

JUN 18 2009

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NV-08-1314-JuHMo
)		
CRYSTAL CASCADES CIVIL, LLC,)	Bk. No.	05-20550
)		
Debtor,)	Adv. No.	06-01082
)		
UNITED STATES OF AMERICA,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
RICHARD H. BUENTING; ROAD &)		
HIGHWAY BUILDERS, LLC,)		
)		
Appellees.)		
)		

Argued and Submitted on May 19, 2009
at Seattle, Washington

Filed - June 18, 2009

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: JURY, HOLLOWELL, and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellees Richard H. Buenting ("Buenting") and Road &
2 Highway Builders, LLC, ("Road & Highway") (collectively,
3 "Appellees") filed an adversary complaint against appellant
4 United States of America ("IRS") seeking a judicial declaration
5 that their later-in-time recorded liens against Crystal Cascades
6 Civil, LLC's real property were superior to the IRS's two
7 notices of federal tax lien (variously, "NFTLs" and "liens")
8 recorded against the same property.²

9 The validity of the IRS's tax liens against Appellees is
10 governed by 26 U.S.C. § 6323(f).³ The statute requires the IRS
11 to record its tax lien in a manner that allows third parties to
12 discover the lien through a reasonable inspection of the public
13 index of deeds. IRC § 6323(f)(4)(A).

14 Here, the NFTLs identified the taxpayer as "Crystal
15 Cascades, LLC, a corporation" instead of "Crystal Cascades
16 Civil, LLC", which was debtor's name registered with the Nevada
17 Secretary of State. Therefore, Appellees contended the tax
18 liens were outside the chain of title and could not be
19 discovered by a reasonable inspection of the public index of
20

21 ² The IRS recorded its tax liens on August 11, 2004 and
22 January 28, 2005, as a result of debtor's failure to pay its
23 employment taxes for the last two quarters of 2003 and the first
24 two quarters of 2004, respectively. Buenting recorded a deed of
25 trust which secured a \$125,256 note on February 4, 2005. Road &
26 Highway recorded a deed of trust which secured a \$455,000 note on
the same date. It recorded a corrected deed of trust for this
loan on February 8, 2005. This corrected deed of trust also
secured a \$3,174,960.13 debt owed under an indemnification
agreement executed by debtor's principals.

27 ³ Hereinafter citations to the Internal Revenue Code, 26
28 U.S.C. § 1 et seq. are referred to as "IRC".

1 real property records in Clark County, Nevada where the property
2 was located.

3 After a trial, the bankruptcy court issued its ruling in a
4 written opinion entered on November 12, 2008, which was amended
5 on December 3, 2008 and published as Buenting v. Crystal
6 Cascades Civil, LLC (In re Crystal Cascades Civil, LLC), 398
7 B.R. 23 (Bankr. D. Nev. 2008). The bankruptcy court held that a
8 search of the real property records in Clark County, Nevada
9 using debtor's exact legal name constituted a reasonable
10 inspection within the meaning of IRC § 6323(f)(4)(A). In so
11 deciding, the court concluded that the standard for a reasonable
12 inspection under the statute should be tested against how a
13 nonprofessional person⁴ would search the public records index,
14 which would be an exact name search. Crystal Cascades Civil,
15 LLC, 398 B.R. at 34. The court also considered the nature of
16 the public index and search methods that were available in Clark
17 County, Nevada. Id. at 36-37. Because an exact-name search
18 would not have revealed the tax liens, the court awarded
19 Appellees \$321,000 in surplus proceeds that remained after the
20 foreclosure sale of debtor's property.

21 The IRS timely filed this appeal, contending that the
22 bankruptcy court applied the incorrect legal standard when
23 making its ruling on what constituted a reasonable inspection
24 under the circumstances here.

25
26 ⁴ The court uses the terminology "average nonprofessional"
27 or "nonprofessional searcher" in its written opinion. At times
28 in trial, reference was made to the "person off the street."
Other times reference was made to the "average user". We use the
term "ordinary prudent person" as synonymous with
"nonprofessional", "person off the street" or "average user".

