

Opinion No. 64-45

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BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Jesse D. Kornegay, Chief Tax Commissioner, Santa Fe, New Mexico

QUESTION

FACTS

From time to time the State Tax Commission receives an application to repurchase tax-title property from a person who is not the last assessed owner, but who derives title from him. At times the applicant has obtained derived title after the two-year redemption period mentioned in Section 72-8-9, N.M.S.A., 1953 Compilation, after the county treasurer has given a deed to the state pursuant to Section 72-8-15, N.M.S.A., 1953 Compilation, or after the further one year period mentioned in Section 72-8-31, N.M.S.A., 1953 Compilation has expired, or after expiration of the three year period specified in Section 72-8-35.4, N.M.S.A., 1953 Compilation.

In some instances the state has received a bid from a third party, has incurred the expense of assessing the property, setting a minimum price, publishing notice pursuant to Section 72-8-35.4 et seq., and then a party who is not the person who owned the land at the time it was sold for taxes seeks to repurchase the realty for the amount of delinquent taxes, interest and penalties.

QUESTIONS

1. Must the state tax commission allow the successor of the last assessed owner the right of repurchase for the amount of the taxes, and if so, what proof should it require of such party?
2. Can the state tax commission require such party to pay the expenses incurred by the state in the preparation of the land for a third-party sale?
3. If the state tax commission is required to permit such third-party by reason of derived title to repurchase the land, should it issue the deed to him or to the heirs and assigns of the last assessed owner of the land?

CONCLUSION

1. The right of repurchase must be permitted to a former assessed owner at the time of the sale of such property to the state, or to one claiming under him, up to and until such time as the land may have been sold to a third party. Where the right of repurchase is

sought to be exercised by one claiming under the last assessed owner, strict evidence of acquisition of such right of repurchase is required to be furnished to the state tax commission.

2. Yes, but see analysis.

3. The deed should be issued to the person who has a valid right of repurchase or to one actually and in fact claiming under him.

OPINION

ANALYSIS

Your first question inquires whether the State Tax Commission may permit a successor of the last assessed owner, or one claiming to hold under him, a right of repurchase of realty which has been sold to the state for delinquent taxes.

Section 72-8-31, N.M.S.A., 1953 Compilation, sets out by statute a preferential right to repurchase lands which have been sold to the state for non-payment of ad valorem taxes. This section provides in part as follows:

"The person, or any lienholder, whose title to or interest in property has been extinguished by the issuance of a tax deed to the state shall have the prior right to repurchase such property.

For a period of one year after the date any tax deed to the state has been recorded, the state tax commission shall not convey any property acquired by such tax deed to any person other than one entitled to repurchase the property. Provided, however, that the prior right to repurchase shall continue after the expiration of one year from the date the tax deed to the state has been recorded and until the property acquired by the state by virtue of such deed is sold at public auction or at private sale as in this act provided." (Emphasis supplied).

Section 72-8-32, N.M.S.A., 1953 Compilation, prescribes that a person entitled to repurchase may do so by making written application for such repurchase to the state tax commission, and by payment of all taxes, penalties, interest and costs, except those which have been delinquent for a period of ten years.

These sections have been interpreted by the New Mexico State Supreme Court to mean that the former owner of the property, **or one claiming under him** may assert at any time up to the sale of such property to another, the right of repurchase. In **De Baca v Perea**, 52 N.M. 418, 200 P. 2d. 715, the court held:

"The law gives the owner of real property sold for delinquent taxes the right to redeem the same at any time before two years from the date of the sale provided for in Section 76-713, 1941 Comp., (72-8-9, N.M.S.A., 1953 Comp.) upon the payment of the amount

of taxes for which it was sold, penalties, interest, and costs required by the Act. To enjoy this right the delinquent taxpayer must exercise it before tax deed is taken to the property. If not exercised in the manner and within the time provided by statute the right is lost . . .

In addition to the right to redeem the property before the issuance of a tax deed to the State, the law gives the former owner, **or one claiming under him**, the first and prior right to repurchase the property from the State after the issuance of a tax deed to it by the county treasurer . . . This is purely statutory and, if claimed, must be exercised in the manner and within the time provided by statute or the right is lost. To protect, preserve and enjoy the preferential right to repurchase the land from the State on the most favorable terms authorized by the Act, the former owner, or one claiming under him, must comply with its provisions. **He must make application to repurchase and claim the preferential right therein given him before any other application has been made for the repurchase of the land.**" (Emphasis supplied).

The court in the **De Baca** case, supra, ruled that while the legislature provided by law that a former owner, or one claiming under him, could claim his preferential right and offer to repurchase from the state at any time before any other application and sale was made, "this does not mean that such owner, or one claiming under him, may delay making his application and offer to repurchase and claim his preferential right until after another has made his for such sale, and then make the offer, assert the right and demand the benefits of a statute with which he has not complied."

