

**TAX SALES
(AN OVERVIEW)**

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If you know what you’re doing and are careful, with luck you won’t be burned.

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A. INTRODUCTION.

Nobody likes taxes but Government runs on tax money. Once you grasp the complexity of this Fundamental conflict, you will begin to understand the reason for the nearly Incomprehensible morass of laws concerning the collection of ad valorem taxes in Georgia. That real estate got drug into the squabble just makes it worse.

As real estate practitioners, we must be concerned with how the collection of ad valorem taxes (i) affect the ability of the current owner to convey good title at closing or if the putative owner has lost title to their land through a tax foreclosure, (ii) how (or if) good title passes through a tax sale. Looking at the Christmas Story for anecdotal historical purposes, we should note that the reason Joseph and Mary were in Bethlehem riding a donkey and sleeping in a stable on that fateful night some 2000 years ago was because the census laws of that time required the head of the household to travel to the town of his birth and register. Extrapolating this sort of governmental foolishness to the collection of taxes in Georgia, it must be observed that dealing with the government has not significantly improved in the past 2000 years despite the advent of democracy, automobiles and computerized motel reservation systems.

Taxes are collected by government via three methods: voluntary, passive and active. “Voluntary” tax collection occurs when the taxing authority sends out tax bills and the recipient of the bill pays the amount shown on the bill in full. “Voluntary” might be a bit too sugar-coated as nobody wants to pay taxes but if taxes are sent in by the tax payer (even if done

begrudgingly), let's call it "voluntary". "Passive" tax collection is a form of tax collection when "voluntary" fails to produce cash. Here, upon delinquency of payment, the Tax Commissioner duly reduces the tax bill to a fifa and records this fifa in the General Execution Docket, Lien Docket or whatever public record for such instruments is in vogue at the time in any particular county. There it sits "passively", like a vulture on a limb waiting for something to die, although here the government is waiting for the tax payer to sell or finance the affected parcel of land hoping that a competent title examiner and closing attorney will discover the fifia, call the tax commissioner for a payoff, and, in order to fulfill their role as closing attorney, collects the taxes for the government.

"Active" tax collection occurs where the taxing authority or their assignee pursues the execution of the duly issued fifa through the statutory foreclosure process. This process is most popular in counties whose government isn't willing (or can't afford) to sit around and wait for something to happen. (Similar to the vulture who decides: "I'm tired of waiting for something to die. I'm going to kill something.") There are two kinds of foreclosure: judicial and non-judicial. Under judicial foreclosures there are two different parties conducting the sales process: in some counties, it is the County Attorney's Office; in other counties, it is a commercial vendor who may be a local law firm or a regional corporate vendor of such services. Under non-judicial foreclosures, there are two different parties conducting the sales process: in some counties it is the Sheriff's office; in other counties, it is the Tax Commissioner acting in their capacity as Ex Officio Sheriff. The topic of this paper is the nature of the sales arising out of judicial and non-judicial sales. I have attached a brief guide to the topic of ad valorem execution as Addendum "A".

B. JUDICIAL SALES

Designed to convey title they are expensive, tedious and slow but reliable

Judicial Sales of delinquent tax bills is a relatively recent phenomenon dating back to O.C.G.A. 48-4-78, *et seq* which was enacted in 1995. It is the foreclosure of the delinquent tax lien through the courts. The Judicial In Rem Foreclosure Statute is a combination of judicial foreclosure, condemnation and quiet title action, and has been used with success in Fulton County and with mixed results in other counties. The goal of the statute originally was to provide an expeditious means to foreclose on the statutory lien granted a delinquent tax lien in such a way as to provide through the judicial process federal and state constitutional protection as well as compliance with civil practice act due process sufficient to afford the purchaser at the foreclosure sale and parties who subsequently take by and through that purchaser marketable title. When the administration of the process was passed from “county run” to “vendor run”, the attention of the attorneys implementing the process changed from the original goal of good title to mere tax collection.

