Coates' Canons Blog: Early Enforced Collections

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Property tax bills for the 2012-2013 fiscal year are arriving in mail boxes across North Carolina. Thankfully most taxpayers will pay up without further encouragement. But plenty will not, and it's a long four months until these bills become delinquent in January 2013.

The general rule, of course, is that enforced collection measures such as attachment and garnishment or foreclosure may not begin until taxes become delinquent. Are tax offices' hands completely tied until then? Or can tax offices take proactive measures before the delinquency date to pursue taxes that seem unlikely to be paid voluntarily?

Happily for tax collectors, the Machinery Act does offer a few opportunities to pursue early enforced collections. Here's a summary of those opportunities, broken out by the type of property those remedies can target: foreclosure for real property, and attachment and garnishment/levy and sale for personal property.

Foreclosure and Non-Delinquent Taxes

To initiate a foreclosure, there must be at least one year of property taxes that are delinquent. And if pursuing an in rem foreclosure, the tax office must first advertise those delinquent taxes before formally beginning the foreclosure process by docketing a judgment for the taxes owed.

That doesn't mean that a foreclosure should ignore taxes that are not yet delinquent, however. All taxes that can be "definitely determined" should be included in the judgment amounts for both mortgage style (GS 105-374) and in rem (GS 105-375) foreclosures. A tax can be definitely determined so long as the tax rate has been set and the assessment is not under appeal. (Remember that GS 105-378 prohibits the use of enforced collections for assessments that are under appeal.)

When using the mortgage style procedure, the attorney conducting the foreclosure should be sure to allege "subsequent taxes" in the initial complaint as described in GS 105-374(e). Later in the proceeding when the attorney seeks a judgment ordering the sale of the real property, the attorney should include in the certificate of taxes owed all taxes that are a lien on the property and can be definitely determined—even if those taxes are not yet due or delinquent.

Assume Carolina County is foreclosing on Parcel A for delinquent taxes from years 2010 and 2011. The foreclosure complaint was filed in April 2012 and included an allegation for "subsequent taxes." In November 2012, the attorney files a certificate of taxes owed that includes the 2012-2013 taxes. These taxes can be recovered from the foreclosure sale proceeds despite the fact they will not become delinquent until January 2013.

When using the in rem procedure, the initial judgment that is docketed with the court should include all taxes that are a lien on the property and can be definitely determined regardless of when those taxes will become due or delinquent. It is important to include non-delinquent taxes in that initial filing because, unlike the mortgage style procedure, the in rem procedure does not provide the opportunity to allege "subsequent taxes" or to add additional taxes owed later in the process.

Assume Blue Devil City is foreclosing on Parcel B for delinquent taxes from years 2010 and 2011. If the initial judgment was docketed in April 2012, the 2012 taxes are already a lien on the property and should be included in that filing if the city has already adopted its tax rate for 2012-2013.

If Blue Devil City's 2012-2013 tax rate has not yet been determined, then the 2012-2013 taxes cannot be included in the foreclosure action. When the city obtains an execution order from the court several months later, that order cannot include the 2012-2013 taxes despite the fact that those taxes could then be definitely determined. As a result, Parcel B will be sold subject to the tax lien for the 2012-2013 taxes. See G.S. 105-375(i).

Attachment and Garnishment/Levy and Sale and Non-Delinquent Taxes

Two often overlooked Machinery Act provisions authorize early enforced collections against personal property. GS 105-366(c) applies when the taxpayer is about to remove the property from the jurisdiction or is in "immediate danger" of becoming "insolvent" (aka bankrupt.) GS 105-366(d) applies to "going-out-of-business" sales by business taxpayers.

The first provision is relatively straightforward. As most commonly applied, GS 105-366(c) permits the tax collector to begin an attachment and garnishment or a levy and sale on *any* personal property owned by the taxpayer if the tax collector "has reasonable grounds for believing" that the taxpayer is going to remove from the jurisdiction personal property on which taxes are assessed.

For example, the provision would apply when the tax collector learns that a business plans to sell an easily movable piece of taxable property such as a plane. The tax collector could immediately begin a bank account attachment or could levy on and sell the plane or any other property owned by the business in order to satisfy the taxes assessed on the plane—even if those taxes are not yet due or delinquent.

GS 105-366(c) can also be used if the tax collector learns that a taxpayer is about to file bankruptcy. There is a risk that payments obtained using enforced collections within 90 days of a bankruptcy could constitute "avoidable preferences" and later be reversed by a bankruptcy court. But that risk is minimal and should not dissuade a tax collector from relying on GS 105-366(c) when the opportunity arises.

The second provision is a bit more complicated. GS 105-366(d) authorizes a tax collector to pursue early enforced collection of taxes assessed on "goods, materials, supplies, or fixtures of a wholesale merchant or retailer" that are sold "other than in the ordinary course of business."

The definition of "wholesale merchant or retailer" is very broad and includes manufacturers and producers of tangible products (chicken processing plants, for example) as well service providers who sell tangible products as part of their services (roofing and paving companies, for example).

A transaction is outside the "ordinary course of business" when it involves a sale of something other than the products or services the business normally sells. For example, if a chicken processing company sells its old processing equipment to make room for new equipment, that sale would fall under GS 105-366(d) because the plant normally sells processed chicken and not processing equipment. Most often this provision will be triggered when a business is sold or shuts down and sells all of its assets.

The provision covers the sale of "goods, materials, supplies or fixtures", but it was written back before the General Assembly exempted inventories from property taxes. Nowadays, goods and materials are nearly always exempt inventory, meaning the sale of them can't trigger GS 105-366(d) because no taxes will be owed on those goods and materials.

That leaves only "supplies or fixtures" to trigger early enforced collections. A large piece of factory equipment might constitute a fixture, but smaller, transportable business equipment would not. The sale of a chicken processor's processing equipment could trigger GS 105-366(d) but the sale of a paving company's trucks and cement mixers could not.

After navigating all of those definitions and determining that a sale triggers GS 105-366(d), what may a tax collector do? The provision requires that the taxes due or about to become due on the property being sold be paid within 30 days of the sale. If not, then the tax collector may employ attachment and garnishment or levy and sale against either the buyer or the seller of the property. An enforced collection action under GS 105-366(d) can be aimed at *any* property of the buyer or seller, not just the property being sold.

There is one important restriction on this authority: Machinery Act collection remedies may be used against the *buyer* only within six months of the sale. After that six month window closes, the only collection remedy available against the buyer for the current year's taxes is a lawsuit in state court.

Assume that a favorite local restaurant, Big Daddy's, closes its doors in August 2012. Two months later another entity buys the building from Big Daddy's and opens up a new restaurant called Momma's Kitchen. The sale of the building and the fixtures inside of that building (ovens, freezers, etc.) should trigger a tax obligation under GS 105-366(d) for the 2012-2013 taxes on those fixtures even though the taxes are not yet delinquent.

The tax collector could pursue Machinery Act enforced collection remedies against Momma's Kitchen within six months of the sale. If the tax collector doesn't learn of the sale until more than six months later, Machinery Act remedies may be used only against Big Daddy. The owners of Momma's Place could be sued for the 2012-2013 taxes but could not be targeted with Machinery Act remedies.

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-374
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-375
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-378
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=105-366