



10-1982

United States v. Whiting Pools, Inc.

Lewis F. Powell Jr.

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resp ref.
9/30

Resp contends that there is no conflict for two reasons. First, the CA4's opinion involved attachment of an account receivable while the CA2 examined the use of inventory and other assets. Second, the amount of the IRS lien exceeded the value of the asset in the CA4 but did not do so in the CA2 case. Although there are factual differences, the reasoning in the CA4 opinion is broader than the facts of the case. There is a conflict. RK

PRELIMINARY MEMORANDUM

October 8, 1982 Conference
List 1, Sheet 3

No. 82-215-CFX

UNITED STATES

v.

Cert to CA 2
✓ (Friendly, Oakes, Pierce)

OR WHITING POOLS, INC. (debtor-in-possession)

Federal/Civil

Timely (w/ ext'n)

1. SUMMARY: Whether a bankruptcy court in a Chapter 11 reorganization proceeding may compel the Government to turn over property to the debtor-in-possession, where the Government has seized the property by levy prior to the filing of the bankruptcy petn to satisfy the debtor's delinquent federal tax liabilities.

→ Grant - Conflict between CA 2 + CA 4
RK The issue ~~is important~~ seems important.

Grant

Conflict

with CA 4

(J. Friendly recognized the conflict & disagreed with CA 4)

2. FACTS AND PROCEEDINGS BELOW: Resp is a corporation involved in installing and servicing swimming pools. During 1978 and 1979 the Government made several assessments against resp for unpaid withholding and employment taxes that it concededly owed in the amount of approximately \$92,000 plus interest. On January 14, 1981, the IRS, acting pursuant to §6331¹ of the Internal Revenue Code of 1954, lawfully levied upon resp's "inventory, equipment, and other tangible property." The next day, resp filed a petn for reorganization under Chapter 11 of the Bankruptcy Code, and was continued as "debtor-in-possession." The IRS soon commenced an adversary proceeding in the United States Bankruptcy Court, seeking a determination that the automatic stay provision of the bankruptcy law (11 U.S.C. (Supp. IV) 362) was inapplicable to its proposed sale of the seized property, or that it be permitted to sell the seized property. Resp counterclaimed, seeking an order directing the United States to turn over the seized property to it pursuant to §542² of the Bankruptcy Code.

¹For the full text of §6331, see Pet. App., at 54a-55a.

²§542 provides in relevant part:

Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title ... , shall deliver to the trustee, and account for, such property or the value of such property. ..."

For the full text of §363, see Pet. App., at 52a.

The bankruptcy court (WDNY Hayes) ordered the United States to deliver to resp the property under its control, subject to resp's paying the Government \$20,000 to protect its interest in the seized property.³ Although foreclosed from relying on §542 by an earlier decision by the WDNY, the bankruptcy court held that the United States was a "custodian" within the meaning of §543 of the Bankruptcy Code, and thus was required to deliver the "property of the debtor" to the debtor-in-possession.⁴

On appeal, the DC (WDNY, Elfin) reversed. The government is not a "custodian" of resp's property within the meaning of §543, and the WDNY had recently decided that §542 did not permit the bankruptcy court to act as it had, either.

3. DECISION BELOW: The CA 2 reversed the DC. It noted that the question has generated a great deal of conflict among the bankruptcy judges and district courts. See Pet. App., at 1a, n.1. It also noted that the CA 4 had recently addressed the question and decided that bankruptcy courts cannot order the IRS to turn over

³Although the property in resp's hands as a going concern was valued at \$162,876, expert testimony fixed its sale value at between \$35,000 and \$20,000.

⁴§543 (b) provides, in relevant part:

A custodian shall--

(1) deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in the custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of this case.
..."

property seized prior to the filing of a reorganization petition to satisfy tax liabilities. Cross Electric, Inc. v. United States, 664 F.2d 1218 (CA4 1981). "We find the issue more difficult than did the Fourth Circuit," CA 2 said, "and, conceding the question to be a close one, reach an opposite result."

First the CA 2 rejected the grounds relied on by the Bankruptcy Court in ordering the turnover. Although §543 (b) directs a "custodian" to "deliver to the trustee any property of the debtor transferred to such custodian ...," §101 (10) defines a "custodian" as a person who acts as "a trustee, receiver, or agent."⁵ Because the IRS is "the archetypical 'adverse claimant,' see Phelps v. United States, 421 U.S. 330, 334 (1975)," it is none of these.

But the CA 2 decided that §542 authorized the turnover. That section requires the turnover "of property that the trustee may use, sell or lease under section 363. ..." Section 363 (c) (1) permits the trustee--or debtor-in-possession--to use, sell or lease "property of the estate" in the ordinary course of business, although §363 (e) creates a mechanism whereby an entity with an interest in the property can seek an order limiting such use, sale or lease to the extent necessary to protect its interest. Section 541 (a) (1) provides that an estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case."⁶

⁵For the relevant portions of §101 (10), see Pet. App., at 6a, n.3.

Footnote(s) 6 will appear on following pages.

The Government argued to CA 2--as it argues here--that the plain meaning of these sections mandates the conclusion reached by the CA4: the Bankruptcy Code does not permit a bankruptcy court to order the IRS to turn over to a debtor property that the IRS had lawfully seized--prior to the filing of the bankruptcy petn--to satisfy a tax assessment. The "property of the estate" that must be turned over under §542 consists only of any interests in property belonging to the debtor as of the time it filed its petn in bankruptcy. At the time this bankruptcy petn was filed, the only interests the debtor had in the seized property were those set forth in §6331 et seq. of the IRC (a right to notice of seizure and sale, a right to redemption prior to sale, and a right to surplus proceeds). Only those interests were part of the "property of the estate," and turnover of those interests would be inappropriate because the debtor-in-possession could not "use, sell or lease" them. All other interests in the property--including the right to possession--are held by the IRS.

Although recognizing the "force" in the Government's *friendly's opinion* construction, the CA 2 disagreed. Upon reviewing the history of the bankruptcy code and the "structure of the statute," it rejected the Government's "mechanical" interpretation. This was principally because the Government's construction of the interplay between §542 and §541 (a) (1)'s definition of "property of the estate" threatened to deprive trustees or debtors in reorganization proceedings of the power not only to obtain turnover of property levied upon by the IRS,

⁶For the relevant portions of §541, see Pet. App., at 52a-54a.

