Tax Deed Sales

Number: INFORMAL

Date: August 12, 2008

Mr. Victor J. Troiano
Attorney for Clerk of the Court
Polk County
Post Office Drawer 829
Lakeland, Florida 33802-0829

Dear Mr. Troiano:

You have asked this office to comment on the responsibilities of the clerk of court when non-homestead property has been the subject of a tax deed sale where no additional bids have been received and the certificateholder refuses to pay the documentary stamp tax and recording fees.

You state that recently the owner of a tax certificate on non-homestead property made application for a tax deed. The sale was conducted pursuant to section 197.542, Florida Statutes, but no bids were received. The property was therefore struck off to the certificateholder, but the certificateholder refused to pay the documentary stamp tax and recording fees that were due. You indicate your feeling that the certificateholder was "testing the waters" to see if another party would buy the property and the certificateholder would be reimbursed for all sums expended in redeeming the certificates.

Section 197.502, Florida Statutes, provides the procedure for filing a tax certificate and applying for a tax deed. The holder of a tax certificate, after a specified time period since issuance of the certificate has lapsed, may file the tax certificate and an application for a tax deed with the tax collector in the county where the lands described in the certificate are located.[1] Subsection (2) of the statute states:

"Any certificateholder, other than the county, who makes application for a tax deed shall pay the tax collector at the time of application all amounts required for redemption or purchase of all other outstanding tax certificates, plus interest, any omitted taxes, plus interest, any delinquent taxes, plus interest, and current taxes, if due, covering the land."

The tax collector is required thereafter to deliver to the clerk of the circuit court a statement that payment has been made for all outstanding certificates.[2] The clerk is directed to advertise and administer the sale and is authorized to "receive such fees for the issuance of the deed and sale of the property as are provided in s. 28.24."[3]

Section 197.502(6)(b), Florida Statutes, requires that "[t]he opening bid on an individual certificate on non-homestead property shall include, in addition to the amount of money paid to the tax collector by the certificateholder at the time of application, the amount required to redeem the applicant's tax certificate and all other costs and fees paid by the applicant." The procedures to be followed for the sale of lands at public auction are prescribed in section 197.542, Florida

Statutes, as follows:

"(1) The lands advertised for sale to the highest bidder as a result of an application filed under s. 197.502 shall be sold at public auction by the clerk of the circuit court, or his or her deputy, of the county where the lands are located on the date, at the time, and at the location as set forth in the published notice, which shall be during the regular hours the clerk's office is open. At the time and place, the clerk shall read the notice of sale and shall offer the lands described in the notice for sale to the highest bidder for cash at public outcry. The amount required to redeem the tax certificate, plus the amounts paid by the holder to the clerk of the circuit court in charges for costs of sale, redemption of other tax certificates on the same lands, and all other costs to the applicant for tax deed, plus interest thereon at the rate of 1.5 percent per month for the period running from the month after the date of application for the deed through the month of sale and costs incurred for the service of notice provided for in s. 197.522(2), shall be considered the bid of the certificateholder for the property. However, if the land to be sold is assessed on the latest tax roll as homestead property, the bid of the certificateholder shall be increased to include an amount equal to one-half of the assessed value of the homestead property as required by s. 197.502. If there are no higher bids, the land shall be struck off and sold to the certificateholder, who shall forthwith pay to the clerk the documentary stamp tax and recording fees due, and a tax deed shall thereupon be issued and recorded by the clerk."

The plain language of the statute establishes the certificateholder's bid for non-homestead property, as well as homestead property, and provides that if no higher bids are received, the clerk is required to strike off and sell the property to the certificateholder. As a precondition to the issuance and recording of the tax deed by the clerk, the certificateholder must pay the documentary stamp tax and recording fees due. The administrative rules interpreting this statutory requirement reiterate that when there are no bids higher than the statutory opening bid for non-homestead property, the land is to be sold to the certificateholder who "is required to immediately pay to the clerk of the circuit court applicable documentary stamp tax and recording fees."[4] The rules provide an alternative procedure for homestead property:

"If the property is homestead property, and the certificate holder fails to pay the monies to cover the one-half value of the homestead, the sale shall be considered canceled and the property shall be re-advertised for sale within 30 days as provided in Section 197.542(2), F.S. If at the subsequent sale there are no bidders at the tax deed sale and the certificate holder refuses to pay the monies to cover the one-half value of the homestead, the clerk shall not advertise the sale again and shall place the property on list of lands available for taxes."[5]

There is no analogous rule for non-homestead property, rather both the controlling statute and the administrative rule adopted to facilitate the statutory requirements contemplate that non-homestead property is sold to the certificateholder in the event there are no other bids. Thus, the sale of the property is complete, but for the collection of the documentary stamp tax and recording fees by the clerk of court and the subsequent issuance and recording of the tax deed. While section 197.542(3), Florida Statutes, provides direction for the clerk should the sale be canceled for any reason, you do not indicate that the sale has been canceled in this instance.[6]

I would note, that prior to 2001, section 197.542(2), Florida Statutes (1999), contained language that provided direction to the clerk in the event full payment, which was stated to be an amount

equal to the highest bid plus applicable documentary stamp taxes and recording fees, was not received. The statute then stated that if full payment "is not received by the clerk within 24 hours after the advertised time of the sale, the clerk shall cancel the bids and readvertise the property for sale." This language was deleted from then subsection (2) and similar language added to a new subsection (2) applicable to situations where additional bids have been received; a situation not present in the instant case.[7]

