

1 The undeveloped land cannot be sold separately from the land on
2 which the residence sits. There are no encumbrances on the
3 property. The two-acre parcel had a value of \$266,800 on the
4 date of the petition. The parties have not agreed to a value for
5 the undeveloped land; the IRS asserts that it is worth at least
6 \$174,000.

7 Debtor did not file tax returns for 1982-1987. The IRS
8 prepared substitute returns for him and assessed tax liability
9 that now exceeds \$182,000.

10 ISSUES

- 11 1. Is the debtor's entireties interest property of the estate?
- 12 2. Does the IRS have a lien on debtor's entireties interest?
- 13 3. If so, does 11 USC § 522(b)(2)(B)¹ preclude the IRS from
14 reaching debtor's entireties interest?
- 15 4. How should the entireties interest be valued for purposes
16 of determining the amount of the IRS's secured claim?

17 DISCUSSION

18 1. The debtor's entireties interest is property of the estate.

19 Section 506(a) provides that an allowed claim secured by a
20 lien on property in which the estate has an interest "is a
21 secured claim to the extent of the value of such creditor's
22 interest in the estate's interest in such property." There is no
23 question that debtor's interest in the property, that of a tenant
24 by the entireties, is property of the estate. The definition of

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26 ¹ All statutory references in this opinion are to the Bankruptcy Code,
11 USC § 101 et seq., unless otherwise stated.

1 property of the estate is extremely broad, and includes all legal
2 or equitable interests of the debtor in property as of the
3 commencement of the case. 11 USC § 541(a)(1). An interest in
4 property as a tenant by the entirety is a legal or equitable
5 interest of the debtor. The question then is what interest, if
6 any, does the IRS have in the estate's interest.

7 2. The IRS has a lien on debtor's entirety interest.

8 Whether a taxpayer has a sufficient interest in property to
9 which a tax lien can attach is determined by state law. If a tax
10 lien can attach, the consequences of the attachment of the lien
11 are a matter of federal law. Aquilino v. United States, 363 US
12 509 (1960); United States v. Bess, 357 US 51 (1958).

13 Debtor argues that an IRS lien for the tax liability of an
14 individual spouse cannot attach to property held in tenancy by
15 the entirety with a spouse who is not jointly liable for the
16 taxes. Debtor is wrong. In Oregon, the interest of a tenant by
17 the entirety is in the nature of a tenancy in common with a
18 right of survivorship. In re Odegaard, 31 BR 718, 721 (Bankr D
19 Or 1983). Each tenant has the right to occupy the property for
20 life, along with the right to one-half of the rents and profits.
21 Id.

22 "The interest of a judgment debtor, as tenant by the
23 entirety with his wife, may be sold on execution. Klorine
24 v. Cole, 121 Or. 76, 80, 252 P. 708, 254 P. 200 (1927); see
25 Howell v. Folsom, 38 Or. 184, 63 P. 116 (1900). The
26 execution purchaser only obtains the debtor spouse's
interest, which ceases to exist should the debtor spouse
predecease the non-debtor spouse. Brownley v. Lincoln
County, 218 Or. 7, 11, 343 P.2d 529 (1959); see Ganoe v.
Ohmart, 121 Or. 116, 254 [P.] 203 (1927).

1 "Ganoe v. Ohmart, supra, 121 Or. at 126-127, 254 [P.]
2 203, states that '[t]he sale on execution of the interest
3 of the husband would not destroy or affect the right of
4 survivorship of the wife. The wife's interest would not be
5 touched. The purchaser at such sale would procure one half
6 of the usufruct of the property.'"

7 Hoyt v. American Traders, Inc., 301 Or 599, 601 n1, 725 P2d 336
8 (1986). Thus, under Oregon law a creditor of one spouse may have
9 a lien that attaches to an individual spouse's interest in land
10 held by the entirety. Brownley, 218 Or at 11.

11 3. Section 522(b)(2)(B) does not preclude the IRS from reaching
12 debtor's entirety interest.

13 Debtor argues that Bankruptcy Code section 522(b)(2)(B)
14 exempts the entirety interest from the reach of the IRS. That
15 section exempts

16 "any interest in property in which the debtor had,
17 immediately before the commencement of the case, an
18 interest as a tenant by the entirety . . . to the extent
19 that such interest as a tenant by the entirety . . . is
20 exempt from process under applicable nonbankruptcy law."

21 That exemption does not apply to protect property from liability
22 for a debt secured by a tax lien for which notice has been
23 properly filed. 11 USC § 522(c)(2)(B).