"but also that repossessed prior to bankruptcy by secured creditors or held by pledgees after a default." In these situations, the secured creditor, like the IRS, typically has rightful possession of the property and the debtor has just such rights as are provided the tax debtor under IRC §6331 et seq. Under the Government's theory, these limited interests would not be turned over to the trustee or debtor-in-possession, either.

This result would be "a significant departure" from treatment of reorganization proceedings under the former bankruptcy act. Section 257 of Chapter X of that Act provided that the "trustee or debtor in possession shall ... have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage." On the basis of that section, and the overall structure of the old act, the courts had conferred on the bankruptcy courts broad power to order secured creditors in possession following the debtor's default to turn over the collateral. See Reconstruction Finance Corp. v. Kaplan, 185 F.2d 791 (CA1 1950). To remove this power from the bankruptcy courts would severely limit the chances of success in many reorganizations. yes

If Congress had set out to make so serious a change in the bankruptcy laws, it would have explicitly said so. Given that principle, and Congress' clear intent to encourage reorganizations under the new Code, the CA2 held that the turnover power recognized in Reconstruction Finance was included in §542. The CA 2 also relied on the fact that §542 first appeared in the proposed new Code after several witnesses had testified that the power to order the turnover of collateral held by secured creditors was important.

An IRS levy on tangible property is "virtually indistinguishable from the ordinary repossession and foreclosure procedures followed by secured creditors." It is true that under the old bankruptcy act property held by an assignee of the debtor but levied upon by the IRS for satisfaction of a tax lien was not subject to the summary jurisdiction of the bankruptcy court. Phelps v. United States, 421 U.S. 330 (1975). But Phelps dealt with the distinction between summary and plenary jurisdiction under the old act, a distinction that the new Code abolishes. "[I]t is far from clear that under the [new] Code a bankruptcy court would not have power to order a turnover on the same facts as Phelps." Moreover, Phelps was a liquidation, not a reorganization case. Even under the old act the bankruptcy court had greater power over creditors, and over the collateral in their possession, in reorganization than in liquidation proceedings. Under the old act, 6 Collier on Bankruptcy ¶3.05, at 431 (14th ed. 1977), and continued in the new Code as established above, the turnover power extends to all property in which the debtor has title. It is well established that when the IRS levies upon property it does not divest title. Bennett v. Hunter, 76 U.S. (9 Wall.) 326, 336-37 (1870). But see United States v. Phelps, supra, 421 U.S., at 337, n.8. Therefore, the turnover power extends to this property.

This result is best for everyone because, if the reorganization is successful, not only is Congress' policy in the Bankruptcy Code--emphasizing utilization of reorganization to save businesses and jobs--fulfilled, but the IRS stands to gain repayment of all--not just some--of the taxes owed. Moreover, the Government's substantial interest in prompt payment of taxes--particularly

If certainly
is

important when, as here, the deficiency relates to amounts withheld from the wages of employees in satisfaction of their taxes--can be safeguarded by the protections a bankruptcy court can provide.

In light of the lapse of one year since the bankruptcy court had dealt with the case, and possible changed circumstances, the CA 2 remanded to the bankruptcy court to reconsider whether a turnover was appropriate in these circumstances, and if so, what protection to provide to the United States.

4. CONTENTIONS: Petr argues that--as CA2 admitted--this decision squarely conflicts with the recent decision of CA4. Moreover, as the CA 2 accurately observed, the lower federal courts are also divided on this question. The issue is important, and this Court's intervention is required to ensure a uniform national rule governing the relationship of the bankruptcy laws to the Government's statutory authority to collect delinquent taxes.

Moreover, petr argues, as it did below, that the CA 2's interpretation is contrary to the plain meaning of the statute, which limits the turnover power to "the property of the estate," and then defines "the property of the estate" as including "all legal or equitable interests of the debtor in property as of the commencement of the case." This plain language and the House and Senate Reports that accompanied it make clear that the debtor's interests as of the time of the filing of the petition in bankruptcy are not expanded by the filing of the petition.

The bankruptcy code itself does not define the property interests of the debtor; instead, these are determined by reference to non-bankruptcy law, here the IRC. Before the bankruptcy petition is

filed, an entity levied upon to satisfy delinquent taxes has rights only to notice, to redemption by paying the amount of the tax due, and to any surplus achieved through sale. The filing of the bankruptcy petition does not expand those rights into rights to turnover of the property upon payment of bond.

Moreover, even assuming that CA2 was correct that Congress silently "incorporated" the case law under former §257 into the new Code, it was erroneous to extend the turnover authority to reach property seized by pre-petition tax levy. CA2's theory was that Congress would not have changed prior law without explicitly stating that it was doing so. But this rationale does not explain this case, because under prior law, property seized by a pre-petition tax levy was not subject to the bankruptcy courts' turnover authority either in liquidating bankruptcies, Phelps v. United States, supra, or in reorganization proceedings, In re Pittsburgh Penguins Partners, 598 F.2d 1299 (CA3 1979). The Committee that summarized the tax effects of the proposed bankruptcy legislation did not mention that the law would change this important and well-settled result. The same principle cited by the CA2, therefore--that a major change from prior law is not to be inferred without a clear statement thereof--requires that its decision be reversed.

5. DISCUSSION: The Government makes a powerful argument that this case should be granted. The conflict between this decision and that of the CA 4 in Cross Electric Co. is square, as the CA 2 recognized. The issue seems to be important, judging not only from the number of recent lower court decisions that have confronted it, but also from the degree to which the power to order the turnover of

property in this situation is important to successful reorganizations, and harmful to the IRS's efforts promptly to collect taxes.

The decision is interlocutory because CA 2 remanded for consideration of whether to order the Government to turn over the property and for consideration of what protection to afford the Government if turnover is required. If the bankruptcy court reverses its prior order to turn over the property, the issue could be avoided. Given the bankruptcy court's clear desire to order the Government to turn the property over, however, it appears unlikely that the issue will go away. The case--and resp's reorganization and the Government's collection of taxes--would then be delayed for another round of appeals. Despite this case's interlocutory posture, therefore, given the importance of the issue and the clear conflict, the Court may wish to grant the petition.

6. RECOMMENDATION: I recommend CFR, with a view toward a grant.

There is no response.

September 22, 1982

Ogden

opn in petn

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 82-215

Submitted, 19...

Announced, 19...

UNITED STATES

VS.

WHITING POOLS, INC.

