

INTERNAL REVENUE SERVICE

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MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL, NORTHERN CALIFORNIA

FROM: ALAN C. LEVINE
Chief, Branch 1 (General Litigation)

SUBJECT: Redemption of Property from Multiple Purchasers

This is in response to your memorandum regarding the above subject. Although, as you have stated, the redemption question regarding this taxpayer has been put to rest, the questions you presented merit further consideration as you indicate that they are likely to arise in the future, given that the real estate market in Northern California is currently strong and the District is identifying a significant number of redemptions.

ISSUE(S):

1. When property is purchased at a nonjudicial foreclosure by more than one purchaser and the Internal Revenue Service (Service) is unable to demonstrate that the purchasers are acting in partnership, must the Service redeem each purchaser's interest in the property through separate tender of redemption funds?
2. If the Service redeems from at least one purchaser, but fails to redeem from all purchasers having an interest in property within the statutory redemption period, does the Service acquire a partial interest in the property?
3. If a partial interest is obtained, may the government seek judicial sale of the property (i.e., a suit for partition) in order to realize the value of its interest?
4. May the Service tender redemption funds to a designated agent of the purchaser(s)?
5. If the Service may tender redemption funds to an agent, what evidence of agency should be required?
6. Is the successful evasion of the Service's diligent attempts to tender a redemption check the equivalent of a refusal to accept tender?

7. Is there any legal purpose served in depositing a redemption check into a Director's account as suggested by IRM 535(26).2 which would not be accomplished by having the Director hold the check in a safe?

8. If a redemption check is deposited into a Director's account as suggested by IRM 535(26).2, should the purchaser be credited with interest on the funds?

CONCLUSIONS:

Issue No. 1 - The Service must redeem from all the purchasers, not just a portion of them.

Issue No. 2 - The Service does not have authority to redeem less than the entire property.

Issue No. 3 - As stated in Issue No. 2, the Service lacks authority to redeem less than the entire property.

Issue No. 4 - The Service may tender redemption funds to an agent of the purchaser provided he or she has obtained the requisite power of attorney prescribed by Treas. Reg. § 601.504(a)(5).

Issue No. 5 - A properly executed Form 2848 satisfies the requirements for both a power of attorney and a declaration of representative.

Issue No. 6 - The successful evasion of the Service's efforts to tender a redemption check is tantamount to a refusal to accept tender.

Issue No. 7 - The Service's segregating the redemption money by depositing it into a separate account and not returning it to the revolving fund will be evidence that an attempt at redemption has been made.

Issue No. 8 - Pursuant to 28 U.S.C. § 2410(d) interest will be paid where the Service redeems real property. Where the Service is unable to tender redemption funds to the purchaser at a nonjudicial sale and the check is deposited in the District Director's special account, the purchaser should be credited with interest but only up until the date the check is deposited in that account.

FACTS:

Two purchasers cooperated in purchasing the subject real property at a foreclosure sale. They did not hold themselves out as partners and they took title as tenants in common. They attempted by letters to the Service, to designate an agent for purposes of dealing with the Service on redemption matters. The Service did not receive the letters until only a few days prior to the expiration of the redemption period and after one of the purchasers had gone out of town on vacation and could not be reached.

LAW AND ANALYSIS:

1. Under the redemption concept, the Service does not have the option of purchasing only part of the property. The plain wording of the statute, I.R.C. § 7425(d)(1), authorizes the Service to redeem the actual property that was sold. There is no authorization to redeem only a portion or fraction of the real property sold. If Congress had intended the Service to have the power to redeem a fraction of the real property sold, it would have explicitly provided for such authority. For example, I.R.C. § 6337(b)(1) specifically states that after the administrative sale of real property, it "shall be permitted to redeem the property sold, or any particular tract of such property." (Emphasis added.) Congress could have enacted section 7425(d)(1) to contain a similar provision allowing the government to redeem a particular tract of the real property sold or some other fractional interest but Congress chose not to give this authority to the government.

As a matter of statutory construction, "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." BFP v. Resolution Trust Corp., 114 S. Ct. 1757, 1761 (1994). Congress clearly omitted from the government's authority the ability to redeem a fractional portion of the real property sold. Consequently, we cannot interpret section 7425(d) to contain that very same authority. Thus, the government may redeem the entire property sold, but nothing less than the entire property.