The New Mexico Supreme Court has ruled that the preferential right to repurchase granted by statute is merely a right of redemption. As stated in **Chaves v. Chaves**, 56 N.M. 393, 244 P.2d. 781:

"The deed from the former owner to the defendants. . . purported to convey a fee simple title to them and it was so treated by such grantees; but, as the property had heretofore been sold to the State of New Mexico for delinquent taxes, it actually conveyed only the preferential right of repurchase. **We have held this is nothing more than a right of redemption.** Langhurst v. Langhurst, 49 N.M. 329, 164 P.2d. 204; Sanchez v. New Mexico State Tax Commission, 51 N.M. 154, 180 P.2d. 246. In the latter case we also held valid liens existing against real property at the time of its sale to the State survive a tax sale where the former owner redeems under section 76-740, supra, (72-8-32)." (Emphasis supplied).

The problem of who may legally be entitled to repurchase was also discussed at length in **Trujillo v. Montano**, 64 N.M. 259, 327 P.2d. 326 wherein the court held: "We are of the opinion and so hold, that any person who procures a tax deed from the State under the provisions of Section 72-8-31, supra, when he has no right, title, or interest in the property, acquires no title to the land sold."

In **Velasquez v. Mascarenas**, 71 N.M. 133, 376 P.2d. 311, the Supreme Court held in interpreting the repurchase statute:

"It is obvious that the legislature did not intend to permit persons whose interests in property are only possessory to benefit themselves of the repurchase provision. Only persons whose titles have been extinguished by a tax deed to the state are contemplated. Possessory interests are certainly not the equivalent of title."

From a careful study of the above statutes and case decisions it is our opinion that any person, or a lienholder, whose title or interest in property has been extinguished by the issuance of a tax deed to the state is entitled to repurchase such land from the state tax commission. In our opinion the former assessed owner or one holding under him, by reason of an assignment, grant or transfer of repurchase rights, or the heirs of such former owner are entitled to make application to the state tax commission, if timely made, and repurchase such realty from the state. As stated in the above authorities, once a tax sale of land has been made to the state, all interest in such realty is vested in the state, subject only to a statutory right of repurchase. In our opinion this right of repurchase may be assigned, granted or transferred to other individuals, it being similar to a right of redemption under a mortgage foreclosure sale. In **Watson v. First National Bank of Roswell**, 23 N.M. 372, 168 P. 488, it was noted that a mortgagor could convey his equity of redemption to a third party. Since in **De Baca v. Perea**, supra, our supreme court has recognized that "one claiming under" a former owner is entitled to exercise a right of repurchase, in our opinion, any person who in fact has received a valid assignment, grant or transfer a former assessed owner's right of repurchase may properly repurchase such realty or interest in such realty from the state tax commission.

Whenever the tax commission is presented with an application for repurchase by an individual other than the former assessed owner, strict proof of acquisition of the right to repurchase should be required by the tax commission. Such proof should include (1) written evidence of the right to repurchase of the former owner; (2) evidence of transfer of such right to the person seeking to repurchase, in writing, and (3) written application for repurchase by the person so entitled, together with the payment of all taxes, interest and costs accruing within the previous ten years.

Your second question inquires whether the state tax commission may require an applicant for repurchase to pay the expenses incurred by the state tax commission in the preparation of the land for a third-party sale.

Section 72-8-32, N.M.S.A., 1953 Compilation, provides in part that "Any person entitled to repurchase under the provisions of law may do so by making written application for such repurchase. . . and by payment. . . of all taxes, penalties, interest and costs, except those which have been delinquent for a period of ten years." This language was construed in **Trujillo v. Montano**, supra, to permit the right of repurchase only upon the payment of the costs incurred by the tax commission, and upon payment of taxes, penalties, and interest outstanding thereon. In our opinion, the reasonable and proportionate share of the costs incident to selling such property at public sale after the statute permits such sale, is a valid cost which may be assessed against one seeking to repurchase. As pointed out in **De Baca v. Perea**, supra, however, an applicant to repurchase "must make application to repurchase and claim the preferential right

therein given him before any other application has been made for the repurchase." Similarly, a person seeking to repurchase must make timely application and present the necessary payment to repurchase before a third party application for purchase is accepted.

Your final question asks whether the state tax commission is required to permit a person seeking to repurchase and who was not the former assessed owner, to obtain the tax title directly from the state, or whether such deed should be given only to the former assessed owner or his heirs.

In our opinion, in line with the holding in **Chaves v. Chaves**, supra, one possessing a statutory right of repurchase may assign, grant or transfer such right to another. The assignee, grantee or transferee of such right is entitled to make application for repurchase to the tax commission and if timely made, obtain tax title to such realty from the state.