Grant

[illegible]

January 7, 1983 Conference
List 7, Sheet 5

No. 82-215

Motion of the Parties to Dispense with
Printing the Joint Appendix

UNITED STATES

v.

WHITING POOLS, INC.

SUMMARY: With consent of resp, the SG as petr seeks leave to dispense with the printing of a joint appendix.

FACTS AND CONTENTIONS: The question presented is whether a bankruptcy court in a reorganization proceeding under Chapter 11 of the Bankruptcy Code may compel the government to turn over property to the debtor-in-possession, where the government had seized the property by levy to satisfy the debtor's delinquent federal tax liabilities prior to the filing of the bankruptcy petn.

Because the question presented is purely legal, the SG anticipates that the Court will not need to consider any other portions of the record than the opinions already appended to the cert petn.

DISCUSSION: The motion should be granted.

1/5/83

Caldwell

PJC

Grant,
mm

No. 82-215

VS.

WHITTING POOLS, INC.

Grant

[illegible]

Received

men 04/17/83

Mark would Affirm on
both Qs & so would I -
at least tentatively,

BENCH MEMORANDUM

No. 82-215:

United States v. Whiting Pools, Inc.

From: Mark

April 17, 1983

Questions Presented

Whether a bankruptcy court in a reorganization proceeding under Chapter 11 may compel the Government to turn over property to the trustee, where the Government had seized the property by levy prior to the filing of the bankruptcy petition to satisfy the debtor's delinquent federal tax liabilities.

I. Background

On Jan. 14, 1981, the IRS seized all of resp Whiting Pools' tangible property. (The IRS's power of levy derives from 26 U.S.C. §6331.) The estimated value of the property as used by resp as a going concern was \$162,000; its value if sold was between \$20,000-\$35,000. The IRS lien was for \$92,000, plus interest -- the amount of resp's unpaid withholding and FICA taxes.

The next day resp filed a petition under Chapter 11 of the Bankruptcy Code and was continued as a debtor in possession. Under the Code, the filing of a petition automatically stays disposition of the debtor's property. §362. The IRS filed an action in bankruptcy court, seeking a ruling that would permit it to sell the levied property. Resp filed a counterclaim asking the court to order the IRS to turn over the property to the trustee under §542. Both parties agreed that the crucial issue was whether the property had to be turned over: if it did, the stay would be continued; if it did not, there was no point in continuing the stay.

The ✓bankruptcy court ordered the turnover; the district court (WDNY, Elfin, J.) reversed. Then CA2 (Friendly, Oakes, Pierce) reversed, reinstating the turnover order. This Court granted cert because of a conflict between CA2 and CA4.

II. Discussion

There are ✓two central issues in the case. The first, and broad, question is ① whether property repossessed by a secured creditor prior to the filing of the bankruptcy petition is sub-

ject to the Bankruptcy Code's turnover requirement. If all such property is exempt from turnover, then it follows that property subject to an IRS tax lien also is not subject to turnover. If property in the possession of a secured creditor is subject to turnover, then the second question must be reached: whether property seized under an IRS tax levy should be treated differently from property seized by ordinary secured creditors.

2nd Q I recommend affirmance of CA2. I think that repossessed property held by secured creditors is subject to turnover. The second question is much closer, but I conclude that property levied by the IRS should not be treated differently from property held as collateral by secured creditors.

A

Section 542 provides:

"§542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 552 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate."

The property that must be turned over is defined as the property that the trustee may use, sell, or lease under §363. Section 363 provides that the trustee may use, sell, or lease "property of the estate," §363(b), provided that other parties' interests in the property are given "adequate protection," §363(e). The key phrase is "property of the estate," which is defined in §541

(a)(1) to mean "all legal or equitable interests of the debtor in property as of the commencement of the case."

The Government's principal position is based on a "plain meaning" construction of these provisions: Section 542 requires turnover of "property of the estate." The property of the estate is determined "as of the commencement of the case." It therefore is necessary to analyze the status of resp's interests in the property as of the date the petition was filed. Under §6331 of the Internal Revenue Code, the delinquent taxpayer has only the following limited rights in the seized property: right to notice of the seizure and sale, right to redeem prior to sale by full payment of the taxes and the expenses of the levy, and right to the surplus of proceeds from the sale. Under §541, then, these property interest belonged to the estate. But the right to possess and use the property did not belong to resp as of the date the petition was filed, and therefore the property did not have to be turned over.

CA2 conceded that the Government's argument has "some force," but rejected it because of its broad implications. Judge Friendly noted that the Government's theory would apply as well to all property "repossessed prior to bankruptcy by secured creditors or held by pledgees after a default." (Pet. App. at 13a.) Yet in Chapter 10 reorganization proceedings under the prior Bankruptcy Act, the bankruptcy court had power to order secured creditors in possession to turn over their collateral. Thus, the reading urged by the Government would be a major change in the law. CA2 found no indications that Congress intended this re-

sult: "[W]e do not believe that nearly 50 years of the law of reorganization ... would have been changed without some clear statement to that effect. This is particularly true because the Government's reading ... would seriously affect the chances of success in many reorganizations." (Id., at 16a.)

CA2 then found that the legislative history strongly supported a broad reading of §542's turnover power. Witness after witness testified that the bankruptcy court had to be able to order turnover of collateral of secured creditors in possession. And it was shortly after this congressional testimony that §542 was added to the proposed legislation. Finally, CA2 stated that if the Government's argument is correct, §542's turnover authority amounts to very little: "[A]pparently its only use would be to authorize obtaining property from persons in wrongful possession following theft or conversion." (Id., at 23a.).

I find CA2's argument persuasive, particularly the point that Congress should not be presumed silently to have eliminated an important power of bankruptcy courts. The existence of this turnover power in reorganization proceedings was settled, the leading case being Reconstruction Finance Corp. v. Kaplan, 185 F.2d 791, 794 (CA1 1950): "In contrast with the provisions of law relating to straight bankruptcy, Chapter X ... contemplates the rehabilitation of financially ailing business corporations under plans of reorganization which may deal with claims of creditors, secured as well as unsecured, and embrace all of the debtor's property, however encumbered with outstanding security interests." In 1975 many witnesses testified as to the importance

yes

yes

yes

to

my knowledge

of this power, and the SG has cited none arguing that such a power was unwarranted or should be eliminated. Section 542 followed on the heels of this testimony. Given this background, I cannot believe that Congress intended to repeal this authority. Under the SG's view, which admittedly is supported by the literal terms of the statute, the only things to be turned over are the particular limited interests (e.g., right to notice before a sale) the debtor retains in encumbered property. It makes little sense, however, to talk of "turning over" such intangibles. I therefore would reject the SG's narrow definition of "property of the estate," and hold that Congress intended §542 to authorize the turnover of tangible property still owned by the debtor but in the possession of a secured creditor.