Returning to your first question, you asked: "When property is purchased at a nonjudicial foreclosure by more than one purchaser and the Service is unable to demonstrate that the purchasers are acting in partnership, must the Service redeem each purchaser's interest in the property through separate tender of redemption checks?"

Applying the above analysis to the given scenario, the government would have to redeem all of the purchasers' interests in order to redeem the entire parcel of real property. This leads to the next question of identifying the purchasers' interests. Where there is no evidence that the purchasers at a nonjudicial foreclosure sale are acting in partnership or some other type of joint venture, *i.e.*, taking title as joint tenants or tenants by the entirety, it is our opinion that they should be considered to have bought the property as tenants in common. A tenancy in common may be defined as that character of tenancy whereby two or more persons are entitled to land in such a manner that they have an undivided possession, but several freeholds or interests. 20 Am Jur Cotenancy and Joint Ownership § 31. As such, we believe that each purchaser's interest should be treated as a separate entity and, therefore, each should be redeemed through a separate tender of redemption funds.

2. Before answering the second question, it is necessary to define the terms involved. One must carefully distinguish the concepts of redeeming the entire property sold under section 7425(d) and purchasing a fractional interest in real property. As discussed above, the Service is authorized to redeem the entire property from a sale; the Service is not authorized under section 7425(d) to purchase a fractional interest in real property. In other words, the concept of redemption is to be used only for purchasing the entire real property sold at the nonjudicial sale. Thus, the phrase, "redemption of a portion of the real property," is a contradiction in terms because the Service is not authorized to redeem a portion of the property. In our opinion, if the Service purchases a portion of the real property from a nonjudicial sale, the Service has committed an ultra vires act because it has not redeemed the property and we have found no authority to allow the Service to purchase portions of the real property after a nonjudicial sale.

Your question asked "[i]f the Service redeems from at least one purchaser, but fails to redeem from all purchasers having an interest in the property within the statutory period, does the Service acquire a partial interest in the property?" As discussed above, we do not think it is possible for the Service to redeem a portion of real property. The narrow question you raise, however, is whether the Service may acquire a partial interest in the property. We think that the Service does not acquire a partial interest in the property because an ultra vires purchase is void. See Mobil Oil Corp v. United States, CN-92-5076 at 6 (Fed. Cir. March 18, 1993) ("The closing agreements do not purport to, nor could they, modify the statutory provisions applicable here. Had they sought to, they would have been void as ultra vires. The IRS as a contracting party had no authority to alter the statutory meaning of 'payment,' ...") See REW Enterprises, Inc. v. Premier Bank, 49 F.3d 163, 171 (5th Cir. 1995) (Because an ultra vires contract is null and void, the remedy for rescission of that contract is to put the parties in the position they would have occupied had the unlawful agreement not been made.)

3. Your third question is whether "[i]f a partial interest is obtained, may the government seek judicial sale of the property (i.e., a suit for partition) in order to realize the value of its interest?" As discussed above, an ultra vires act is void. Consequently, the Service does not obtain a partial interest in the property. The government, moreover, cannot compound its error by representing to a court that it has title to the property and is entitled to relief through a suit to partition.

4. Your fourth question is whether "[m]ay the Service tender redemption funds to a designated agent of the purchaser(s)?" Neither Treas. Reg. § 301.7425-4, nor I.R.C. 7425 mention the possibility of the Service tendering the redemption amount to anyone but the purchaser. However, Treas. Reg. § 601.502, et. seq., provides rules for powers of attorney that should apply to this question. Section 601.501(a) states that "these rules [as to the power of attorney] apply to all offices of the Internal Revenue Service in all matters." Thus, the power of attorney rules must apply to the Service's redemption of real property. The power of attorney regulations address payment by the Service. "The authority to receive (but not endorse or collect) a check drawn on the United States Treasury must be specifically granted in a power of attorney." Treas. Reg. § 601.504(a)(5). See also Treas. Reg. § 601.506(c) ("a check drawn on the United States Treasury ... will be mailed to the recognized representative of a taxpayer provided that a power of attorney is filed containing specific authorization for this to be done.")

Applying the above to your question, we conclude that the Service cannot tender redemption funds to a designated agent of the purchaser(s) unless the purchaser(s) have executed a power of attorney under the regulations that specifically grant the authority to receive a check drawn on the United States Treasury.

