

## Opinion No. 37-1829

December 1, 1937

**BY:** FRANK H. PATTON, Attorney General

**TO:** Mr. C. C. McCulloh Assist. Special Tax Attorney State Tax Commission Santa Fe, New Mexico

{\*194} We have your letter of November 27, 1937, in which you ask twenty-three different questions with respect to the sale of property acquired by the state through tax deed. You state you have your own opinion as to what the answers should be to the questions propounded.

Your sound judgment and reasoning based on your detailed study of these problems as tax attorney would have been of inestimable value in forming my own conclusions, and I am sorry you did not favor us with any comment or authorities on the subject.

I take it, however, that these question are anticipatory of problems which may arise, and for the purpose of formulating a policy for the administration of this phase of your work. Therefore, without going into extended research and study, I shall endeavor to answer the questions in the order enumerated; and if the opinion which you say you have as to these questions does not correspond with my own, or if controversy arises out of any one or more of these questions, I shall be glad to reconsider and to give such particular question or questions a more deliberate and thorough study.

Without repeating the question, the answer to each question numbered will be given the same number.

1. As to real property put up for private sale under Chapter 215, Laws of 1937, the Tax Commission may and should accept offers for the full amount of taxes and interest from the owner of the property in the event no higher bids are received from others. Such a repurchase would be in the nature of a redemption. The law favors redemptions. As stated in the quotation used by Justice Simms in *State vs. Hatley*, 34 N.M. 86, "It would be beneath the dignity of a great commonwealth to seek to make gain out of the misfortunes of her citizens." True in that case a tax sale certificate was involved, but one which just as effectively passed title to the county as {\*195} tax deeds do to the state. Sec. 442, Ch. 133, Laws of 1933; *Williams v. Van Pelt*, 35 N.M. 286; *Witt v. Evans*, 36 N.M. 365. The only difference is that in the *Hatley* case the period of redemption had expired, and here in addition to that a deed has been issued. As in that case, so long as the rights of third persons have not intervened, by the same reasoning redemption by re-purchase should be permitted. Perhaps the deed should be made to reflect the fact that it is made for the purpose of permitting such redemption. Such repurchase should of course be for all taxes due.

2. Strictly speaking, rights of a third person have not as yet intervened when a bid is made by a third party, but in inviting the public to make bids there would be, to say the least, a moral obligation to comply strictly with the law and require the owner to meet the bid made by the third party. Bidders no doubt go to the expense of investigation before bidding. Once a bid is made, therefore, I would say that the situation is not the same as that described in paragraph 1 of this opinion, and that sale cannot be made to the owner except in strict compliance with the preferential right given by Chapter 215, Laws of 1937.

3. As to property which may be sold at private sale under the first paragraph of Section 1, Chapter 215, Laws of 1937, the law, in my opinion, was quite clear that no appraisal was required. By Section 4 of Chapter 180, the Legislature amended Section 32 of Chapter 27 of the Special Session Laws of 1934, by making provision for the administration and sale of lands which cannot be sold at the first or second sale. And it may be that before the Tax Commission may transfer any land to the Land Commissioner appraisal and effort to sell at public sale are necessary, but it does not necessarily follow that a private sale may not be made of the smaller tracts without appraisal.

It is quite evident that in that statute, as in the original Section 32 of Chapter 27, Laws of 1937, the provisions for sale and rental applied only to land required to be sold at public sale, or which in the discretion of the Tax Commission should be sold at public sale after appraisement. This is reasonable since no doubt the legislature did not wish to burden the Commissioner with the administration of the small tracts. I would so interpret that statute. It is my opinion, therefore, that the Tax Commission may, in its discretion, sell smaller tracts without appraisal to third parties.

4. The preference right to re-purchase given by Chapter 215, Laws of 1937, and other sections of our tax law, was intended for the protection of those who but for the tax sale would be entitled to the property; and successors of the persons who owned the property at the time of tax sale are also entitled to the preferential right of re-purchase.

5. The state tax commission is specifically authorized to employ such assistants as may be necessary for the efficient administration of that section of the law providing for sales by the commission, (see Sec. 1, Ch. 215, L. '37), but it is my opinion that only the expenses provided by Section 31, Chapter 27, Laws of 1934, may be deducted from the proceeds of sales. Note also that Chapter 215, Laws of 1937, prohibits payment to the county commissioners for appraisal. All they can get is reimbursement for expense.

6. It is my opinion that the words "taxes appearing on the tax sale certificate" in Sec. 1, Chapter 215, Laws of 1937, refer to general taxes as distinguished from special assessments, (particularly in view of Sections 30-515 and 30-518 of the 1929 Compilation (providing for the preservation of the conservancy assessment {\*196} liens upon sale of property for general taxes), and that in figuring the taxes to determine whether a tract of land is subject to private sale, general taxes alone are to be considered. In fact, it is my opinion, with all due respect to other lawyers who disagree

with me, that the conservancy assessments should not be included in the tax sale certificate with the general taxes.

7. I do not know of any liability attaching to the State Tax Commission in cases where due to irregularity or illegality a deed should be held void by the courts, except that provided at the end of Section 27, Chapter 34, Laws of 1934, against all tax officials.

8. It is quite evident from Chapter 27, Laws of 1934, and acts amendatory thereof, that property may be sold by the Tax Commission for less than the taxes due when the property is worth less. Nowhere, aside from the provisions for the issuance, assignment and redemption of tax sale certificates, and the issuance of deeds by the Treasurer, is the amount of tax due made the criterion for the amount which must be paid.