B *yes*

The more difficult question is whether an IRS tax levy should be treated differently from the interests of secured creditors in possession. The SG emphasizes that an IRS tax levy "virtually transfers ownership of seized property to the government," Brief at 25, that "[t]here are sharp differences between the consensual relationship of a private creditor and his debtor, and the involuntary relationship of the government and a delinquent taxpayer," id., at 36, and that the Federal Government has more extensive remedies for collecting debts than do private creditors. CA2, on the other hand, found that an IRS levy "is virtually indistinguishable from the ordinary repossession and foreclosure procedures followed by secured creditors, except for the fact that the IRS can make its own levy without need of the

yes

50 do 9
assistance of a sheriff" (Pet. App. at 23a-24a.)

I agree with CA2. When a secured creditor exercises his right of repossession, he obtains essentially the same rights over the property as does the IRS -- ownership may be "virtually transferred" from the debtor to the creditor. And although the SG is correct that tax liability to the IRS differs from a contractual liability to a creditor, I do not see why this difference should lead to a different turnover rule. The peculiar interests of the IRS appropriately may be considered by the trustee in deciding what constitutes "adequate protection" of its interests under §363(e). But I am not convinced that Congress would want the IRS to be able to keep its levied property entirely out of the reorganization process when other secured creditors must turn their repossessed property over to the trustee.

The SG relies heavily on ✓ Phelps v. United States, 421 U.S. 330 (1975), for the proposition that tax-levied property does not have to be turned over. In Phelps a delinquent taxpayer had assigned property to a third party, which had converted the property to cash. The IRS filed a notice of tax lien and levied on the funds in the assignee's hands. An involuntary bankruptcy petition subsequently was filed against the taxpayer, and the receiver sought to force the assignee to turn over the cash. This Court held that the bankruptcy court was without jurisdiction to order the turnover. In so holding, the Court found that the levy gave the U.S. "full legal right" to the amount levied. 421 U.S., at 337.

The significance of this case is doubtful. Certain language

used by the Court suggests a view that mere notice of a tax levy vests legal title in the United States, which might suggest that IRS tax levies do differ from other rights of secured creditors. But, as CA2 found, the particular holding in Phelps is not relevant, because it dealt with a now defunct distinction between summary and plenary bankruptcy jurisdiction. The Court determined that the assignee was holding the funds for the Government, and followed the rule that "where possession is assertedly held not for the bankrupt but for others prior to bankruptcy ... the holder is not subject to summary jurisdiction." Id., at 335-336. It is significant that this rule apparently would apply as well to property held for a private third party, i.e., a secured creditor. Moreover, Phelps involved a liquidation bankruptcy, not a reorganization proceeding -- and the turnover rule recognized in cases such as RFC v. Kaplan, supra, was based expressly on the particular need for turnover in reorganization cases. In sum, I do not think Phelps provides much support for the view that the IRS is free from the turnover authority of a trustee in a reorganization proceeding.

I should add that I am not entirely at rest on the above analysis. The SG makes a reasonable argument that even if the Court finds that Congress intended to continue the preexisting rule on turnovers by secured creditors in possession, there is no reason to imply such a rule as to the IRS because there was no clearly established prior rule to that effect. But as of now I am persuaded by CA2's analysis that the rule should encompass all similar security interests.

So
am
9

III. Conclusion

I recommend that CA2 be affirmed, on the same reasoning used by CA2. "Property of the estate" subject to turnover includes property of the debtor that has been levied or repossessed.

See p 3 of Br

No 82-215

§ 542(a) Bankruptcy Act provides
 "turnover" in Ch 11 proceedings of
 "prop. that trustee may use, sell
 or lease" under § 363.

§ 363 authorizes trustee to "use,
 sell or lease" ^{the} "prop. of the estate".

Courts (e.g. CA 4, 9 think) that
 agree with U.S. have construed
 "prop. of the estate" as used in § 542(a)
 as "legal & eq. interests of the
 debtor in prop. at commencement
 of bankruptcy suit" - p 3.

CA 2 construed "property of the
 estate" to mean the "property"
itself - not just some interest
 in it - 3. Under this construction
 the trustee obtained possession
 of the assets subj. to lien - 3.

There was rule under Ch X
 (now replaced by new Act). If
 SG wins this case, all prop.
 repossessed by secured creditors
 would be beyond reach of
 trustee - no matter how great

The Daily Record Corporation
Rochester, New York

(9298)

Spaulding Law Printing
Syracuse, New York

The equity of debtor may be - 4

And the equity here that would be
 wiped out is substantial:

Ch 11 of Bk. Act - fed levy on
all prop. day before bankruptcy filed

Smith (SG)

liquidating value of \$35,000 formed
by Bankruptcy Judge. Govt's debt
was \$92,000. ~~Total~~ Govt's concern
value \$162,000 (See CH 2's op. 2a)

Govt's position is different from
other secured claimers

~~Sup~~

→ SO'C suggested - as I would - that if
Govt may force liquidation by
exercising its levy, the objective of
reorganization would be frustrated.

BRW raised my point as to
situation under old Ch X. (Smith
said there are no cases)

Effect of "levy" is to ^{dispose} ~~dispose~~ the
owner of all interest.

WHR & BRW think if a city creditor
had levied the day before, Smith's
position would apply to it also.
The statutes relied on by Govt apply
equally to all secured creditors.

~~Smith (cont.)~~

Relin (Kerk) - Able lawyer

Following default
of debtor,

Use
his
argument
if I
want

Responding to C.F., counsel agreed
that if the \$2,000 owed Govt had been
put into a "separate fund," it no
longer would have been a part of
debtor's estate.

X X X

Relier on House & Senate Reports

Under old Ch 10, if a secured
creditor had taken possession prior
to bankruptcy, it would had had
to "turn over" to Trustee - subj.
to the creditors lien

Relier on § 543(a) & (b) - see
CA 2's Appx p. 5a & 6a.