Section 201.02(1), Florida Statutes, requires the collection of tax on deeds and other instruments conveying lands, tenements, or other real property at the rate of 70 cents on each $100 of the consideration thereon. The tax is to be paid by the purchaser and the document is to be recorded by the clerk of the circuit court.[8] This statutory direction provides no exception applicable to the sale of a tax certificate for issuing a tax deed. Moreover, the clerk is required to report to the Department of Revenue any individual who fails to affix either the required amount of documentary stamps or a notation that the proper amount of stamps has been or will be paid on any conveyance or instrument which may be recorded in the clerk's office.[9] Liability for failure to pay the appropriate documentary stamp tax extends to "[w]hoever makes, signs, issues, or accepts, or causes to be made, signed, issued, or accepted, any instrument, document, or paper of any kind or description whatsoever, without the full amount of the tax herein imposed thereon being fully paid[.]"[10]

The Legislature did not contemplate that the holder of a tax certificate who applies for a tax deed on non-homestead property and pays the requisite sums for the clerk to hold the sale would then refuse to pay the documentary stamp tax and recording fees on the transaction. As noted above, if the sale is canceled for any reason, the clerk may readvertise and hold another sale. The statute, however, does not enumerate acceptable "reasons" for the cancelation of a sale. It appears that even if the clerk were to cancel the sale and hold a subsequent sale within 30 days as contemplated in section 197.542(3), Florida Statutes, the collection of documentary stamps and recording fees would not be ensured and additional expense and interest would be incurred.

It is generally recognized that the grant of an express power, such as the collection of documentary stamp taxes and recording fees, duly conferred, includes the implied power to use the means necessary to make the express power effective or to carry out the expressed objective or purpose of a statute.[11] The schedule of charges for services rendered by the clerk's office set forth in section 28.24, Florida Statutes, is mandatory and may not be altered absent statutory authority.[12] Moreover, as noted above, the collection of the documentary stamp tax is mandated once the tax certificate has been struck off and sold to the certificateholder. It would appear, therefore, that absent cancelation of the sale, the clerk is required to collect the documentary stamp tax and recording fees from the certificateholder when non-homestead property is the subject of a tax deed sale and there are no other bids, prior to issuing a tax deed. In light of the refusal of the certificateholder to pay the documentary stamp tax as requested, the clerk may advise the certificateholder of the potential criminal liability for such action and exercise means necessary to collect the delinquent taxes and fees. In this instance, there is insufficient guidance in the relevant statutes or in other source materials to sufficiently determine the Legislature's intent. This office may not add terms to the statute where the Legislature has failed to address a particular matter.[13] In light of the lack of specific direction in the situation you have raised, it may be advisable to seek further legislative clarification in this matter.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Section 197.502(1), Fla. Stat.

[2] Section 197.502(4), Fla. Stat.

[3] Section 197.502(5)(c), Fla. Stat.

[4] Rule 12D-13.063(5)(a)1., F.A.C.

[5] Rule 12D-13.063(5)(a)2., F.A.C.

[6] *See* s. 11, Ch. 2001-252, Laws of Fla., amending s. 197.542, Fla. Stat.

[7] Section 197.542(3), Fla. Stat., provides:

"If the sale is canceled for any reason, the clerk shall immediately readvertise the sale to be held no later than 30 days after the date the sale was canceled. Only one advertisement is necessary. No further notice is required. The amount of the statutory (opening) bid shall be increased by the cost of advertising, additional clerk's fees as provided in s. 28.24(21), and interest as provided for in subsection (1). The clerk shall receive full payment prior to the issuance of the tax deed."

Cf., s. 197.542(2), Fla. Stat., acknowledging that if there are other bids on the property, the certificateholder has the right to bid as others may bid, with the property to be struck off and sold to the highest bidder. The high bidder is required to post a $200 deposit at the time of the sale, which will be applied to the sale price at the time of full payment. Subsection (2), however, further provides:

"If full payment of the final bid and of documentary stamp tax and recording fees is not made within 24 hours, excluding weekends and legal holidays, the clerk shall cancel all bids, readvertise the sale as provided in this section, and pay all costs of the sale from the deposit."

This would apparently be implicated only when there have been other bids on the property, since there is no requirement that a certificateholder pay the $200 deposit in the event no other bids are made.

[8] *See* s. 201.02(3), Fla. Stat.

[9] *See* s. 201.12, Fla. Stat., further stating that "any such clerk who knowingly fails to report any

such violation within 30 days after recording of any taxable instrument or document, without such stamps or notation, shall be deemed guilty of a misdemeanor and upon conviction punished accordingly."

[10] *See* s. 201.17(1), Fla. Stat., making it a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083, Fla. Stat., for failure to fully pay the documentary stamp tax due on a transaction.

[11] *See Southern Utilities Company v. City of Palatka*, 99 So. 236 (Fla. 1923); *Molwin Investment Company v. Turner*, 167 So. 33 (Fla. 1936); and Ops. Att'y Gen. Fla. 73-374 (1973) and 58-228 (1958) (power that is indispensable or essential to valid purpose of statute may be inferred or implied from authority expressly given).

[12] *See Bauer v. Resolution Trust Corp.*, 621 So. 2d 521, 522 (Fla. 4th DCA, 1993); *Wilken v. North County Co.*, 670 So. 2d 181, 182 (Fla. 4th DCA, 1996) and Ops. Att'y Gen. Fla. 77-120 (1977) and 2001-50.

[13] *Cf. Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974), and Op. Att'y Gen. Fla. 87-43 (1987).