1 Debtor entered into the stipulation with Business Bank after
2 concluding that the property's value was less than the amount of
3 liens encumbering it.

4 Appellees did not receive notice of the stipulation, but
5 they discovered it on February 6, 2006, during a routine search
6 of the docket. Due to their lack of notice, Appellees filed
7 their adversary complaint⁵ on February 21, 2006, seeking to
8 reimpose the automatic stay and to obtain a judicial declaration
9 regarding the priority of their liens over the government's tax
10 liens. In conjunction with filing the complaint, Appellees
11 moved for a preliminary injunction against the pending
12 foreclosure sale. At the February 27, 2006 hearing on this
13 motion, the court denied the relief, authorized the foreclosure
14 sale to go forward on February 28, 2006, and ordered that any
15 excess proceeds be deposited in an interest-bearing account
16 pending resolution of Appellees' adversary proceeding.⁶

17 Stewart Title Company ("Stewart Title") conducted the
18 nonjudicial foreclosure sale on Business Bank's behalf. The
19 title officer responsible for conducting the sale performed a
20

21 ⁵ Appellees also named Debtor, Business Bank and the Gore
22 Family Trust ("Gore") as defendants.

23 ⁶ Because the priority of Business Bank's lien was
24 uncontested, it was permitted to keep the portion of the
25 foreclosure proceeds which satisfied its debt and was thereafter
26 dismissed from the proceeding on March 3, 2006. Appellees
27 entered into a settlement agreement with Gore on October 18,
28 2007, which provided that Appellees would pay one third of all
amounts recovered to Gore, up to a maximum of \$100,000. In
return, Gore agreed to dismiss, with prejudice, its counterclaim
against Appellees. Appellees dismissed Gore from the adversary
proceeding on November 1, 2007.

1 title search that determined who would receive notice of the
2 foreclosure sale. The title officer did not find the NFTLs.
3 Consequently, the IRS did not receive notice of the sale.

4 Road & Highway purchased the property at the foreclosure
5 sale for \$1.5 million.⁷ Thereafter, the IRS notified Road &
6 Highway that it was exercising its statutory right of redemption
7 under IRC § 7425. Appellees negotiated a release of the IRS's
8 claim to a right of redemption in exchange for \$100,000.⁸

9 The trial regarding the priority of the IRS's NFTLs over
10 Appellees' liens occurred in November 2007. The bankruptcy
11 court ruled against the IRS and in favor of Appellees. The IRS
12 timely filed this appeal.

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14
15
16 ⁷ Bunting owned 50% of Road & Highway Builders, LLC.
17 Fisher Sand and Gravel Corporation, a North Dakota C Corporation
18 owned the other 50%.

19 ⁸ Appellees asserted for the first time in their October 18,
20 2007, trial brief that the IRS's election to redeem the property
21 operated to extinguish its liens. The court addressed this issue
22 in its final ruling, finding that a precondition of the IRS's
23 right of redemption was the proper filing of the tax liens.
24 Because the court found the tax liens were not properly filed and
25 ineffective against third parties, the court concluded that the
26 IRS had no legal right of redemption which arose when the
27 property was foreclosed upon. The court further held that if the
28 tax liens were valid, the IRS's acceptance of \$100,000 was not
itself a redemption and, therefore, was not an election of
remedies. Thus, the court concluded that the IRS was not
estopped from asserting a claim to the surplus proceeds. Crystal
Cascades Civil, LLC, 398 B.R. at 37-38. Since the court's ruling
on the election of remedies issue does not depend upon whether
the NFTLs were valid against third parties, we need not address
these issues to reach our determination.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction over this core
3 proceeding under 28 U.S.C. §§ 1334(b) and 157(b) (2) (K) and (O).
4 We have jurisdiction under 28 U.S.C. § 158.⁹

5 **III. ISSUE**

6 Whether the bankruptcy court applied the correct legal
7 standard in reaching its decision that a reasonable inspection of
8 the relevant property records in Clark County, Nevada would not
9 have revealed the tax liens.