→ The prior cases under Ch X
were carried forward under
§ 542(a) Appx p. 5a. See CA 2's op. 10a
CA 2 relied heavily on RFC case

IRS is the Govt agency most
frequently in reorg. cases, Congress
hardly could have intended ~~to~~ to ~~to~~
have exempted IRS from "turn-over."

Smith (Reply)

~~The~~ This prop. was not "prop.
of the state" at commencement
of the case.

"Prop. rights" are defined
in this case by IRS.

Mark

aff'm 9-0

No. 82-215, U.S. v. Whiting Pools

Conf. 4/22/83

The Chief Justice

aff'm

Justice Brennan

aff'm

no discussion

Justice White

aff'm

Important case (amen!)

Justice Marshall

App in

Justice Blackmun

App in

Justice Powell

App in (agree with CA2)

Two questions:

1. Whether prop. levied upon (or otherwise, ^{foreclosed on} reposessed) by a secured creditor prior to filing a pet. to reorg. (Ch. 11), is subject to "turnover requirement".

Answer, clearly, is yes. Reg. history makes this clear. Otherwise, few reorgs arising

2. Whether prop. seized by IRS should be treated differently from other secured creditors?

I think not. This case illustrates why.

Justice Rehnquist

aff m

Justice Stevens

aff m

Justice O'Connor

aff m

Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

W.T.V.

From: **Justice Blackmun**

Circulated: MAY 24 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-215

UNITED STATES, PETITIONER *v.*
WHITING POOLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May —, 1983]

JUSTICE BLACKMUN delivered the opinion of the Court.

Promptly after the Internal Revenue Service (IRS or Service) seized respondent's property to satisfy a tax lien, respondent filed a petition for reorganization under the Bankruptcy Reform Act of 1978, hereinafter referred to as the "Bankruptcy Code." The issue before us is whether § 542(a) of that Code authorized the Bankruptcy Court to subject the IRS to a turnover order with respect to the seized property.

I

A

Respondent Whiting Pools, Inc., a corporation, sells, installs, and services swimming pools and related equipment and supplies. As of January 1981, Whiting owed approximately \$92,000 in Federal Insurance Contribution Act taxes and federal taxes withheld from its employees, but had failed to respond to assessments and demands for payment by the IRS. As a consequence, a tax lien in that amount attached to all of Whiting's property.¹

¹Section 6321 of the Internal Revenue Code of 1954, 26 U. S. C. § 6321, provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States

Join

On January 14, 1981, the Service seized Whiting's tangible personal property—equipment, vehicles, inventory, and office supplies—pursuant to the levy and distraint provision of the Internal Revenue Code of 1954.² According to uncontroverted findings, the estimated liquidation value of the property seized was, at most, \$35,000, but its estimated going-concern value in Whiting's hands was \$162,876. The very next day, January 15, Whiting filed a petition for reorganization, under the Bankruptcy Code's Chapter 11, 11 U. S. C. §§ 1101 *et seq.* (1976 ed., Supp. V), in the United States Bankruptcy Court for the Western District of New York. Whiting was continued as debtor-in-possession.³

The United States, intending to proceed with a tax sale of the property,⁴ moved in the Bankruptcy Court for a declaration that the automatic stay provision of the Bankruptcy Code, § 362(a), is inapplicable to the IRS or, in the alterna-

upon all property and rights to property, whether real or personal, belonging to such person."

²Section 6331 of that Code, 26 U. S. C. § 6331 provides:

"(a) Authority of Secretary

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . .

"(b) Seizure and sale of property

"The term 'levy' as used in this title includes the power of distraint and seizure by any means. . . . In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

³With certain exceptions not relevant here, a debtor-in-possession, such as Whiting, performs the same functions as a trustee in a reorganization. 11 U. S. C. § 1107(a) (1976 ed., Supp. V).

⁴Section 6335, as amended, of the 1954 Code, 26 U. S. C. § 6335, provides for the sale of seized property after notice. The taxpayer is entitled to any surplus of the proceeds of the sale. § 6342(b).

tive, for relief from the stay. Whiting counterclaimed for an order requiring the Service to turn the seized property over to the bankruptcy estate pursuant to § 542(a) of the Bankruptcy Code.⁵ Whiting intended to use the property in its reorganized business.

B

The Bankruptcy Court determined that the IRS was bound by the automatic stay provision. *In re Whiting Pools, Inc.*, 10 B. R. 755 (1981). Because it found that the seized property was essential to Whiting's reorganization effort, it refused to lift the stay. Acting under § 543(b)(1) of the Bankruptcy Code,⁶ rather than under § 542(a), the court directed the IRS to turn the property over to Whiting on the condition that Whiting provide the Service with specified protection for its interests. 10 B. R., at 760-761.⁷

⁵Section 542(a) provides in relevant part:

"[A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U. S. C. § 542(a) (1976 ed., Supp. V).

⁶Section 543(b)(1) requires a *custodian* to "deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case."

The Bankruptcy Court declined to base the turnover order on § 542(a) because it felt bound by *In re Avery Health Center, Inc.*, 8 B. R. 1016 (WDNY 1981) (§ 542(a) does not draw into debtor's estate property seized by IRS prior to filing of petition).

⁷Section 363(e) of the Bankruptcy Code provides:

"Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased by the trustee, the court shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. In any hearing under this section, the trustee

The United States District Court reversed, holding that a turnover order against the Service was not authorized by either § 542(a) or § 543(b)(1). App. to Pet. for Cert. 46a. The United States Court of Appeals for the Second Circuit, in turn, reversed the District Court. 674 F. 2d 144 (1982). It held that a turnover order could issue against the Service under § 542(a), and it remanded the case for reconsideration of the adequacy of Bankruptcy Court's protection conditions. The Court of Appeals acknowledged that its ruling was contrary to that reached by the United States Court of Appeals for the Fourth Circuit in *Cross Electric Co. v. United States*, 664 F. 2d 1218 (1981), and noted confusion on the issue among bankruptcy and district courts. 674 F. 2d, at 145 and n. 1. We granted certiorari to resolve this conflict in an important area of the law under the new Bankruptcy Code. 459 U. S. — (1982).

II

By virtue of its tax lien, the Service holds a secured interest in Whiting's property. We first examine whether § 542(a) of the Bankruptcy Code generally authorizes the turnover of property of a debtor seized by a secured creditor prior to the commencement of reorganization proceedings. Section 542(a) requires an entity in possession of "property that the trustee may use, sell, or lease under § 363" to deliver that property to the trustee. Subsections (b) and (c) of § 363 authorize the trustee to use, sell, or lease any "property of the estate," subject to certain conditions for the protection of

has the burden of proof on the issue of adequate protection." 11 U. S. C. § 363(e) (1976 ed., Supp. V).

