



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-040

June 23, 2014

The Honorable Uvalde Lindsey
State Senator
2257 Gentle Oaks Lane
Fayetteville, Arkansas 72703

Dear Senator Lindsey:

You have requested my opinion on the following background scenario and question regarding A.C.A. § 26-35-601 (Repl. 2012), which addresses the collection of personal property taxes with real estate taxes:

A homeowner decides he or she wants to refinance his or her mortgage and contacts a mortgage company inquiring about such. The mortgage company then contacts a title company to handle the transaction and requires the title company to collect any delinquent or currently due real estate taxes from the homeowner. The title company, in its role as escrow agent, then closes pursuant to the mortgage company's requirements, disbursing funds to the tax collector for payment of the real estate taxes.

In this scenario, is the title company required to collect and remit delinquent personal property taxes?

RESPONSE

In my opinion, the answer to this question depends on whether the real estate tax payment can be deemed to be made by the mortgage company. That issue likely presents a mixed question of law and fact that may require resort to the courts for resolution, absent legislative clarification. As explained below, a mortgagee or other lien holder has the right to pay real estate taxes on any property securing the debt owed it, regardless of whether the real property owner owes any personal

property tax at that time. It appears to be the situation that the title company is the agent of the mortgage company, at least for some purposes, under the facts you have outlined. It may be, then, that this scenario falls within the scope of what I will refer to as the “lien-holder exception” to the usual rule that a taxpayer’s personal property taxes must be paid before the county collector can accept payment of real estate taxes. If that is the case, then the title company is not required to remit any personal property taxes, either current or delinquent, and the answer to your question is “no.” I must emphasize, however, that the relevant statute does not explicitly address the scenario you have presented; and I have found no helpful case law applicable to this situation, making it difficult to confidently predict the outcome. Legislative clarification may therefore be warranted.

DISCUSSION

Some initial explanation of the relevant statutory scheme is necessary before further elaborating on this response. Arkansas Code Annotated 26-35-601(a) requires taxpayers to pay their personal property taxes before the county collector can accept payment of real estate taxes:

Each county collector in this state shall be charged with the responsibility of collecting personal property taxes shown to be due by the taxpayer as reflected by the records in the county collector’s office at the time the taxpayer pays the general taxes due on real estate.¹

Subsection (c), however, provides several exceptions to the requirement that all of a real property owner’s personal taxes – both delinquent and currently due – must be paid before the collector can accept payment of real estate taxes. Subsection - 601(c)(2) gives a mortgagee or other lien holder the right to pay real estate tax on any property securing the debt owed it, regardless of whether the real property owner owes any personal property tax at that time:

¹ A.C.A. § 26-35-601(a). *See also* subsection (c)(1) (expressing the intention to prevent a taxpayer from paying and the collector from receiving general real estate taxes unless outstanding personal property taxes are paid). Subsection 26-35-601(b) provides that it is a misdemeanor for a collector willfully to accept payment of real estate taxes without requiring payment of any personal property taxes due from the taxpayer.

The provisions of this section shall not prevent any person, firm, partnership, or corporation from paying general real estate taxes on property securing the payment of indebtedness due the person, firm, partnership, or corporation seeking to pay the taxes.

A mortgagee is thus not required to pay the real property owner's personal property taxes, delinquent or otherwise, before the county collector can accept payment of real estate taxes on the mortgaged property from said mortgagee.

I believe the answer to your question likely turns on whether the payment of real estate taxes by the title company in this mortgage closing scenario can be deemed made by the mortgage company, so as to fall within the lien-holder exception under subsection -601(c)(2). In my opinion, this presents a close question of law and fact.²

Assuming, as the facts you have set forth invite me to do, that the title company establishes the escrow account at the direction of and subject to the control of the mortgage company, then to that extent the title company would appear to be the mortgage company's agent. Logic may suggest that on account of that agency relationship, the lien-holder exception applies when the real estate taxes are paid, in which case the existence of any outstanding personal property taxes is immaterial. This would appear as well to be consistent with the apparent purpose of this exception, which is to allow the lien-holder to protect its interest in the property.

But by the same token, the title company in this same transaction might be seen as acting for the taxpayer, given that the real estate tax payment is made by the taxpayer to the title company for delivery to the collector. As stated above, taxpayers must pay their personal property taxes before the county collector may accept payment of real estate taxes.

² Under another subsection, -601(c)(3), a closing agent or abstract company may pay real estate taxes "at the time the *ownership of the property is being transferred*" (emphasis added) without having to pay any currently due taxes on personal property taxes, but any delinquent personal property taxes must be paid. In my opinion, this subsection has no bearing on your question, which pertains specifically to a mortgage closing and does not involve a land transfer.

Under another subsection that also does not appear to be relevant to your question – subsection 601(c)(4) – a purchaser in a foreclosure sale is not responsible for paying personal property taxes that would otherwise have to be paid in accordance with this statute.

I have found no helpful case law addressing this scenario, where the title company is likely acting in some capacity as agent for both the taxpayer and the mortgage company in the mortgage refinancing transaction. In my opinion, only if the real estate tax payment can be deemed made by the mortgage company will the lienholder exception apply. A court might be persuaded to view the payment this way if the closing is conditioned in part on the title company collecting the real estate taxes from the homeowner. But there is no explicit provision to this effect in the statute, suggesting that legislative clarification may be warranted.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,


DUSTIN MCDANIEL
Attorney General

DM:EAW/cyh