S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

September 10, 2012

Opinion No. 12-85

Court Clerk's Application of Delinquent Tax Sale Proceeds to Pay Taxes for Subsequent Years

QUESTIONS

1. After property is sold in a delinquent property tax sale by the court, does the court clerk have the authority to pay, from overage funds the clerk is holding during the redemption period, other taxes that become due on the property?

2. If there exists no statutory authority for paying such taxes from overage funds, may the court clerk nevertheless be required to pay the taxes if directed to do so by an order of the court?

OPINIONS

1. No, in the absence of a specific court directive. The court clerk's authority to distribute funds from a delinquent tax sale is limited by statute and by the terms of the court's order confirming the sale. Tenn. Code Ann. §§ 67-5-2501(a)(3) & (b)(3) expressly state that the clerk may pay from the sale proceeds only the amount of state, county and municipality taxes "ascertained by a decree of the court." To the extent that the court's decree directs the court clerk to apply the sale proceeds to additional taxes that are due and unpaid on the day of the delinquent tax sale pursuant to Tenn. Code Ann. § 26-5-108(a), the court clerk is authorized and required to apply the proceeds accordingly. In the absence of such an order, however, no authority exists for the court clerk to pay other taxes that become due on the property during the delinquent tax proceedings or during the one-year redemption period following confirmation of the tax sale.

2. Yes. If a final court order directs the court clerk to apply overage funds toward the payment of property taxes for other years, the court clerk is bound by the order's provisions.

ANALYSIS

This request addresses the use of "overage funds" to pay additional property taxes that become due on property (1) after the initiation of delinquent tax sale proceedings and before the date the property is sold and (2) during the one-year statutory redemption period that follows the tax sale. "Overage funds" are any excess amounts held by a court clerk that arise from the sale of property for delinquent taxes after the payment of all expenses required to be paid under Tenn. Code Ann. § 67-5-2501. As the request points out, several years may elapse between the

time tax delinquency proceedings are initiated and the time property actually is sold at a delinquent tax sale. During this time, property taxes for additional years may accrue or even become delinquent.

Property that is sold in a delinquent tax sale is sold "for cash, subject to the equity of redemption." Tenn. Code Ann. §§ 67-5-2501(a)(1) & (b)(1).[1] The successful bidder at a tax sale must offer at least "the debt ascertained to be due for taxes, interest, penalties, and the costs incident to the collection thereof." Tenn. Code Ann. § 67-5-2501(a)(2). The statutes governing delinquent tax sales set forth the manner in which the court clerk should apply the sale proceeds. First, up to 10% shall be applied to compensate for the prosecution of the delinquent tax litigation. Tenn. Code Ann. §§ 67-5-2501(a)(3) & (b)(3). Second, the sale proceeds "shall be applied to the costs of the suits." *Id.* Finally, the remainder shall be applied to the payment of state, county and municipal taxes, in that order, with the respective amounts due each "to be ascertained by a decree of the court." *Id.; see also* Tenn. Code Ann. § 67-5-2506(a) (containing virtually identical provisions for sales of land for county taxes only).

As suggested by the request, once the foregoing payments are applied, excess or "overage" funds may remain, which the court clerk retains during the one-year statutory redemption period.[2] The overage funds represent the amount bid by the purchaser in excess of the minimum bid amount established by Tenn. Code Ann. § 67-5-2501(a)(2), a situation which could occur in delinquent tax sales involving multiple bidders vying for the same property.

The duties of the court clerk regarding the distribution of proceeds derived from a delinquent tax sale are set forth by Tenn. Code Ann. § 67-5-2501. These statutory provisions require the court clerk to pay (1) up to 10% of the proceeds to compensate for the prosecution of the suit, (2) the costs of the suit, and then (3) state, county and municipal taxes, in that order, with the amounts due each governmental entity "to be ascertained by a decree of the court." Tenn. Code Ann. §§ 67-5-2501(a)(3) & (b)(3). The clerk's responsibility for the payment of these taxes is ministerial, and the clerk has no discretion to pay any taxes from these proceeds other than those tax amounts set forth in the court's decree. *See State v. White*, 362 S.W.3d 559,

[1] Tenn. Code Ann. § 67-5-2501 establishes two procedures for the sale of property for non-payment of delinquent taxes, one procedure applicable to certain Tennessee counties and the second procedure applicable to all counties excluded from the first procedure. *Compare* Tenn. Code Ann. § 67-5-2501(a)(4) *with* Tenn. Code Ann. § 67-5-2501(b)(4). The only difference between these two procedures concerns the distribution of the proceeds from the sale. In counties subject to Tenn. Code Ann. § 67-5-2501(a), up to 10% of the sale proceeds are applied first "to payment of any unpaid balance of compensation due the prosecuting attorney," whereas in counties subject to Tenn. Code Ann. § 67-5-2501(b) the sale proceeds are applied first "to the payment of the ten percent (10%) penalty allowed as compensation for prosecuting the suits." *Compare* Tenn. Code Ann. § 67-5-2501(a)(3) *with* Tenn. Code Ann. § 67-5-2501(b)(3).