10 **IV. STANDARD OF REVIEW**

11 Whether a reasonable inspection of the relevant property
12 records within the meaning of IRC § 6323(f) (4) (A) would have
13 revealed the IRS's NFTLs is a mixed question of law and fact that
14 we review de novo. TKB Int'l, Inc. v. United States, 995 F.2d
15 1460, 1465 (9th Cir. 1993) (citing Kivel v. United States, 878
16 F.2d 301, 304 (9th Cir. 1989)). Because our review is de novo,
17 we consider whether a reasonable inspection of the public index
18 occurred as if no decision had been rendered by the bankruptcy
19 court. United States v. Silverman, 861 F.2d 571, 576 (9th Cir.
20 1988).

21 **V. DISCUSSION**

22 The priority of a federal tax lien is governed by federal
23 law. United States v. Equitable Life Assurance Soc'y, 384 U.S.
24 323, 328 (1966). When a taxpayer neglects or refuses to pay a
25

26 ⁹ When Appellees filed the adversary proceeding, the estate
27 owned the real property. Subject matter jurisdiction is
28 determined as of the date the complaint is filed. Fietz v. Great
W. Sav. (In re Fietz), 852 F.2d 455, 457 n.2 (9th Cir. 1988).

1 tax liability after assessment, notice, and demand, the amount
2 due becomes "a lien in favor of the United States upon all
3 property and rights to property, whether real or personal,
4 belonging to such person." IRC § 6321.

5 Once the IRS files a proper notice of a tax lien, the lien
6 is valid against a subsequent purchaser of the property, provided
7 that the purchaser is given notice of the encumbrance. IRC
8 § 6323(a).¹⁰ The filing requirements for the notice are set
9 forth in IRC § 6323(f).¹¹ The notice itself must be on Form 668

10
11 ¹⁰ This subsection provides:

12 Purchasers, holders of security interests, mechanic's
13 lienors, and judgment lien creditors.--The lien imposed
14 by section 6321 shall not be valid as against any
15 purchaser, holder of a security interest, mechanic's
16 lienor, or judgment lien creditor until notice thereof
17 which meets the requirements of subsection (f) has been
18 filed by the Secretary.

19 ¹¹ Subsection (f) titled "Place for filing notice; form"
20 provides in relevant part:

21 (1) Place for filing.--The notice referred to in
22 subsection (a) shall be filed--(A) Under State laws.--
23 (i) Real property.--In the case of real property, in
24 one office within the State (or the county, or other
25 governmental subdivision), as designated by the laws of
26 such State, in which the property subject to the lien
27 is situated; (3) Form.--The form and content of
28 the notice referred to in subsection (a) shall be
prescribed by the Secretary. Such notice shall be valid
notwithstanding any other provision of law regarding
the form or content of a notice of lien. (4) Indexing
required with respect to certain real property.--In the
case of real property, if--(A) under the laws of the
State in which the real property is located, a deed is
not valid as against a purchaser of the property who
(at the time of purchase) does not have actual notice
or knowledge of the existence of such deed unless the

(continued...)

1 and its contents are dictated by the Secretary of the Treasury.
2 IRC § 6323(f)(3). Treasury Regulation ("Treas. Reg.")
3 § 301.6323(f)-1(d)(2) requires that the NFTL "must identify the
4 taxpayer, the tax liability giving rise to the lien, and the date
5 the assessment arose...."

6 With respect to real property, the notice requirement under
7 the statute requires proper filing of the tax lien under the laws
8 of the state "in which the property subject to the lien is
9 situated." IRC § 6323(f)(1)(A)(i). Where, as here, the property
10 is situated in a state that invalidates a deed against a bona
11 fide purchaser unless the filing of that deed has been recorded,
12 the NFTL "shall not be treated as meeting the ... requirements"
13 with respect to such a purchaser "unless the fact of filing [the
14 tax lien] is entered and recorded in [an] index ... in such a
15 manner that a reasonable inspection of the index will reveal the
16 existence of the lien."¹² IRC § 6323(f)(4)(A).

