

[171] Tax Comm'r of N.Y. State v. Special Serv. Transp., Inc., No. 04CA0069-M, 2005 WL 1225930 (Ohio Ct. App. May 25, 2005).

[172] *Id.*; OHIO REV. CODE ANN. § 2329.021 (West 2011).

[173] *Special Serv. Transp.*, 2005 WL 1225930 at *1.

[174] N.Y. C.P.L.R. 5018(a) (McKinney 2011).

[175] *Id.* § 5018(b).

[176] *See id.* § 5018(a), (b) (stating that a clerk is authorized to docket judgments from other

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.[177] 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 unsupportable. A private creditor with a money judgment in New York has no lien on personal property until she serves an execution on the sheriff,[178] or obtains a turnover order or appointment of a receiver.[179] 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)*,[180] the DTF docketed a tax warrant in New York and then docketed it in Virginia where the debtor had real property.[181] The debtor disputed the tax debt set forth in the tax warrant.[182] The bankruptcy court ruled that the tax debt was only half of what the tax warrant claimed.[183] 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 bankruptcy proceedings, Bankruptcy Code section 505(a)(2) 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."[184]

It is of some embarrassment that the New York Court of Appeals

courts without a judge's involvement).

[177] N.Y. State Dep't of Taxation v. Boone, No. CV030407833S, 2005 WL 407636, at *1 n.5 (Conn. Super. Ct. Jan. 11, 2005).

[178] C.P.L.R. 5202(a).

[179] *Id.* § 5202(b).

[180] Mead v. United States (*In re* Mead), 374 B.R. 296 (Bankr. M.D. Fla. 2007).

[181] *Id.* at 300.

[182] *Id.* at 307.

[183] *See id.*

[184] 11 U.S.C. § 505(a)(2)(A) (2011).

does not consider the tax assessments of Philadelphia to be worthy of full faith and credit. In *City of Philadelphia v. Cohen*,[185] the city sought recognition of an "alleged liability, *not reduced to judgment*"[186] of a city excise tax.[187] City procedure required that notice of an assessment be mailed to the taxpayer.[188] The taxpayer then had sixty days to institute a review of such determination.[189] The Philadelphia taxpayer did not appeal the assessment and so the liability had become "perfect and complete."[190] Nevertheless, the New York Court of Appeals denied Philadelphia full faith and credit for its assessment.[191] To add insult to injury, the court refused to give the comity of enforcement to Philadelphia since Pennsylvania gave no comity to New York.[192]

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.[193] It refers to public "acts, records, and judicial proceedings."[194] What should count, said the *Shapiro* court, is the *finality* of the obligation.[195] 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

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185 City of Philadelphia v. Cohen, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962), *cert. denied*, 371 U.S. 934 (1962).

186 *Id.* at 403–04, 184 N.E.2d at 168, 230 N.Y.S.2d at 189 (emphasis added).

187 *Cf.* City of Philadelphia v. Austin, 429 A.2d 568, 568–69 (1981) ("[T]he courts of New Jersey must extend full faith and credit to a Pennsylvania civil court judgment for a fine for failure to file tax returns required by the Philadelphia Wage Tax Ordinance.").

188 *Cohen*, 11 N.Y.2d at 405, 184 N.E.2d at 169, 230 N.Y.S.2d at 191.

189 *Id.*

190 *Id.* at 405, 184 N.E.2d at 170, 230 N.Y.S.2d at 192 (citing City of Philadelphia v. Bobman Dep't Store Co., 149 A.2d 518 (1959)).

191 *Id.* at 407, 184 N.E.2d at 170, 230 N.Y.S.2d at 192.

192 *Id.* at 406–07, 184 N.E.2d at 169–70, 230 N.Y.S.2d at 191–92.

193 City of New York v. Shapiro, 129 F. Supp. 149, 153–54 (D. Mass. 1954).

194 *Id.* at 154.

195 As we have seen, a New York taxpayer, in imitation of federal procedure, can pay and seek a refund on the merits later. *Id.* at 153. But pending the exercise of this option (by no means required), the tax warrant is final. *Id.*

the statutory term "judgment" makes a difference.

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

> 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.[196]

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.[197]

After *Quill Corp. v. North Dakota*,[198] 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.[199] But even if this were not

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[196] N.Y. TAX LAW § 902 (McKinney 2011). Florida has a similar statute that applies to sales, use, corporate income, or fuel taxes of other states. FLA. STAT. § 72.041 (2011). 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. *Id.* § 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 taxing state" unless, reciprocally, the taxing state will enforce Florida warrants without a judgment. *Id.* § 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 subdivisions shall be paid first and shall be prior in right to any tax liability arising under the laws of other states." *Id.* § 72.041(4). 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. *Id.* § 72.041.

[197] *See* Charles F. Midkiff, *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." (citation omitted)).

[198] Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

[199] 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. *Id.* at 308. 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. *Id.* at 315 n.8. Our comment in the text presupposes that

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 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.[200] 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."[201] 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.[202] 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.[203]

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the tax itself is constitutionally applied to persons outside New York.

[200] City of Philadelphia v. Cohen, 11 N.Y.2d 401, 407, 184 N.E.2d 167, 170, 230 N.Y.S.2d 188, 192 (1962) (Fuld, J., dissenting); *see also* Jackson, *supra* note 109, at 15 ("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." (footnote omitted)).

[201] TAX § 692(d) (personal income tax); § 1141(b) (sales 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.").

[202] *Id.* § 6.

[203] *Id.* § 1141(b) (sales and use tax). This limitation was added in 1985.

The requirement of filing with the Department of State does not apply to many New York City tax liens.[204] But it does apply to the New York City personal income tax.[205] 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."[206] 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.[207]

1. Local Docketing

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 section 1141(b) (sales and use tax), the warrant itself directs the sheriff to levy on real and personal property "which may be found within his county."[208] Yet in the fourth sentence, the lien-creative moment does not refer to any geographical limitation.[209]

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

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[204] N.Y.C., N.Y., ADMIN. CODE § 11-683 (2011); *see* City of New York v. Panzirer, 23 A.D.2d 158, 162–63, 259 N.Y.S.2d 284, 288 (App. Div. 1st Dep't 1965) (awarding priority to the bank which served an execution of a garnishee over the city which docketed a warrant and served a restraining notice on the garnishee which the court though could not create a lien); *see also* United States v. Herzog (*In re* Thriftway Auto Rental Corp.), 457 F.2d 409, 411 (2d Cir. 1972) (pointing out the error).

[205] ADMIN. § 11-1792.

[206] TAX § 692. *Accord* TAX § 1141(b); ADMIN. § 11-683(6).

[207] N.Y. C.P.L.R. 5203(a) (McKinney 2011).

[208] TAX § 1141(b).

[209] *Id.* 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." TAX §§ 692, 1092; *see also* N.Y. GEN. CITY LAW §§ 25-a, 83, 140 (McKinney 2011); ADMIN. §§ 11-532, 11-683, 11-1792. This statutory 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.

that would deeply upset the title insurance companies, because it means that they must search sixty-two 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."[210] Where a private creditor has a money judgment docketed, CPLR section 5203(a) is quite clear that the real property encumbered must be located in the county where the docketing occurs.[211] Since regular money judgments which are not docketed (or levied) in Erie County cannot be enforced against real property located 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 section 1141(b): "[s]uch lien shall not apply to personal property unless such warrant is filed in the department of state."[212] 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, arguably implies that docketing the tax warrant creates a lien only on local real estate.[213] According to New York Tax Law section 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

[210] TAX § 692; *see also id.* § 1141; ADMIN. § 11-683.
[211] C.P.L.R. 5203(a).
[212] TAX § 1141(b).
[213] 1997 N.Y. Laws 1987 (amending section 174-a of the Tax Law).

> *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.[214]

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 the 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.[215] 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 where the warrant is docketed.[216]

2. Death of the Tax Lien on Real Property

The purpose of Tax Law section 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.[217] Under CPLR section 5203(a), a lien commences upon docketing a judgment where the judgment debtor owns real property.[218] The lien terminates ten years after the judgment roll is filed in the county where the judgment was entered.[219] So a docketing lien on real property can

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[214] TAX § 174-a (emphasis added).

[215] See Carlson, *Pt. 1*, *supra* note 1, at 1307, for a discussion on extension of real estate liens.