24 Further, a federal tax lien attaches on assessment to all
25 of the property of the taxpayer, even property that is exempt
26 under state and bankruptcy law. 26 USC § 6321; McQueen and
27 Williams, Tax Aspects of Bankruptcy Law and Practice § 9.26 (3d

1 ed 1997).² Therefore, debtor's entireties interest is subject to
2 the IRS's lien.

3 4. The entireties interest should be valued for purposes to
4 determining the amount of the IRS's secured claim by determining
5 the fair market value of the property and multiplying it by
6 debtor's actuarially determined interest.

7 The final question is what value should be applied to the
8 debtor's interest in the property, on which the IRS has a lien.
9 Debtor asserts that the value is \$12,000, which represents his
10 attorney's "best estimate" of what debtor's individual interest
11 would be worth on the open market. The IRS argues that the
12 interest is worth 50% of the total value of the property as of
13 the petition date because, under 26 USC § 7403, the IRS could
14 sell the entire property and thereby obtain its full value.

15 Internal Revenue Code section 7403 provides that, in a case
16 where a taxpayer has not paid taxes, the IRS may file a civil
17 action in the district court "to enforce the lien of the United
18 States under this title with respect to such tax or liability or
19 to subject any property, of whatever nature, of the delinquent,
20 or in which he has any right, title, or interest, to the payment
21 of such tax or liability."

22 Debtor argues that the IRS cannot sell property held by the

23 ² Debtor argues that the IRS has ignored the provisions of 28 USC
24 § 3010, which allows the government to enforce remedies against co-owned property
25 only to the extent allowed by state law. Section 3010 is part of the Federal Debt
26 Collection Procedures Act, which provides that it shall not be construed to
curtail or limit the right of the United States under any other federal law to
collect taxes. 28 USC § 3003(b). Therefore, section 3010 does not apply in this
case.

1 entireties for the obligation of an individual taxpayer. He
2 relies on cases that address the impact of other states'
3 entireties laws on the attachment of tax liens. For example, in
4 Talbot v. U.S., 850 F Supp 969 (D Wyo 1994), the court held that
5 the husband's entireties interest was not subject to an IRS lien,
6 because under Wyoming law neither spouse had a separate interest
7 that could be alienated. Those cases are of no assistance here,
8 because Oregon law does allow the alienation of the interest of
9 one spouse in property held as tenants by the entireties.³

10 I agree with the IRS that United States v. Rodgers, 461 US
11 677 (1983) and U.S. v. Gibson, 817 F2d 1406 (9th Cir 1987) stand
12 for the proposition that Oregon property held by the entireties
13 is subject to sale by the IRS under IRC section 7403. In
14 Rodgers, the Court held that property in which a delinquent
15 taxpayer had an interest could be sold under section 7403 despite
16 his nondebtor spouse's Texas homestead exemption. The Court
17 noted that, under Texas law, each spouse is given a separate and
18 undivided possessory interest in the homestead, which is lost
19 only by death or abandonment and cannot be compromised by either
20 spouse or the spouse's heirs. 461 US at 685. Nonetheless,
21 because under Texas law the lien could attach to the taxpayer
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23 ³ The case debtor's counsel referred to at the hearing on this matter,
24 In re Street, 165 BR 408 (Bankr D Md 1994), suffers from the same flaw. Under
25 Maryland law, an IRS lien for the tax liability of one spouse cannot attach to
26 property held by the taxpayer and a nondebtor spouse as tenants by the entireties.
E.g., Phillips v. Krakower, 46 F2d 764 (4th Cir 1931) (applying Maryland law).
The reasoning of those cases does not apply to cases governed by Oregon law
because, under Oregon law, the lien can attach.

1 spouse's interest, the IRS was authorized under IRC § 7403 to
2 sell the entire property for the individual's tax liability,
3 subject to payment to the nontaxpayer spouse for the fair value
4 of her homestead interest.

5 The Court recognized that, in some states, no tax lien can
6 attach to an individual taxpayer's interest in entireties
7 property. 461 US at 702 n31. As I have already pointed out,
8 however, under Oregon law, a tax lien can attach to an interest
9 held as a tenant by the entireties. Because the lien can attach,
10 section 7403, as construed in Rodgers, allows the sale of Oregon
11 property held by the taxpayer as a tenant by the entireties.
12 Accord U.S. v. Gibson, 817 F2d 1406 (Ninth Circuit remanded for
13 district court to apply discretionary factors to consideration of
14 sale of Oregon entireties interest).⁴

15 Debtor argues that no sale could occur under Bankruptcy

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17 ⁴ Because section 7403 authorizes the sale of the entire property, not
18 just the interest of the taxpayer spouse, it is not necessary for this court to
19 determine whether, considering all of the factors set out in Rodgers, the district
20 court would in fact order such a sale.

