

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF SOUTH DAKOTA**

**ROOM 211**

**FEDERAL BUILDING AND U.S. POST OFFICE**

**225 SOUTH PIERRE STREET**

**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**  
**BANKRUPTCY JUDGE**

**TELEPHONE (605) 224-0560**

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September 30, 1988

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Re: Ronald F. Honstein  
Chapter 13 88-30027

Dear Counsel:

On June 6, 1988 the Debtor filed a motion requesting an order satisfying judgments and liens of record. Accompanying the motion was a notice of proposed sale of property free and clear of liens. Listed in the motion are I.R.S. claims for \$23,302.28, \$203.93, \$1,756.53, and \$14,025.75. Appended to the motion are copies of three documents entitled "Notice of Tax Lien" filed by the United States on behalf of the three smaller claims. Also appended is a document entitled "Certificate of Discharge of Property from Federal Tax Lien" which discharges the lien for the largest claim against certain described property, but purports to continue the lien against other property of the debtor to which the encumbrance attached. The property described in the certificate is not that described in the notice of proposed sale.

On July 5, 1988 a hearing was held regarding the notice and motion. Pursuant to the disposition of this hearing an order was entered July 18, 1988 approving the sale of certain described land, and providing that the net proceeds of the sale shall be held in escrow with the Clerk of this Court "pending final determination as to the attachment and priority of liens by this Court-" The described land apparently is the Debtors homestead. An additional Order was entered the same day satisfying judgments and liens of record on behalf of which no objections were entered.

The issue preserved in the order approving sale is whether an I.R.S. lien for delinquent taxes may attach to sale proceeds of property classified under south Dakota state law as a homestead exempt from certain process. Counsel for the respective parties have submitted briefs in support of their respective positions.

The Debtor initially points out that South Dakota has opted out of the Federal Bankruptcy exemptions, and correctly concludes therefore that South Dakota homestead law applies-Because a homestead is absolutely exempt under state law, he concludes no federal lien may attach. See S.D.C.L. 43-45-3-This argument overlooks the fact that while state law governs the Debtor's interest in property, [f]ederal law governs what is exempt from federal levy." United States v. Mitchell, 91 S.Ct. 1763, 1771 (1971).

Section 6334 of the Internal Revenue Code (Title 26 U.S.C.S.) exempts from levy all property enumerated in subsection (a) of that statute. That subsection does not refer to a homestead. Subsection C of the statute provides: "Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." This language has not materially changed since 1971 when Justice Blackmun interpreted the subsection on behalf of a unanimous court as follows: "This language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law." Mitchell, 91 S.Ct. at 1771.

Mitchell did not concern a taxpayers homestead exemption. However, the Supreme Court subsequently held that Section 6334(c) allows the I.R.S. to foreclose over the homestead rights of a delinquent taxpayer. United States v. Rogers, 103 S.Ct. 2132, 2146 (1983). The Court relied on the Supremacy Clause for providing "the underpinning for the Federal Government's right to sweep aside state created exemptions...." Id.

Prior to Rogers the Eighth Circuit explained that the federal levying statute was "the 'supreme law of the land' in relation to state exemption statutes" and that the federal government's ability to collect taxes prevailed over "any rights of the state to exempt its citizens from federal taxing power." Herndon v. United States, 501 F.2d 1219, 1223 (1974). The Court allowed only those exemptions provided for in Section 6334(a). The Eighth Circuit's position in Herndon was stated fourteen years earlier in United States v. Heasley, 283 F.2d 422, 427 (1960), and has been subsequently reaffirmed in United States v. Pilla, 711 F.2d 94 (1983), which interprets Rogers.

The South Dakota Supreme Court itself has recognized the ineffectiveness of the state exemption laws against I.R.S. collection efforts. Judge Wollman authored an opinion for the State Supreme Court acknowledging "that the Internal Revenue Service need not recognize homestead exemptions." First Nat. Bank of Beresford v. Anderson, 332 N.W.2d 723, 725 (S.D. 1983) (citing, ~ Mitchell; Herndon.)

In closing I note that Rogers overrules, and the Eighth Circuit via Herndon had previously rejected, authority which drew a distinction between homesteads which under state law were merely a privilege of exemption, and those homesteads which under local law constituted a present property right. See Rogers, 103 S.Ct. at

2146; Herndon, 501 F.2d at 1222-23. These rejected cases allowed the I.R.S. to foreclose against a delinquent taxpayer's interest in the former instance, but not in the latter. The rejection of these cases by the two controlling courts renders any such classification of the nature of the Debtor's homestead exemption under South Dakota law irrelevant.

Based upon the foregoing, I have concluded that an I.R.S. lien for delinquent taxes may attach to sale proceeds of property classified under South Dakota state law as a homestead.<sup>1</sup>

This opinion shall constitute findings of fact and conclusions of law in this matter. The attorney for the I.R.S. shall propose an appropriate order, and any supplemental findings and conclusions it wishes.

This matter constitutes a core proceeding under 28 U.S.C. Section 157(b) (2).

Very truly yours,

Irvin N. Hoyt  
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

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<sup>1</sup> The validity or perfection of the I.R.S. liens is not otherwise presently in dispute. There has been no issue raised as to the rights in the homestead of any person other than the Debtor.