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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Central Division

(25)

COUNTER COPY - DO NOT REMOVE - [redacted]

In re	:	
ATLAS DIRTY DEVIL MINING COMPANY,	:	Bankruptcy No. B-79-00327
Debtor.	:	
INGERSOLL-RAND FINANCIAL CORPORATION,	:	
Plaintiff,	:	
vs.	:	MEMORANDUM DECISION AND ORDER
JOHN HYLAND, ATLAS DIRTY DEVIL MINING COMPANY, MARINE MIDLAND BANK, WAYNE COUNTY, KENNETH REES, FARRELL CHAPPELL and HAROLD EKKER, WAYNE COUNTY COMMISSIONERS, and NAD RASMUSSEN, WAYNE COUNTY ASSESSOR,	:	
Defendants.	:	

William Thomas Thurman representing the plaintiff Ingersoll-Rand Financial Corporation. Tex R. Olsen representing the defendants Wayne County, Wayne County Commissioners and Wayne County Assessor.

This case concerns the effect of an assessment of taxes on personal property in possession of the debtor, made subsequent to the filing of a Chapter XI petition. Also at issue is the right, under Utah law, of Wayne County to receive payment for personal property taxes from the proceeds of the personal property against which the taxes were assessed. These issues arise in the following context.

On or about December 19, 1978, Ingersoll-Rand Financial Corporation (Ingersoll-Rand) entered into a lease agreement with the debtor, Atlas Dirty Devil Mining (Atlas), under which certain mining equipment was leased to the debtor. Although under the terms of the lease Ingersoll-Rand remained the owner of all of the leased equipment, it filed a financing statement covering the equipment with the Secretary of State

of Utah on December 20, 1978, presumably to protect its interest in the event its status as owner-lessor was challenged.

Atlas filed a Chapter XI petition on March 22, 1979. Upon the filing of this petition, the automatic stay of Rule 11-44, Fed.R. Bankr.P., came into effect. On April 11, 1979, the Wayne County Assessor assessed for the 1979 tax year the personal property covered by the lease and attached a notice of assessment to the equipment. On or about June 26, 1979, pursuant to a stipulation made between Atlas, Intersoll-Rand and Marine Midland Bank, this Court entered an Order lifting the stay of Rule 11-44, Fed.R. Bankr.P. The Order of the Court, which incorporated the terms of the stipulation between the parties, surrendered the property to Ingersoll-Rand allowing it to sell the equipment in a commercially reasonable manner. By terms of the stipulation, and hence the order, the proceeds were to be divided according to an agreement among the three parties. The Wayne County Assessor was not included in the stipulation nor was his claim mentioned in the settlement.

On or about June 26, 1979, Ingersoll-Rand took possession of the property in question pursuant to the Order of the Court. When Ingersoll-Rand attempted to remove the equipment, the Wayne County officials advised Ingersoll-Rand of its claim to the property and refused to release the equipment until approximately $16,000.00 in taxes were paid to the County. Ingersoll-Rand subsequently took possession of all of the property with the exception of one piece of equipment left to secure the payment of the taxes, if due. On July 13, 1979, a bond was posted by Ingersoll-Rand with the Wayne County officials to cover any tax liability, at which time the remaining piece of equipment was released.

On July 9, 1979, Ingersoll-Rand moved to add Wayne County, the Wayne County Commissioners, and the Wayne County Assessor as additional party defendants, then amended its

complaint to ask for a determination of the invalidity of the tax lien, damages occasioned by the wrongful detention of the equipment, and an order holding the added parties in contempt for violation of the automatic stay of Rule 11-44, Fed.R. Bankr.P. The answer, in denying the basis for relief, asked for a determination of the validity of the lien on the equipment until such time as the tax was paid. The case was submitted to the Court on stipulated facts and after oral argument.

Although some argument was made in Ingersoll-Rand's brief concerning its rights in the event the Court determined the lease not to be a true lease but in the nature of a security instrument, as no contention of that kind was made by the defendant, the Court need not reach this issue and will take the document, as written, to be a lease. Under the lease, then, Ingersoll-Rand remained the owner of the equipment, and Atlas held only the rights of a lessee.

The initial issue concerns the effect of a post-petition assessment of taxes on personal property in possession of the debtor. This issue must be confronted first in the context of whether the automatic stay of Rule 11-44, Fed.R. Bankr.P., was violated by either the assessment of the taxes in April or the seizure of the property in June as such a determination will affect the validity of the claimed tax lien.

Rule 11-44(a), Fed.R. Bankr.P., states that the filing of a Chapter XI petition shall act as a

> stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate. (Emphasis added.)

Ingersoll-Rand claims that the assessment of taxes is stayed by terms of this rule, for it constitutes a "proceeding against

the debtor . . . to enforce any lien against his property." Although not specifically raised, argument can also be made that an assessment of taxes is stayed as an "act . . . to enforce [a] lien" against the property of the debtor.