17 IRC § 6323(f)(4)(A) thus defines the rights of the
18 subsequent purchaser of real property vis-a-vis the IRS's NFTLs
19 and fixes a standard by which such rights are to be measured.
20 However, there is no precise legal test for determining what

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22 ¹¹(...continued)
23 fact of filing of such deed has been entered and
24 recorded in a public index at the place of filing in
such a manner that a reasonable inspection of the index
will reveal the existence of the deed....

25 ¹² Under Nevada law, a subsequent purchaser without notice of
26 a prior interest takes free and clear of that interest. Nev.
27 Rev. Stat. § 111.320. Clark County maintains grantor-grantee
28 indices pursuant to Nev. Rev. Stat. § 247.190.1. The indexing is
supplemented by an Internet-based search engine that allows
searching by entity name. See Nev. Rev. Stat. § 247.150.9(b).

1 constitutes a "reasonable inspection" within the meaning of the
2 statute. The term is defined neither in the statute nor in the
3 regulations. Central to this case, therefore, is the
4 interpretation of the word "reasonable".

5 The IRS's various assignments of error in this appeal
6 demonstrate that the word "reasonable" raises numerous questions
7 which we must address: Should the reasonableness of an
8 inspection of the public records be tested against the conduct of
9 an ordinary prudent person? Or, as the IRS argues, should
10 reasonableness be tested against the type of search conducted by
11 a professional title officer? Should the reasonableness of the
12 search depend at all on local idiosyncracies with respect to the
13 organization of the public index and electronic search methods
14 available? Or, as the IRS argues, does consideration of local
15 practice impose too strict a burden on the IRS?

16 Additionally, should a subsequent purchaser who has reason
17 to know that an encumbrance exists be held to inquiry notice to
18 search the grantor/grantee index not only under the name of the
19 record owner, but also under other names the record owner might
20 possibly have used? The final question for our consideration is
21 whether it is necessary for us to reconcile the bankruptcy
22 court's holding that an exact-name search constitutes a
23 reasonable inspection under IRC § 6323(f)(4)(A) with Treas. Reg.
24 § 301.6323(f)-1(d)(2), which incorporates a federal common law
25 substantial compliance test regarding the taxpayer's identity.

26 **A. The Reasonable Inspection Test Under IRC § 6323(f)(4)(A)**

27 Our analysis for application of the reasonable inspection
28 test to the facts before us starts with the plain language of the

1 statute. United States v. Ron Pair Enters., 489 U.S. 235, 240-41
2 (1989). Unlike other definitions of terms for tax purposes which
3 often bear little resemblance to their definitions in everyday
4 life,¹³ we can rely on the dictionary definition of the word
5 "reasonable" to guide us in evaluating the conduct to which it
6 refers. United States v. McNab, 331 F.3d 1228, 1237 (11th Cir.
7 2003) ("To determine the ordinary meaning of a term, courts often
8 turn to dictionary definitions for guidance."). Reasonable is
9 defined as "what is fair, proper and moderate" under the
10 circumstances. Black's Law Dictionary (8th ed. 2009). The word
11 connotes use of an objective standard by which to measure the
12 conduct of an index searcher – a common sense, nontechnical
13 concept that deals with practical considerations on which a
14 reasonable and prudent person would act under similar
15 circumstances.

16 The word inspection means a "careful examination". Black's
17 Law Dictionary (8th ed. 2009). However, when preceded by the
18 word "reasonable", it implies that an inspection cannot be
19 expected to completely eliminate the possibility that a material
20 error on the NFTL will be uncovered. See generally Sum of
21 \$66,839.59 v. IRS, 119 F. Supp. 2d 1358, 1362 (N.D. Ga. 2000).

22
23 ¹³ For example, "the term 'basis,'...which in tax parlance
24 means very roughly the cost of an asset adjusted for depreciation
25 and other expenses, has a dictionary definition that is
26 essentially useless for tax purposes. 'Basis' therefore means as
27 much (or as little) as the statutory context, regulations, and
28 previous judicial decisions provides. The term 'gift' has
different meanings for income, estate, and gift tax purposes,
none of them really consistent with the nontax definition." 2A
Singer, Sutherland on Statutory Construction, § 77A:1 (7th ed.
2008).