[216] 1997 N.Y. Laws 1987 goes on to state that subparagraph one applies to "any tax which is administered by the commissioner and which is imposed . . . pursuant to this chapter" (among others). "This chapter" refers to the entire section one of the Tax Law ("This chapter shall be known as the 'Tax Law.'"). Section 174-a(2) additional applies to "section 27-0923 of the environmental conservation law [and] the racing, pari-mutuel wagering and breeding law." TAX § 174-a. Neither the cited section of the environmental law nor the entire racing, pari-mutuel wagering and breeding law makes any reference to tax warrants.

[217] *Id.*

[218] N.Y. C.P.L.R. 5203(a) (McKinney 2011). Where the docketing lien has died but the judgment still lives, CPLR section 211(b) (twenty-year life, at least), a lien may also be created by "levy[ing]" on the real property. *Id.* § 5235. A levy consists of the sheriff filing notice in the real estate records that a sale is pending. *Id.*

[219] The judgment roll is described in CPLR section 5017. It must be prepared and filed by

last no more than ten years—and perhaps a good deal less than that.[220]

The Tax Law, however, often states that "[t]he provisions of the [CPLR] relative to the limitation of time of enforcing a civil remedy shall not apply to any proceeding or action taken to . . . enforce the collection of any tax or penalty prescribed by this article . . . ."[221] 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 section 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,[222] 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 return admits the tax debt) upon filing of the return.[223]

We think, however, that this analogy should be rejected. Docketing a judgment formally includes "the date and time the judgment-roll was filed"[224] and "the court and county in which judgment was entered."[225] 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

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the attorney for the party whose instance the judgment is entered. C.P.L.R. 5017(a). It contains the principal documents of the litigation, such as the summons, pleadings and court orders, and the like. *Id.* § 5017(b). The judgment roll is to be filed at the time the judgment is entered. *Id.* § 5017(a). Entry of a judgment is defined as the time a judgment is signed and filed by the clerk. *Id.* § 5016(a); *see also id.* § 9702(1) (explaining that clerks of all courts, except the clerk of the appellate division, are to keep a "judgment book" wherein "entered" judgments are recorded).

[220] *See* Carlson, *Pt. 1*, *supra* note 1, at 1305.

[221] TAX § 219 (footnote omitted); *see id.* § 207 (corporation tax); § 281 (tax on transfers of stock and other corporate certificates); § 313 (tax on petroleum businesses); § 1147(b) (sales and compensating use tax); § 1420(a) (real estate transfer tax); *see also* N.Y. GEN. CITY LAW § 10 (general corporation tax); § 64(2) (transportation corporation tax) (McKinney 2011).

[222] C.P.L.R. 5017(a).

[223] *See supra* Part I.B.1.

[224] C.P.L.R. 5018(c)(1)(iv).

[225] *Id.* § 5018(c)(1)(vi).

named."[226] 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 judgment against the taxpayer for the tax or other amounts."[227] 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.[228] But the Tax Law states the opposite conclusion; insofar as tax warrants are concerned, docketing *is the same* as entry of a judgment.[229] Docketing is when the tax warrant *first becomes 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.[230] To be sure, the Albany docketing creates a judgment that can be enforced even after the Westchester lien has terminated in 2017;[231] New York money

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[226] TAX § 692 (sales and use tax).

[227] *Id.* § 692(e) (personal income tax); *see also id.* § 1092(d) (corporate tax); N.Y.C., N.Y., ADMIN. CODE § 11-683(5) (2010) (New York City corporate income taxes).

[228] *Compare* C.P.L.R. 5016 (entry of judgment), *with* C.P.L.R. 5018 (docketing of judgment).

[229] *See* TAX § 692(e).

[230] One disadvantage the DTF will have is that a tax warrant must issue within six years of assessment. *Id.* § 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 twenty years. *See* C.P.L.R. 211(b). This transcript could be docketed in Westchester to create a lien in 2014 for the DTF, even if a tax warrant could not be issued in 2014. *See id.* § 5018(a) (governing "docketing elsewhere by transcript").

[231] *See* Smith v. Comm'r of Taxation & Fin., No. 310370, 2004 WL 2609388, at *1 (Sur. Ct. Sept. 28, 2004) ("The judgment itself stands as a debt until twenty years after the docketing of the judgment, and the expiration of the lien does not render the judgment unenforceable."

judgments endure at least twenty years after they are "entered."[232] The Westchester *lien*, however, would terminate ten years after the Albany docketing. After that point, the DTF would have to "levy" the Westchester property.[233]

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 sixty-two counties in New York, the searcher will find the Albany docketing and can calculate lien duration.

Such an interpretative choice, which serves the cause of title searching, is by no means contradicted by the 2011 enactment of section 174-b, which creates a statute of limitations for tax obligations, in replacement of an analogy to judgments, which are subject to the renewable twenty-year period provided in CPLR section 211(b).[234] New section 174-b provides that "every tax liability shall be extinguished after twenty years *from the first date a warrant could be filed by the commissioner*,[235] without regard to

(internal citation omitted)).

[232] *See* C.P.L.R. 211(b). This period is not a true statute of limitations but is merely a presumption, though eventually a conclusive one. *See* Jimenez v. Shippy Realty Corp., 163 Misc. 2d 121, 126, 618 N.Y.S.2d 963, 966 (Sup. Ct. Westchester County 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. *See* C.P.L.R. 211(b).

[233] *See* C.P.L.R. 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 230. 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.

[234] This section provides:

> A money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recording it was first entitled to enforce it. This presumption is conclusive, except as against a person who within the twenty years acknowledges an indebtedness, or makes a payment, of all or part of the amount recovered by the judgment, or his heir or personal representative, or a person whom he otherwise represents. . .

C.P.L.R. 211(b).

[235] Oddly, the Commissioner does not file warrants. Rather, the sheriff or the tax compliance officer does so. *See supra* text accompanying notes 52–56.

whether the warrant is filed."[236] This hypothetiocal (and therefore invisible event) is not intended to govern liens but rather to govern the underlying enforceability of the tax warrant. With regard to the life of a tax *lien* (as opposed to a tax warrant), courts must still find the best analogy in tax procedure to the filing of a judgment-roll. We believe that, since a judgment-roll immediately precedes docketing the judgment,[237] the historic first filing of the warrant is the properly analogy. Under such an analogy, a tax lien on real property would arise upon local filing and would die ten years after the first tax warrant was filed.

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:

> [A]s 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 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 after the expiration of ten years from the date such taxes became due and payable.[238]

Arguably, section 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.[239] Section 174-a, after all, begins with the sweeping remark, "[n]otwithstanding any provision of law to the contrary . . . ."[240]

Another tax law provision that could be superseded by section

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[236] *Id.* (emphasis added). This "first date" is carefully defined:

> The first date a warrant could be filed means the day after the last day specified for payment by the notice and demand issued for the tax liability where there is no right to a hearing with respect to such notice and demand. The first day a warrant could be filed shall be determined without regard to subsection (c) of section six hundred ninety or subsection (c) of section one thousand ninety of this chapter, unless the commissioner assesses the liability under either such subsection (c). When there is a right to a hearing with respect to a notice and demand for a tax liability, the first date a warrant could be filed means the day that opportunity for a hearing or review has been exhausted.

Id.

[237] C.P.L.R. 5018(a) ("Immediately after filing the judgment-roll the clerk shall docket a money judgment . . . .").

[238] N.Y. TAX LAW § 207 (corporation tax); § 219 (franchise tax); § 313 (tax on petroleum business); *see also* GEN. CITY LAW § 10 (city incorporated business tax); § 64(2) (transportation corporation tax).

[239] TAX § 174-a.

[240] *Id.*

174-a is the rule that tax warrants must be filed within six years of the assessment. For example, Tax Law section 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 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 . . . .[241]

Can it be argued that section 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.[242] If so, the tax lien is entitled to "like effect."[243]

The argument against any such inference is that section 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, section 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 section 1141(b) (sales and use tax) states that the tax warrant command the sheriff to *levy* real property (as well as personal property).[244] This is an odd command, in that, when a private creditor has docketed a judgment, a levy is not required so long as the docketing lien lives.[245] In fact, courts have held that a levy on behalf of a private creditor is not even permitted during this period.[246] Yet, insofar as a tax warrant is concerned, a

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[241] *Id.* § 692(c) (emphasis added); *see also* TAX § 1092(c) (corporate tax).