9. Tax sales must be made in strict compliance with the statute, and no provision is made for sales at a "nominal" sum to municipalities for any purpose, beneficial or otherwise. The sole design of the statute is to collect the taxes for the benefit of the creditors of the state and its political subdivisions.

10. The only authority for the sale of property on installments is that contained in Chapter 127, Laws of 1937, upon applications filed before June 30, 1937. In the absence of such authority, sales must be for cash. Section 31, Chapter 27, Laws of 1934, specifically provides that sales "shall be for cash."

11. A tax deed to the state conveying lands, conveys also the improvements, unless they have been separately assessed, in which case, of course, it does not.

12. Section 1 of Chapter 180, Laws of 1937, amended Section 17 of Chapter 27, Laws of 1934, by providing that tax deed "shall not be issued" as to any property within a municipality against which there exist any municipal special improvement assessment liens. Whether the notice is given or not given, the effect of the deed is the same. It effectively conveys the property subject to the special assessment liens where bonds secured thereby have been sold. It is my opinion that the statutes providing for preservation of such liens (Sec. 90-1217, 1929 Compilation) is a part of the contract with the bondholders, and such contracts may not be impaired. Regardless of bonds, it is doubtful that the statute could be interpreted as intending to wipe out liens for municipal assessments of any kind without specific provision to that effect.

13. What I just said with respect to municipal special improvement assessments, is true of the conservancy district assessments. The property is sold subject to the conservancy taxes. Sec. 30-518 and 30-515, 1929 Compilation.

14. Public property is not exempt from Conservancy District Assessments. *Lake Arthur Drainage v. Chaves County*, 29 N.M. 219. The assessments are against the property and not a personal liability. So far as I know the legislature has made no provision for payments of such assessments by the state. Neither the Tax Commission nor any other agency of the state has authority to expend moneys for that purpose.

15. Sec. 1, Chapter 180, Laws of 1937, provides that tax deed shall vest title free and clear of all incumbrances. Notice to mortgagees is required just as notice to the owners is required. Failure to give notice, however, is an irregularity which is cured by Sections 24 and 25 of Chapter {\*197} 27, Laws of 1934. The notice is not jurisdictional. Maxwell v. Page, 23 N.M. 356. Purchasers from the state, except perhaps those who make repurchase of property owned by them for the taxes in the nature of redemption, obtain title free and clear of all mortgage liens.

You also inquire what procedure should be followed in cases where it is discovered that the deed to the state is defective (1) because based on a double assessment, (2) because the description on the tax roll and on the deed is insufficient to identify the property, (3) where the property was not taxable because of soldier's exemption which was claimed but through clerical error was not granted, (4) where part of the description is erroneous and part is correct, and (5) where a typographical error was made in copying the description from the tax roll or from the tax sale certificate.

Where the tax commission is satisfied that the taxes for which the property was sold were illegal or void, as in the first three instances above enumerated, it should file a petition to cancel the assessment in order that a proper assessment may be made if taxable. Sec. 2, Chapter 125, Laws of 1933. If deed has already issued, it of course, is a nullity, and there is no reason why it should not be cancelled in the same action.

Where part of the description in the tax roll was erroneous and part was correct, if the correct portion of the description is sufficient to pass title, the sale undoubtedly is valid; and I think the same is true where the error in description occurred in copying descriptions from the tax roll or tax sale certificate. In such cases the defects may be cured in the manner specifically provided for the purpose by Section 26, Chapter 27, Laws of 1934.

As to distribution of proceeds from sales by the State Tax Commission, Section 31, Chapter 27, Laws of 1934, provides that the moneys from sales, after payment of costs, shall be paid to the treasurer of the proper county "for the credit of the several county funds of the year for which sold." This cannot be taken literally to mean the one year for which the sale which resulted in tax deed may have been made in any one instance. The whole statute should be looked to in determining the meaning of this provision.

When tax deed is applied for, all taxes due for the last ten years must be paid by the individual applying for tax deed. Section 17, Chapter 27, Laws of 1934, as amended. When the property is deeded to the state, the state takes it primarily as trustee, so to speak, for the benefit of the creditors of the state and its subdivisions, and in my opinion all other tax liens merge in that title to the state for the same purpose, so that the deed is in effect, as in the case of deed to any other purchaser, the result of sale for all liens of general taxes in existence against the property. It is my opinion, therefore, that the moneys received are to be distributed to the funds entitled to the taxes which were a lien against the property at the time of conveyance to the state. This applies to proceeds from a private sale as well as to proceeds from a public sale.

The last question in your letter, as I understand it, is whether the Middle Rio Grande Assessment may be collected by the Tax Commission from the owner of land which has been sold to the state, remitted to the Conservancy District, and at a later time re-sell the property back to the taxpayer to collect the general taxes. I take it that the conservancy tax is included in the same certificate.

As stated above, it is my opinion that the law does not contemplate *{\*198}* the conservancy tax should be included with the general taxes in the tax sale certificate, and that deed is for general taxes and subject to the conservancy assessments. That being the case, I see no reason why the conservancy assessments may not be paid at any time and the property repurchased by the owner later, provided the Tax Commission does not in the meantime sell to a third party to recover general taxes at private or public sale.

By: A. M. FERNANDEZ,

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