

under the letter of credit, the tax liens attach under section 6321 only to the equity acquired by H, and the rights of Z in the inventory so purchased as superior even to the lien filed on December 31, 1968, without regard to this section.

(iii) Because Z's security interest arose by reason of disbursements made under a written agreement which was entered into before the filing of notice of the second tax lien on January 10, 1969, and which constitutes an agreement to make disbursements required to be made by reason of the intervention of the rights of O, a person other than the taxpayer, and because Z's security interest is valid under local law against a judgment lien arising as of the time of such tax lien filing on January 10, 1969, out of an unsecured obligation, the second tax lien is, under this section, not valid with respect to Z's security interest in inventory owned by H on January 10, 1969, as well as any after-acquired inventory directly traceable to Z's disbursements (apart from such greater protection as Z enjoys, with respect to the latter, under its purchase money security interest). No protection against the second tax lien is provided under this section with respect to a security interest in any other inventory acquired by H after January 10, 1969, because such other inventory is neither subject to the tax lien at the time of tax lien filing nor directly traceable to Z's disbursements.

*Example 2.* On June 1, 1971, K is awarded a contract to construct an office building. At the same time, S, a surety company, agrees in writing to insure the performance of the contract. The agreement provides that in the event S must complete the job as the result of a default by K, S will be entitled to the proceeds of the contract. In addition, the agreement provides that S is to have a security interest in all property belonging to K. On December 1, 1971, prior to the completion of the building, K defaults. On the same date, under § 301.6323(f)-1, a notice of lien is filed with respect to K's delinquent tax liability. S completes the building on June 1, 1972. Under local law S's security interest in the proceeds of the contract and S's security interest in the property of K are entitled to priority over a judgment lien arising December 1, 1971 (the date of tax lien filing) out of an unsecured obligation. Because, for purposes of an obligatory disbursement agreement which is a surety agreement, the security interest may be in the proceeds of the insured contract, S's security interest in the proceeds of the contract has priority over the tax lien even though a notice of lien was filed before S's security interest arose. Furthermore, because the insured contract was a contract to construct real property, S's security interest in any of K's tangible personal property used in the performance of the contract also has priority over the tax lien.

*Example 3.* (i) On February 2, 1970, L enters into an agreement with M, a contractor, to construct an apartment building on land owned by L. Under a separate agreement, N bank agrees to furnish funds on a short-term basis to L for the payment of amounts due to M during the course of construction. Simultaneously, X, a financial institution, makes a binding commitment to N bank and L to provide long-term financing for the project after its completion. Under its commitment, X is obligated to pay off the balance of the construction loan held by N bank upon the execution by L of a new promissory note secured by a mortgage deed of trust upon the improved property. On September 4, 1970, in accordance with § 301.6323(f)-1, notice of lien is properly filed with respect to L's delinquent tax liability. On September 8, 1970, X obtains actual notice of the tax lien filing. On September 14, 1970, the documents creating X's security interest are executed and recorded, N bank's lien for its construction loan is released, and X makes the required disbursements to N bank. Under local law, X's security interest is protected against a judgment lien arising on September 4, 1970 (the time of tax lien filing) out of an unsecured obligation.

(ii) Because X's security interest arose by reason of a disbursement made under a written agreement entered into before tax lien filing, which constitutes an agreement to make disbursements required to be made by reason of the intervention of the rights of N bank, a person other than the taxpayer, and because X's security interest is valid under local law against a judgment lien arising as of the time of the tax lien filing out of an unsecured obligation, the tax lien is not valid with respect to X's security interest to the extent of the disbursement to N bank. The obligatory disbursement is protected under section 6323(c)(4) even if X is not subrogated to N bank's rights or X's agreement is not itself a real property construction financing agreement.