Fortunately for the practitioner, In Rem titles are relatively rare with less than 1000 properties passing in Fulton County from 1996-2004 and fewer than that collectively throughout the state. Also fortunately for the practitioner, because the In Rem Process is relatively new and purely statutory method of foreclosure, it has fewer case law cites (Burress v. Ferdinand, 245 Ga. App. 203 (2000), Clarence L. Martin, P.C. v. Wallace, 248 Ga. App. 284 (2001) and “Canoeside” (2002), it is easier to check conformance and therefore quality of title. Unfortunately, the In Rem Process is not popular with tax collectors as it is tedious, expensive and slow.

C. NON-JUDICIAL SALES

Never designed as a tool to convey worthwhile title, tax sales were originally a last resort blunt instrument to force collection of taxes from renascent taxpayers “or else”. In the 1990’s, delinquent tax fifa transfers backed by laws permitting non-judicial tax sales allowed governments to liquidate large portfolios of delinquent tax fifas to third party purchasers as if they were securitized debentures. Can you say “just like the sub-prime mortgage market”?

Non-judicial tax sales are the foreclosure of the delinquent tax fifas without the benefit of the courts. A form of tax collection since at least 1873, this is the preferred method of completing the tax collection process since it is easy, cheap and fast. Not having judicial input worrying about pesky notice and due process, non-judicial foreclosures work great for the collection of taxes but stumble when it comes to conveying title. Just look at the many cases concerning the problem. Tax fifas are treated in the same manner as judicial executions under O.C.G.A. § 9-13-140 but also has its own Code Section O.C.G.A. § 48-4-1. This duality causes confusion where it is the Sheriff who conducts the foreclosure as (a) a fifa is oftentimes referred to as an execution (b) the foreclosure process is oftentimes referred to as a levy and sale and (c) the delinquent taxpayer may be also called the defendant in fifa. As far as the Sheriff is concerned, the foreclosure of a tax fifa held by the County or a third party parallels that of a judgment creditor and Sheriff’s generally are not in favor of foreclosing judgment creditor fifas. As far as the Tax Commissioner is concerned their fifas are all they know or care about.

It is the foreclosing party’s responsibility for compliance with the code for title examination, notice to the taxpayer and lien holders, preparation of the advertisement, conduct of the sale, and receipt of funds and processing of surplus funds. This is where the reliability in the Non-Judicial Foreclosure Process breaks down. Working backwards, in order for a citizens to lose their property (as in a foreclosure), the courts apply strict standards of notice and due diligence. However, if you look at the taxation, fifa and foreclosure process as a whole, reliable

quality of notice and due diligence only appears at the foreclosing end of the process and not before and this is what makes the tax deed process so risky:

1. First, taxpayer name, address and other vital statistics appearing on the base tax bill is derived from information collected by the Tax Assessor, who generally is notoriously inaccurate as compounded by the fact that it is the Taxpayer's responsibility to make sure the tax records are accurate.

2. Second, delinquent tax fifas are routinely was issued in the name of the Taxpayer at the time the taxes were assessed. This means if the tax record and bill did not match the true owner, either due to gross ineptitude of the Assessor's Office or interim conveyance, the tax fifa could appear out of the chain of title. Also, a party who had legitimately sold the property could have their credit report thoroughly trashed by fifas being incorrectly, but legally, issued in their name. As a note, in 2006, O.C.G.A. § 48-3-3 was dramatically amended to attempt to provide (restricted) setting aside of such fifas saying: "No execution shall be issued against any person who is not the record owner of the property if, within 90 days from the due date, that person has provided satisfactory proof to the tax collector or tax commissioner that the property has been transferred by recorded deed and the liability for the payment of ad valorem taxed has been assigned to the vested transferee by written agreement or contract." The statute is silent about a tax deed which comes out of a party who is not the owner on the date of the bill, let alone the levy.

3. Third, there is a ten days written notice of intent to levy which is sent to the taxpayer according to the date provided by the Tax Assessor "last known address as listed in the records of the tax commissioner..." O.C.G.A. § 48-4-1 (1). What good is that if it's wrong to start with?