1 Along the same vein, a third party cannot be required to search
2 every possible variation of a taxpayer's name. See generally
3 Assocs. Fin. Serv. Co. v. Brown, 258 Wis. 2d 915, 656 N.W. 2d 56
4 (2002).

5
6 **1. Title Officer Versus Ordinary Prudent Person**

7 With these definitions and principles to guide us, we
8 consider the government's argument that the reasonableness of the
9 inspection should be tested against the search methods used by a
10 professional title officer. The IRS urges us to utilize this
11 standard in our analysis for essentially two reasons. First, the
12 IRS maintains that the vast majority of title searches are
13 conducted by professionals. Second, title officers use a "less
14 is more" approach with their search. As the moniker denotes, a
15 lesser version of the taxpayer's name is used. Under that
16 scenario, the government contends that a reasonable search would
17 use the term "Crystal Cascades" only, which would have located
18 the tax liens.

19 The plain wording of IRC § 6323(f)(4)(A), however, requires
20 the IRS to provide notice of its tax liens through the public
21 index. Title officers use private title plants which provide
22 information above and beyond what is available at the local state
23 recorder's office. Such title plants are not accessible to the
24 public. It follows then that, although a tax lien may be
25 discovered through a search in a title plant, it may still be
26 outside the chain of title if it cannot be found by the
27 appropriate method of examining the public records.

1 In addition, title officers have extensive training in
2 searching land records. Underwriting standards dictate the
3 extent of their search techniques depending on the stakes
4 involved. With high stakes, the title officer may perform
5 searches using numerous variations of the debtor's name.¹⁴
6 However, it is irrelevant what types of searches title companies
7 do, as the issue is whether a subsequent purchaser has
8 constructive notice of the tax liens through inspection of the
9 public records. What a title company should have or would have
10 done to discover the liens does not control. See Kivel, 878 F.2d
11 at 304.

12 In sum, to accommodate its error, the IRS essentially seeks
13 to change the law of constructive notice to require that future
14 title searches be performed only by trained individuals with
15 elaborate and expensive equipment at their disposal. This result
16 cannot be what Congress intended when mandating the IRS's NFTLs
17 to impart notice through a public recording system. Accordingly,
18 we hold as a matter of law that the reasonableness of a search
19 should be tested against the conduct of an ordinary prudent
20 person.

21 **2. Locality And The Exact-Name Search**

22 Although we are dealing with a federal tax statute, the
23 standard for what constitutes a reasonable search of the public
24 index will necessarily vary because of the nature of the

25
26 ¹⁴ The IRS's witness, Betty Waters, testified that the
27 underwriting guidelines for a company would dictate the type of
28 search required by the title officer. She further testified that
among title companies, the search would vary depending upon each
company's guidelines.

1 particular state's indexing system. As the bankruptcy court
2 noted, a person might use different searches in different
3 localities, even when presented with the same name. "A searcher
4 would construct different searches, for example, in jurisdictions
5 that maintain only grantor-grantee indexes than he or she would
6 if the jurisdiction permits full-name search by computer, with
7 the added function of 'wildcards.'" Crystal Cascades Civil, LLC,
8 398 B.R. at 31.

9 That leads us to the question of what constitutes a
10 reasonable search of the public records in Clark County, Nevada.
11 The parties' witnesses, both of whom were title officers, agreed
12 that an ordinary prudent person would use an exact-name search
13 only. Common sense dictates that an exact-name search is a
14 logical starting point under circumstances where the public is
15 offered a computerized database in which grantors and grantees
16 may be searched by name, such as we have here. See generally
17 United States v. Polk, 822 F.2d 871 (9th Cir. 1987) (government's
18 lien against third party valid when NFTL used taxpayer's full
19 legal name, but third party conducted search only with taxpayer's
20 middle and last name).