Pursuant to this section, the Bankruptcy Court set the following conditions to protect the tax lien: Whiting was to pay the Service \$20,000 before the turnover occurred; Whiting also was to pay \$1,000 a month until the taxes were satisfied; the IRS was to retain its lien during this period; and if Whiting failed to make the payments, the stay was to be lifted. 10 B. R., at 761.

creditors with an interest in the property. Section 541(a)(1) defines the "estate" as "comprised of all the following property, wherever located: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case." Although these statutes could be read to limit the estate to those "interests of the debtor in property" at the time of the filing of the petition, we view them as a definition of what is included in the estate, rather than as a limitation.

A

In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future. Until the business can be reorganized pursuant to a plan under 11 U. S. C. §§ 1121–1129 (1976 ed., Supp. V), the trustee or debtor-in-possession is authorized to manage the property of the estate and to continue the operation of the business. See § 1108. By permitting reorganization, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners. H. R. Rep. No. 95–595, p. 220 (1977). Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if "sold for scrap." *Ibid.* The reorganization effort would have small chance of success, however, if property essential to running the business were excluded from the estate. See 6 J. Moore & L. King, *Collier on Bankruptcy* ¶3.05, p. 431 (14th ed. 1978). Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate.

This authorization extends even to property of the estate in which a creditor has a secured interest. § 363(b) and (c); see H. R. Rep. No. 95–595, p. 182 (1977). Although Congress might have safeguarded the interests of secured creditors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with

“adequate protection” for their interests. § 363(e), quoted in n. 7, *supra*. At the secured creditor’s insistence, the bankruptcy court must place such limits or conditions on the trustee’s power to sell, use, or lease property as are necessary to protect the creditor. The creditor with a secured interest in property included in the estate must look to this provision for protection, rather than to the nonbankruptcy remedy of possession.

Both the congressional goal of encouraging reorganizations and Congress’ choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate.

B

The statutory language reflects this view of the scope of the estate. As noted above, § 541(a) provides that the “estate is comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U. S. C. § 541(a)(1).⁸ The House and Senate Reports on the Bank-

⁸ Section 541(a)(1) speaks in terms of the debtor’s “interests . . . in property,” rather than property in which the debtor has an interest, but this choice of language was not meant to limit the expansive scope of the section. The legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. See 124 Cong. Rec. 32399, 32417 (1978) (remarks of Rep. Edwards); *id.*, at 33999, 34016–34017 (remarks of Sen. DeConcini); cf. § 541(d) (property in which debtor holds legal but not equitable title, such as a mortgage in which debtor retained legal title to service or to supervise servicing of mortgage, becomes part of estate only to extent of legal title); 124 Cong. Rec. 33999 (1978) (remarks of Sen. DeConcini) (§ 541(d) “reiterates the general principle that where the debtor holds bare legal title without any equitable interest, . . . the estate acquires bare legal title without any equitable interest in the property”). Similar statements to the effect that § 541(a)(1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of

ruptcy Code indicate that § 541(a)(1)'s scope is broad.⁹ Most important, in the context of this case, § 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. See H. R. Rep. No. 95-595, p. 367 (1977). Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.¹⁰

Section 542(a) is such a provision. It requires an entity (other than a custodian) holding any property of the debtor that the trustee can use under § 363 to turn that property over to the trustee.¹¹ Given the broad scope of the reorga-

action against third parties than those held by the debtor. See H. R. Rep. No. 95-595, pp. 367-368 (1977). These statements do not limit the ability of a trustee to regain possession of property in which the debtor had equitable as well as legal title.

⁹ "The scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act." H. R. Rep. No. 95-595, p. 367 (1977); S. Rep. No. 95-989, p. 82 (1978).

¹⁰ See, *e. g.*, §§ 543, 547, and 548. These sections permit the trustee to demand the turnover of property that is in the possession of others if that possession is due to a custodial arrangement, § 543, to a preferential transfer, § 547, or to a fraudulent transfer, § 548.

We do not now decide the outer boundaries of the bankruptcy estate. We note only that Congress plainly excluded property of others held by the debtor in trust at the time of the filing of the petition. See § 541(b); H. R. Rep. No. 95-595, p. 368 (1977); S. Rep. No. 95-989, p. 82 (1978). Although it may well be that funds that the IRS can demonstrate were withheld for its benefit pursuant to 26 U. S. C. § 7501 (employee withholding taxes), are excludable from the estate, see 124 Cong. Rec. 32417 (1978) (remarks of Rep. Edwards) (Service may exclude funds it can trace), the IRS did not attempt to trace the withheld taxes in this case. See Tr. of Oral Arg. 18, 28-29.

¹¹ The House Report expressly includes property of the debtor recovered under § 542(a) in the estate: the estate includes "property recovered by the trustee under section 542 . . . , if the property recovered was merely out of the possession of the debtor, yet remained 'property of the debtor.'"

nization estate, property of the debtor repossessed by a secured creditor falls within this rule, and therefore may be drawn into the estate. While there are explicit limitations on the reach of § 542(a),¹² none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings.¹³

As does all bankruptcy law, § 542(a) modifies the procedural rights available to creditors to protect and satisfy their liens.¹⁴ See *Wright v. Union Central Life Ins. Co.*, 311

H. R. Rep. No. 95-595, p. 367 (1977); see 4 L. King, *Collier on Bankruptcy* ¶ 541.16, p. 541-72.10 (15th ed. 1982).

¹² Section 542 provides that the property be usable under § 363, and that turnover is not required in three situations: when the property is of inconsequential value or benefit to the estate, § 542(a), when the holder of the property has transferred it in good faith without knowledge of the petition, § 542(c), or when the transfer of the property is automatic to pay a life insurance premium, § 542(d).

¹³ Under the old Bankruptcy Act, a bankruptcy court's summary jurisdiction over a debtor's property was limited to property in the debtor's possession when the liquidation petition was filed. *Phelps v. United States*, 421 U. S. 330, 335-336 (1975); *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 432-434 (1924). *Phelps*, which involved a liquidation under the prior Bankruptcy Act, held that a bankruptcy court lacked jurisdiction to direct the Service to turn over property which had been levied on and which, at the time of the commencement of bankruptcy proceedings, was in the possession of an assignee of the debtor's creditors.