4. Fourth, after statutory notice is given (as shown, a problem in itself when it comes to “to whom?” and “how?”), the foreclosing party causes an advertisement to be published in the legal organ for the county for four weeks prior to the first Tuesday of the month.

5. Fifth, the sale is conducted on the courthouse steps (this being a court-specified location in the event of a building with multiple entrances such as Fulton County) by official personnel during the hours of 10:00 and 4:00. The foreclosing party’s personnel can choose the time so long as it is during the legal hours. The foreclosing party sells the property to the highest bidder at public auction, provided that the minimum purchase price is met which must include all delinquent taxes and assessments, penalties, and the costs of the current tax sales. Statutorily, full payment of the purchase price is due to the foreclosing party immediately upon conclusion of the tax sale. Occasionally, the high bidder fails to make the payment but there is no statutory method to determine the next bidder. Sometimes the sale will go to the next highest bidder. Sometime a second auction is held. I know of no case law which legitimizes anything other than an entirely new foreclosure. Proceeds of the sale go toward the payment of all amounts owed under the fifa taxes, assessments, penalties and costs. If there is a surplus the money will be paid into court according to statute.

6. Sixth, within a reasonable time after the tax sale purchaser pays his bid, the sheriff will deliver a Tax Deed to the purchaser which is signed by the sheriff and which must then be recorded in the land records of the Clerk of Superior Court in a form established by the county. The form is many times faulty in the legal description, tax parcel number, name of tax payer and fifa upon which the deed is based. It is the responsibility of the purchaser at the tax sale (or a party taking title through a purchaser at a tax sale) to assure them of the correctness and completeness of the Tax Deed.

7. The taxpayer or any party in interest may redeem the property sold at tax sale at any time before expiration of the statutory one year or until the right to redeem has been foreclosed under O.C.G.A. § 48-4-45, O.C.G.A. § 48-4-40 (1) and (2). The effect of redemption is to put the title conveyed by the tax deed back into the defendant in fact. O.C.G.A. § 48-4-43. This, of course, becomes terribly muddled when the defendant in fact has been out of the chain of title for many years. Under O.C.G.A. § 48-4-42 (for sales after July 1, 2002), the total amount required for redemption of the property includes:

the amount of the bid paid at the tax sale as shown by the recitals in the tax deed;
plus taxes paid on the property by the purchaser after the tax sale;
plus special assessments paid on the property by the purchaser after the tax sale;
plus a premium of 20% of the amount paid on the property by the purchaser at the tax sale for the first year or partial year ;
plus a premium of 10% for every year or partial year thereafter;
plus costs if the redemption is made more than 30 days after the notice to bar the right of redemption was filed.

There is, at this time, no recognized independent method to confirm that the right of redemption has been filed. Remember, under O.C.G.A. § 9-11-4, failure to provide reasonable notice to a party allows that party to move to set aside the results of that action on the grounds that said action does not affect them due to the failure of notice.

D. CONCLUSION

If you know what you're doing and are careful, with luck you won't be burned.

Much litigation has occurred about invalid sales and there is no statutory safe harbor for the purchaser of factas or tax deeds resulting from the foreclosure of tax factas. In E Lane Pine Hills

LLC vs Ferdinand, 277 Ga. App. 566, the Georgia Court of Appeals invalidated a tax sale on the grounds that the tax fifa transfer was faulty. In that case, the Tax Commissioner refused to transfer 2002 delinquent tax fifas to a third party because O.C.G.A. § 48-3-19, the statute which had authorized such transfers, had been repealed. The third party sued in the Superior Court of Fulton County under the O.C.G.A. § 9-13-36 of the Civil Practice Act which permitted the free transfers of judgment fifas. A Writ of Mandamus was issued ordering the Tax Commissioner to make the transfer. There was no appeal and the transfer was made, and again in 2003 and again in 2004. The Court of Appeals found that the repeal of O.C.G.A. § 48-3-19 implied that tax fifas were not to be transferred, therefore the third party holder of the fifa held it invalidly and therefore the foreclosure was also invalid. Numerous questions about the repercussions of E Lane and it's effect on over \$120 Million worth of fifa transfers, redemptions and tax sales has still to be sorted out. SB 585 did not address this question either. Of the \$120 Million transferred fifas, approximately \$96 Million have been liquidated through redemption or foreclosure. The holder of the balance of the fifas has asked the County for a refund (even though they were the one who sought the Writ of Mandamus) but no response has been forthcoming from the County.