[242] C.P.L.R. 5018(a) (McKinney 2011) (describing docketing of transcripts of judgments from other courts), 5203(a); *see also* Quarant v. Ferrara, 111 Misc. 2d 1042, 1043, 445 N.Y.S.2d 885, 886 (Sup. Ct. Queens County 1981).

[243] C.P.L.R. 5018(a).

[244] TAX § 1141(b) (emphasis added).

[245] C.P.L.R. 5236(a) (requiring 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." (emphasis added)). Assuming, as is fair, that "lien of the judgment" refers to docketing the judgment pursuant to CPLR section 5203(a), then the sheriff need not levy, so long as the ten-year docketing lien of section 5203(a) is still alive.

[246] Cmty. Capital Corp. v. Lee, 58 Misc. 2d 34, 36, 294 N.Y.S.2d 336, 338 (Sup. Ct. Nassau County 1968).

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,[247] 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."[248] Ordinary judgment creditors with docketed judgments have no lien on personal property unless they deliver an execution to the sheriff[249] 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."[250]

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

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[247] C.P.L.R. 5232(a).

[248] TAX § 692(f) (personal income tax). *Accord* TAX § 1141(b) (sales and use tax); N.Y.C., N.Y., ADMIN. CODE § 11-683(6) (2010).

[249] C.P.L.R. 5202(a).

[250] Corrigan v. U.S. Fire Ins. Co., 427 F. Supp. 940, 943 (S.D.N.Y. 1977). In *United States v. Herzog*, 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. United States v. Herzog (*In re* Thriftway Auto Rental Corp.), 457 F.2d 409, 413 (2d Cir. 1972). Significantly, it suggested the result would have been otherwise under the state liens for income and sales tax. *Id.* 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." *See, e.g.*, United States v. Fleming, 474 F. Supp. 904, 906 (S.D.N.Y. 1979). This language has since been amended. Today, section 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*." TAX § 692(d) (personal income tax) (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*.

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."[251] 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 ministerial 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.[252]

This ambiguity does not arise under the state personal income tax lien. New York Tax Law section 692(c) instructs both the sheriff and the DTF employee to file the warrant with the clerk,[253] and thereafter the lien arises when the tax warrant is filed with the department of state.[254]

Under the CPLR, executions must be returned in sixty days (though their lives may be extended).[255] Tax warrants too must be returned in sixty days (with no opportunity for renewal).[256]

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[251] TAX § 1141(b) (sales and use tax).

[252] Arthur Treacher's Fish & Chips, Inc. v. N.Y. State Tax Comm'n, 69 A.D.2d 550, 553–54, 419 N.Y.S.2d 768, 771–72 (App. Div. 3d Dep't 1979).

[253] TAX § 692(d) (personal income tax).

[254] *Id.*

[255] N.Y. C.P.L.R. 5230(c) (McKinney 2011).

[256] TAX § 279-b (tax on transfers of stock and other corporate certificates); § 289 (tax on gasoline and similar motor fuel); § 431(2) (tax on alcoholic beverages); § 479 (tax on cigarettes

According to section 1141(b) (sales and compensating use tax), the sheriff (and, presumably, an employee of the DTF to whom a tax warrant is addressed)[257] 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."[258]

When an execution is returned (in the absence of a levy), the lien that arose upon delivery of the execution is considered dead.[259] 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.[260] 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 sixty 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 liens arise under pre-judgment orders of attachment.[261] There is no requirement that orders of attachment be returned at all. They continue to be valid after sixty days.[262] This should serve as indirect support for the

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and tobacco products); § 511(2) (highway use tax); § 692(c) (personal income tax); § 1092(c) (franchise tax); § 1141(b) (sales and use tax).

257 *Arthur Treacher's*, 69 A.D.2d at 553, 419 N.Y.S.2d at 771 (so presuming).

258 TAX § 1141(b).

259 N.Y.C. Transit Auth. v. Paradise Guard Dogs, Inc., 565 F. Supp. 388, 390 (E.D.N.Y. 1983); United States v. Fleming, 474 F. Supp. 904, 908 (S.D.N.Y. 1979); Walker v. Henry, 85 N.Y. 130, 134 (1881); Garro v. Republic Sheet Metal Works, Inc., 284 A.D. 660, 662, 134 N.Y.S.2d 151, 153–54 (App. Div. 4th Dep't 1954) (prior to the CPLR); Vance Boiler Works v. Coop. Feed Dealers, Inc., 46 Misc. 2d 654, 655, 260 N.Y.S.2d 303, 304 (Sup. Ct. Wayne County 1965).

260 The New York 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. *See* Wandschneider v. Bekeny, 75 Misc. 2d 32, 36, 346 N.Y.S.2d 925, 929 (Sup. Ct. Westchester County 1973). In *Rondack Construction Services, Inc. v. Kaatsbaan Int'l Dance Center, Inc.*, the court sensibly reasoned that the legislature did not intend to obliterate all rights of redemption—only redemption after the sale. Rondack Constr. Servs., Inc. v. Kaatsbaan Int'l Dance Ctr., Inc., 13 N.Y.3d 580, 584, 923 N.E.2d 561, 562–63, 896 N.Y.S.2d 278, 279–80 (2009). 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.

261 N.Y. C.P.L.R. 6203 (McKinney 2011).

262 According to *Fireman's Fund Insurance Co. v. D'Ambra*:

> Although section 6214(e) provides, with certain exceptions not relevant here, that "[a]t 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

proposition that tax warrants do not die after sixty days.

Nevertheless, the court in *Marine Midland Bank-Central v. Gleason*[263] 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.[264] A levy occurred within sixty days of the third tax warrant but not within sixty days of the first two.[265] The court ruled that the tax warrant died at the end of sixty days.[266] In so ruling, the court did not emphasize the duty to return the tax warrant.[267] Rather, it emphasized the fifth sentence of section 1141(b) (sales and use tax), which indicates that the sheriff "shall then proceed upon the warrant 'in the same manner, and with like effect, as that provided by law in respect to [judgment] executions."[268] Since executions die when they are returned (or perhaps due to be returned), so do tax warrants, reasoned the court.[269]

Although the Court of Appeals affirmed the result in *Gleason II*,[270] it stated in dictum that the tax lien does not die when the

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 necessary to satisfy the amount specified in the order.

Fireman's Fund Ins. Co. v. D'Ambra, 766 F.2d 95, 96 (2d Cir. 1985) (citations omitted). 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. Kitson & Kitson v. City of Yonkers, 10 A.D.3d 21, 778 N.Y.S.2d 503 (App. Div. 2d Dep't 2004); N.Y. State Comm'r of Taxation & Fin. v. Bank of N.Y., 275 A.D.2d 287, 712 N.Y.S.2d 543 (App. Div. 1st Dep't 2000). But it still is the case that orders of attachment need not be returned and permanently ground motions to extend the levy nunc pro tunc after the levy has died. Bizarrely, CPLR section 5234(b) suggests that, *if* a sheriff returns an order of attachment, the order of attachment forfeits its place in the priority scheme. C.P.L.R. 5234(b).

[263] Marine Midland Bank-Cent. v. Gleason, (Gleason I), 62 A.D.2d 429, 405 N.Y.S.2d 334 (App. Div. 4th Dep't 1978), *aff'd*, 47 N.Y.2d 758, 391 N.E.2d 294, 417 N.Y.S.2d 458 (1979).

[264] *Id.* at 433–34, 405 N.Y.S.2d at 336–37.

[265] *Id.* at 436, 405 N.Y.S.2d at 338.

[266] *Id.*

[267] *Id.* at 436–47, 405 N.Y.S.2d at 338.

[268] *Id.* at 436, 405 N.Y.S.2d at 338 (citing N.Y. TAX LAW § 1141(b) (McKinney 2011)).

[269] *Id.* at 435–36, 405 N.Y.S.2d at 338.