Phelps does not control this case. First, the new Bankruptcy Code abolished the distinction between summary and plenary jurisdiction, thus expanding the jurisdiction of bankruptcy courts beyond the possession limitation. H. R. Rep. No. 95-595, pp. 48-49 (1977); see *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, — U. S. —, — (1982) (plurality opinion) (slip op. 3). Moreover, *Phelps* was a liquidation situation, and is inapplicable to reorganization proceedings such as we consider here.

¹⁴ One of the procedural rights the law of secured transactions grants a secured creditor to enforce its lien is the right to take possession of the secured property upon the debtor's default. Uniform Commercial Code § 9-503, 3A U. L. A. 211 (1981). A creditor's possessory interest resulting from the exercise of this right is subject to certain restrictions on the credi-

U. S. 273, 278-279 (1940). See generally Nowak, Turnover Following Prepetition Levy of Distrain Under Bankruptcy Code § 542, 55 Am. Bankr. L. J. 313, 332-333 (1981). In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of reorganization proceedings.¹⁵ The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession.

C

This interpretation of § 542(a) is supported by the section's legislative history. Although the legislative reports are silent on the precise issue before us, the House and Senate hearings from which § 542(a) emerged provide guidance. Several witnesses at those hearings noted, without contradiction, the need for a provision authorizing the turnover of property of the debtor in the possession of secured credi-

tor's use of the property. See § 9-504, 3A U. L. A. 256-257. Here, we address the abrogation of the Service's possessory interest obtained pursuant to its tax lien, a secured interest. We do not decide whether any property of the debtor in which a third party holds a possessory interest independent of a creditor's remedies is subject to turnover under § 542(a). For example, if property is pledged to the secured creditor so that the creditor has possession prior to any default, 542(a) may not require turnover. See 4 L. King, Collier on Bankruptcy ¶ 541.08[9], p. 541-53 (15th ed. 1982).

¹⁵ Indeed, if this were not the effect, § 542(a) would be largely superfluous in light of § 541(a)(1). Interests in the seized property that could have been exercised by the debtor—in this case, the rights to notice and the surplus from a tax sale, see n. 4, *supra*—are already part of the estate by virtue of § 541(a)(1). No coercive power is needed for this inclusion. The fact that § 542(a) grants the trustee greater rights than those held by the debtor prior to the filing of the petition is consistent with other provisions of the Bankruptcy Code that address the scope of the estate. See, *e. g.*, § 544 (trustee has rights of lien creditor); § 545 (trustee has power to avoid statutory liens); § 549 (trustee has power to avoid certain post-petition transactions).

tors.¹⁶ Section 542(a) first appeared in the proposed legislation shortly after these hearings. See H. R. 6, § 542(a), 95th Cong., 1st Sess., introduced January 4, 1977. See generally Klee, Legislative History of the New Bankruptcy Code, 54 Am. Bankr. L. J. 275, 279–281 (1980). The section remained unchanged through subsequent versions of the legislation.

Moreover, this interpretation of § 542 in the reorganization context is consistent with judicial precedent predating the Bankruptcy Code. Under Chapter X, the reorganization chapter of the Bankruptcy Act of 1878, as amended, §§ 101–276, 52 Stat. 883 (1938) (formerly codified as 11 U. S.C. §§ 501–676 (1976 ed.)), the bankruptcy court could order the turnover of collateral in the hands of a secured creditor. *Reconstruction Finance Corp. v. Kaplan*, 185 F. 2d 791, 796 (CA1 1950); see *In re Third Ave. Transit Corp.*, 198 F. 2d 703, 706 (CA2 1952); 6A J. Moore & L. King, Collier on Bankruptcy ¶ 14.03, p. 741–742 (14th ed. 1977); Murphy, Use of Collateral in Business Rehabilitations: A Suggested Redrafting of Section 7–203 of the Bankruptcy Reform Act, 63 Calif. L. Rev. 1483, 1492–1495 (1975). Nothing in the legislative history evinces a congressional intent to depart from that practice. Any other interpretation of § 542(a) would deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions.¹⁷

¹⁶ See Hearings on H. R. 31 and H. R. 32 Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 439 (1975) (statement of Patrick A. Murphy); *id.*, at 1023 (statement of Walter W. Vaughn); *id.*, at 1757 (statement of Robert J. Grimmig); *id.*, at 1823–1839 (remarks and statement of Leon S. Forman, National Bankruptcy Conference); Hearings on S. 235 and S. 236 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 125 (1975) (statement of William W. Vaughn); *id.*, at 464 (statement of Robert J. Grimmig). In general, we find Judge Friendly's careful analysis of this history for the Court of Appeals, 674 F. 2d, at 152–156, to be unassailable.

¹⁷ Section 542(a) also governs turnovers in liquidation and individual

We conclude that the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization.

III

A

We see no reason why a different result should obtain when the IRS is the creditor. The Service is bound by § 542(a) to the same extent as any other secured creditor. The Bankruptcy Code expressly states that the term "entity," used in § 542(a), includes a governmental unit. § 101(14). See Tr. of Oral Arg. 16. Moreover, Congress carefully considered the effect of the new Bankruptcy Code on tax collection, see generally S. Rep. No. 95-1106 (1978) (report of Senate Finance Committee), and decided to provide protection to tax collectors, such as the IRS, through grants of enhanced priorities for unsecured tax claims, § 507(a)(6), and by the nondischarge of tax liabilities, § 523(a)(1). S. Rep. No. 95-989, pp. 14-15 (1978). Tax collectors also enjoy the generally applicable right under § 363(e) to adequate protection for property subject to their liens. Nothing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector in the form of an exclusion from the estate of property seized to satisfy a tax lien.

B

Of course, if a tax levy or seizure transfers to the IRS ownership of the property seized, § 542(a) may not apply. The enforcement provisions of the Internal Revenue Code of

adjustment of debt proceedings under Chapters 7 and 13 of the Bankruptcy Code, 11 U. S. C. §§ 701-766, 1301-1330 (1976 ed., Supp. V). See § 103(a). Our analysis in this case depends in part on the reorganization context in which the turnover order is sought. We express no view on the issue whether § 542(a) has the same broad effect in liquidation or adjustment of debt proceedings.