The notes to Rule 11-44, Fed.R. Bankr.P., by the Advisory Committee, which drafted much of the Rules as enacted, illuminate the intended interpretation of "other proceeding[s]":

> The reference to a stay of other proceedings against the debtor is to signify the inclusion of a pending arbitration proceeding within the scope of the automatic stay.

With this clarification, it appears that the phrase "other proceeding" was designed to include specifically arbitration proceedings or other formal proceedings akin to them. The assessment of taxes against personal property is not this kind of formal proceeding. Rather, it is an act to establish the amount of taxes due from the previous year and to insure the right of collection. The taxes, when assessed, relate back for purposes of lien creation to the beginning of the year in which assessed. See UTAH CODE ANN. §59-10-2 (1974). The assessment is analogous to the filing of a financing statement subsequent to the filing of bankruptcy when, under UTAH CODE §70A-9-304 (Supp. 1979), such filing perfects an interest relating back to the time the interest attached. Neither action violates the automatic stay of Rule 11-44, Fed.R. Bankr.P.

Neither can an assessment of taxes be considered an "act . . . to enforce [a] lien" against the debtor's property which is stayed by Rule 11-44, Fed.R. Bankr.P. As will be discussed later, no lien arises on the property assessed from the mere act of assessment. Rather, assessment creates only a right of enforcement against the owner of the property, who, in this case, is Ingersoll-Rand and not the debtor being protected by the stay. Therefore, the act of assessment was neither the enforcement nor the creation of a lien on the

debtor's property.

The evidence submitted shows that the tax assessment must be made by April 15th of the year following the year for which the assessment is being made, or the opportunity for a possible enforcement of the taxes is lost by statute. See UTAH CODE ANN. §59-5-4 (1974). In other words, if taxes are not assessed by that date, they can never be collected. It is helpful to note that under the new Bankruptcy Code, by terms of 11 U.S.C. §362(b)(8), the issuance of a notice of tax deficiency by a governmental unit to a debtor is specifically excepted from the terms of the automatic stay. This provision appears to track former law. The cases cited by Ingersoll-Rand deal not with the effect of Rule 11-44, Fed.R. Bankr.P., on an assessment of taxes, but with its effect on tax sales of property owned by the debtor, which the rule clearly stays. See Dayton v. Standard, 241 U.S. 588 (1916); In re Munsen 11 F. Supp. 564 (1935). Since no cases have been cited to the contrary and the evidence available supports a finding that the assessment was not stayed by operation of Rule 11-44, Fed.R. Bankr.P., the assessment was validly made.

When the seizure of the personal property was effected by the Wayne County officials, the automatic stay had been lifted by the Court's Order of June 26, 1979, in order to allow the owner of the property, Ingersoll-Rand, to sell it in satisfaction of its claim on the property. Although Atlas, by terms of the Order, might still claim an interest in surplus proceeds from the sale, this interest was more in the nature of an accounting required of Ingersoll-Rand and not a retention of the property within the estate.

Ingersoll-Rand, as the owner of the property, was pursuant to UTAH CODE ANN. §59-5-12 (1974), the party liable for the tax. As UTAH CODE ANN. §59-5-4 (Supp. 1979) speaks of assessing personal property taxes "to the person owned, or in whose possession or control it was", some argument can

be made that assessment should not be made on the owner, Ingersoll-Rand, but on the possessor, Atlas. The mandatory language of UTAH CODE §59-5-12 (1974), requiring assessment to be made in the name of the owner, if known, and current Utah case law, however, reinforce the Court's conclusion that the owner is the one against whom assessment must be made and who is liable for the tax, with the possessor being assessed only if the owner cannot be ascertained. See Tintic Undine Mining Co. v. Ercanback, 93 Utah 561, 74 P.2d 1184 (1938); Home Owner's Loan Corporation v. Dudley, 105 Utah 208, 141 P.2d 160 (1943). Although Ingersoll-Rand complains that it should not be liable for the tax as it did not use the property within the state, and taxation in this instance is based on use, this complaint is without substance. The presence of the property within the state establishes the basis for taxation, not the presence of or use by the owner. See generally Crystal Car Line v. State Tax Commission, 110 Utah 426, 174 P.2d 984 (1946). When the Wayne County officials executed on the property, therefore, they did so against Ingersoll-Rand, the owner and the one then entitiled to possession. At that time, the debtor no longer held either an ownership or a possessory interest in the property. Thus, the Wayne County officials did not violate the automatic stay of Rule 11-44, Fed.R. Bankr.P., and are not in contempt of this Court. Further, as the claims of Wayne County were not considered nor included in the stipulation upon which the Order for the lifting of the stay was based, it did not prevent the Wayne County officials from taking the action they did.

Once both issues concerning the violation of the automatic stay are resolved in favor of the Wayne County officials, it becomes clear that any lien acquired by the County is valid. The priority to be granted that lien has been clearly settled by state law. In Union Cent. Life Ins. Co. v. Black et al., 247 P.2d 486, 489 (Utah 1926), the Supreme Court of the State

of Utah held that a lien created by assessment of personal property tax is, by terms of the governing statute, "superior to any liens past or present created by the acts of private parties." Thus, the lien of Wayne County must be accorded absolute priority over all other consensual claims to the property to which it attaches.