[270] *Gleason II* 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). Marine Midland Bank-Cent. v. Gleason, (Gleason II), 47 N.Y.2d 758, 391 N.E.2d 294, 417 N.Y.S.2d 458 (1979). Three tax warrants and a federal tax lien took seniority over the unperfected security interest. *Id.* at 761, 391 N.E.2d at 294, 417 N.Y.S.2d at 459. 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. *Gleason I*, 62 A.D.2d at 435–46, 495 N.Y.S.2d at 338. On appeal, the Court of Appeals

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."[271] 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 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.[272] 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.[273] Separately, the CPLR makes execution liens defeasible until the sheriff actually levies.[274] And even the levy is defeasible if the property levied is not capable of delivery.[275] 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, if the defeasibility of an execution lien on personal property relates to the execution's invisibility, then it does not necessarily imply the defeasibility of the tax lien, which is based on public docketing.

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*

suggested in dictum that New York tax liens do not die after sixty days, as the Appellate Division had assumed. *Gleason II*, 47 N.Y.2d at 760–61, 391 N.E.2d at 294, 417 N.Y.S.2d at 459. Rather, the tax liens alone were enough to guarantee that the proceeds could be kept away from the junior secured party.

[271] *Gleason II*, 47 N.Y.2d at 760–61, 391 N.E.2d at 294, 417 N.Y.S.2d 458–59 (citing C.P.L.R. 5230(c)).

[272] Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 653 (2d Cir. 1979) ("[B]ut the order granting the attachment was never itself rendered void. It subsisted so that a new levy . . . could be made under it.").

[273] N.Y. C.P.L.R. 6214(a) (McKinney 2011).

[274] *Id.* § 5202(a)(1).

[275] *Id.* § 5202(a)(2).

Treacher's Fish & Chips, Inc. v. New York State Tax Commission,[276] 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 interference with the right of possession or use.[277] 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.[278] As applied to tax warrants, section 5202(a)(1) would authorize authority of a taxpayer business to continue to make ordinary course sales.[279]

There is, however, another solution to the problem of the ordinary course sale. According to Uniform Commercial Code ("UCC") section 2-403(2), "[a]ny 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."[280]

Entrusting is defined to include "acquiescence in retention of possession" of goods by the merchant.[281] The DTF, by virtue of its tax 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 ordinary 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

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[276] Arthur Treacher's Fish & Chips, Inc. v. N.Y. State Tax Comm'n, 69 A.D.2d 550, 554–55, 419 N.Y.S.2d 768, 772 (App. Div. 3d Dep't 1979).

[277] *Id.* at 553–55, 419 N.Y.S.2d at 771–73.

[278] C.P.L.R. 5202(a)(1).

[279] In contrast, I.R.C. section 6323(b)(3) makes clear that a federal tax lien:

> [w]ith respect to tangible personal property purchased 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 intends such purchase to (or knows such purchase will) hinder, evade, or defeat the collection of any tax under this title.

I.R.C. § 6323(b)(3) (2011).

[280] U.C.C. § 2-403(2) (2011).

[281] *Id.* § 2-403(3).

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.[282] The City obtains the usual lien upon docketing the tax warrant, but, unlike state liens, an "additional" lien pre-exists the tax warrant.[283] 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)."[284] And there is an additional rule that "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."[285] 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.[286] 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 act in good faith. It also must be true that the transferor must have "transferred in good faith."[287] Accordingly, the city might still defeat the rights of a bona fide purchaser because, unbeknownst to the purchaser, the transfer was in bad faith.

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[282] The New York City Administrative Code refers to "taxes imposed by the named subchapters." N.Y.C., N.Y., ADMIN. CODE § 11-683(1) (2010). "[N]amed subchapters" means subchapters 2–4. *Id.* at § 11-671(2)(a). These refer to taxes on general corporations, financial corporations, and transportation corporations. *See id.* §§ 11-602, 611, 662.

[283] *Id.* § 11-683(10)(a) (lien is "[i]n 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, 1053, 190 N.E.2d 240, 241, 239 N.Y.S.2d 880, 881 (1963). But this yields value to the state only if the taxpayer has some sort of claim against the state.

[284] ADMIN. § 11-683(10)(a).

[285] *Id.*

[286] *Id.*

[287] *Id.*

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.[288] 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 that ultimately 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."[289] 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.[290] 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.[291]

The taxpayer may obtain title to real property which is subject to a mortgage granted by the taxpayer's predecessor-in-interest.[292] In such a case, the city's lien attaches only to the equity.[293] This would appear to be so even where the mortgage is unrecorded. Indeed, unrecorded mortgages are good against ordinary judgment creditors;[294] the City is treated no differently.

A sentence exists in the City's Administrative Code with regard to

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[288] *Id.* This rule is modified with the words, "whether as a purchase money mortgage or otherwise." *Id.* 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. *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] Fed. Deposit Ins. Co. v. Malin, 802 F.2d 12, 20 (2d Cir. 1986) (citations omitted); United States v. Certain Lands Located in Hempstead, Nassau Cnty., N.Y., 41 F. Supp. 636, 637 (E.D.N.Y. 1941); Sullivan v. Corn Exch. Bank, 154 A.D. 292, 295, 139 N.Y.S. 97, 100 (App. Div. 2d Dep't 1912).

a senior mortgage or senior local tax lien.[295] If the City is 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.[296]

Both the tax warrant lien and the pre-warrant lien live for twenty years from the time the taxes are due.[297] This would appear to be a different rule from the state tax lien, which has at most a ten-year period from the time of docketing (not from the time when taxes are due).[298] Also, where real property has been transferred subject to the lien to a good faith purchaser, the City's tax lien lasts for only ten years.[299] These limitations are repealed if transfers are made in bad faith to avoid the taxes.[300] 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 one million or more."[301] 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.[302] The model law provides for an income tax lien upon docketing a warrant,[303] but it does not expressly authorize the expansion of the lien. With regard to municipal corporate taxes[304] and unincorporated business taxes, however, an improved lien is directly authorized.[305]

B. Bulk Sales

Sometimes, in circumstances where the DTF might issue a tax warrant, legislation gives a lien for sales tax supplemental to the

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[295] ADMIN. § 11-683(10)(a). Presumably the fifth sentence refers to senior mortgages. The language refers to "such mortgage." *Id.* Prior sentences refer to mortgages that are and are not senior to the city. *Id.* It seems hard to believe, however, that the city is submitting to foreclosure by a junior mortgage.

[296] *Id.*

[297] *Id.* § 11-683(10)(c).

[298] *See supra* text accompanying note 70.

[299] ADMIN. § 11-683(10)(c).

[300] *Id.*

[301] N.Y. GEN. CITY LAW § 25–a (McKinney 2011).

[302] *Id.*

[303] *Id.* § 83(4)

[304] *Id.* § 83(10)(a).

[305] *Id.* § 140(d).

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."[306]

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.[307] New York followed this recommendation in 2001,[308] so that Article 6 is no longer the law for ordinary creditors. If ordinary creditors wish to avoid a bulk sale today, they must show that the debtor intended to hinder, delay or defraud creditors,[309] and that the buyer was not a bona fide purchaser for value.[310] Nevertheless, the bulk sale concept lives on in New York's tax law.

The way Article 6 formerly worked was that bulk buyers had to require the seller to furnish a list of creditors.[311] The buyer had to send notice ten days in advance of the sale.[312] 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.[313] 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."[314] If the DTF notifies the buyer that sales taxes are due from the seller, or if the

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306 N.Y. TAX LAW § 1141(c) (McKinney 2011).

307 Steven L. Harris, *Article 6: The Process and the Product—An Introduction*, 41 ALA. L. REV. 549, 550–51 (1990).

308 2001 N.Y. Sess. Laws 960, 965.

309 N.Y. DEBT. & CRED. LAW § 276 (McKinney 2011).

310 *Id.* § 278. The Second Circuit elaborated on this noting that:

> 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 business, sold every chattel on the premises for whatever price the traffic would bear and then vanished from the scene, leaving his creditors empty-handed. Since the goods 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.2d 90, 92 (2d Cir. 1968) (citations omitted). Prior to 2001, aggrieved creditors routinely alleged a violation of fraudulent conveyance law *and* the bulk sales law. *See* FMI Forwarding Co. v. Union Transp. Corp., No. 00 B 41815(CB), 2005 WL 147298, at *4 (S.D.N.Y. Jan. 24, 2005).

311 U.C.C. § 6-104 (2010).

312 *Id.* § 6-105.

313 *Id.* § 6-106.

