

2018 GL1 - Lesson 12

JUDICIAL AND NONJUDICIAL FORECLOSURES AND SALES

(June 2018)

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I. INTRODUCTION

Before the enactment of the Federal Tax Lien Act of 1966, the foreclosure of a lien senior to a federal tax lien could extinguish the tax lien even if the United States was not, or even required to be, a party to the foreclosure proceeding. See, e.g., United States v. Brosnan, 363 U.S. 237 (1960). This occurred in—

- Plenary judicial actions, and
- Non-judicial actions, e.g. -
 - Foreclosures pursuant to power of sale contained in security instrument.
 - Foreclosures by a judicial officer pursuant to judgment entered by a "confession of judgment" signed by debtor.

Discharge of the junior federal tax lien often occurred without the United States being made a party to the proceeding or having actual notice of the non-judicial action. It was impossible for the Service to take steps to protect the interests of the United States under such circumstances.

To address these problems, Congress enacted section 7425 of the Code as part of the Federal Tax Lien Act. This provision greatly increases the rights of the United States in cases involving the

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foreclosure of liens that are senior to federal tax liens. See Elias v. Commissioner, 100 T.C. 510 (1993).

Notwithstanding discharge of its lien, the United States still may be able to obtain payment of a tax liability through the exercise of its right of redemption. Counsel must review and approve all proposed redemptions. Counsel may also become involved in the defense of quiet-title actions that are brought as challenges to the exercise of the right of redemption. The Internal Revenue Manual (“IRM”) provides guidance with respect to redemptions and related matters. IRM 5.12.5.

II. OBJECTIVES

At the end of this lesson you will be able to:

- Identify when a federal tax lien may be discharged in the course of a judicial or non-judicial foreclosure by a third party;
- Explain the notice requirements which must be met in order for a foreclosure sale to effect a discharge of a federal tax lien;
- Identify various administrative steps available to effect discharge in appropriate cases without litigation;
- Explain the law that governs redemptions by the United States and the procedures employed by the Internal Revenue Service (the “Service”) to both exercise and release redemption rights;
- Calculate the amount that is required to be paid when the Service decides to redeem; and
- Identify some of the legal problems connected with the right of redemption.

III. DISCHARGES IN JUDICIAL PROCEEDINGS

A. 28 U.S.C. § 2410(a) – Judicial Sales: U.S. Named in Suit

1. Under the conditions prescribed in 28 U.S.C. § 2410, “the United States may be named a party in any civil action or suit, in any district court, or in any state court having jurisdiction of the subject matter—

- a) to quiet title to,
- b) to foreclose a mortgage or other lien upon,
- c) to partition
- d) to condemn, or
- e) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.” 28 U.S.C. § 2410(a).

2. If the United States is named as a party to one of those actions or suits, a judgment or decree in the action or suit “shall have the same effect respecting the discharge of the property from the mortgage or other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated.” 28 U.S.C. § 2410(c).

3. However, for the lien of the United States, including a federal tax lien, to be discharged, “an action to foreclose a mortgage or other lien, naming the United States as a party under [section 2410], must seek judicial sale.” 28 U.S.C. § 2410(c).

4. A sale to satisfy a lien junior to the lien of the United States, including any federal tax lien, “shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien.” 28 U.S.C. § 2410(c). See also Rodriguez v. Escambron Dev. Corp., 740 F.2d 92, 99 (1st Cir. 1984); Berlin v. United States, 535 F. Supp. 298 (E.D.N.Y. 1982).

B. I.R.C. § 7425(a) – Judicial Sales: U.S. Not Named in Suit

1. Section 7425(a) of the Code provides that if the United States is not joined as a party, a judgment in any civil action or suit allowed under 28 U.S.C. § 2410(a), or a judicial sale of property pursuant to such a judgment—

- a) shall be made subject to and without disturbing the federal tax lien on the property, if a notice of lien has been properly filed at the time the suit is commenced (Section 7425(a)(1)); Treas. Reg. § 301.7425-1(c)(2)), or
- b) shall have the same effect with respect to the discharge or divestment of the federal tax lien on the property as may be provided by the local law of the place where such property is situated if a notice of lien is not on file at the time the suit is commenced or if the law makes no provision for such filing (Section 7425(a)(2); Treas. Reg. § 301.7425-1(c)(3)).

2. If the United States is improperly named as a party, the result is the same as if the United States were not joined. Treas. Reg. § 301.7425-1(c)(1).

3. If a judicial sale pursuant to a judgment in an any civil action to which the United States is not a party discharges a federal tax lien, the United States may claim the sales proceeds (less costs) with the same priority it had on the property

sold. Section 7425(a) (flush language); Treas. Reg. § 301.7425-1(c)(4). The claim must be made before the distribution of sales proceeds is ordered. Id. The claim may be made by intervening in the action under section 7424.

C. Administrative Discharges (General)

1. When Available

a) Foreclosing mortgagees may avail themselves of the administrative discharge provisions of section 6325(b), which allows the Internal Revenue Service (the “Service”) to issue a certificate of discharge when—

(1) The value of the property is at least double the amount of the unsatisfied liability and all other prior liens;

(2) Partial payment is made equal to the value of the Service’s secured interest in the property;

(3) The secured interest in the property has no value; or

(4) The Service’s lien is to be paid out of sale proceeds on the property.

b) This is a highly desirable result, and should be encouraged, because it avoids unnecessary litigation. It is desirable from the purchaser's perspective because the right of redemption accruing to the United States under 28 U.S.C. § 2410(c) is eliminated.

2. How Obtained

a) A conditional commitment letter is issued by the Service prior to the judicial foreclosure sale. Upon conclusion of the foreclosure proceeding, payment of the amount determined to be the value of the lien interest, if any, is made and a certificate of discharge issued.

b) Look for changes in the value of the government's interest between the time the letter is issued and the property is sold. (This contingency should be covered in the conditional commitment letter.)

c) If the United States has already been named a party in a suit, a certificate of discharge can still be issued. However, the plaintiff should agree to dismiss the United States in return for the conditional

commitment. The U.S. Attorney should be notified of the issuance of the certificate.

IV. DISCHARGES IN NON-JUDICIAL PROCEEDINGS

A. I.R.C. § 7425(b) and (c)

1. Section 7425(b)(1) provides that if the United States has or claims a lien (or title derived from enforcing a lien) on property, a sale of that property in a non-judicial sale will not discharge a junior federal tax lien or defeat a title derived from enforcing the lien, if—

a) Notice of the lien (or title) was properly filed more than 30 days before the date of sale; and

b) The United States is not given at least 25 days written notice of the sale pursuant to section 7425(c)(1). Russell v. United States, 551 F.3d 1174 (10th Cir. 2008), cert. denied, 558 U.S. 820 (2009) (state law remedies and lien priority rules held preempted by section 7425(b) structure where United States not given 25 days notice of sale) (citing Sec. Pac. Mortg. Corp. v. Choate, 897 F.2d 1057 (10th Cir. 1990)).

The general rationale for notice to the United States of the sale is to allow the government to “review its position and determine the appropriate action.” United States v. Beauchamp, 611 F. Supp. 2d 194 (D.R.I. 2009) (quoting S. Rep. No. 1708, 89th Cong., 2d Sess., reprinted in 1966 U.S.C.C.A.N. 3722, 3748).

2. However, if a notice of lien (or title) was not on file for more than 30 days (or the law makes no provision for such filing), or notice of the sale is required and is timely given, the non-judicial sale discharges the federal tax lien (or defeats title), if that is the effect upon junior interest holders under the local law of the place where the property is situated. Section 7425(b)(2).

3. Notwithstanding the notice requirement, the Service, upon prior application, may consent to a sale of the property free and clear of the federal tax lien (or title). See section 7425(c)(2); Treas. Reg. § 301.7425-3(b).