21 Moreover, even though the index had a "wild card" feature
22 (when the name is searched, the search results will not only
23 contain documents with that name, but also documents that have
24 the name searched as a root), the IRS's witness Ms. Waters
25 testified that an index searcher of the public records would
26 input the legal name of the entity and not use the "less is more"
27
28

1 approach.¹⁵ While the witnesses' opinions are not dispositive,
2 the bankruptcy court found their testimony credible and we have
3 no reason to question that an exact-name search is reasonable
4 even when a "wildcard" search feature was available.

5 Inherent in the application of the reasonable inspection
6 test are judgment calls about what constitutes a reasonable
7 search, especially in today's electronic age. If a "balance must
8 be struck between exactitude in searching – searching under the
9 debtor's precise name, and only that name, – and latitude in
10 searching – searching under some variant of the debtor's exact
11 name," Crystal Cascades Civil, LLC, 398 B.R. at 35, we think the
12 balance must tip in favor of subsequent purchasers, whom the
13 statute is designed to protect. Requiring an ordinary prudent
14 person to use variants of the debtor's exact name would not only
15 be time intensive, but also unfair in relation to the IRS who
16 need only check the accuracy of its tax liens.

17 Moreover, this approach provides a simpler rule that has
18 general application, eliminating nuances regarding one word, two
19 word, or three-word searches versus exact-name searches. Common
20 sense tells us that some index searchers will be more computer
21 savvy than others, but on the whole we cannot expect them to do
22 the work of trained title officers. What we can expect is that
23 all searchers would uniformly be able to come up with an exact-

24
25 ¹⁵ At trial, the government's lawyer asked Ms. Waters: "If
26 you were given the name Crystal Cascades Civil, LLC, and know
27 that the [title insurance] policy is only for \$10,000, is a
28 reasonable and diligent search then to use only the exact name?"
Ms. Waters: "Yes." She also testified that she would probably
not do a "less is more" search unless there was a lot at stake.

1 name search on their own.¹⁶

2 In short, after consideration of local practices and
3 testimony by witnesses who were familiar with Clark County's
4 system and searching capabilities, we conclude that under the
5 circumstances here, an ordinary prudent person would use an
6 exact-name search only when searching the land records in Clark
7 County Nevada. We hold that the bankruptcy court did not err in
8 deciding that such a search was reasonable as a matter of law.
9 Such a search would not have revealed the tax liens.

10 3. Inquiry Notice

11 The next step in the analysis is to determine whether the
12 search revealed facts which would have put the subsequent
13 purchaser on notice to inquire further. Kivel, 878 F.2d at 304
14 (index searcher has a duty to investigate the documents that
15 underlie the search). The IRS argues that the exact-name search
16 would have put the searcher on notice that the property could be
17 affected by liens that were filed against other entities listed
18 on the result of the search.

19 According to the IRS, the second entry of the search reveals
20 a judgment lien against numerous entities including Crystal
21 Cascades, Crystal Cascades Inc., Crystal Cascades Civil LLC and
22 Crystal Cascades Pools & Spas LLC. This information, the
23 government explains, should have tipped off the searcher to
24 conduct a second search using the two-word search of "Crystal
25 Cascades".

26
27 ¹⁶ Appellees' witness, Mr. Kiernan, testified that the clerk
28 at the Recorder's Office would tell the public to go to the
computer and input the name exactly as it is on the title
document.

1 That two-word search revealed the following entities, with
2 the number of documents for each entity represented by the number
3 in parentheses after the name: Crystal Cascades Construction (2);
4 Crystal Cascades Inc (7); Crystal Cascades Inc Pool Division (1);
5 Crystal Cascades LLC (2); Crystal Cascades LLC,' (1) (with the
6 ending apostrophe distinguishing this entry from the prior
7 entry); Crystal Cascades Pools & Spas (2); Crystal Cascades Pools
8 & Spas LLC (10); Crystal Cascades Pools and Spas LLC (1).
9 Crystal Cascades Civil, LLC, 398 B.R. at 33 n. 10.