A tax deed issued pursuant to the established procedures vests in the grantee a very poor title as the deed is little more than a Quitclaim Deed without warranties and as such subject to an absolute right of redemption. Quiet Title Actions have been routinely filed and from personal examination are little more than rubber stamp operations tied to a particular tax foreclosure company. Correctly, most title companies in Georgia will generally not insure tax deeds and are becoming unfortunately hesitant to insure the interests coming out of quiet title actions sanitizing

tax deeds unless satisfied that they do not suffer from the same failure of notice as the tax deed process.

ADDENDUM "A"

Statutes:

All citations in this summary are to Official Code of Georgia.

Title 9. Judicial sales, generally O.C.G.A. § 9-13-140

Title 48. Revenue and Taxation:

Chapter 2: Department of Revenue

§48-2-40 Rate of Interest on past due taxes is one percent per month from the date the tax is due

§48-2-56 Liens for taxes

(a) Liens for all taxes due the state or any county or municipality arise as of the time the taxes become due and unpaid and all tax liens shall cover all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid.

(b) Liens for taxes are superior to all other liens and shall be paid before any other debt, lien, or claim of any kind. They are ranked:

1. Taxes due the state
2. Taxes due county
3. Taxes due school board
4. Taxes due municipality

Comment:

There exists confusion about whether or not a foreclosure of an ad valorem tax fifa eliminates the lien of a State Income Tax Lien. §48-2-57. The State Department of Revenue argues “not” but doesn’t have a cite for that position...yet. There is no doubt that the foreclosure of an ad valorem tax fifa does not eliminate a federal lien such as a Federal Tax Lien or other federal lien.

Chapter 3: Tax Executions

Chapter 4 Sales Under Tax Executions Title 48.

§48-3-9 (prior Chapter dictates that at the time the fifa is levied upon (foreclosed), before the foreclosure is advertised, it is the obligation of the foreclosing official to give notice of the impending levy to the taxpayer, the record title owner and the record owner of each security deed and mortgage must be given twenty days written notice (the “20 day letter”). The form of the letter is dictated in the statute.

Comment:

1. In Georgia, the Tax Commissioner is solely responsible for ad valorem tax collection which, in Fulton County, includes the state, county, school board and some (but not all) of the cities located in the County. The Tax Commissioner may be either hired by the county commission or elected. After a fifty year period, in 2004, the statute providing for the hiring of the Fulton County Tax Commissioner was changed to make it an elected position. The change was implemented by a disgruntled state representative with the active and overt support of the Fulton County Board of Commissioners in an attempt to oust (or at least harass) the incumbent Tax Commissioner. (In Fulton County, the Tax Assessor is an employee and the writer has no knowledge of any plan to allow him to run for office.) The plan backfired as no one qualified for the position in 2004 and the incumbent Tax Commissioner ran unopposed. In 2008, the incumbent Tax Commissioner won the Primary and has no opposition in the General Election. The rancor that existed between the Tax Commissioner and the County Commission has only been exacerbated by the independence he now enjoys as an elected official but goes a long way in demonstrating the problem facing government where there exists an elected Board of

Commissioners who desperately need tax dollars to fund their respective pet projects but whose constituents bristle under an aggressive but even handed collection process.

An ad valorem tax fifa has certain priority over other liens against real property. The foreclosure of a tax fifa, until the right of redemption is barred, is little more than a super lien: the taxpayer has a statutory right for at least one year to redeem the property and the purchaser at the sale cannot take possession or collect rents.