4. As a general rule, the third-party purchaser at the foreclosure sale may be subrogated to the rights of the foreclosing lienor to the extent of the amount paid. State law determines whether a lien being foreclosed is extinguished upon foreclosure, and whether a purchaser at foreclosure is subrogated to the foreclosing lienor. Some courts have held that the failure of a mortgagee to comply with the notice provisions of section 7425 before conducting a foreclosure sale extinguished the mortgage lien and prevented the purchaser from being subrogated to it, thereby elevating the federal tax lien from its junior status. See

United States v. Polk, 822 F.2d 871 (9th Cir. 1987); S. Bank of Lauderdale County v. Internal Revenue Service, 770 F.2d 1001 (11th Cir. 1985). But other courts have held that the purchaser is subrogated to the mortgage lien and the federal tax lien maintains its junior position. See Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991) (senior lienholder that purchased property at nonjudicial foreclosure maintained its position over tax lien); Colo. Prop. Acquisitions v. United States, 894 F.2d 1173 (10th Cir. 1990).

Purchasers of the property or new lenders may argue against elevation of the federal tax lien on three grounds: (1) equitable subrogation; (2) equitable relief from merger; and (3) unjust enrichment.

1. Equitable Subrogation

Section 6323(i)(2) permits subrogation to the extent provided by state law. The most common requirements for subrogation are: (1) the subrogee must have made a payment to protect its own interest; (2) the subrogee did not otherwise act as a volunteer (Note: Parties may be considered volunteers if, in making a payment, they have no interest of their own to protect, they act without any obligation, legal or moral, and they act without being requested to do so by the person liable on the original obligation.); (3) the entire amount of the debt was paid; (4) the subrogee was not primarily liable for the debt; and (5) subrogation does not create an injustice to the rights of others. First Fed. Sav. Bank of Wabash v. United States, 118 F.3d 532 (7th Cir. 1997) (Indiana law does not allow lender subrogation rights where it failed to discover an intervening tax lien); Mort v. United States, 86 F.3d 890 (9th Cir. 1996) (second mortgagee's right to equitable subrogation allowed in case involving unsophisticated non-commercial lender, despite presence of intervening federal tax lien); Simon v. United States, 756 F.2d 696 (9th Cir. 1985); Bednarowski & Michaels Dev., LLC v. Wallace, 293 F. Supp. 2d 728, 730-32 (E.D. Mich. 2003) (purchasers denied equitable subrogation and priority of interests through equitable subrogation under Michigan law because they paid off the first mortgage, that was senior to the federal tax lien, voluntarily).

The difficult requirements for the purchaser or new lender to satisfy are the protection of interest and volunteer factors. Purchasers and new lenders typically have no pre-existing interest in the property and are arguably acting as volunteers in purchasing or advancing new loans for the property. Some courts have held, however, that the interest of a purchaser or new lender can be subrogated to the senior lien. Concerning the purchaser, see, e.g., Dietrich Indus. v. United States, 988 F.2d 568 (5th Cir. 1993) (purchaser entitled to equitable subrogation of senior lienholder under Texas law). But see Little v. United States, 709 F.2d 517 (9th Cir. 1983) (purchaser was not equitably subrogated to position of senior lienholder under California law). Concerning the new lender, see, e.g., United

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States v. Baran, 996 F.2d 25 (2d Cir. 1993) (New York: permitting equitable subrogation where the funds of a mortgagee who failed to discover of a properly-filed federal tax lien are used to satisfy an existing mortgage senior to the tax lien); ContiMortgage Corp. v. United States, 109 F. Supp. 2d 1038 (D. Minn. 2000) (denying summary judgment, but finding that equitable subrogation would allow mortgage assignee to assume priority position of mortgage assignor); Robert E. Weiss, Inc. v. United States, 91-1 USTC ¶ 50,170 (N.D. Cal. 1991) (new lender entitled to equitable subrogation of the federal tax lien but only to the principal sum and interest that accrued before the Service recorded the notice of tax lien); but see First Fed. Sav. Bank of Wabash v. United States, 118 F.3d 532 (7th Cir. 1997) (Indiana law does not allow lender subrogation rights where it failed to discover an intervening tax lien); Universal Title Ins. Co. v. United States, 942 F.2d 1311 (8th Cir. 1991) (failure to discover tax lien precludes title insurance company's subrogation rights); Fidelity Nat'l Title Ins. Co. v. United States, 907 F.2d 868 (9th Cir. 1990) (no equitable subrogation for foreclosure sale purchaser).

An interested party that purchases foreclosed property on which the Service holds a lien and then pays the Service's claim to prevent redemption may not rely on equitable subrogation in order to recoup that amount from the debtor. See, e.g., Bevan v. Social Communications Sites, LLC, 327 F.3d 994 (9th Cir. 2003). In Bevan, a lienholder bought the property of the bankrupt debtors on which the Service held a lien that was junior to the deed of trust held by the purchaser at a nonjudicial foreclosure sale. The purchaser, wishing to keep the property, then paid the Service's claim in full in order to obtain a release of the right of redemption. The purchaser next had the Service's claim transferred to it, and then claimed that it was equitably subrogated to the rights of the Service and could require reimbursement from the debtors' estate in the amount paid to obtain the release of the right of redemption. The Ninth Circuit held that the test for equitable subrogation was not satisfied because the creditor had acted as a "volunteer." Id. at 997-98 (citing Mort v. United States, 86 F.3d 890, 894 (9th Cir. 1996)). Moreover, the court observed that allowing the creditor to be equitably subrogated to the Service's claim would frustrate the intent of the redemption statute. The purpose of the statute, according to the Ninth Circuit, is as follows: "[T]o prevent a potential windfall to a foreclosure purchaser, the IRS can repay the purchaser the purchase price and sell the property at closer to fair market value. All excess profit then accrues for the benefit of the taxpayer – to pay off the taxpayer's tax liability. The [Service]'s redemption right protects the taxpayer, who would otherwise be liable to the [Service] for unpaid taxes." Id. at 998. The court asserted that "nothing could be more inequitable" than to apply equitable subrogation in this circumstance to permit the creditor to hold a claim against the bankruptcy debtors for the amount it paid to the Service in order to eliminate that taxpayer benefit. Id.

2. Equitable Relief from Merger

A mortgage-lien creditor who purchases the property at the foreclosure sale also may be entitled to other equitable relief. Generally, if the mortgage-lien creditor “buys-in” the property, a merger is deemed to occur, *i.e.*, the lien merges into the acquired fee interest and is extinguished. If the mortgage lien is extinguished, the mortgage-lien creditor will lose its priority relative to a later-filed federal tax lien. See, e.g., United States v. Polk, 822 F.2d 871 (9th Cir. 1987) (Arizona: merger extinguished senior lien; senior lienor’s intent deemed irrelevant); S. Bank of Lauderdale County v. IRS, 770 F.2d 1001 (11th Cir. 1985) (Alabama: merger extinguished senior lien). But see Tompkins v. United States, 946 F.2d 817 (11th Cir. 1991) (Georgia: mortgagee’s senior lien interest in property does not merge into fee when property is purchased at foreclosure); Security Pac. Mortgage Corp. v. Choate, 897 F.2d 1057 (10th Cir. 1990) (Colorado: intent of the mortgagee controls); United States v. Colorado, 872 F.2d 338 (10th Cir. 1989) (Colorado: merger occurs automatically unless contrary intent established); Vereyken v. Annie’s Place, Inc., 90-1 USTC ¶ 50,298 (E.D. Mich. 1990), *aff’d*, 964 F.2d 593 (6th Cir. 1992) (Michigan: lienholder/seller’s intent that merger should not occur controls). However, a court may allow equitable relief from the doctrine of merger if the creditor/purchaser can show: (1) the creditor’s best interests would be served by preventing a merger of the lien and the fee interest; (2) justice would be served; and (3) the government cannot prove by a preponderance of the evidence that the creditor actually intended to merge the lien into the fee interest. See, e.g., First Am. Title Ins. Co. v. United States, 848 F.2d 969 (9th Cir. 1988). In cases where a court grants relief, the creditor maintains its senior position relative to the federal tax lien.