10 As noted by the bankruptcy court, "there were some twenty-
11 six other entities that a shortened search of 'Crystal Cascades"
12 would have revealed, and to connect any of those entities back to
13 the debtor would have required an extensive search of not only
14 the records indexed and filed at the Clark County Recorder's
15 Office, but also at the Nevada Secretary of State's office." The
16 court concluded that this kind of extensive search could not be
17 considered "reasonable" within the meaning of the statute. Id.
18 at 35-36.

19 Our own assessment is that the two-word search the IRS
20 proposes produces results which are unwieldy for the ordinary
21 prudent person. We conclude that the facts which the IRS
22 maintains put the searcher on inquiry notice were insufficient to
23 impose a duty on the searcher to investigate over twenty-six
24 entries and search the Nevada Secretary of State's records to
25 find the tax liens. We hold that a reasonable inspection of the
26 public index simply cannot encompass the kind of extensive search
27 the IRS proposes, as that is neither fair nor a moderate
28 approach.

1 Finally, we comment on the IRS's argument made in passing
2 that Buenting's knowledge of debtor's various d/b/a's, including
3 Crystal Cascades, LLC, put him on inquiry notice to search the
4 public index under other names debtor may have used. As noted,
5 however, in TKB, IRC § 6323(f)(4)(A) is concerned only with the
6 notice imparted through the public indexing system and does not
7 concern the actual or subjective knowledge of the subsequent
8 purchaser. TKB Int'l, 995 F.2d at 1465 (finding that whether
9 subsequent purchaser had actual notice of the tax liens was
10 unimportant). This is consistent with the purpose of the statute
11 which was "to keep the federal tax lien in line with other
12 recorded instruments in the state recording system....[and] to
13 serve as notice to subsequent purchasers wherever possible."
14 Davis v. United States, 705 F.Supp. 446, 453 (1989). We conclude
15 as a matter of law that the plain language of the statute does
16 not contemplate any type of subjective analysis. Rather, the
17 focus is on whether an ordinary prudent person could discover the
18 tax liens in the public indexing system.

19
20 **B. The Substantial Compliance Test Is Distinct From the
Reasonable Inspection Test Under § 6323(f)(4)(A)**

21 Finally, we answer the last question as to whether the
22 result in this case needs to be reconciled with Treas. Reg.
23 § 301.6323(f)-1(d)(2) which requires that the NFTL "must identify
24 the taxpayer."¹⁷ The IRS devotes a significant portion of its
25

26 ¹⁷ In a sense, the IRS back peddles into this argument.
27 According to the IRS, since the bankruptcy court held that an
28 exact-name search standing alone was reasonable under the
circumstances here, then that must mean that the IRS must put the

(continued...)

1 brief and argument to the substantial compliance test,¹⁸
2 which arose from circumstances similar to those here –
3 discrepancies in the taxpayer's name on the NFTL.

4 The seminal and oft-cited case is United States v. Sirico,
5 247 F. Supp. 421 (S.D.N.Y. 1965) where the issue in the case was
6 whether a valid and properly recorded NFTL was subordinated as
7 against a subsequent mortgagee solely by reason of the fact that
8 the taxpayer's initial instead of her full name was set forth.
9 The court stated:

10 The mere fact that a full name is not given or that
11 there is an addition, omission or substitution of
12 letters in a name, or even errors, does not, in and of
13 itself, invalidate the notice. The essential purpose
14 of the filing of the lien is to give constructive
15 notice of its existence. The test is not absolute
16 perfection in compliance with the statutory requirement
17 for filing the tax lien, but whether there is
18 substantial compliance sufficient to give constructive
19 notice and to alert one of the government's claim.

16 The Sirico court found that under the facts, it was difficult to
17

18 ¹⁷(...continued)

19 exact name of the taxpayer on the NFTL. The IRS argues that this
20 is inconsistent with the federal common law standard that has
21 evolved regarding discrepancies in the taxpayer's name on the
22 notice. The IRS maintains that its NFTLs adequately identified
23 the taxpayer when they were filed with the name debtor used on
24 its EIN application. However, our inquiry in this appeal turns
25 on whether a reasonable inspection would reveal the lien, not
26 whether the IRS complied with its own regulation.