314 TAX § 1141(c); *see* N.Y. COMP. CODES R. & REGS. tit. 20, § 537.0(b)(1) (2011).

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."[315] The fact that a bulk sale is free and clear of a security interest does not, however, bring the bulk sale within the exception.[316]

A lien on the proceeds of a bulk sale exists irrespective of a tax warrant. In *Lady Bayard, Division of Bayard Shirt Co. v. Raymar*,[317] the buyer failed to give timely notice. Subsequently, a judgment creditor sought a turnover order aimed at the withheld purchase price of the bulk sale.[318] The court ruled that the DTF had priority over the judgment creditor because the DTF had levied pursuant to a tax warrant.[319] In fact, the DTF's priority properly existed even if no tax warrant or levy was pending at the time of the judgment creditor'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."[320]

Oddly, the buyer is made subject to an injunction. She may not transfer the purchase price to the seller if she has not notified the DTF of the sale.[321] Or, if she has notified the DTF, she may not convey the purchase price if the DTF notifies the purchaser that the seller owes the sales tax.[322] The DTF has ninety days to notify the purchaser of any sales tax debt.[323] Therefore, as a general proposition, bulk buyers must hold back payment for ninety days after the DTF is notified of the sale.[324]

What are the consequences of paying too early? The statute's

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[315] N.Y. COMP. CODES R. & REGS. tit. 20, § 537.1(a)(4)(i).

[316] N. Shore Cadillac-Oldsmobile, Inc. v. Tax Appeals Tribunal of the State of N.Y., 13 A.D.3d 994, 996–97, 787 N.Y.S.2d 463, 465 (App. Div. 3d Dep't 2004).

[317] Lady Bayard, Div. of Bayard Shirt Co. v. Raymar, 75 Misc. 2d 354, 347 N.Y.S.2d 764 (N.Y.C. Civ. Ct. 1973).

[318] *Id.* at 354, 347 N.Y.S.2d at 765.

[319] *Id.*

[320] TAX § 1141(c) (sales and compensating use tax).

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *See id.*

fourth sentence still indicates that the buyer is subject to the bulk sales provisions of the UCC.[325] Unhappily, as we have seen, these the state legislature repealed in 2001.[326] Section 1141(c)'s fourth sentence goes on to say that the buyer "shall be personally liable" for the seller's sales tax obligation.[327] So no tax lien arises against any property of the buyer.[328] Rather, the DTF will have to obtain a money judgment under the CPLR.[329] Or, alternatively, the fourth sentence of section 1141(a) indicates that "such liability may be assessed and enforced in the same manner as the liability for tax under this article."[330] Therefore a new tax warrant may issue against the buyer, and a lien will arise in the manner previously described.[331]

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."[332] This sentence gives the DTF the option of valuing the assets transferred if higher than the purchase price.[333] In *Myers v. State Tax Commission*,[334] a retired restaurateur bought the equipment and 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.[335] This the buyer challenged in an Article 78 proceeding.[336] The appellate court affirmed that the DTF could not

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[325] *Id.*; *see* N.Y. U.C.C. LAW § 6-102 (repealed 2001).

[326] 2001 N.Y. Laws 965.

[327] TAX § 1141(c). This liability includes interest or penalties due from the seller. *See* Lorenz v. Div. of Taxation of Dep't of Taxation and Fin. of the State of N.Y., 212 A.D.2d 992, 993, 623 N.Y.S.2d 455, 456 (App. Div. 4th Dep't 1995). The liability arises even if the buyer relied upon the seller's representation that no sales tax was owing. *See* Harcel Liquors, Inc. v. Evsam Parking, Inc., 48 N.Y.2d 503, 507, 399 N.E.2d 905, 907, 423 N.Y.S.2d 873, 875 (1979). For a case in which a bankruptcy court denied that Bankruptcy Code § 505 authorized disallowing the DTF's claim against a buyer of assets for unpaid sales and use tax, see In re Nash Printing, Inc., No. 10-71391-ast, 2012 Bankr. LEXIS 432 (Bankr. E.D.N.Y. Jan. 30, 2012).

[328] *See* TAX § 1141(c).

[329] *See* Hall v. N.Y. State Tax Comm'n, 108 A.D.2d 488, 489–90, 489 N.Y.S.2d 787, 789 (App. Div. 3d Dep't 1985).

[330] TAX § 1141(c).

[331] *See id.*

[332] *Id.*

[333] *See id.*

[334] Myers v. State Tax Comm'n, 101 A.D.2d 650, 650, 475 N.Y.S.2d 560, 561 (App. Div. 3d Dep't 1984).

[335] *Id.*

[336] *Id.* A proceeding under Article 78 can generally be brought to challenge whether the DTF's actions are lawful. *See* Hall v. N.Y. State Tax Comm'n, 108 A.D.2d 488, 489–90, 489 N.Y.S.2d 787, 789 (App. Div. 3d Dep't 1985). But this cannot occur until the state actually

collect more than the larger of either the price paid or the value of the assets in question.[337]

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.[338] The mystery is whether an unperfected secured party also prevails over the tax warrant.

Marine Midland Bank-Central v. Gleason[339] 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.[340] These created liens against the personal property of the debtor, pursuant to Tax Law section 1141(b) (sales and compensating use tax). After the docketing, a secured party filed a financing statement perfecting a security interest on the equipment.[341] The DTF levied the equipment by placing a padlock on the restaurant,[342] at a time when the security interest was perfected. Nevertheless, the DTF prevailed as to one of

tries to levy under a tax warrant. *See* Keslow v. State Tax Comm'n, 125 A.D.2d 294, 295, 508 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 1986).

[337] Where the price paid is assumption of debt, the price equates with the amount of the debt assumed. *See* Spandau v. United States, 73 N.Y.2d 832, 833–34, 534 N.E.2d 37, 38, 537 N.Y.S.2d 120, 121 (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. *Id.* Perhaps the deal would not have gone through if the buyer had followed the dictates of section 1141(c).

[338] IMFC Prof'l Servs., Inc. v. State, 59 A.D.2d 1047, 1048, 399 N.Y.S.2d 804, 805 (App. Div. 3d Dep't 1977).

[339] Marine Midland Bank-Cent. v. Gleason, (Gleason I), 62 A.D.2d 429, 405 N.Y.S.2d 334 (App. Div. 4th Dep't 1978), *aff'd*, 47 N.Y.2d 758, 391 N.E.2d 294, 417 N.Y.S.2d 458 (1979).

[340] *Id.* at 433, 405 N.Y.S.2d at 336.

[341] *Id.* at 434, 405 N.Y.S.2d at 337.

[342] *Id.* at 436, 405 N.Y.S.2d at 338; *see also* Marrano v. State, 80 Misc. 2d 768, 771, 364 N.Y.S.2d 751, 755 (N.Y. Ct. Cl. Feb. 7, 1975) (stating the state does not owe rent to the landlord when it padlocks premises to protect levied personal property).

its tax warrants.[343] Accordingly, the secured party's law firm was rendered guilty of malpractice for not perfecting the security interest in time.[344] Clearly, the tax lien arose when the tax warrant was docketed.[345] After 1985, however, the lien would have arisen only when the DTF filed notice with the department of state.[346]

The possibility of the DTF prevailing over an unperfected security interest presupposes that the New York tax lien is a judicial lien. New York UCC section 9-317 sets forth a compendium of persons capable of taking priority over a security interest.[347] If the DTF is not described there, then the unperfected security interest falls to the so-called Golden Rule of Article 9: "[e]xcept 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."[348]

Among those listed in section 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 that 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).[349] Also listed are buyers who give value and receive delivery without knowledge of the security interest, before it is perfected[350] and lessees of goods and licensees of general intangibles who take delivery without knowledge of the security interest, before it is perfected.[351]

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.

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[343] *Gleason I*, 62 A.D.2d at 437, 405 N.Y.S.2d at 339. Two of them had "died" before the DTF managed to levy. *See infra* text accompanying note 389.

[344] *Gleason I*, 62 A.D.2d at 437, 405 N.Y.S.2d at 338.

[345] *Id. Accord* York-Hoover Corp. v. United Casket Co. (*In re* United Casket Co.), 449 F. Supp. 261, 265 (E.D.N.Y. 1978), *aff'd*, 608 F.2d 1370, *cert. denied*, 444 U.S. 967 (1979).

[346] *See supra* text accompanying notes 192–97.