3. Unjust Enrichment

Under the doctrine of unjust enrichment, a party with a state-created lien can be restored to its intended position when there is an inadvertent discharge of the lien. Specifically, section 6323(i)(2), which authorizes application of the common law doctrine of equitable subrogation, does not preclude application of the state-created doctrine of unjust enrichment. The federal tax laws do not create property rights but merely attach federally defined consequences to rights created under state law. United States v. Nat’l Bank of Commerce, 472 U.S. 713, 722 (1985) (quoting United States v. Bess, 357 U.S. 51, 55 (1958)). Accordingly, where the taxpayer refinances a mortgage and the bank makes an inadvertent discharge of that original mortgage, thereby allowing the Service to gain unintended priority over the refinanced mortgage, the bank’s mortgage can be restored to first priority over the federal tax lien under the doctrine of unjust enrichment. Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228 (1st Cir. 1996) (doctrine of unjust enrichment prevents the Service from elevating its junior lien interest).

B. "Non-judicial Sale" Defined

1. Treasury Regulation section 301.7425-2(a) states that a non-judicial sale is a sale made pursuant to—

- a) An instrument creating a lien on the property sold;
- b) A confession of judgment on the obligation secured by an instrument creating a lien on the property sold; or
- c) A statutory lien on the property sold.

2. The term includes, but is not limited to, the divestment of the taxpayer's interest in property, either real or personal, which occurs: (a) by operation of law, (b) by public or private sale, (c) by forfeiture, or (d) by termination under provisions contained in a contract for a deed or a conditional sales contract. Treas. Reg. § 301.7425-2(a).

3. Examples:

- a) Tax sales under statutory liens. See Kasdon v. G.W. Zierdon Landscaping, Inc., 541 F. Supp. 991 (D. Md. 1982), aff'd sub nom Kasdon v. United States, 707 F.2d 820 (4th Cir. 1983).
- b) Strict foreclosures. See Galesi v. United States, 406 F. Supp. 623 (D. Vt. 1976), aff'd, 544 F.2d 606 (2d Cir. 1976) (decision adverse to the United States). Compare United States v. Fernandez, 82-1 U.S.T.C. (CCH) ¶ 9212 (D.P.R. 1981) (foreclosure was judicial sale), with Myers v. United States, 647 F.2d 591 (5th Cir. 1981) (foreclosure was non-judicial sale).
- c) Forfeitures. Section 7425(c)(4) explicitly includes a forfeiture of a land sales contract as a non-judicial sale of property. See Orme v. United States, 269 F.3d 991 (9th Cir. 2001). The Service takes the position that the lien remains attached to the property in the amount equal to the taxpayer's pre-forfeiture equitable interest.
- d) Sales pursuant to mortgages or deeds of trust with powers of sale. See Zink v. United States, 82-1 U.S.T.C. (CCH) ¶ 9277 (S.D. Tex. 1981).
- e) Sales pursuant to the "self-help" provisions of the Uniform Commercial Code concerning secured interests in personal property.

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V. NOTICE OF SALE REQUIREMENTS (I.R.C. § 7425(b)(1) & (c)(1))

A. When Required

A notice of nonjudicial sale is required only if a notice of federal tax lien has been filed in the proper place for more than 30 days before the date of sale. For this purpose the "date of sale" is—

1. For public sales, the day the sale is held;
2. For a private sale, the date the title to the property is transferred; and
3. For cases not involving a public or private sale, the date junior liens are divested under local law.

Treas. Reg. § 301.7425-2(b).

B. When Not Required

No notice of sale is required if (1) notice of the tax lien has not been filed; (2) there are no provisions for filing (e.g., estate and gift tax liens); or (3) the notice has been on file less than 31 days before the sale. Government agencies (VA, FHA, SBA, etc.) do not give notice, but apply for certificate of discharge.

C. Timing

Notice of the sale must be given not less than 25 days before the sale date.

Section 7425(c)(1). The provisions of sections 7502 and 7503 apply in determining the date of the notice. Treas. Reg. § 301.7425-3(a)(1).

D. Postponements of Sales

1. *Where notice of sale is given.* If the seller of the property gave notice of the sale to the Service, the seller is required to give notice of any postponement to the Service in the same manner as is required under local law with respect to other secured creditors. Treas. Reg. § 301.7425-3(a)(2)(i).

2. *Where notice of sale is not given.* In the event of a postponement, notice of sale must be given if

- a) notice of a nonjudicial sale was not required, either because a notice of federal tax lien was not filed or it was on file for less than 31 days before the date of sale,

b) because of a postponement of the scheduled sale, more than 30 days elapse between the originally scheduled date of the sale and the new date of the sale, and

c) a notice of tax lien is filed more than 30 days before the new date of sale.

Treas. Reg. § 301.7425-3(a)(2)(ii).

3. If notice of sale is required but not given, postponement of the sale does not affect the rights of the United States under section 7425(b). Id.

4. See examples in Treas. Reg. § 301.7425-3(a)(2)(iii). See also Baldwin Cnty. Sav. and Loan Assn. v. IRS, 921 F.2d 1229 (11th Cir. 1991).

E. Form

Notice shall be given in writing by registered or certified mail or by personal service to the appropriate Service office. Treas. Reg. § 301.7425-3(a)(1). See Musick v. United States, 87-2 U.S.T.C. (CCH) ¶ 9632 (C.D. Ca. 1987) (quoting the language of the regulations). Actual notice cannot be substituted for written notice. Nat'l Cent. Bank v. United States, 78-2 U.S.T.C. (CCH) ¶ 9544 (M.D. Pa. 1977).

The Secretary has delegated receipt of the notice to the Collection Advisory Group Manager for the area in which the Notice of Federal Tax Lien was filed. Publication 786, "Instructions for Preparing Notice of Non-Judicial Sale of Property & Application for Consent to Sale," contains instructions for preparing a notice of nonjudicial sale of property and an application for consent to sale. This publication, in relevant part, is to be read in conjunction with Publication 4235, "Collection Advisory Group Addresses," which provides the relevant addresses. The Service should be on guard to make sure that incoming notices and applications are properly routed and reviewed so that the proper action, e.g., a notice of inadequacy, can be taken to protect the government's interests. See, e.g., Glasgow Realty, LLC v. Withington, 345 F. Supp. 2d 1025 (E.D. Mo. 2004).

F. Contents

Treasury Regulation § 301.7425-3(d)(1) requires that the notice of sale include:

1. Name and address of person submitting notice;
2. A copy of the notice of lien, or the following information from the notice: name and address of the taxpayer; date and place of filing of the notice; and Service office named in the notice;

3. Detailed description (including location) of the property (for real property, the street address, city, and State and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title);
4. Date, time, place, and terms of sale;
5. In the case of perishable property, a statement of the reasons why the property is believed to be perishable.
6. Approximate amount of secured obligations; and
7. Sales expenses and other costs which may be charged against the sale proceeds.