There is some question, however, as to whether this superior lien attaches only to the owner's real property or whether it attaches to the personal property assessed as well. UTAH CODE ANN. §59-10-1 (1974) states:

> Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all personal property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.

UTAH CODE ANN. §59-10-2 (1974) states, however: "Every current tax upon personal property is a lien upon the real property of the owner thereof . . ."

Ingersoll-Rand contends that in Taylor Motor Car Company v. Salt Lake County, 74 Utah 594, 281 P. 49 (1929), and Crystal Car Line v. State Tax Commission, supra, the Utah Supreme Court held that these statutes create only a lien on the real property of the owner of the personal property assessed, and not a lien on the personal property itself. A careful study of these cases and the applicable statutes, however, shows otherwise.

UTAH CODE ANN. §59-10-4 (1974) gives several options for the collection of personal property tax due. The tax collector may either list the lien with the real property of the owner, collect the taxes, or obtain a bond. By terms of UTAH CODE ANN. §59-10-2 (1974), the personal property tax assessed becomes an automatic lien on the real property of the owner if listed with the real property in accordance with the law. If payment cannot be secured by the three options given in section 59-10-4, the tax collector is

allowed, by terms of UTAH CODE ANN. §59-10-5 (1974), to seize the personal property of the owner and sell it in accordance with the statute for the amount due.

In Taylor Motor Car Company v. Salt Lake County, supra, personal property tax was assessed against the owner of an automobile. The owner sold the automobile without first paying the tax. The tax collector then went after the purchaser, demanding payment of the tax or turnover of the automobile. The Court held that the assessment of the tax became a lien on the real property of the owner, but not on the personal property assessed. It did not say, however, that the tax could never become a lien on the personal property, but only that in those circumstances it did not.

According to the statute, personal property tax is assessed against the owner. By terms of section 59-10-2 (1974), it becomes a lien on the owner's real property when properly listed. UTAH CODE ANN. §59-10-1 (1974) also gives the assessment of taxes the effect of a personal judgment against the owner. As such, when the personal property against which the tax was assessed is transferred, the liablilty for the tax does not follow the property, but remains the liablility of the owner against whom it was assessed. Therefore, the only way to collect the tax from the property assessed is, as with a personal judgment, to seize and sell it in accordance with the provision of UTAH CODE ANN. §59-10-5 (1974) while it is still owned by the person against whom the tax is assessed. Only then does a lien for the tax attach to the personal property.

This interpretation is supported by a statement made in Crystal Car Line v. State Tax Commission, supra. There, the Utah Supreme Court, in reaffirming its holding in Taylor, stated:

> [The statute] expressly provides that every tax has the effect of a judgment against the person, which indicated that every tax should be collected by the same means, in the same manner and within the same time as a judgment, unless otherwise expressly provided. This chapter expressly provides for collection of a tax against personal property, in a summary proceeding through seizure and sale of the personal property of the delinquent. Id at 991. (Emphasis added.)

The Utah Court specifically recognized the opportunity available to the tax collector to obtain payment for the tax assessed out of the personal property of the owner by seizing and selling the property. If, as in Taylor Motor Car Company, the property is not seized while owned by the liable person, no lien can be claimed on the property.

In the case before the Court, the Wayne County officials seized the property subsequent to the lifting of the stay, refusing possession to the owner against whom the tax was assessed. As a result, the tax due became a lien on the personal property as of that time, and the lien remains until the taxes are paid or the property is sold for payment. Therefore, the issuance of the bond for release of the property subjects it to the tax claims of Wayne County.

Finally, Ingersoll-Rand argues that Wayne County's remedy is to file a proof of claim under Rule 11-33, Fed.R. Bankr.P., for payment out of the estate. Although under Rule 11-33, "the court may . . . permit the filing of a proof of claim" for taxes owing at the time of the filing in bankruptcy, but assessed afterwards, this does not afford an exclusive remedy for the taxing authority, but merely an alternative. In any case, as the taxes here were not assessed against the debtor, but against Ingersoll-Rand, Wayne County would presumably have no right to make a claim on the estate under this rule. Atlas is liable for the taxes only by virtue of the lease agreement executed between it and Ingersoll-Rand. Thus, the debtor's liability is only contractual, not

statutory. Therefore, it is Ingersoll-Rand, the party directly liable, which may have a claim on the estate for reimbursement for any tax paid.

ORDER

Pursuant to this memorandum decision, IT IS NOW ORDERED that judgment be entered for the defendants, Wayne County, Wayne County Commissioners, and the Wayne County Assessor against the plaintiff, Ingersoll-Rand Financial Corporation, in the amount of the assessed property tax. Defendants shall prepare a judgment consistent with this opinion and in accordance with the Local Rules of this Court.

DATED this 16 day of September, 1980.

Ralph R. Mabey
United States Bankruptcy Judge