[347] N.Y. U.C.C. LAW § 9-317 (2011).

[348] *Id.* § 9-201.

[349] *Id.* § 9-317(a)(1).

[350] *Id.* § 9-317(b). Buyers who are also defined as secured parties are excluded from this protection and must win priority under section 9-322. According to section 9-102(a)(72)(D), these include buyers of "accounts, chattel paper, payment intangibles, or promissory notes." *Id.* § 9-102(a)(72)(D). Notice that since buyers of chattel paper are always secured parties, they can never benefit from the protection that section 9-317(b) purports to give them. A similar contradiction exists in section 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 secured parties. *Id.* § 9-317(d). But they are *always* secured parties and so they get no protection, unless section 9-322 provides for it.

[351] *Id.* § 9-317(b), (c).

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.[352]

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

> (A) [A] creditor that has acquired a lien on the property involved by attachment, levy, or the like;
>
> (B) an assignee for the benefit of creditors from the time of assignment;
>
> (C) a trustee in bankruptcy from the date of filing of the petition; or
>
> (D) a receiver in equity from the time of appointment.[353]

Obviously, if the DTF is a lien creditor for Article 9 purposes, it must have acquired its lien by "attachment, levy, or the like."[354] 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, liens arise when an execution is delivered to the sheriff[355] or when a turnover or receivership is procured.[356] 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.[357] Such a conclusion requires that a New York tax lien makes the DTF a lien creditor within the meaning of the UCC.[358] 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.[359]

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[352] *See infra* text accompanying notes 385–887.

[353] U.C.C. § 9-102(a)(52).

[354] *Id.* § 9-102(a)(52)(A).

[355] N.Y. C.P.L.R. 5202(a) (McKinney 2011).

[356] *Id.* § 5202(b).

[357] Colonia Ins. Co. v. PB & JB Cafe Ltd., No. 86 Civ. 7399, 1989 U.S. Dist. LEXIS 4513 (S.D.N.Y. April 24, 1989).

[358] *Id.* at *6 ("[s]o too, [the secured party's] interest is junior to New York's and the United States's [sic]. Since [the secured party'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 section 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.

[359] *See* 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*

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 New York UCC section 9-404(a):

> Unless an account debtor has made an enforceable agreement not to assert defenses or claims . . . the rights of an assignee are subject to:
>
> . . . .
>
> (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.[360]

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.[361] The fact that the state maintains the UCC index does not make perfection into the notification referred to in section 9-404(a)(2).[362]

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 one judgment creditor ("JC_1") dockets a judgment at one time ("t_1") and another judgment creditor ("JC_2") dockets at a second time ("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

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).

360 N.Y. U.C.C. LAW § 9-404(a) (McKinney 2011).

361 Cent. State Bank v. State, 73 Misc. 2d 128, 130, 341 N.Y.S.2d 322 (Ct. Cl. 1973).

362 Chase Manhattan Bank v. State, 40 N.Y.2d 590, 592, 357 N.E.2d 366, 368, 388 N.Y.S.2d 896, 898 (1976).

and JC_2.[363] 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.[364]

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.[365] 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 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 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 were just counseled to ignore), then the DTF can foreclose JC_1. CPLR 5236(c), however, requires a judgment creditor to submit to the sheriff a list of competing claimants to the real property, including JC_1.[366] Must the DTF submit this list to the sheriff? Or may the DTF send notice without implicating the sheriff, in satisfaction of CPLR 5236(c)? The answers to questions such as these have yet to be given by the courts.

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[363] N.Y. C.P.L.R. 5203(a) (McKinney 2011).
[364] Berlin v. United States, 535 F. Supp. 298, 301 (E.D.N.Y. 1982).
[365] C.P.L.R. 5236(g).
[366] *Id.* § 5236(c).

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.[367] 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 files with the secretary of state) and if the sheriff levies second pursuant 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 section 5239.[368] In such a proceeding, a court "may at any time, on its own initiative 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."[369] Presumably, 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 warrant is scant. In *Security Trust Co. v. West*,[370] sketchy facts are presented in the Appellate Division, Third Department's too-short opinion. Tax warrants had been issued against the taxpayer, who

[367] *Id.* § 5202.

[368] *Id.* § 5239 ("[A]ny interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt.").

[369] *Id.* § 5240.

[370] Sec. Trust Co. v. West, 120 A.D.2d 84, 507 N.Y.S.2d 546 (App. Div. 3d Dep't 1986), *app. denied*, 70 N.Y.2d 601, 512 N.E.2d 549, 518 N.Y.S.2d 1023 (1987).

owned a restaurant.[371] Presumably these warrants were docketed, though the court does not say so.[372] Thereafter, a judgment creditor ("*JC*") docketed a judgment against the taxpayer.[373] Apparently, the taxpayer did not own the real estate on which the restaurant was located.[374] 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 allow West to sell [it]."[375] The price included deferred payments from the buyer.[376] At the time of the sale, *JC* had served an execution to the sheriff.[377] 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.[378]

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.[379] 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.[380]

The buyer's consideration was a deferred payment (making the buyer what Article 9 calls an "account debtor"—the debtor of a debtor).[381] 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

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[371] *Id.* at 85, 507 N.Y.S.2d at 547.

[372] *Id.* ("Between October 1980 and July 1984, the Tax Commission filed five warrants . . . against respondent James West for failing to pay sales and income tax.").

[373] *Id.*

[374] *Id.*

[375] *Id.*

[376] *See id.* ("[T]he terms of sale provided for deferment of $15,000 of the purchase price.").

[377] *Id.*

[378] *Id.* at 86, 507 N.Y.S.2d at 547–48.

[379] N.Y. C.P.L.R. 5232(b) (McKinney 2011).

[380] *Id.* § 5202(a)(1).

[381] *See* N.Y. U.C.C. LAW § 9-102(a)(3) (2011) ("'Account debtor' means a person obligated on an account, chattel paper, or general intangible.").

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 the account debtor's obligation to pay the price.

If the DTF indeed had a lien on proceeds of the restaurant-related personal property, 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 in this case. If so, then the execution lien lapsed on October 16. In that case, the DTF clearly wins because JC's lien has lapsed.

We learn also that, "[o]n October 19, 1984, [*JC*] obtained an order directing [the buyer] to pay money owed to [the taxpayer] directly to [*JC*]."[382] If this refers to an order for the payment of a debt pursuant to CPLR section 5227, then *JC* obtains a lien only on October 19,[383] 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 ninety days.[384] 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 intangible payment.

Although it is quite unlikely *JC* had a lien equivalent to the tax liens, the court assumed the simultaneous attachment of the 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 owed 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.[385]

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

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[382] *West*, 120 A.D.2d at 85, 507 N.Y.S.2d at 547.
[383] *See* C.P.L.R. 5202, 5227.
[384] *Id.* § 5232.
[385] *West*, 120 A.D.2d at 86, 507 N.Y.S.2d at 547 (citations omitted).

priority.[386] But the doctrine does not apply when a creditor claims a "specific lien."[387] By virtue of the payment order, *JC did* have a specific lien. Ergo, the state's prerogative right cannot be invoked.[388] Nevertheless, the case 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 super priority 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.[389] 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.[390] A New York tax lien that arises from docketing a warrant is therefore senior to the federal lien if docketing occurs before the federal

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[386] Marshall v. New York, 254 U.S. 380, 384 (1920); *In re* Gruner, 295 N.Y. 510, 520, 68 N.E.2d 514, 520 (1946).

[387] *In re* Gruner, 295 N.Y. at 523, 68 N.E.2d at 521–22. According to the court in *In re Bloomfield*:

> At early common law, the Crown of Great Britain enjoyed a prerogative right over its subjects which entitled it to priority in the payment of the debts owed to it from the 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 a lien, before the sovereign sought to enforce its claim against the debtor.

In re Bloomfield, 53 N.Y.2d 118, 121, 423 N.E.2d 32, 34, 440 N.Y.S.2d 609, 611 (1981) (citations omitted).

[388] The principle of state law just described also exists at the federal level. 31 U.S.C. § 3713 (1982). This federal statute is of ancient lineage and was enacted shortly after the adoption of the United States Constitution. United States v. Estate of Romani, 523 U.S. 517, 524–26 (1998). In federal law, tax lien priorities, I.R.C. section 6323, trump 31 U.S.C. § 3713. *Romani*, 523 U.S. at 520–21, 534.