G. Adequacy and Acknowledgment

1. Adequacy of the notice is conclusively presumed where the notice contains the name and address of the person submitting the notice, unless the person submitting the notice receives written notification of the inadequacy at least six days prior to the sale. Treas. Reg. § 301.7425-3(d)(2); Whiteside v. United States, 833 F. 2d 820 (9th Cir. 1987).
2. If the tax lien data (such as the Service office named in the lien and date and time the lien notice was filed) is missing from the notice, the Service may simply give notice of that fact without specifying other inadequacies and the notice is considered inadequate for all purposes. Treas. Reg. § 301.7425-3(d)(2).
3. All notices must contain the name and address of the person submitting the notice. Notices lacking this information are considered inadequate for all purposes, and the Service's general obligation to provide written notice of a notice's flaws does not apply. Treas. Reg. § 301.7425-3(d)(2).
4. Acknowledgment of receipt of the notice by the Service will be provided upon request. Treas. Reg. § 301.7425-3(d)(3).
5. The Service may disclose to any person having a proper interest whether adequate notice was given. Treas. Reg. § 301.7425-3(d)(4).

VI. SALE OF PERISHABLE GOODS

Special rules apply to non-judicial sales of perishable goods. Section 7425(c)(3); Treas. Reg. § 301.7425-3(c).

A. Perishable Goods Defined

"Perishable goods" means any tangible personal property, which in the reasonable view of the person selling the property—

1. Is liable to perish; or
2. Become greatly reduced in price or value by keeping; or
3. Cannot be kept without great expense.

Treas. Reg. § 301.7425-3(c)(2)

B. Notice Requirements

1. The notice criteria are the same as for nonperishable goods, except that the notice may be given at any time before the sale. Treas. Reg. § 301.7425-3(c)(1). (Note sections 7502 and 7503 apply. Id. Therefore, an adequate notice that is properly mailed and postmarked before the sale, but received by the Service after the sale, would be effective to discharge the tax lien or the United States' title). The notice must also state the reasons for perishability. Treas. Reg. § 301.7425-3(d)(1)(iii)(C).
2. The seller of the perishable goods must hold the proceeds of the sale (less costs) for not less than 30 days as a fund subject to the liens and claims of the United States (with the same priorities as before the sale). If the proceeds are not so held and the United States claims the funds within 30 days after the sale date, the seller is personally liable to the extent of the government's interest in the fund. Treas. Reg. § 301.7425-3(c)(1).
3. The buyer of perishable goods takes them free of the liens and claims of the United States, provided the notice requirements described above are met, even if the proceeds of the sale are not held by the seller. Treas. Reg. § 301.7425-3(c)(1).
4. In the event of a postponement of a scheduled sale of perishable goods, the seller is not required to notify the Service of the postponement. Treas. Reg. § 301.7425-3(c)(1).

VII. CONSENT TO SALE

1. Notwithstanding the notice of sale provisions of section 7425(c), the Service may consent to a sale of the property free of the lien (or title) of the United States. Section 7425(c)(2); Treas. Reg. § 301.7425-3(b)(1).

2. The consent must be requested in writing and contain the same information that the notice contains. The consent application must also describe why the applicant wants the consent. Treas. Reg. § 301.7425-3(b)(2).
3. The request must be made before the sale. Treas. Reg. § 301.7425-3(b)(1).
4. The consent itself must be given in writing. Treas. Reg. § 301.7425-3(b)(1).
5. The Service may consent only if adequate protection is afforded the lien or title of the United States. Treas. Reg. § 301.7425-3(b)(1). The consent may be based upon such limitations and conditions as the Service may require (e.g., payment of the tax). Id.
6. The right of the United States to redeem real property is not affected by the consent. Treas. Reg. § 301.7425-4(a)(1).

VIII. DISCHARGE APPLICATION

Except in the case of applications by government agencies, applications for discharge will not be granted following a non-judicial foreclosure sale that discharges the federal tax lien. The discharge occurs by operation of law. Thus, the issuance of a certificate would be meaningless. Rev. Rul. 61-19, 1961-1 C.B. 715.

Note that on December 16, 2008, the Service issued Information Release 2008-141, 2008 WL 5220547, to announce certain types of expedited lien-related relief for financially distressed homeowners. This Information Release addresses, among other things, expedited processing for requests to discharge or subordinate a lien.

For more information, see IRM § 5.12.4 Judicial/Non-judicial Foreclosures, and Pub 783, Instructions on how to apply for a Certificate of Discharge of Property From Federal Tax Lien.

IX. REDEMPTION AUTHORITY

A. The Authority to Redeem

Authority to redeem is found in the following statutes:

1. Judicial sales – 28 U.S.C. § 2410(c). The term “judicial sale” is narrowly defined, and only applies to sales where there is a judicial proceeding that provides a complete and formal hearing on the merits and results in an order directing the sale of the property. See Treas. Reg. § 301.7425-1(a).
2. Nonjudicial sales – I.R.C. § 7425(d)(1); Treas. Reg. § 301.7425-4(a)(1). The regulations provide that a nonjudicial sale “includes, but is not limited to, the

divestment of a taxpayer's interest in property which occurs by operation of law, by public or private sale, by forfeiture, or by termination under provisions contained in a contract for a deed or a conditional sales contract." Treas. Reg. § 301.7425-2(a), 4(a)(1).

B. When the Right of Redemption Arises

The statutory right of redemption arises only when a sale is conducted to satisfy a lien on real property that is prior to the federal tax lien and results in a discharge of the tax lien. The law of the state in which the property is located determines whether the junior tax lien is discharged.

1. Instances in Which the Right Arises

The following sales create a right of redemption by the United States:

- a) A judicial sale in a proceeding in which the United States was joined as a party and where its lien is junior to the lien being foreclosed. 28 U.S.C. § 2410(c).
- b) A nonjudicial sale in which the notice of federal tax lien was on file more than 30 days prior to the sale, and the Service is entitled to notice of the sale (under section 7425(b) and Treas. Reg. § 301.7425-3(a)(1)), and either receives adequate notice at least 25 days in advance of the sale (see section 7425(c)(1)) or consents to the sale (see section 7425(c)(2)). Treas. Reg. § 301.7425-4(a)(1), (3). The right of redemption allows the Service to buy the property from the party that purchased it at the nonjudicial sale that was undertaken to satisfy a lien senior to the federal tax lien.
- c) A nonjudicial sale in which the notice of federal tax lien was not on file more than 30 days before the sale and the tax lien is attached to the property at the time of the sale. The United States has the same right of redemption, if any, afforded to similar creditors under the local law of the place in which the property is situated. Treas. Reg. § 301.7425-4(a)(3). In addition, while the federal tax lien may be discharged from the property sold, the lien still attaches to the surplus proceeds of the sale. Island Title Corp. v. Bundy, 488 F. Supp. 2d 1084, 1092 (D. Hi. 2007); Caldwell v. Loeb, 742 F. Supp. 650, 652 (N.D. Ga. 1990).

2. Instances in Which the Right Does Not Arise

The right of redemption does not exist in the following instances:

a) Judicial sales in which:

(1) The lien of the foreclosing lienor is junior to the federal tax lien. The tax lien is not discharged and remains attached to the property. The sale will be made subject to the federal tax lien. 28 U.S.C. § 2410(c).

(2) The United States was not named as a party and a notice of federal tax lien was on file when the suit was commenced. Section 7425(a).

(3) The United States was not named as a party, notice of federal tax lien was not on file when the suit was commenced, and local law provides that the lien is not discharged. Section 7425(a).

(4) Local law does not provide for the discharge of junior encumbrances by the sale.

b) Nonjudicial sales in which:

(1) The lien of the foreclosing lienor is junior to the federal tax lien. The tax lien is not discharged, and the sale will be made subject to the federal tax lien.

(2) The tax lien is not discharged under local law if

- a. A notice of federal tax lien was not filed more than 30 days prior to the sale (Treas. Reg. § 301.7425-2(a)),
- b. Notice of sale is given to the Service in the manner provided under section 7425(c)(1) and the relevant regulations (Treas. Reg. § 301.7425-2(a)).

