

**TAXES - Penalty and interest, mortgage foreclosure; Small Business Administration. Section 84-3809, R.C.M. 1947.**

**HELD: The Small Business Administration is not required to pay penalty and interest on foreclosure of a mortgage which it holds.**

October 19, 1971

Mr. J. Fred Bourdeau  
Cascade County Attorney  
Great Falls, Montana 59401

Dear Mr. Bourdeau:

You have requested my opinion as to whether penalty and interest on unpaid state and local taxes must be paid by the Small Business Administration when it forecloses on a mortgage which it holds.

This exact point was decided by Federal District Judge Jameson in the case of **United States v. Christensen** (U.S.D.C.D. Mont.) 218 F. Supp. 722. Judge Jameson stated in part as follows:

“While the lien for taxes extends to penalties and interest (Sections 84-4124, 84-4130 and 84-4138, R.C.M. 1947) these charges are not a part of the tax. The Supreme Court of Montana expressly so held in *State ex rel. Sparling v. Hitsman*, 1935, 99 Mont. 521, 44 P.2d 747. That case upheld the validity of legislation permitting redemption of property from tax sale by payment of the taxes without adding penalties and interest. Since it was recognized that the tax was a liability which could not be remitted, reduced or postponed by reason of Article V, section 39 of the Constitution of Montana, it was necessary for the court, in upholding the legislation, to hold that interest and penalties were not part of the tax itself. In so doing the court deemed interest upon a tax obligation a ‘penalty’, which has for its function inducement of property owners to promptly pay their taxes.

“The Small Business Administration is an agency of the United States. 15 U.S.C.A. § 633. Section 646 of that title, *supra*, does not subordinate security interests of the SBA to penalties imposed by the states to enforce the collection of their taxes. Where the United States undertakes an obligation, penalties for failure to perform such obligation may not be imposed upon it in the absence of express congressional authority. See *Missouri Pacific Railroad Company v. Ault*, 1921, 256 U.S. 554, 41 S.Ct.

593, 65 L. Ed. 1087; *Reconstruction Finance Corporation v. State of Texas*, supra. And normally penalties and interest are not proper charges against governmental agencies. See *Cascade County, Montana v. Penwell*, D. Mont. 1946, 67 F. Supp. 253, 256. . . .”

Judge Jameson concluded as follows:

“ . . . I conclude accordingly: (1) that the liens for state and local taxes assessed against both real and personal property are superior to plaintiff’s mortgage; but (2) **that this priority does not extend to penalties and interest. . . .**” (Emphasis supplied)

The Supreme Court of Montana concurred with Judge Jameson’s findings in *Unites States v. Christensen*, supra, when it stated in *Salvation Army v. State Bd. of Equal.*, 144 Mont. 415, 396 P.2d 463, as follows:

“ . . . (See also *United States v. Christensen* (U.S.D.C.D. Mont.), 218 F. Supp. 722 where a federal district court held that, although liens for the State of Montana and local taxes assessed against both real and personal property were superior to mortgage liens of the Small Business Administration, an agency of the United States Government; this priority did not extend to penalties and interest under the rule stated by State ex rel. Sparling v. Hitsman, supra.) It should also be noted that in the Sparling case, supra, 99 Mont. at p. 530, 44 P.2d at p. 751, this court overruled prior decisions, saying: ‘\* \* \* the decisions of this court in the cases of *Sanderson v. Bateman* (78 Mont. 235, 253 P. 1100) and *State ex rel. Kain v. Fischl* (94 Mont. 92, 20 P.2d 1057), were erroneous in holding that penalty and interest imposed upon delinquent taxes were a part of the tax proper, and as such constituted an obligation or liability within the meaning of section 39, art. 5, of our Constitution.’ . . .”

A similar decision was reached by the United States Court of Appeals in *U.S. v. Consumers Scrap Iron Corp., et al.*, 384 F.2d 62 (C.A. 6, 1967). The above-cited cases hold that penalty and interest on unpaid taxes is not a lien superior to the lien of a mortgage held by the Small Business Administration.

**THEREFORE, IT IS MY OPINION that:**

Penalty and interest on unpaid state and local taxes need not be paid by the Small Business Administration when it forecloses on a mortgage which it holds.

Very truly yours,  
**ROBERT L. WOODAHL**  
 Attorney General