[389] Riverhead Estates Civic Ass'n v. Gobron, 206 Misc. 405, 406–07, 134 N.Y.S.2d 13, 15, 17 (Sup. Ct. Suffolk County 1954).

[390] I.R.C. § 6321 (2011). 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.

assessment.[391]

Until the IRS files notices in a statutorily designated office, the federal lien is unperfected against various transferees, including judgment creditors.[392] 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).[393] Other courts state that the DTF is no judgment creditor and therefore is junior even if its tax warrant is docketed before the IRS assessment.[394]

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 the IRS has assessed the tax before the tax warrant) and the DTF is senior to the judgment creditor if it has filed its tax warrant before the judgment creditor has obtained a lien. In *Lantner*, the court broke this circle by awarding victory to the DTF.[395] The judgment creditor was senior to the IRS and so was awarded the amount of its judgment.[396] But this amount was

[391] Dior v. Stephen Lion, Inc., No. 75 Civ. 5085, 1978 U.S. Dist. LEXIS 7088, at *5 (S.D.N.Y. Dec. 21, 1978). 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).

[392] I.R.C. § 6323(a) (2011).

[393] Corrigan v. U.S. Fire Ins. Co., 427 F. Supp. 940, 942 (S.D.N.Y. 1977); State Tax Comm'n v. Brooklyn Prop. Clerk of N.Y.C. Police Dep't, 1981 WL 141848, at *2 (Sup. Ct. Kings County May 6, 1980), *aff'd*, 87 A.D.2d 872, 450 N.Y.S.2d 757 (App. Div. 2d Dep't 1982). Although beyond the scope of this article, *Corrigan* was wrongly decided for a different reason. The case involved proceeds of a fire insurance policy. *Corrigan*, 427 F. Supp. at 941. 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, 868, 270 N.Y.S.2d 38, 39 (App. Div. 2d Dep't 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 of New York, 89 Misc. 2d 864, 867, 392 N.Y.S.2d 976, 978–79 (Ct. Cl. 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. *Corrigan*, 427 F. Supp. at 943.

[394] *See, e.g.*, Rheingold Breweries, Inc. v. Lantner, 100 Misc. 2d 897, 899–900, 420 N.Y.S.2d 582, 583–84 (Civ. Ct. New York County 1978); State Tax Comm'n v. Union Gen. Corp., 208 Misc. 133, 135, 144 N.Y.S.2d 75, 78 (Sup. Ct. New York County 1955). In *Marine Midland Bank-Central v. Gleason*, the court assumed that a federal tax outranked the DTF's lien. Marine Midland Bank-Cent. v. Gleason, 62 A.D.2d 429, 435, 405 N.Y.S.2d 334, 337 (App. Div. 4th Dep't 1978), *aff'd*, 47 N.Y.2d 758, 417 N.Y.S.2d 458, 391 N.E.2d 294 (1979). In the case of two warrants, the DTF lien was thought to have "died," while the third DTF tax lien was docketed after the IRS filed the proper perfecting notices. *Id.* at 436–37, 405 N.Y.S.2d at 338. So the court never reached the status of the DTF as a judgment creditor, within the meaning of IRC section 6323(a).

[395] *Lantner*, 100 Misc. 2d at 899–901, 420 N.Y.S.2d at 584.

[396] *Id.* at 898–900, 420 N.Y.S.2d at 583–84.

withheld from the judgment creditor and paid to the DTF instead.[397] 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. UCC provisions spell 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 difficulty 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 creditor's 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.[398] Accordingly, when the damage occurs, the mortgage lender is deemed to have an equitable lien on the proceeds of the insurance.[399] This too can be seen as priority-preserving in the case of multiple liens.

When applying these thoughts to New York tax warrants, the first impression of the result in *Long Island Insurance Co. v. S & L Delicatessen*[400] is defensible. In this case, the DTF had docketed a tax warrant against a taxpayer who had insured real property.[401] Docketing the tax warrant creates a lien on the real property.[402] Thereafter, the IRS obtained a perfected federal lien. Fire ensued,

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397 *Id.*

398 *Nor-Shire*, 25 A.D.2d at 868, 270 N.Y.S.2d at 39.

399 *Id.*

400 Long Island Ins. Co. v. S & L Delicatessen, 102 Misc. 2d 853, 424 N.Y.S.2d 849 (Sup. Ct. Kings County 1980).

401 *Id.* at 854–55, 424 N.Y.S.2d at 850.

402 *Id.*

and insurance proceeds were generated.[403]

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.[404] 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.[405] The IRS further insisted that, in cases of simultaneous liens, the IRS prevails as a matter of federal law.[406]

The *S & L* court held for the DTF.[407] 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).[408] Although it did not quite absolutely refute the concept that the IRS and the DTF had simultaneous liens, the rationale we have set forth (the landowner acted as agent of the DTF) certainly suffices to explain the result.[409]

F. Effect on Account Debtors

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

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[403] *Id.*

[404] *Id.* at 855, 424 N.Y.S.2d at 851.

[405] *Id.*

[406] This questionable position was later adopted by the United States Supreme Court in *United States v. McDermott*. United States v. McDermott, 507 U.S. 477 (1993). For criticism, see Carlson, *Pt. 1*, *supra* note 1, at 1401–04.

[407] *Long Island Ins. Co.*, 102 Misc. 2d at 857, 424 N.Y.S.2d at 852.

[408] *Id.* at 855–56, 424 N.Y.S.2d at 851.

[409] The *S & L* court relied on *Fischer-Hansen v. Brooklyn Heights R.R.*, which at best provides shaky support. Fischer-Hansen v. Brooklyn Heights R.R., 173 N.Y. 492, 66 N.E. 395 (1903). In *Fischer-Hansen*, an attorney had a statutory lien on a cause of action. *Id.* at 500–01, 66 N.E. at 397. 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. *Id.* at 499, 66 N.E. at 397. The court ruled that clients have the right to settle cases in good faith, in spite of the statutory attorney's lien. *Id.* at 500–01, 66 N.E. at 397. 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. *Id.* In the course of so deciding, the court remarked:

> [T]he 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.

Id. 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*.[410] In this case, the taxpayer owed sales tax and the DTF had a tax lien on all of the taxpayer's personal property.[411] One of these properties was a judgment against an account debtor ("*AD1*").[412] Pursuant to that judgment, the taxpayer served an execution on the sheriff, who garnished a bank ("*AD2*"), who paid the sheriff, who paid *AD1*.[413] The DTF then sought to have *AD2* pay again.[414] Properly, *AD2* was protected by CPLR section 5209, which provides: "[a] person who, pursuant to an execution . . . pays . . . to . . . a sheriff . . . money . . . in which a judgment debtor has . . . an interest . . . is discharged from his obligation to the judgment debtor to the extent of the payment . . . ."[415]

Accordingly, *AD2* no longer owed money to *AD1* 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 *AD1*'s checking account.[416] Therefore, there was no valid levy.[417] Such reasoning, however, is defective. It invited the DTF to levy once again, this time with an adequate description. The true rationale is that *AD2* had extinguished its obligation to *AD1* by paying the sheriff. It follows that *AD1* 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"

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[410] State Tax Comm'n v. Blanchard Mgmt. Corp., 91 A.D.2d 501, 456 N.Y.S.2d 364 (App. Div. 1st Dep't 1982).

[411] *Id.* at 501, 456 N.Y.S.2d at 365.

[412] *Id.*

[413] *Id.* at 502, 456 N.Y.S.2d at 365.

[414] *Id.*

[415] N.Y. C.P.L.R. 5209 (McKinney 2011).

[416] *Blanchard*, 91 A.D.2d at 502, 456 N.Y.S.2d at 366.

[417] *Id.*

is a transferee who takes title in a voluntary conveyance.[418] 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.*,[419] the taxpayer assigned to a secured party ("*SP*") its contingent right to a refund from the state comptroller if the judgment debtor ("*JD*") chose to cancel its liquor license. The taxpayer did cancel its license, so that the comptroller had a fixed obligation to pay.[420] The city of New York then filed a tax warrant against the taxpayer.[421] Only thereafter did the State Liquor Authority advise the comptroller that the refund was due and owing.[422] The *Bedford* court remarked, "[h]ence the refund did not come into existence until that date."[423]

Did the obligation to refund not 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.[424] But contingent debts are contingent property,[425] and this can be encumbered by judicial liens.[426] 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.[427] Nevertheless, *JC* prevailed.[428] As a result, New York law seems to

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[418] I.R.C. § 6323(h)(6) (2011).