(3) The tax lien is not discharged because a notice of lien was filed more than 30 days before the sale, but the Service was not given notice of the foreclosure sale in the manner provided under section 7425(c)(1) and the relevant regulations. See Treas. Reg. § 301.7425-3(a)(1); S. Bank of Lauderdale County v. IRS, 770 F.2d 1001 (11th Cir. 1985); Russell v. United States, 551 F.3d 1174 (10th Cir. 2008), cert. denied, 130 S.Ct. 95 (2009) (reversing a district court decision that terminated a federal tax lien and provided the United States a “right of cure and redemption” under a state statute where the United States was not provided proper notice of a non-judicial sale). Note, the Service is required to

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notify the foreclosing party if the notice is inadequate, i.e., one that fails to contain the information described in Treas. Reg. §§ 301.7425-3(d)(1), (d)(2). See supra part V(G) for adequacy of notice discussion.

For regulatory limitations on the right of redemption by the United States, see Treas. Reg. § 301.7425-4(a)(3).

C. Time for Redemption

The United States has 120 days from the date of sale or the period allowable for redemption under state law, whichever is longer, to exercise its redemption right. 28 U.S.C. § 2410(c); I.R.C. § 7425(d)(1); Treas. Reg. § 301.7425-4(a)(2). The 120-day period is not extended by section 7503 (which, when applicable, extends the time for performance of acts where the last day falls on a Saturday, Sunday, or legal holiday). Cf. Rev. Rul. 83-116, 1983-2 C.B. 264 (discussing the redemption of stock under section 302(c)(2)(A)(ii) in relation to section 7503 and concluding that Congress did not intend the general rule for timely performance in section 7503 to apply to all time limitations prescribed by the Code, especially where it has indicated a preference to deal with time limitations in other than general procedural rules).

The “date of sale” is determined in accordance with the rules set out in Treas. Reg. § 301.7425-2(b). See United States v. Comer, 2000-2 U.S.T.C. 50,618 (E.D. Mich. 2000). But see United States v. Newkirk, 27 A.F.T.R.2d 71-1191 (N.D. Ill. 1971) (under Illinois law, the date of sale is the date of the tax sale, not the date set forth in Treas. Reg. § 301.7425-2(b)). Where the Service does not attempt to redeem property within the allotted time period, its federal tax liens are extinguished by the foreclosure sale. United States v. Espinoza, 90-1 USTC ¶ 50,073 (D. Colo. 1989); Black v. United States, 683 F. Supp. 770 (N.D. Ala. 1987). See also Ellis v. United States, 2005-2 USTC ¶ 50,518 (M.D.N.C. 2005) (noting that the United States can also lose any other legal or equitable interest property once the tax lien is extinguished if the Service fails to redeem the property).

D. Property Rights Redeemed

A redemption reaches the entire property foreclosed even if the federal tax lien had attached only to a partial interest. See Vardanega v. IRS, 170 F.3d 1184 (9th Cir. 1999). Redemption is not limited to the taxpayer’s interest in the property. For example, if property in which the delinquent taxpayer had a joint tenancy interest was foreclosed, redemption would ultimately give the United States title to the entire property rather than only the taxpayer’s interest. This is because the government redeems by paying the amount that was paid or satisfied by the sale; since the government paid the full amount, the government receives title to the entire property that was being foreclosed. It is our

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position that in view of the express wording of section 7425(d)(1), there is no authorization that would permit the Service to redeem only a portion or fraction of the actual property that was sold. This is so even where the property may have been sold to more than one purchaser; i.e., in order to successfully redeem property in such a case, the Service would have to redeem from all of the purchasers, not just one or some of them. Thus, by exercising the right of redemption, the Service acquires the same interest as that bought by the purchaser. The property therefore remains subject to encumbrances that exist and are subject to the foreclosed interest at the time of the sale. Little v. United States, 794 F.2d 484, 490 (9th Cir. 1986) (citing section 7425(d)(3)(C); Treas. Reg. § 301.7425-4(c)(3)). If the purchaser takes title free of any junior liens under local law, the United States also takes title free of those liens. Treas. Reg. § 301.7425-4(c)(3).

E. Subsequent Encumbrances

If the holder of a second lien interest senior to the federal tax lien forecloses on the same property within the 120-day redemption period, the Service's redemption right survives the second foreclosure. The Service can then redeem the property from the purchaser within the 120-day period following that foreclosure sale. First-Lockhart Nat'l Bank v. United States, 84-1 USTC ¶ 9155 (W.D. Tex. 1984).

When the Service redeems property under section 7425(d), it takes the interest that the property's purchaser acquired at the time of the execution sale. As a result, if the purchaser encumbers the property with a mortgage between the time of the sale and the time the Service redeems the property, the Service receives the property free and clear of the mortgage. Olympic Fed. Sav. & Loan Ass'n v. Regan, 648 F.2d 1218, 1220–21 (9th Cir. 1981). Since the mortgage does not attach to the property after the redemption, the mortgage lender may be left without effective recourse if the purchaser defaults on the mortgage. Id. at 1223.

X. AMOUNT TO BE PAID FOR REDEMPTION

A. Statutory Authority

The following statutes provide for the amount to be paid for redemption:

1. Judicial sales – 28 U.S.C. § 2410(d)
2. Nonjudicial sales – I.R.C. § 7425(d)(2), which incorporates 28 U.S.C. § 2410(d)

B. Computation of Amount Required to Redeem

To redeem, the United States must pay the purchaser, or his successor in interest, the “actual amount paid” for the property, plus certain additional amounts specified by the

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regulations. 28 U.S.C. § 2410(d); section 7425(d)(2); Treas. Reg. § 301.7425-4(b)(1); IRM 5.12.5.2.7; 5.12.5.2.2. For examples illustrating the computation of the amount to be paid, see Treas. Reg. § 301.7425-4(b)(5).

1. Actual amount paid

a) If the property is purchased by a third party (other than the holder of the lien being foreclosed), the actual amount paid is the amount paid by such third party at the sale. 28 U.S.C. § 2410(d); Treas. Reg. § 301.7425-4(b)(2)(i). Such amount includes deferred payments upon the bid price. Treas. Reg. § 301.7425-4(b)(2)(i).

b) If the property is purchased by the holder of the lien being foreclosed, the actual amount paid is the amount of the obligation secured by the lien to the extent legally satisfied by the sale, plus any additional amount bid and paid at the sale. Treas. Reg. § 301.7425-4(b)(2)(ii). See also 28 U.S.C. § 2410(d). Such amount includes deferred payments upon any portion of the bid price that is in excess of the amount of the lien being foreclosed. Treas. Reg. § 301.7425-4(b)(2)(ii). In Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981), the purchaser was not the foreclosing party, but a lienholder junior to the foreclosing lienor. The Ninth Circuit concluded that the regulatory language referring to the foreclosing lienor also applied to junior lienholders who purchased at foreclosure.

c) Payments made by the foreclosing lienholder to a senior lienholder before the foreclosure sale are included in the amount paid to the extent they gave rise to an interest that is legally satisfied by the foreclosure sale. Treas. Reg. § 301.7425-4(b)(2)(ii). It is our position that only payments of interest and principal are included. A payment to a senior lienholder to obtain forbearance from enforcing a provision that required full payment on sale of the property does not increase the interest of the foreclosing lienholder.

d) Where the lien foreclosed attaches to other property not subject to the foreclosure sale, the amount legally satisfied does **not** include the amount of such lien to the extent that it still attaches to the other property. Treas. Reg. § 301.7425-4(b)(2)(ii). See also H.R. REP. NO. 89-1884, at 33 (1996) (legislative history of section 2410); S. REP. NO. 89-1708, at 34 (1996) (accord).

e) Pre-sale costs and expenses are not part of the “actual amount paid” unless they are included in the amount of the bid and paid at the sale, or if the purchaser holds the lien being foreclosed, are included in the amount

of the lien, which is legally satisfied by reason of the sale. Treas. Reg. § 301.7425-4(b)(2)(i) and (ii).