5. Your fifth question is "[i]f the Service may tender redemption funds to an agent, what evidence of agency [power of attorney] should be required?" A properly executed Form 2848 "satisfies the requirements for both a power of attorney (as described in Treas. Reg. § 601.503(a) and a declaration of representative (as described § 601.502(c)." Treas. Reg. § 601.503(b). As stated above, the agent must have a power of attorney that explicitly authorizes him to receive a check drawn on the United States Treasury.

6. Is the successful evasion of the Service's diligent attempts to tender a redemption check the equivalent of a refusal to accept tender? Our research fails to disclose any case law involving redemption by the Service under section 7425 where there has been an attempt to avoid tender of the necessary funds. However, in Guthrie v. Curnutt, 417 F.2d 764 (10th Cir. 1969), a case involving redemption under section 6337(b), the Tenth Circuit held that where a party, willing and able to do so, offers to pay another a sum of money and is told that it will not be accepted, the offer is a tender without the money being produced. The court stated that it had taken this same view in many previous cases. In Guthrie, the plaintiff's actions in attempting to redeem from the purchaser or his lawyer were frustrated. As just stated, Guthrie dealt with redemptions from distraint sales under section 6337 rather than redemptions from nonjudicial sales

pursuant to section 7425. However, based upon the rationale set forth by the Tenth Circuit in Guthrie, we are of the opinion that with respect to section 7425 redemptions, the successful evasion of the Service's diligent attempts to tender a redemption check is tantamount to the refusal to accept tender with the result that redemption should be deemed to have been accomplished.

7. As you have indicated in your memorandum, IRM 535(26).2 permits the Service, in the event it is unable to accomplish tender of the redemption check, to deposit that check into the Director's account. We believe the purpose behind this provision is to establish that there was an actual tender of the redemption funds. By documenting and segregating this money into a separate account and not returning it back into the revolving fund, evidence has been established of the fact that an attempt at redemption was made. We further believe that the placing of the check in the Director's safe would tend to accomplish the same result but caution that the date of placement in the safe should also be documented. This date should be considered to be the date of redemption which date, in our opinion, causes additional interest to cease to accrue.

8. On the assumption that it was not possible to tender the redemption check to the purchaser(s) and it is placed in the District Director's account, it is our position that interest will accrue on the redemption amount but only up until the date of its deposit into that account. Code section 7425(d)(2) itself does not provide for the payment of interest in redemption cases but references 28 U.S.C. § 2410(d)(2) which section does provide for such interest. Section 2410(d)(2) states that interest shall run from the date of sale but it does not state when that interest will cease to run. Under normal circumstances, *i.e.*, where the Service is able to locate the purchaser(s) and tender the redemption funds, the payment of interest terminates upon tender of the Service's check to the purchaser(s). It would be unreasonable for interest to continue to accrue beyond this date. Our research fails to disclose any case law or statutory or regulatory basis for payment of interest subsequent to the tender date. As a general rule, a lawful, bona fide tender of the amount due stops the further accrual of interest. See 74 Am. Jur. 2d Tender § 39 (1974).

As we stated in our response to your sixth question, we believe that the successful evasion of the Service's diligent attempts to tender a redemption check is tantamount to the refusal to accept tender, the ultimate result being that redemption should be deemed to have been accomplished. Turner v. Sanchez, 50 N. M. 15, 168 P. 2d 96 (1946). See also Taylor v. Mutual Ben. Health & Accident Assoc., 133 F.2d 239 (8th Cir. 1943). Since, as indicated above, interest will accrue only until the Service tenders payment to the purchaser(s), interest should not accrue past the date the District

Director deposits the necessary redemption funds into his special account in cases where it is impossible to tender these funds to the purchaser(s). Similarly, where the District Director elects to retain the redemption check in his safe, the amount of that check should include interest from the date of sale up until the date the check is placed in the safe. Should the purchaser(s) ever present themselves to the Service and argue that they are entitled, among other amounts, to interest, we believe that a court would not find the Service's position to be unreasonable.

Please note that the foregoing conclusions are based upon the premise that the Service will have accurately ascertained what the purchase price of the property to be redeemed was and what percentage of that purchase price was paid by each purchaser, assuming that there were multiple purchasers. Under Treas. Reg. § 301.7425-4(b)(2)(i), "The actual amount paid for property by a purchaser, other than the holder of a lien being foreclosed, is the amount paid by him at the sale."

Please be advised that we have coordinated this response to you with the Collection Division in the National Office and they concur with the conclusions reached herein.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS.

None

If you have any further questions, please call Ray Schuman on 202-622-3610.