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Wednesday, March 28, 2012

The Honorable Greg Abbott
Attorney General
Price Daniel Building
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78701-2548

FILE # ML-47002-12
I.D. # 47002
RQ-1051-GA

RE: Authority of a tax assessor-collector to transfer a taxing unit's tax liens and the scope of the transferred lien under Tex. Tax Code § 32.06

Dear General Abbott:

I am writing to request an Attorney General opinion on the authority of a tax assessor-collector to transfer a taxing unit's tax liens and the scope of the transferred lien under Tex. Tax Code § 32.06. There are no prior Attorney General opinions directly on point with the facts herein specified.

QUESTIONS PRESENTED

1. Does the tax assessor-collector for a taxing unit have the authority, acting alone, to transfer the taxing unit's tax lien in a case that otherwise meets the requirements of Section 32.06, Tex. Tax Code? If so, does the tax assessor-collector have the discretion to decline to transfer a tax lien notwithstanding a taxpayer's consent to the transfer? If the tax assessor-collector lacks the authority to unilaterally transfer the taxing unit's tax lien, does the governing body of the taxing unit have the discretion to decline to transfer its tax lien notwithstanding a taxpayer's consent to the transfer?
2. Does the transferred lien extend to and secure the closing costs associated with a property tax loan to the property owner, lien recordation fees, or any other costs incurred before or after the tax lien transfer?

BACKGROUND ON QUESTION 1

Section 32.06 of the Tax Code authorizes the transfer of a taxing unit's tax lien to a person (hereinafter "property tax lender") who advances funds on behalf of a property owner for the purpose of paying the property owner's property taxes. It is provided by Section 32.06, in pertinent part, as follows:

(a-1) A person may authorize another person to pay the taxes imposed by a taxing unit on the person's real property by filing with the collector for the unit:

(1) a sworn document stating:

(A) the authorization;

(B) the name and street address of the transferee authorized to pay the taxes of the property owner;

(C) a description of the property by street address, if applicable, and legal description; and

(D) notice has been given to the property owner that if the property owner is age 65 or disabled, the property owner may be eligible for a tax deferral under Section 33.06; and

(2) the information required by Section 351.054, Finance Code.

(a-2) A tax lien may be transferred to the person who pays the taxes on behalf of the property owner under the authorization for:

(1) taxes that are delinquent at the time of payment; or

(2) taxes that are not delinquent at the time of payment if:

(A) the property is not subject to a recorded mortgage lien; or

(B) a tax lien transfer authorized by the property owner has been executed and recorded for one or more prior years on the same property and the property owner has executed an authorization consenting to a transfer of the tax liens for both the taxes on the property that are not delinquent and taxes on the property that are delinquent in the manner provided by Subsection (a-1).

(a-3). . .

(a-4). . .

(b) If a transferee authorized to pay a property owner's taxes pursuant to Subsection (a-1) pays the taxes and any penalties and interest imposed, the collector shall issue a tax receipt to that transferee. In addition, the collector or a person designated by the collector shall certify that the taxes and any penalties and interest on the subject property and collection costs have been paid by the transferee on behalf of the property owner and that the taxing unit's tax lien is transferred to that transferee. The collector shall attach to the certified statement the collector's seal of office or sign the statement before a notary public and deliver a tax receipt and the statement attesting to the transfer of the tax lien to the transferee within 30 days. The tax receipt and statement may be combined into one document. The collector shall identify in a discrete field in the applicable property owner's account the date of the transfer of a tax lien transferred under this section. When a tax lien is released, the transferee shall file a release with the county clerk of each county in which the property encumbered by the lien is located for recordation by the clerk and send a copy to the collector. The transferee may charge the property owner a reasonable fee for filing the release. (underscored emphasis supplied)

It is provided under Tex. Tax Code § 32.01(a) that the tax lien “exists in favor of each taxing unit having power to tax the property.” Because this provision shows that the tax lien is owned by the taxing unit itself, the question is raised as to who actually has the authority to approve the transfer of tax lien on behalf of the taxing unit. May the tax collector, acting alone, carry out the transfer of the tax lien on behalf of the taxing unit without any express authorization from the taxing unit’s governing body? Note that unlike the express authority given to the State Comptroller to assign the state’s tax liens under Tex. Tax Code § 111.251(a),¹ there is no corollary provision granting tax collectors express authority to assign a taxing unit’s property tax liens.

Further, Section 32.06(a-2) utilizes permissive language (i.e., “may”) in authorizing the transfer of the tax lien to a property tax lender when the requirements of Section 32.06 are otherwise met. However Subsection (b) uses mandatory language (i.e., “shall”) in requiring that the collector certify that the tax lien is transferred when the transferee has been authorized to pay the taxes on behalf of the property owner and the taxes are in fact paid by that transferee. Thus, the additional question is raised as to whether the tax collector, if authorized to unilaterally act in transferring a tax lien, has discretion over making the transfer of lien in the first instance. And, if only the governing body of the taxing unit has the authority to transfer its lien, does the taxing unit itself have the discretion to decline to transfer a tax lien notwithstanding a taxpayer’s consent to the transfer and a payment by the transferee? Of relevance perhaps in answering this question is the fact that under Tex. Tax Code § 32.065, a lender and a property owner are free to contract as they see fit without requesting any transfer of the tax lien or, assuming the tax lien is properly transferred upon the consent of and certification by parties who do not own the lien, the property tax lender holds both the tax lien and the deed of trust lien as security for payment.

BACKGROUND ON QUESTION 2

Subsection (e) of § 32.06 provides as follows:

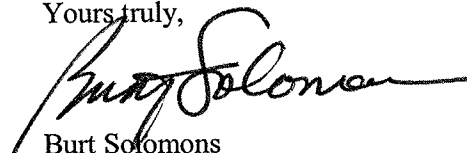
(e) A transferee holding a tax lien transferred as provided by this section may not charge a greater rate of interest than 18 percent a year on the funds advanced. Funds advanced are limited to the taxes, penalties, interest, and collection costs paid as shown on the tax receipt, expenses paid to record the lien, plus reasonable closing costs.

The foregoing Subsection (e) clearly authorizes the accrual of interest on recordation expenses and closing costs in addition to the taxes, penalties, interest and collection costs that are advanced by the transferee. However, Subsection (b) requires the tax collector to issue a tax receipt showing the amounts paid to the collector and to “certify that the taxes and any penalties and interest on the subject property and collection costs have been paid by the transferee on behalf of the property owner and that the taxing unit’s tax lien is transferred to that transferee.” This language suggests that the transferred tax lien extends only to the taxes, penalties, interest, and collection costs under TEX. TAX CODE §§ 32.01, 33.07, but not to closing costs, recordation costs, or other costs incurred by the transferee. Does the transferred tax lien extend to and secure the closing costs associated with the loan to the property owner, lien recordation fees, or any other costs incurred before or after the tax lien transfer?

¹ Section 111.251(a) states that upon payment of a tax by a person other than the taxpayer, “the comptroller may assign all rights, liens, judgments, and remedies of the state to secure and enforce tax payments to the person paying the tax or the judgment.”

Thank you for your assistance on the questions posed herein. I stand available to provide any other information or assistance needed by the Attorney General to facilitate a response to these questions.

Yours truly,

A handwritten signature in black ink, appearing to read "Burt Solomons", written in a cursive style.

Burt Solomons

CC: Stephen Y. Scurlock, Independent Bankers Association of Texas