[2] Within one year from the date of the order confirming the delinquent tax sale, any person with a legal or equitable interest in the property may redeem the property by paying to the court clerk "the amount paid for the delinquent taxes, interest and penalties, court costs, and any court ordered charges, and interest at the rate of ten percent (10%) per annum computed from the date of the sale on the entire purchase price paid at the tax sale." Tenn. Code Ann. § 67-5-2703; *see also* Tenn. Code Ann. §§ 67-5-2701(a) & 67-5-2702(a). Additionally, upon motion by the purchaser at the tax sale and as ordered by the court, the person redeeming the property shall pay additional sums to the court clerk for "any other lawful charges or moneys, including property taxes due or delinquent on the property, expended [by the purchaser] to preserve the value of the property" during the redemption period. Tenn. Code Ann. § 67-5-2704(a).

566 (Tenn. 2012) (quoting *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004) (stating that if the statutory language is "clear and unambiguous" the court will "apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application")).

As noted above, Tenn. Code Ann. §§ 67-5-2501(a) & (b) authorize the trial court to ascertain the tax amounts due the state, county and municipality in ordering the distribution of proceeds from a tax sale, which could include taxes that came due before and after the initiation of the delinquent tax proceeding. During the delinquent tax proceeding, the trial court has the authority, by reference to a master, to ascertain "all such revenue as may be delinquent," and to include these amounts in the lawsuit. Tenn. Code Ann. § 67-5-2416.

Moreover, Tenn. Code Ann. § 26-5-108 requires the trial court, again by reference to the court clerk or clerk and master, "[w]henever real estate is sold under a decree of any court" to "ascertain if, upon the day of sale, there were any taxes due and unpaid which were a lien upon the real estate." Tenn. Code Ann. § 26-5-108(a). If such taxes were due and unpaid, the trial court is required to enter a decree "stating the amount of taxes, and directing the clerk and master or [court] clerk to pay the taxes out of the first money collected from the sale of the real estate." *Id.*

Although Tenn. Code Ann. § 26-5-108(a) appears in a different section of the Tennessee Code dealing generally with sales of property upon execution of judgment rather than sales of property in delinquent tax proceedings, the Supreme Court has held that this provision also applies to delinquent tax sales. *See State v. Southern Lumber Mfg. Co.*, 165 Tenn. 671, 674, 57 S.W.2d 454, 455 (1933) (observing that under Shannon's Code § 969 and Code of 1932 § 1678 [now Tenn. Code Ann. § 26-5-108], the trial court conducting a delinquent tax proceeding is required to make an order of reference to "determine the amount of taxes due on the property, *other than those sued for*") (emphasis added); *see also State v. Collier*, 160 Tenn. 403, 451, 23 S.W.2d 897, 912 (1929).

Thus, for the court's purposes in ascertaining any additional tax amounts due on the property sold at the tax sale that may have accrued after the initiation of the delinquent tax proceeding, the critical date is the date of the delinquent tax sale. *See State v. Collier*, 160 Tenn. at 451, 23 S.W.2d at 912 (observing that "the reference is to be taken as to taxes which are a lien on the land upon the *day of sale*") (emphasis in original); *cf. State v. Southern Lumber Mfg. Co.*, 165 Tenn. at 674, 57 S.W.2d at 455 (holding that, if the court fails to order a reference to ascertain all taxes due prior to a delinquent tax sale, the reference instead "may be made after the sale, before confirmation, and, indeed, even after confirmation before distribution" of the sale proceeds).

This Office is unaware of any statutory authority allowing the court to apply sale proceeds to future taxes that have not yet become due as of the date of the tax sale. Instead, after the tax sale, any taxes coming due must be paid by the purchaser, with the purchaser retaining the right to obtain reimbursement for such taxes if the former owner should exercise that owner's statutory redemption rights. *See* Tenn. Code Ann. § 67-5-2704.

Your request also raises a question concerning the court clerk's liability, if any, when the court clerk applies tax sale proceeds toward subsequent taxes in compliance with a court order that directs such application but that arguably conflicts with the pertinent statutory provisions cited above. By law, the court clerk is required to comply with the order of the court. *See* Tenn. Code Ann. § 18-2-213. By applying the tax sale proceeds in accordance with the court's order, the court clerk merely is discharging one of the clerk's statutorily-imposed duties, and the court clerk will not incur any liability for obeying the court's order. *See Kelton v. Snell*, 689 S.W.2d 186, 189 (Tenn. Ct. App. 1985).

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

MARY ELLEN KNACK
Senior Counsel

Requested by:

The Honorable Pat Marsh
State Representative
110 War Memorial Building
Nashville, Tennessee 37243