[419] City of New York v. Bedford Bar & Grill, Inc., 285 A.D. 1202, 1202, 140 N.Y.S.2d 762, 763 (App. Div. 3d Dep't 1955).

[420] *Id.* at 1202–03, 140 N.Y.S.2d at 763.

[421] *Id.* at 1203, 140 N.Y.S.2d at 763.

[422] *Id.*

[423] *Id.*

[424] According to CPLR 5201(a), "[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 . . . ." N.Y. C.P.L.R. 5201(a) (McKinney 2011).

[425] According to CPLR 5201(b), "[a] money judgment may be enforced against 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 . . . ." *Id.* § 5201(b).

[426] ABKCO Indus., Inc. v. Apple Films, Inc., 39 N.Y.2d 670, 674–75, 350 N.E.2d 899, 902, 385 N.Y.S.2d 511, 513 (1976).

[427] Eisenberg v. Mercer Hicks Corp., 199 Misc. 52, 54, 101 N.Y.S.2d 662, 665 (Sup. Ct. New York County 1950), *aff'd mem.*, 278 A.D. 806, 104 N.Y.S.2d 806 (App. Div. 1st Dep't 1951).

[428] For scathing criticism, see 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 7.12, 12.9 (1965).

permit tax liens to attach to constructive trusts.[429]

H. Versus the Bankruptcy Trustee

The federal tax lien arises upon assessment,[430] 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")[431] and perhaps also under Bankruptcy Code section 545(2), which applies to "statutory liens."[432]

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,[433] 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,[434] the 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.[435] 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.[436] 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 section 545(2), the trustee may have an avoidance theory, although the matter has become unclear. According to

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[429] SEC v. Levine, 881 F.2d 1165, 1174 (2d Cir. 1989) (holding that IRS lien could attach to property held in trust for cheated investors).

[430] 28 U.S.C. § 6321 (2010).

[431] 11 U.S.C. § 544(a)(1) (2011); United States v. LMS Holding Co., 50 F.3d 1526, 1527 (10th Cir. 1995).

[432] *See infra* text accompanying notes 437–40; 11 U.S.C. § 545(2) (2010).

[433] *See supra* text accompanying notes 418–29.

[434] 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." N.Y. TAW LAW § 692(f) (McKinney 2011) (personal income tax); § 1141(b) (sales and use tax); N.Y.C., N.Y., ADMIN. CODE § 11-683(6) (2010).

[435] N.Y. C.P.L.R. 5234(b) (McKinney 2011).

[436] *Id.* § 5234(c). *See generally* Carlson, *Pt. 2*, *supra* note 1, at 169–70 (analyzing execution liens under 11 U.S.C § 547(e)(2)(b)).

section 545:

> The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien
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> . . . .
>
> (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*.[437]

The emphasized words were added by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and they are profoundly mystifying.[438] At least one court reads these words to mean that section 545(2) can no longer be used against an unperfected federal tax lien.[439] Such a reading is not implausible, but since the trustee also prevails as a hypothetical lien creditor under section 544(a)(1), this "de-fanging" of section 545(2) is unimportant.

For the record, at least before BAPCPA, the trustee could argue that a docketed tax warrant could be defeated by even bad faith purchasers (before a levy)[440] or good faith purchasers (after a levy).[441] 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 or local law."[442] Or, to be more precise, the CPLR gives rights to "transferees,"[443] but this phrase includes

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[437] 11 U.S.C. § 545 (emphasis added). "[S]tatutory lien" is defined as:

> [A] lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include security interest 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).

[438] The legislative history simply deepens the mystery, according to which the amendment "prevents the avoidance of unperfected liens against a bona fide purchaser, if the purchaser qualifies as such under section 6323 of the Internal Revenue Code or a similar provision under state or local law." H.R. REP. NO. 109-31, pt. 1, at 102 (2005).

[439] *In re* Krummel, 427 B.R. 711, 714 (Bankr. W.D. Ark. 2010).

[440] C.P.L.R. 5202(a)(1).

[441] *Id.* § 5202(a)(2).

[442] 11 U.S.C. § 545(2).

[443] C.P.L.R. 5202(a)(1)–(2).

both voluntary and involuntary transferees.[444]

Even if the DTF survives these theories, the DTF faces more problems pursuant to Bankruptcy Code section 724(b)(2), which subordinates tax liens to unsecured priority claims in a bankruptcy.[445] This subordination rule relates back to the Bankruptcy Act of 1898[446] 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 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.[447] However, early cases proclaim section 724(b)(2) to be a Chapter 7 rule not applicable in Chapter 11 cases.[448] The notorious BAPCPA may have intended to change this assumption. Bankruptcy Code section 724(b) now reads that tax liens are subordinated to administrative expenses,[449] "except that such expenses under each such section, 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 this chapter and shall not include expenses incurred under chapter 11 of this title."[450] This provision does not quite function, in that chapter eleven still sets a creditor's minimum entitlement to what the creditor would receive in a hypothetical liquidation.[451] This minimal test means that the tax lien could face a reduction in a Chapter 11 case.

More helpful to tax collectors is new section 724(e), which provides:

> Before subordinating a tax lien on real or personal property

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

[445] 11 U.S.C. § 724(b)(2). *See, e.g.*, United States v. Herzog (*In re* Thriftway Auto Rental Corp.), 457 F.2d 409, 412 (2d Cir. 1972) (docketing a city's tax warrant against bankrupt for certain unpaid taxes created a lien).

[446] *See* Pearlstein v. U.S. Small Bus. Admin., 719 F.2d 1169, 1174 (D.C. Cir. 1983) (explaining that the amendment to the Chandler Act did not cure the defects in the Bankruptcy Act of 1898).

[447] 11 U.S.C. § 1129(a)(7)(A).

[448] *See In re* By-Rite Oil Co., 87 B.R. 905, 920 (Bankr. E.D. Mich. 1988); *In re* Roamer Linen Supply, Inc., 30 B.R. 932, 934 (Bankr. S.D.N.Y. 1983).

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

[450] *Id.*

[451] *Id.* § 1129(a)(7)(A)(ii).

> of the estate, the trustee shall—
> (1) exhaust the unencumbered assets of the estate; and
> (2) in a manner consistent with section 506(c), recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving or disposing of such property.[452]

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 seven, and so the DTF may find itself financing a chapter seven 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.[453] Today, even where a taxing authority has levied, the trustee may obtain a turnover and impose subordination on the hapless taxing authority.[454]

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."[455] An ad valorem tax is a tax on the value of property that is not an excise tax.[456] The most common is local real property taxes. This exception will not aid the DTF, however, because none of the taxes for which a warrant issues is an ad valorem tax. New York Constitution article sixteen, section three, specifically prohibits these kinds of taxes on intangibles to assure people that they can safely keep their stocks and bonds with trust companies and brokers in New York.[457]

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 seven liquidations.[458] Furthermore, they are typically non-dischargeable (if not stale).[459] In Chapter 13 cases, priority claims (including tax claims) must be paid in full over the life of the

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[452] *Id.* § 724(e).

[453] *See* City of New York v. Hall, 139 F.2d 935, 936 (2d Cir. 1944).

[454] United States v. Whiting Pools, Inc., 462 U.S. 198, 209 (1983).

[455] 11 U.S.C. § 724(b). This exception is partially repealed by section 724(f), which invites the trustee to subordinate ad valorem tax liens for wages and pension claims. *Id.* § 724(f).

[456] N.Y. CONST. art., 16 § 3 (McKinney 2011) (distinguishing between ad valorem and excise taxes).

[457] According to article sixteen, section three, "[i]ntangible 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 therefrom may be taken into consideration in computing any excise tax measured by income generally." *Id.*

[458] 11 U.S.C. §§ 507(a)(8), 726(a)(1).

[459] *Id.* § 523(a)(1)(A).

plan.[460] These entitlements should mitigate somewhat the loss of the tax lien, though they will do no good in corporate liquidation cases, where the taxpayer does not continue in business.

VI. 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.

[460] *Id.* § 1322(a)(2).