

COPY

March 5, 1943

Honorable Jerome B. Kavanaugh
District Attorney of San Bernardino County
San Bernardino, California

Attention R. J. Farrell, Esq., Deputy

Dear Sir:

In your letter of February 19, you ask to be advised whether I concur in your opinion to the Auditor of your county on the question whether he is authorized to cancel a penalty assessed against a bankrupt owner of real property for non-payment of taxes.

Your opinion to the Auditor expresses the view that if the penalty was incurred subsequent to the adjudication in bankruptcy, and while the property was in the hands of the trustee, the penalty is due and payable and should not be cancelled. On the other hand, if the penalty was imposed prior to adjudication in bankruptcy, you express the view that since the tax and penalty are a lien on the property pursuant to section 3718 of the Political Code, there is no justification for cancelling the penalty, citing in support of this conclusion In re Knox-Stockton Co., 100 Fed. (2d) 979, and State v. Hisey, 84 Fed. (2d) 802.

On the first proposition I think it is clear that a trustee in bankruptcy who operates the business of a bankrupt is liable for all taxes, including penalties, the same as the bankrupt would have been had there been no bankruptcy.

Sec. 124(a), 28 U.S.C.A.

Boteler v Ingels, 308 U.S. 57.

It does not appear from your opinion whether the bankrupt was engaged in a business or if so whether the trustee is now operating that business. Nor does it appear whether the penalty in question was incurred prior to or after adjudication in bankruptcy.

You do state, however, that the penalty was incurred for delinquency in payment of the taxes for 1939, and that the adjudication in bankruptcy was on Feb. 28, 1940. The first installment of taxes would be delinquent if not paid by December 5, 1939, but the second installment would not be delinquent until after April 20, 1940, which would be subsequent to the adjudication in bankruptcy.

If the first installment was delinquent, the penalty was one imposed prior to bankruptcy and unless a tax penalty is withdrawn from the protection of section 57j of the Bankruptcy Act it would have to be disallowed as a claim against the bankrupt.

In the Knox-Stockton case and in State v. Hisey it was held that the penalty is a part of the tax. Those cases support the view that since the penalty is a part of the tax and the lien covers both tax and penalty, there would be no authorization for cancellation of the

The court in the Knox-Powell-Stockton case said, at page 983:

"Section 41 (quoted supra) provides a lien for the assessments and charges levied under the provisions of the act. Since, under the California law, a percentage penalty for delinquency is as much a part of the tax as the principal amount (Carpenter v Peoples Mut. Life Ins. Co., 1937, 10 Cal.2d 299, 74 P. 2d 508, 511; and see, State of California v Hisey, 9 Cir. 1936, 84 F 2d 802, 805) the lien, which arose before the adjudication, was sufficiently broad to support the after accruing penalties as well as the taxes proper. It may be conceded that section 57j of the Bankruptcy Act (11 U.S.C.Asec.93(j)), precludes the 'allowance' of a claim for penalties, but as pointed out earlier, adjudication in bankruptcy does not affect a valid and existing lien, consequently where a lien exists to support a penalty at the time of adjudication, section 57j does not come into operation. Hiscock v Varick Bank, supra; see, also, State of California v. Moore, 9 cir. 1937, 88 F 2d 564. In New York v Jersawit, 263 U.S. 493, 44 S.Ct.167, 68 L.Ed.405, cited by appellant, there was a simple claim for priority unsupported by a lien."

The situation presented here, so far as your opinion indicates, is not one involving the allowance of a claim in bankruptcy. On the contrary, it is a request by a trustee in bankruptcy for an estimate of the amount necessary to be paid to redeem the property from tax delinquency. In preparing such an estimate, the Auditor is governed by the provisions of the Revenue and Taxation Code and has no authority to exclude penalties.

For the reasons above expressed, I concur in the conclusions stated in your opinion of April 2, 1942, to the Auditor of your county.

Very truly yours,

ROBERT W. KENNY, ATTORNEY GENERAL

by

H. H. LINNEY Assistant

HHL:VC

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