24 ¹⁸ Internal Revenue Manual ("IRM") § 5.17.2.3.5 (12-14-2007)
25 states: "A number of controversies concern errors in the name of
26 the taxpayer as it appears on the NFTL. The general rule is that
27 if the name on the notice is not identical to the correct name of
28 the taxpayer, then the NFTL is still valid if the NFTL is
sufficient to put a third party on notice of a lien outstanding
against the taxpayer. This is known as the substantial compliance
test. United States v. Sirico, 247 F. Supp. 421 (S.D.N.Y.
1965)."

1 understand how one searching the public land records could have
2 missed the notice of tax lien. The court noted that not only was
3 the correct surname of the taxpayer listed, but her residence
4 address corresponded with the premises, which was the subject of
5 the title search. The court concluded that the filing of the
6 lien under the circumstances was adequate to give constructive
7 notice to interested persons.¹⁹

8 The government's reliance on the substantial compliance test
9 to set the legal standard under IRC § 6323(f)(4)(A) is misplaced.
10 The IRS understates the test by omitting that the essential
11 purpose of the NFTL was to give constructive notice of the
12 government's claim. At the same time, the IRS overstates the
13 test's precedential importance because the substantial compliance
14 test evolved prior to November 6, 1978 when IRC § 6323(f) was
15 amended to include subsection (4)(A) to read as it does today.²⁰

17
18 ¹⁹ The "substantial compliance test" is an anglicized version
19 of the common law rule of "idem sonans" where "given a variance
20 in the spelling of two names, if the correct pronunciation of the
21 two names results in practically identical sounds, the names are
22 held to designate the same person." 57 Am. Jur. 2d Name § 60
23 (2008). At common law, a party typically invoked the doctrine of
24 idem sonas to avoid the invalidation of a document, despite a
variance in the spelling of a particular name in the document,
when the document had already been exchanged between, or
acknowledged by, people who knew each other. Tibbets v. Kiah, 2
N.H. 557-58 (1823). This is not the situation we are confronted
with here.

25 ²⁰ Prior to amendment, paragraph (f)(4) read as follows:
26 "(4) Index. The notice of lien referred to in subsection (a)
27 shall not be treated as meeting the filing requirements under
28 paragraph (1) unless the fact of filing is entered and recorded
in a public index at the district office of the Internal Revenue
Service for the district in which the property subject to the
lien is situated."

1 The amended statute does not mention "substantial
2 compliance" in conjunction with the validity of the NFTL against
3 a subsequent purchaser without actual notice. Rather, the
4 statute requires that the NFTL be "entered and recorded in a
5 public index ... in such a manner that a reasonable inspection of
6 the index will reveal the [lien]." Thus, the plain language of
7 the statute applies a reasonable inspection test when the
8 priority of the IRS's lien is at issue.

9 It is questionable whether we need to consider the extent of
10 the IRS's compliance with identifying the taxpayer on its notice
11 in this context.²¹ Our hesitation occurs because the Ninth
12 Circuit analysis of IRS lien priority has focused on the
13 reasonable inspection test even when the NFTL uses the taxpayer's
14 correct legal name. See Kivel, 878 F.2d 302 (court determined
15 that it need not decide whether the NFTL filed under the
16 taxpayer's full legal name was valid against a subsequent
17 purchaser, but whether the way the notices were filed complied
18 with 26 U.S.C. § 6323(f)(4), as that was the statute which
19 governed the validity of liens in California); TKB Int'l, 995
20 F.2d 1460 (tax liens filed in exact name of taxpayer held invalid
21 against subsequent purchaser who acquired property that was
22 subject to fraudulent conveyance and fraudulent nature of

23
24 ²¹ In actuality, the substantial compliance test and the
25 reasonable inspection test are but opposite sides of one coin.
26 The substantial compliance test focuses on the notice itself and
27 whether the IRS substantially complied with Treas. Reg.
28 § 301.6323(f)-1(d)(2) by identifying the taxpayer so as to give
constructive notice of the government's claim. In contrast, the
reasonable inspection test focuses on whether the filing is
recorded in such a manner that a searcher could find the NFTL in
the public records.