2. Interest

The amount paid for the redemption includes interest at the rate of 6 percent per annum on the amount paid by the purchaser of the real property computed from the date of sale to the date of redemption. Treas. Reg. § 301.7425-4(b)(1)(ii). (The 6-percent rate is governed by section 2410(d) not the flexible rates of the Internal Revenue Code.)

3. Excess expenses

The amount required to redeem also includes expenses necessarily incurred by the purchaser to maintain the property after the foreclosure sale reduced by rents received (plus the reasonable rental value if purchaser-occupied or is rented at less than its reasonable rental value). Treas. Reg. § 301.7425-4(b)(1)(iii), 4(b)(3)(i).

a) Examples of excess expenses that will be paid can be found in Treas. Reg. § 301.7425-4(b)(3)(i) and include:

- (1) Rental agent commissions
- (2) Repair and maintenance expenses
- (3) Utilities expenses
- (4) Post-sale legal fees incurred in defending the title
- (5) A proportionate amount of casualty insurance premiums
- (6) A proportionate amount of ad valorem taxes
- (7) Improvements necessary to maintain the property
- (8) Legal expenses necessary to maintain the property. See MWT Properties v. Everson, 336 F. Supp. 2d 1163, 1173-75 (D. Utah 2004) (holding that, because legal expenses incurred by the purchaser (during the redemption period) to evict an unauthorized occupant were necessary to maintain the property, the legal fees were an excess expense that was to be reimbursed by the Service following redemption of the property.)

b) Examples of expenses that will not normally be paid can be found in Treas. Reg. § 301.7425-4(b)(2)(i), 4(b)(2)(ii), and 4(b)(3)(i) and include:

- (1) Costs of improvement for cosmetic purposes
- (2) Title search costs
- (3) Professional fees prior to purchase, e.g., finder's fees
- (4) Interest on debt incurred to obtain funds to purchase the property
- (5) The rental value of the property between the date of purchase and the date of redemption. See MWT Properties v. Everson, 336 F. Supp. 2d 1163, 1173 (D. Utah 2004) (reasoning that, because such rental value is not an expense "necessarily incurred to maintain [the] property," the purchaser is not entitled to so-called rental value compensation.).

The regulations under section 7425 provide guidelines under which a purchaser (or successor in interest) may submit a claim for excess expenses incurred after the foreclosure sale but before the Service's redemption. See Treas. Reg. § 301.7425-4(b)(3)(ii). A purchaser at a nonjudicial sale should submit a written claim for excess expenses within 15 days after the Service makes a request for a written, itemized statement of the amount claimed by the purchaser or his successor in interest. Thus, if the purchaser fails to furnish a statement within the 15 days after the Service's request, or if there is a disagreement as to the amount properly payable, or if the purchaser incurs any additional expenses after submitting a timely claim, the purchaser has 30 days after the Service's redemption in which to submit a written itemized statement claiming excess expenses. Failure to submit a timely claim precludes recovery of the expenses. Id.

If the purchaser timely submits a reimbursement request before redemption but the Service disagrees or requests supporting documentation, the failure of the Service to pay the reimbursement until after the redemption period does not render invalid an otherwise effective redemption. MWT Properties v. Everson, 336 F. Supp. 2d 1163, 1167-72 (D. Utah 2004).

4. Payments to senior lienholders

- a) A purchaser (or successor in interest) of real property at a foreclosure sale may request reimbursement for: (1) a payment of principal or interest to a holder of a lien that was, immediately before the foreclosure sale, senior to the lien foreclosed; and/or, (2) a payment by an escrow agent of a real property tax or special assessment lien that was senior to the lien

foreclosed. Treas. Reg. § 301.7425-4(b)(1)(iv), 4(b)(4)(i). Before the redemption period expires, the Service must send the purchaser or successor-in-interest notice of the right to request reimbursement for payments made to senior lienholders. Treas. Reg. § 301.7425-4(b)(4)(ii). A purchaser at a nonjudicial sale must submit a written claim within 15 calendar days after the Service sends notice of the purchaser's right to request reimbursement for a payment made to a senior lienor. Treas. Reg. § 301.7425-4(b)(4)(ii); IRM 5.12.5.2.4(1).

b) The purchaser's claim must include "[a] written itemized statement, signed by the claimant, of the amount" for which reimbursement is requested and additional supporting materials and "[a] waiver or other document that will be effective upon redemption by the United States to discharge the property from, or transfer to the United States, any interest in or lien on the property that may arise under local law with respect to the payment made to a senior lienor." Treas. Reg. § 301.7425-4(b)(4)(ii)(A), (B); IRM 5.12.5.2.4(2). If the purchaser shows reasonable cause and if the Service consents, the purchaser may request an extension for a reasonable period to submit, amend, or supplement a request for reimbursement. A request for an extension must be submitted before expiration of the applicable period for redemption. IRM 5.12.5.2.5(2).

(1) If the request for reimbursement is not provided or is not timely mailed or delivered, no amount shall be reimbursed. Treas. Reg. § 301.7425-4(b)(4)(ii).

(2) The Revenue Officer will review the request for reimbursement under existing guidelines. See IRM 5.12.5.2.5; 5.12.5.2.6.

c) A timely, complete request for reimbursement will be considered approved for the total amount claimed by the purchaser unless the Service sends notice of the denial of the request to the purchaser on or before the later of the date that is 30 days after receipt of the request or 15 days before the expiration of the redemption period. Treas. Reg. § 301.7425-4(b)(4)(iii). If the notice of denial is timely issued, then the request for reimbursement is deemed withdrawn. Id. However, notwithstanding such withdrawal, the Service has the discretion to reimburse the purchaser for payments made to senior lienholders after resolution of the disagreement as to the amount to be reimbursed. Id. See also Little v. United States, 794 F.2d 484 (9th Cir. 1986).

d) Only payments made by the purchaser before the redemption may properly constitute part of the amount that is required to redeem. Treas. Reg. § 301-7425-4(b)(1)(iv) (the amount to be paid for redemption

includes “the amounts, if any, of a payment made by the purchaser or his successor in interest after the foreclosure sale to a holder of a senior lien (to the extent provided under paragraph (b)(4) of this section)”, 4(b)(4). But see Equity Mortg. Corp. v. Loftus, 504 F.2d 1071 (4th Cir. 1974) (holding that the Service should pay the purchaser amounts he had paid to a senior lienor both before and after the foreclosure sale, and after the Service had redeemed).

e) Failure to properly give notice to the purchaser of the right to request reimbursement of payments made to a senior lienholder will invalidate the certificate of redemption. See Title Ins. Co. of Minnesota v. United States, 963 F.2d 297 (10th Cir. 1992) (verbal notice is insufficient and invalidates Service’s certificate of redemption).

5. Computation Problems

State law determines the amount of debt legally satisfied by the foreclosure sale. There is considerable variation among the states about the amount of a lien that is deemed satisfied when the foreclosing lienor is the purchaser. For example, some states do not permit deficiency judgments, or limit them, which increases the amount of the lien legally satisfied. Others measure the satisfaction by the fair market value of the property. See, e.g., Delta Sav. & Loan Ass’n v. IRS, 847 F.2d 248 (5th Cir. 1988) (Louisiana law: the amount the mortgagee paid at the foreclosure sale, not the entire amount of the underlying debt, is the amount the Service was required to pay in order to redeem the property); Mikulec v. United States, 705 F.2d 599 (2d Cir. 1983) (New York law: United States could redeem property from the judgment creditor who purchased the property for the actual amount paid by the judgment creditor); Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981) (California law: Redemption price is the amount by which the fair market value of the property at the time of the senior lienholder’s foreclosure sale exceeds the amount the purchaser (foreclosing lienholder) paid at the sale to purchase the property, plus the purchase price, plus interest. However, the redemption price cannot exceed the sum of the foreclosing lienor’s debt and the purchase price); Equity Mortg. Corp. v. Loftus, 504 F.2d 1071 (4th Cir. 1974) (Virginia Law: United States could redeem the property for the sum of the purchase price at the sale and the amount of the payments made to the senior lienholder). See also section 301.7425-4(b)(5) (providing examples of how to calculate the amount satisfied depending on the existence of an anti-deficiency statute in a particular state).