[T.D. 7429, 41 FR 35504, Aug. 23, 1976]

**§ 301.6323(d)-1 45-day period for making disbursements.**

(a) *In general.* Even though a notice of a lien imposed by section 6321 is filed in accordance with § 301.6323(f)-1, the lien is not valid with respect to a security interest which comes into existence, after tax lien filing, by reason of disbursements made before the 46th day after the date of tax lien filing, or if earlier, before the person making the disbursements has actual notice or knowledge of the tax lien filing, but only if the security interest is—

### § 301.6323(e)-1

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(1) In property which is subject, at the time of tax lien filing, to the lien imposed by section 6321 and which is covered by the terms of a written agreement entered into before tax lien filing, and

(2) Protected under local law against a judgment lien arising, as of the time of tax lien filing, out of an unsecured obligation.

For purposes of subparagraph (1) of this paragraph (a), a contract right (as defined in paragraph (c)(2)(i) of § 301.6323(c)-1) is subject, at the time of tax lien filing, to the lien imposed by section 6321 if the contract has been made by such time. An account receivable (as defined in paragraph (c)(2)(ii) of § 301.6323(c)-1) is subject, at the time of tax lien filing, to the lien imposed by section 6321 if, and to the extent, a right to payment has been earned by performance at such time. For purposes of subparagraph (2) of this paragraph (a), a judgment lien is a lien held by a judgment lien creditor as defined in paragraph (g) of § 301.6323(h)-1. For purposes of this section, it is immaterial that the written agreement provides that the disbursements are to be made at the option of the person making the disbursements. See paragraphs (a) and (e) of § 301.6323(h)-1 for definitions of the terms "security interest" and "tax lien filing," respectively. See paragraph (a) of § 301.6323(i)-1 for certain circumstances under which a person is deemed to have actual notice or knowledge of a fact.

(b) *Examples.* The application of this section may be illustrated by the following examples:

*Example 1.* On December 1, 1967, an assessment is made against A with respect to his delinquent tax liability. On January 2, 1968, A enters into a written agreement with B whereby B agrees to lend A \$10,000 in return for a security interest in certain property owned by A. On January 10, 1968, in accordance with § 301.6323(f)-1 notice of the tax lien affecting the property is filed. On February 1, 1968, B, without actual notice or knowledge of the tax lien filing, disburses the loan to A. Under local law, the security interest arising by reason of the disbursement is entitled to priority over a judgment lien arising January 10, 1968 (the date of tax lien filing) out of an unsecured obligation. Because the disbursement was made before the 46th day after tax lien filing, because the disbursement was made pursuant to a written agree-

ment entered into before tax lien filing, and because the resulting security interest is protected under local law against a judgment lien arising as of the date of tax lien filing out of an unsecured obligation, B's \$10,000 security interest has priority over the tax lien.

*Example 2.* Assume the same facts as in example 1 except that when B disburses the \$10,000 to A on February 10, 1968, B has actual knowledge of the tax lien filing. Because the disbursement was made with actual knowledge of tax lien filing, B's security interest does not have priority over the tax lien even though the disbursement was made before the 46th day after the tax lien filing. Furthermore, B is not protected under § 301.6323(a)-1(a) as a holder of a security interest because he had not parted with money or money's worth prior to the time the notice of tax lien was filed (January 10, 1968) even though he had made a firm commitment to A before that time.

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### § 301.6323(e)-1 Priority of interest and expenses.

(a) *In general.* If the lien imposed by section 6321 is not valid as against another lien or security interest, the priority of the other lien or security interest also extends to each of the following items to the extent that under local law the item has the same priority as the lien or security interest to which it relates:

(1) Any interest or carrying charges (including finance, service, and similar charges) upon the obligation secured,

(2) The reasonable charges and expenses of an indenture trustee (including, for example, the trustee under a deed of trust) or agent holding the security interest for the benefit of the holder of the security interest,

(3) The reasonable expenses, including reasonable compensation for attorneys, actually incurred in collecting or enforcing the obligation secured,

(4) The reasonable costs of insuring, preserving, or repairing the property to which the lien or security interest relates,

(5) The reasonable costs of insuring payment of the obligation secured (including amounts paid by the holder of the security interest for mortgage insurance, such as that issued by the Federal Housing Administration), and

(6) Amounts paid to satisfy any lien on the property to which the lien or security interest relates, but only if the