2. In Fulton County, by court order, an ad valorem tax fifa must be reduced to writing and filed with the Clerk of the Superior Court before it can be transferred to a third party. The Tax Commissioner does not have to pay a filing cost. The transferee must pay to file their transfer. Usually the taxpayer pays to file the satisfaction or quitclaim deed to remove a fifa. Blanket transfers and satisfactions were never contemplated within the real estate practice and have caused innumerable cases of heartburn among practitioners.

§48-3-20 All tax executions shall bear interest at the rate specified in 48-2-40 (one per cent per month). This conflicts with other statutes.

§48-3-22 Tax fifas have a seven year statute of limitations the same as ordinary executions. There is some confusion in Fulton County as to when the seven years begin to toll.

TRANSFERS OF TAX FIFAS

Comment:

Due to strong legislative activity supported by Fulton County and based upon a vocal group of disgruntled taxpayers, which included a chronically delinquent state representative, the existing statute O.C.G.A. § 48-3-19, which detailed how fifas were to be transferred was repealed in 2004. A substitute was passed by the legislature in 2006 as SB 585 which reinstated (in a different form) O.C.G.A. § 48-3-19 and amended O.C.G.A. § 48-4-1 as to Tax Sales and

amended O.C.G.A. § 48-4-5 Excess Proceeds. As the statute is brand new, there is little case law to guide the third party transferee. Notice to the record title owner/tax payer is now of statutory importance. The definition of due diligence is clearly defined to be: if the first notice comes back the party charged with making the notice must check the telephone books, the tax commissioner's records (does not define "records") and checking the real estate records (does not define "checking" or which "records").

1. Requires the transferee to record the fifa within 30 days of transfer. Failure to records the transfer affects the validity of the lien as to bona fide purchasers for value without notice.
2. Requires the transferee within 60 days of the transfer to "notify" the delinquent taxpayer of certain material information: name, mailing addresses, and telephone number of transferees' business office; amount necessary to satisfy the execution; other important information. If the notice comes back, transferee is required to perform the aforementioned "due diligence".
3. Transferee may collect interest as set forth in 48-3-20 plus recording fees (est. \$10.00 per transfer) plus statutory penalties "as are provided for in this title". This is unclear as the statute fails to provide for any other sums.
4. Transferee shall not initiate foreclosure for 12 months after the transfer or 24 months after the date of the delinquency, whichever is EARLIER.
5. Transferee must give ANNUAL notice to the delinquent taxpayer.
6. If transferee buys more than two million of fifas in any calendar year, the transferee must maintain a "reasonably accessible" office within fifty miles of the county courthouse, open to the public 8 hours a day, five days a week

Under the new statute, it is the Tax Commissioner's sole decision whether or not to sell fifas. The purchase of the fifas are at par. The statute is silent as to warranties of validity of the fifas making the purchase of possible invalid fifas a risk the transferee must make. All funds received by County officials go into the general fund and it is difficult for a Tax Commissioner to reverse a sale without having to ask the county bureaucracy which he may be loath to do for political reasons. Counties are habitually cash poor which means a significant refund may require litigation and even then may be a long time in coming. As of this writing, few, if any, counties in Georgia transfer delinquent tax fifas to third parties. Fulton County has not transferred fifas to third parties for tax years 2005, 2006 or 2007..

SUBSEQUENT TAXES

The purchaser of a tax fifa does not have an obligation to pay subsequent years' taxes. Failure to do so, however exposes the holder of the fifa to a transfer of the later fifa to a hostile fifa holder who would have priority. Voluntary payment is added to the amount owed however and the statutory one percent is collected upon redemption of the fifa. The purchase of a property at a tax sale DOES become liable for subsequent years' taxes but again, payment is added to the redemption price.

SURPLUS FUNDS

SB 585 amends 48-4-5 to require the officer conducting the sale to give written notice to the record owner of the land at the time of the tax sale and to the record owner of each security deed and "to all other parties having any equity interest or claim in such property at the time of the tax sale." No independent procedure for request for distribution is defined other than "the order of priority in which their interest exist". SB 585 goes further to say that said office may file an interpleader in court. Again, independent procedure for request for distribution is defined other

than “the order of priority in which their interest exist”. After five years the surplus funds appear to escheat to the “department”.