



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

WAGGONER CARR
ATTORNEY GENERAL

September 12, 1963

Honorable Robert S. Calvert
Comptroller of Public Accounts
Capitol Station
Austin, Texas

Opinion No. C-143

RE: Whether certain notice
is a sufficient act to
prevent running of
limitation under Art.
16.01, Title 122A,
Taxation-General, R.C.S.,
as amended in 1963.

Dear Mr. Calvert:

You have asked us ". . . whether the filing of notice of State's lien under provisions of Articles 1.07, 1.07A and 1.07B, Title 122A, Taxation-General, Revised Civil Statutes of Texas, is an Act which will protect the State's interest in taxes due, on the transfer of no-par stock." Your inquiry is predicated upon the Act¹ of our last Legislature which, in its relevant portion, states:

". . . No action shall be commenced or prosecuted after the expiration of one hundred and eighty (180) days from the effective date of this Act in regard to stock transfer taxes accruing on transfers of no-par shares of stock prior to such effective date." (under-scoring added.).

Our opinion is that the ". . . action . . . commenced or prosecuted . . ." contemplated by this Act must be a suit filed in a court of competent jurisdiction which seeks payment of the taxes referred to in the Act. Therefore, the filing of notice of the State's lien mentioned in your inquiry would not be a sufficient action to prevent running of the bar of limitation provided in the Act.

We quote from the following authorities:

". . . An action is a judicial proceeding, either in law or in equity, to obtain certain relief at the

¹Acts 1963, 58th Leg., Ch. 513, p. 1351, H.B. 668, which amended Art. 16.01 of Title 122A, Taxation-General, Revised Civil Statutes of Texas. This Article imposes a tax upon the sale and transfer of corporate shares.

hands of the court . . ." Elmo v. James, 282 S.W. 835 (Tex. Civ. App. 1926, error dism.).

". . . To constitute the proceeding 'a suit' or 'action,' in any legal sense, it is essential that it rest in a court, with the power to hear it . . ." United Production Corporation v. Hughes, 137 Tex. 21, 152 S.W.2d 327 (1941).

Accord: Merchants' Mutual Insurance Co. v. Lacroix, 35 Tex. 249 (1871-2); Hereford Independent School Dist. v. Jones, 118 Tex. 655, 23 S.W.2d 690 (1930).

The lien provided by Articles 1.07, 1.07A and 1.07B is merely security for the tax, and when the tax is barred by limitation the State is left without any remedy upon the lien. The following authorities establish this principle with reference to debts; we hold that this principle is also applicable to the lien provisions and the taxes under consideration. Blackwell v. Barnett, 52 Tex. 326, 332-333 (1879); Hawthorn v. Coates Bros., 202 S.W. 804 (Tex. Civ. App. 1918); 36 Tex. Jur.2d 697-701, Liens, Sec. 20-23.

The amended act which states, "No action shall be commenced or prosecuted after the expiration of one hundred and eighty (180) days," is a statute of limitations, and to be available as a defense must be affirmatively pleaded. Cook v. City of Booker, 167 S.W.2d 232 (Tex. Civ. App. 1942); Attorney General's Opinion No. 0-7303 (1946) and V-39 (1947).

Limitation statutes do not release or extinguish the debt but merely affect the remedy when its enforcement is sought. Sam Bassett Lumber Co. v. City of Houston, 145 Tex. 492, 198 S.W.2d 879 (1947).

You are therefore advised that filing of notice of the State's lien pursuant to Articles 1.07, 1.07A and 1.07B of Title 122A, Taxation-General, R.C.S., is not an action which will prevent the running of limitation under Article 16.01, as amended by Acts 1963, 58th Legislature.

SUMMARY

"Filing of notice of the State's lien pursuant to Articles 1.07, 1.07A and 1.07B of Title 122A, Taxation-General, R.C.S., is not an action which will prevent the running of limitation under

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Article 16.01, as amended by Acts 1963,
58th Legislature.

Very truly yours,

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APPROVED:
OPINION COMMITTEE

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APPROVED FOR THE ATTORNEY GENERAL
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