The regulations require that a waiver by the foreclosing lienor of his right to a deficiency judgment must be in writing and legally binding on the foreclosing lienor, as of the time the foreclosing sale is completed, in order to count as part of the amount satisfied. Treas. Reg. § 301.7425-4(b)(2)(ii).

XI. REDEMPTION PROCEDURES

A. Advisory and Insolvency Office

With respect to both judicial and nonjudicial sale situations, after the Service receives notice that the foreclosure sale has taken place, or is about to take place, and the taxes outstanding meet the threshold established by the Service, the case is assigned to a Revenue Officer in the field to conduct a redemption investigation. IRM 5.12.5.1.

B. Redemption Investigations

The Revenue Officer/Property and Asset Liquidation Specialist (PALS) has 60 days from the date of the foreclosure sale to make a preliminary decision whether to redeem. The Revenue Officer/PALS prepares Form 4376, Report of Investigation, or a memorandum report, which, along with the history sheet, is forwarded to Technical Services. A variety of criteria are considered in deciding whether or not to redeem, see IRM 5.12.5.1.3, 5.12.5.1.2, which include a review of the property for potential toxic waste problems and potential clean-up costs, IRM 5.12.5.1.3(7). The primary factor in arriving at the decision to redeem or not is whether the fair market value of the property reasonably exceeds the sum of the amount paid by the purchaser and the amount of all liens senior to the foreclosing encumbrance. IRM 5.12.5.1.3(5). The Service may also levy upon the escrow company for any surplus proceeds which may remain after the foreclosing lien is fully paid. Caldwell v. Loeb, 742 F. Supp. 650 (N.D. Ga. 1990). (Note: It may be necessary to provide the taxpayer with a Collection Due Process notice before the levy can be issued). In some jurisdictions a suit for excess proceeds brought by the U.S. Attorney's office is the appropriate mechanism.

If the Revenue Officer/PALS tentatively decides to redeem, the purchaser (or successor in interest) of the property should be sent written notice (Pattern Letter P-597) that the government is considering redemption and, inter alia, the right to request reimbursement. IRM 5.12.5.1.3(8).

Service policy requires the Revenue Officer/PALS, before recommending redemption, to arrange for a guaranteed bidder, who will agree in writing to bid a certain amount for the redeemed property, and who will deposit 20 percent of that amount. IRM 5.12.5.3; 5.12.5.3.2. In rare circumstances, approval may be given to accept a deposit of less than 20 percent but in no case should the deposit be less than \$1,000 unless the deposit amount represents 20 percent of the agreed bid. IRM 5.12.5.3.3(3). The Revenue Officer should consider the use of commercial advertising to solicit bids. See IRM 5.12.5.3.1. The Revenue Officer/PALS can use Letter 1879(P) to solicit such an undertaking from

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prospective purchasers. The Revenue Officer may use Pattern Letter P-338 for the Agreement to Bid.

Notwithstanding the above, obtaining a guaranteed bidder is not a statutory or regulatory requirement and may be waived.

C. Counsel Review and Approval

Counsel reviews the redemption file and advises as to the legality of the proposed redemption, the amount needed to redeem, the title of the taxpayer, and related matters.

If Counsel approves the proposed redemption, the file goes back to the Collection Advisory Group which will take necessary actions to obtain a redemption check.

D. Tender of Redemption Check

Under section 7810, a revolving fund was established by the Tax Reform Act of 1984 to finance the redemption of real property by the United States. Once the check is issued from the revolving fund, the Revenue Officer/PALS tenders it to the purchaser. To exercise the right of redemption, the government must tender payment within the 120-day period. See IRM 5.12.5.5.1. If the purchaser refuses to accept the check, there has, nevertheless, been a valid exercise of the redemption right. See Bain v. United States, 32 A.F.T.R.2d 73-6108 (E.D. Tex. 1973). Our position is that the Service cannot tender redemption funds to a designated agent of the purchaser unless the purchaser has executed a power of attorney pursuant Treas. Reg. § 601.502 et seq. specifically granting the authority to receive a check drawn on the United States Treasury.

E. Certificate of Redemption

As soon as possible **after** the check has been tendered and **before** the redemption period has expired, a certificate of redemption or documents evidencing redemption required by local law must be issued and filed with the appropriate local recording office. IRM 5.12.5.6. See also section 7425(d)(3); Treas. Reg. § 301.7425-4(c)(1) & (2) (the certificate of redemption must be filed “without delay”). This certificate “constitute[s] prima facie evidence of the regularity of [the] redemption.” Section 7425(d)(3)(C); Treas. Reg. § 301.7425-4(c)(3). The certificate or documents required by local law must be filed in the recording office where such redemption documents are normally filed or, if there is no such office, with the clerk of the United States district court for the district in which the redeemed property is located. Treas. Reg. § 301.7425-4(c)(2). The recording of a certificate of redemption is not itself the moment of redemption; rather, such recording “serves merely to evidence that redemption occurred and to transfer legal title of the redeemed interest.” Vardanega v. I.R.S., 170 F.3d 1184, 1187 (9th Cir. 1999) (quoting Southwest Prods. Co., Inc. v. United States, 882 F.2d 113, 118 (4th Cir. 1989)).

The effect of the certificate when recorded is to transfer title to the United States of all rights, title, and interest in the property of the purchaser at the foreclosure sale. Section 7425(d)(3)(c); Treas. Reg. § 301.7425-4(c)(3). If the redemption was not effective, then the Service will file a revocation of the certificate of redemption. Id.

F. Sale of the Redeemed Property

Redeemed property may be leased or sold. See IRM 5.12.5.7.1, IRM 5.12.5.7.2. Redeemed property is “acquired property” within the meaning of section 7506. The Service must follow the provisions of section 7506 (not sections 6335 through 6338, which apply to the sale of seized property) when preparing the notice of sale, issuing the deed to the buyer, see IRM 5.12.5.7.4, and performing other sale-related activities. The Service may sell redeemed property at public sale with not less than 20 days public notice. Section 7506(b); Treas. Reg. § 301.7506-1(b)(3). If the redeemed property is not sold within two years of the redemption, then the taxpayer may reacquire the property during two-year period by paying his or her outstanding tax liabilities (tax, penalties, and interest) plus 1% interest per month. Section 7506(d); Treas. Reg. § 301.7506-1(d).

G. Disposition of Sale Proceeds/Surplus Proceeds

After sale of the redeemed property, the revolving fund (section 7810) is reimbursed, and the remaining proceeds are applied in the manner prescribed by section 6342(a). See IRM 5.12.5.7.5. Under section 6342(a), money realized from the sale of property either seized or redeemed by the United States must be applied to: (1) expenses of levy and sale; (2) specific tax liabilities of the property; and (3) the liability in respect of which the levy was made or the sale was conducted. Paragraph (b) of section 6342 goes on to provide that after the above applications are made, the surplus proceeds shall be credited or refunded to the persons entitled to them. It is our position that the Service may apply proceeds from redemption sales to liabilities not stated in the recorded tax lien on which the redemption right was based pursuant to the section 6402(a) right of offset, unless another creditor establishes a superior claim to the proceeds.