1954, 26 U. S. C. §§ 6321–6326 (1976 ed. and Supp. V), do grant to the Service powers to enforce its tax liens that are greater than those possessed by private secured creditors under state law. See *United States v. Rodgers*, — U. S. —, — (1983) (slip op. 4); *id.*, at —, —, n. 7 (dissenting opinion) (slip op. 1, 6, n. 7); *United States v. Bess*, 357 U. S. 51, 56–57 (1958). But those provisions do not transfer ownership of the property to the IRS.¹⁸

¹⁸ It could be argued that dictum in *Phelps v. United States*, 421 U. S. 330 (1975), suggests the contrary. In that case, the IRS had levied on a fund held by an assignee of the debtor for the benefit of the debtor's creditors. In a liquidation proceeding under the old Bankruptcy Act, the trustee sought an order directing the assignee to turn the funds over to the estate. The Court determined that the levy transferred constructive possession of the fund to the Service, thus ousting the bankruptcy court of jurisdiction. 421 U. S., at 335–336. In rebutting the trustee's argument that actual possession by the IRS was necessary to avoid jurisdiction, the Court stated: "The levy . . . gave the United States full legal right to the \$38,000 levied upon as against the claim of the petitioner receiver." *Id.*, at 337. This sentence, however, is merely a restatement of the proposition that the levy gave the Service a sufficient possessory interest to avoid the bankruptcy court's summary jurisdiction. The proposition is now irrelevant because of the expanded jurisdiction of bankruptcy courts under the Bankruptcy Code. See n. 13, *supra*.

The Court in *Phelps* made a similar statement in discussing the trustee's claim that § 70a(8) of the old Bankruptcy Act, 11 U. S. C. § 110(a)(8) (1976 ed.) (trustee is vested "with the title of the debtor as of the date of the filing of the petition . . . to . . . property held by an assignee for the benefit of creditors"), continued constructive possession of the property in the estate, notwithstanding the pre-petition levy. 421 U. S., at 337, n. 8. The Court rejected this claim. It first cited the trustee's concession that the debtor had surrendered title upon conveying the property to the assignee, *ibid.*, and held that, because the debtor did not hold title to the property as of the date of filing, the property was not covered by § 70a(8). The Court went on, however, to state that "the pre-bankruptcy levy displaced any title of [the debtor] and § 70a(8) is therefore inapplicable." *Ibid.* Because the initial conveyance of the property to the assignee was said to have extinguished the debtor's claim, this latter statement was unnecessary to the decision. To the extent, if any, that it conflicts with our decision here,

The Service's interest in seized property is its lien on that property. The Internal Revenue Code's levy and seizure provisions, 26 U. S. C. §§ 6331 and 6332, are special procedural devices available to the IRS to protect and satisfy its liens, *United States v. Sullivan*, 333 F. 2d 100, 116 (CA3 1964), and are analogous to the remedies available to private secured creditors. See Uniform Commercial Code § 9-503, 3A U. L. A. 211-212 (1981); n. 14, *supra*. They are provisional remedies that do not determine the Service's rights to the seized property, but merely bring the property into the Service's legal custody. See 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶111.5.5, p. 111-108 (1981). See generally Plumb, *Federal Tax Collection and Lien Problems*, pt. 1, 13 Tax L. Rev. 247, 272 (1958). At no point does the Service's interest in the property exceed the value of the lien. *United States v. Rodgers*, — U. S., at —, — (slip op. 12); *id.*, at — (dissenting opinion) (slip op. 12); see *United States v. Sullivan*, 333 F. 2d, at 116 ("the Commissioner acts pursuant to the collection process in the capacity of lienor as distinguished from owner"). The IRS is obligated to return to the debtor any surplus from a sale. 26 U. S. C. § 6342(b). Ownership of the property is transferred only when the property is sold to a bona fide purchaser at a tax sale. See *Bennett v. Hunter*, 9 Wall. 326, 336 (1870); 26 U. S. C. § 6339(a)(2); Plumb, 13 Tax. L. Rev., at 274-275. In fact, the tax sale provision itself refers to the debtor as the owner of the property after the seizure but prior to the sale.¹⁹ Until such a sale takes place, the property remains the debtor's and thus is subject to the turnover requirement of § 542(a).

we depart from it.

¹⁹ See 26 U. S. C. § 6335(a) ("As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property"), and § 6335(b) ("The Secretary shall as soon as practicable after the seizure of the property give notice to the owner").

IV

When property seized prior to the filing of a petition is drawn into the Chapter 11 reorganization estate, the Service's tax lien is not dissolved; nor is its status as a secured creditor destroyed. The IRS, under § 363(e), remains entitled to adequate protection for its interests, to other rights enjoyed by secured creditors, and to the specific privileges accorded tax collectors. Section 542(a) simply requires the Service to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

May 25, 1983

82-215 United States v. Whiting Pools, Inc.

Dear Harry:

Please join me.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1983

Re: No. 82-215

United States
v. Whiting Pools, Inc.

Dear Harry,
I agree.

Sincerely,

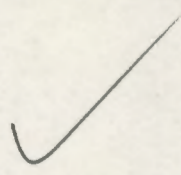
Bill

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL



May 25, 1983

Re: No. 82-215-U.S. v. Whiting Pools, Inc.

Dear Harry:

Please join me.

Sincerely,

TM

T.M.

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1983

Re: No. 82-215 United States v. Whiting Pools, Inc.

Dear Harry:

Please join me.

Sincerely, *WM*

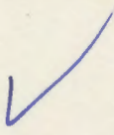
Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 26, 1983

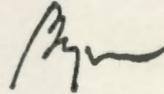


Re: 82-215 -
United States v. Whiting Pools, Inc.

Dear Harry,

Please join me.

Sincerely,



Justice Blackmun

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

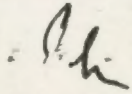
May 26, 1983

Re: 82-215 - United States v. Whiting
Pools, Inc.

Dear Harry:

Please join me.

Respectfully,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

✓

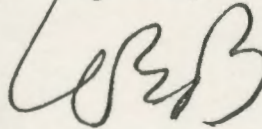
June 1, 1983

Re: No. 82-215, U.S. v. Whiting Pools, Inc.

Dear Harry:

I join.

Regards,



Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 2, 1983

No. 82-215 U. S. v. Whiting Pools, Inc.

Dear Harry,

Please join me.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

82-215

U.S. v. Whiting Pools (Mark)

HAB for the Court

2nd draft 6/2/83

Joined by CJ, WJB, BRW, TM, LFP, WHR, JPS, SOC