21 Even if I were to consider the factors circumscribing the court's limited
22 discretion in determining whether to authorize a sale, I would conclude that the
23 sale would be approved. The Supreme Court stated that "the limited discretion
24 accorded by § 7403 [to deny a sale] should be exercised rigorously and sparingly,
25 keeping in mind the Government's paramount interest in prompt and certain
26 collection of delinquent taxes." 461 US at 711. Mrs. Pletz's affidavit states
that sale of the home would be a tremendous financial and emotional hardship on
her and her children. The bases stated for the hardships are that Mrs. Pletz
cannot afford to purchase a home in the same community without the equity from the
property at issue, and that her children attend Lincoln High School and must live
within the school district to be eligible to attend there. If the property were
sold, Mrs. Pletz would be paid for her interest in it, which funds would
presumably then be available to her for the purchase of another residence. I am
not convinced that her desire to reside in a particular community or send her
children to a particular school outweighs the IRS's interest in collection of
delinquent taxes.

1 Code section 363. The trustee is not seeking to sell the
2 property under that provision, and it is inapplicable to the
3 issue of whether the IRS could force a sale under the Internal
4 Revenue Code.

5 Having determined that the IRS has the right to sell the
6 entire interest of the property, I still must determine the value
7 of debtor's individual interest in that property. The IRS argues
8 that, because it can sell the entire interest in the property
9 rather than just debtor's entireties interest, it follows that
10 his interest is worth 50% of the sale price. The IRS has no
11 authority for the proposition that, when entireties property is
12 sold, each spouse has a right to 50% of the sale price. In fact,
13 the Supreme Court, in considering the sale of property subject to
14 the comparable Texas homestead interest, noted that the
15 nontaxpayer spouse would have to be compensated for her interest
16 through the distribution of the proceeds of a sale under IRC
17 section 7403. 461 US at 698. Thus, it provided an example in
18 which it applied discount rates and actuarial calculations to
19 determine the possible practical effect of a tax sale of the
20 entire interest in the property. In no way did the court imply
21 that it would be adequate simply to split the proceeds between
22 the two spouses. Instead, it noted that any calculation of the
23 cash value of the Texas homestead exemption "must of necessity be
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1 based on actuarial statistics" 461 US at 704.⁵

2 I conclude that, to determine the value of the IRS's
3 interest in the estate's interest in the property, I must take
4 into account the value of the interest in the property of the
5 nondebtor spouse, which would have to be compensated in any sale.
6 That determination will be based on the life expectancy of debtor
7 and his spouse. The only evidence in the record at this time
8 regarding value is debtor's counsel's unsupported opinion that
9 debtor's interest alone (without sale of the entire property) is
10 worth \$12,000. That evidence is not persuasive with regard to
11 the value of the debtor's interest upon sale of the entire
12 interest in the property. The IRS has not submitted any evidence
13 of value. Further, there is no evidence regarding the value of
14 the 26-acre portion of the property. Therefore, I will continue
15 this matter to give the parties the opportunity to provide
16 evidence regarding the value of debtor's interest upon sale of
17 the entire interest in the property.

18 CONCLUSION

19 The IRS lien attached to debtor's Oregon entireties
20 interest in real property. Under IRC section 7403, the IRS has

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22 ⁵ A similar value issue arises in a sale under section 363(h). In In re
23 Levenhar, 30 BR 976 (Bankr EDNY 1983), the court noted that the trustee's argument
24 that the estate would receive 50% of the purchase price was based on a faulty
25 premise. The court recognized that the nonfiling spouse might be entitled to as
26 much as 95% of the gross proceeds, as illustrated by the Court in Rodgers. As in
Rodgers, distribution of the proceeds of sale to the nondebtor spouse under
section 363 must be according to their interests, which must compensate for the
interest taken. The percentage share of the proceeds to which the nondebtor
spouse would be entitled was a matter of proof, not simply a matter of splitting
the proceeds 50/50.

1 the authority to sell the entire property, subject to
2 compensating the nondebtor spouse for her interest. The value of
3 debtor's interest must be determined based on what the IRS would
4 receive upon sale of the entire property, less the value of the
5 nondebtor spouse's interest.

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ELIZABETH L. PERRIS
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