XII. RELEASE OF RIGHT OF REDEMPTION

The right to redeem may be released for its value to a party with a proper interest in the property sold, upon request, although it cannot be sold to a third party. 28 U.S.C. § 2410(e); Treas. Reg. § 301.7425-4(c)(4).

A. Judicial Sales

The authority for granting a release of the right of redemption has been vested in the Department of Justice by § 0.70 of Title 28 of the Code of Federal Regulations, and redelegated to the United States Attorney with respect to (1) real property on which is

located only one single-family residence, and (2) all other real property having a fair market value not exceeding \$200,000.

Application is made to the United States Attorney on a Form OBD-225. Detailed information as to the procedure to be followed is set forth on the back of the application form. The United States Attorney refers it to the Service for investigation. The Service is not required to notify Counsel of their determination regarding the release of the right of redemption before transmitting their recommendation to the United States Attorney. CCDDM 34.5.6.5.1(3).

The Department of Justice generally will not release a right of redemption, even where it is valueless, without some consideration being paid. The Department's current policy is that the consideration paid for the release must be equal to the value of the right of redemption or \$50 whichever is greater. The limitations as to value or use of the property and consideration to be paid do not apply, however, in those instances where the release is requested by the Department of Veterans Affairs or any other federal agency.

Any payment is credited to the taxpayer. See IRM 5.12.5.8.5(3).

B. Nonjudicial Sales (IRM 5.12.5.9)

The Service has the authority to release the right of redemption. Treas. Reg. § 301.7425-4(c)(4). The authority to release any such right of redemption is delegated to the advisory group manager for the area in which the property is located. IRM 5.12.5.9.1(1), 5.12.5.9.3.

Payment cannot be less than the value of the right of redemption. If valueless, the right may be released without any payment, (see Treas. Reg. § 301.7425-4(c)(4), in contrast to the policy of the Department of Justice with respect to judicial sales).

Valuing the right of redemption. The Service relies on appraisals to determine the value of the right of redemption. See IRM 5.12.5.8.2(3), 5.12.5.9.1.2. Any legal questions with respect to the value of the right should be referred to Area Counsel for an opinion. IRM 5.12.5.9(3).

Rev. Proc. 68-10, 1968-1 C.B. 758, contains the information that is required by the Service in an application by any person with a proper interest in property for release of the right of redemption under section 7425(d), for example, the description of the property, the name and address of the owner, and a list of encumbrances on the property. Applicants should be furnished a copy of Publication 487, "How to Prepare an Application Requesting the United States to Release Its Right to Redeem Property Secured by a Federal Tax Lien" (Rev. 1-2006).

If an application is complete and proper, a field investigation will not be required unless the assigned Collection Advisory Group has information that indicates such investigation is warranted. A field investigation will not be required on any application made by the Veterans Administration or any other federal agency regardless of value or use. IRM 5.12.5.9.1.1.

Legal questions relating to an application for release of the right of redemption will be forwarded to Counsel. IRM 5.12.5.9.1(3).

Any payment secured for the release of the right of redemption is applied to the taxpayer's outstanding liability. IRM 5.12.5.9.3(5).

XIII. LEGAL PROBLEMS IN REDEMPTION

A. Proceedings to Quiet Title

Questions regarding the legality of the redemption or adequacy of the amount paid may be resolved in proceedings to quiet title. See, e.g., Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981); Equity Mortg. Corp. v. Loftus, 504 F.2d 1071 (4th Cir. 1974); Bailey v. United States, 43 A.F.T.R.2d 79-532 (D. Utah 1978); Bain v. United States, 32 A.F.T.R.2d 73-6108 (E.D. Tex. 1973).

B. Right to Rents and Profits

The right to rents and profits during the 120-day redemption period is governed by state law.

C. Successor-in-Interest

A party may be a purchaser's "successor in interest" even though the party holds only equitable title, as opposed to legal title, to the property. See, e.g., Olympic Fed. Sav. & Loan Ass'n v. Regan, 648 F.2d 1218 (9th Cir. 1981).

D. Tender of Redemption Check

If purchaser refuses to accept the check which the Revenue Officer/PALS tenders to him, the right of redemption has nevertheless been exercised. Bain v. United States, 32 A.F.T.R.2d, 73-6108 (E.D. Tex. 1973). If the purchaser in bad faith avoids the Revenue Officer so that tender cannot be effectuated, case law supports the government's equitable right to redeem. See Francis v. White, 49 So. 334 (Ala. 1909); Smith v. Kessler, 117 Cal. Rptr. 470 (Cal. Ct. App. 1974); Powers v. Powers, 34 Cal. Rptr. 835 (Cal. Ct. App. 1963); Ayres v. Dozier, 52 S.W. 662 (Tenn. 1899). Cf. Guthrie v. Curnutt, 417 F.2d 764 (10th Cir. 1969) (holding that where a purchaser purposely avoids the

taxpayer's attempt to tender a redemption check under section 6337, the taxpayer had a right to redeem).

The Service can redeem property from a purchaser even if the purchaser attempts to withdraw its bid. Southwest Products Co., Inc. v. United States, 882 F.2d 113, 117 (4th Cir. 1989). If the Service tenders a redemption check for the wrong amount, rather than to the wrong party, the Service is allowed to perfect its tender after the period for making full tender has passed so long as the original amount was calculated in good faith. Equity Mortgage Corp. v. Loftus, 504 F.2d 1071, 1078 (4th Cir. 1974).

Additionally, if the Service untimely redeems property, a mortgage holder that fails to tender sufficient redemption funds under applicable state law lacks the right to contest the Service's certificate of redemption. Real Estate Equity Strategies, LLC. v. Internal Revenue Service, 540 F.3d 860 (8th Cir. 2008).

E. Discharge of tax lien v. release of the right of redemption

The right of redemption arises when the federal tax lien is discharged and is not confined to the amount of taxes owed. In Olympic Fed. Sav. & Loan Ass'n v. Regan, 648 F.2d 1218 (9th Cir. 1981), the Ninth Circuit held that the Service was not required to accept a foreclosing lienor's tender of the amount of the federal tax lien in exchange for and satisfaction of the Service's redemption rights. The Ninth Circuit found support for its conclusion in the legislative purpose behind section 7425, which was, in part, to prevent taxpayers from losing their equity in property when foreclosure bids do not approximate the value of the property.

It is our position that the tax lien and the right of redemption exist separately and independently. The government may exercise its right of redemption even though the tax liability stated in the lien on which the right of redemption was based is satisfied after foreclosure. A purchaser at foreclosure cannot extinguish the government's right to redeem by simply tendering payment of the full amount of the tax liability stated in the lien.

F. Forfeitures

The Tax Reform Act of 1986 added section 7425(c)(4), which states that a forfeiture of a land sales contract is a nonjudicial sale of property. This subsection overruled Brookbank, Inc. v. Hubbard, 712 F.2d 399 (9th Cir. 1983); Runkel v. United States, 527 F.2d 914 (9th Cir. 1977); and Hedlund v. Brellenthin, 520 F. Supp. 81 (W.D. Wash. 1981), which had held that section 7425 did not apply to forfeitures of land sales contracts.

Because the forfeiture of a land sales contract for property that is subject to a federal tax lien is a nonjudicial sale of property, the federal tax lien remains on the property if the tax

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lien was filed more than 30 days before the sale and notice of the sale was not given to the Service. Orme v. United States, 269 F.3d 991, 996 (9th Cir. 2001)

G. Gramm-Leach-Bliley Act

A financial institution may assert that the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 et seq., prohibits it from providing the Service with financial and other information relating to a foreclosed property. The general exception under section 6802(e)(3)(D) of the Act, however, generally would permit disclosure of nonpublic personal information, including relevant financial information, by the financial institution to the government as a lien holder on the property.

2018 GL-1 Instruction Assigned to Thomas W. Curteman, Jr.

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