

# MCCREARY, VESELKA, BRAGG & ALLEN, P.C.

## ATTORNEYS AT LAW

100 Jeffrey Way, Suite 100

Round Rock, Texas 78680

1-800-369-9000

[www.mvbalaw.com](http://www.mvbalaw.com)

## BULLETIN

JANUARY 2010

---

### COLLECTION OF PROPERTY TAXES AND THE FDIC

#### *It's Déjà Vu All Over Again*

For those of us who have been in the property tax business longer than we like to admit, we may have a fond recollection of the financial debacle in the late 1980's that impacted the collection of property taxes. The failure of the savings and loans resulted in the United States Congress passing the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, ("FIRREA") which among other things dealt with the payment of ad valorem taxes on property that the Federal Deposit Insurance Company ("FDIC") acquired. It took several years (and lawsuits) to work through the inventory of properties and property taxes that were due against properties acquired by the FDIC from failed financial institutions. Well, it is *déjà vu all over again*.

In the past year over one hundred banks have failed in the United States. Typically, when a bank fails or is determined to be insolvent, which is a polite way of saying broke, the FDIC places the assets of the bank in receivership and the FDIC becomes the receiver. Normally, the FDIC will sell or transfer to a new bank the failed bank's deposits, and may also transfer some of the old bank's mortgages and some real property including the actual bank buildings. However, many mortgages, especially those that are in default, are not necessarily sold by the FDIC to the new bank. The FDIC may attempt to collect on the non-performing mortgages by foreclosing on the properties and reselling the properties to recover the debts due against the properties. In the alternative, the FDIC may ultimately sell the mortgages to another financial entity or a private investor.

The problem for tax assessor-collectors is the collection of property taxes that are due against 1) the properties owned by the failed bank on the date the FDIC places the failed bank into receivership and 2) the properties that have mortgages that are now held by the FDIC and are subsequently foreclosed on and re-sold by the FDIC. To determine what taxes are due and by whom when these circumstances occur we have to look at both federal law (FIRREA), and the Texas Property Tax Code.

### **IS IT TAXABLE?**

YES. Real property acquired by the FDIC is subject to ad valorem taxation by taxing authorities in the State of Texas. If on January 1 of the year of the tax, a property is owned by the FDIC, taxing authorities may still assess taxes against the property, and under FIRREA the FDIC is responsible for payment of the taxes. If an appraisal district receives information that the FDIC has placed an insolvent bank into receivership which owns real property, the appraisal district should continue to assess the property in the name of the insolvent bank that the FDIC has taken over and send all appraisal notices and tax bills in care of the FDIC. The FDIC in some instances hires companies to act as their agents and in these instances, the appraisal notices and tax bills should be sent to the agent at its address. Although FIRREA makes the FDIC responsible for payment of taxes on property it owns, it prohibits the foreclosure of a tax lien against the property to obtain payment of the taxes.

### **IS IT DELINQUENT? (Imposition of Penalties and Interest)**

The issue of whether delinquent taxes, included penalties and interest may be recovered from property owned by the FDIC and what rights taxing authorities have to recover delinquent taxes, penalties and interest was decided in 1992 by the Fifth Circuit Court of Appeals in *Irving Independent School District, et al. v. Packard Properties, et al.*, 970 F.2d 58 (5<sup>th</sup> Cir. 1992). In this case the federal court held the following as to the recovery of delinquent taxes, penalties and interest on property owned by the FDIC.

#### **Pre-FDIC Ownership**

YES, BUT. Delinquent taxes, penalties and interest assessed against property prior to the FDIC's ownership of a property are due and payable to taxing authorities. Thus, if the FDIC forecloses or acquires property that has outstanding delinquent taxes, penalties and interest due against it, the delinquent taxes, penalties and interest are still due and payable to the taxing authorities. After the FDIC acquires property with delinquent taxes, *penalties* may no longer accrue, but *interest* continues to accrue until the delinquent taxes are paid.

The FDIC is not personally liable for payment of the delinquent taxes, penalties and interest on property it acquires, but the delinquent taxes, penalties and interest due at the time that the FDIC acquires property are secured by a tax lien against the property. The fact that the FDIC acquires property does not invalidate the tax lien that secures the payment of the taxes, penalties and interest. However, FIRREA prohibits the taxing authorities from filing suit against the FDIC to foreclose the tax lien against the property to recover the delinquent taxes, penalties and interest due. If the delinquent taxes are not paid when the FDIC sells the property, the taxing authorities

## *Collection of Property Taxes & the FDIC*

may file a lawsuit against the person or entity that purchased the property from the FDIC and foreclose on the property to recover the delinquent taxes.

### **Post-FDIC Ownership**

YES, BUT. If on January 1 of the year of the tax, the FDIC owns the property it is subject to being taxed. If the taxes became delinquent, *interest* but not *penalties* may be charged to the FDIC. FIRREA requires the FDIC to pay the taxes and interest, but prohibits the taxes and interest from being secured by a tax lien against the property.

### **IS IT COLLECTABLE?**

The Fifth Circuit Court of Appeals in the case of *Matagorda Court, et al. v. Russell Law, et al.*, 19 F2d 215 (5<sup>th</sup> Cir. 1994), decided the issue of the rights of taxing authorities to foreclose on properties for non-payment of delinquent property taxes when the property is owned by the FDIC or the FDIC has acquired a mortgage or lien against the property.

YES, BUT. The federal court stated that even though the taxing authorities may have a valid tax lien that secures the payment of delinquent, taxes, penalties and interest due against the property when the FDIC acquired the property, the taxing authorities may not file a lawsuit to foreclosure and sell the property while the property is owned by the FDIC. The court held that the FDIC may not be sued without its consent, which is rarely given. The court ruled that although FIRREA makes the FDIC responsible for payment of taxes and interest due against property that it owned on January 1 of the year of the tax, a taxing unit may not sue the FDIC to recover taxes and interest that are owed by the FDIC.

The court also ruled that under federal law the definition of the word “property” includes both the actual real property that the FDIC has acquired and any mortgages or liens that the FDIC acquires when it takes over the assets of an insolvent bank. Under FIRREA, a taxing unit may not file a lawsuit to foreclose on property that the FDIC has a mortgage or lien against.

The extent to which the limit on a taxing unit’s rights to impose penalties against property in which the FDIC only has a mortgage was decided by the San Antonio Court of Appeals in *PNL Asset Management Company, L.L.C. v. Kerrville Independent School District*, 37 S.W.3<sup>rd</sup> 80, (Tex.App-San Antonio 2001, reh.den’d). In this case the Texas court ruled that although the FDIC may hold a mortgage against the property, the taxing units may still tax the property and impose penalties and interest against the property when the taxes are not timely paid. And the taxes, penalties and interest are secured by a tax lien against the property which may be foreclosed when the FDIC transfers the mortgage it owns on the property.

## **WHAT'S A TAX ASSESSOR-COLLECTOR TO DO?**

When dealing with the issues of collecting taxes due against property acquired by the FDIC, tax assessor-collectors will be faced with confusing facts that they will need to sort out to determine what is collectable. Adding to the confusion is that in many instances, there may be a delay in notifying the taxing authorities (either the appraisal district or the tax office) that the FDIC has acquired a property. Thus, taxing authorities may have to recalculate what is due when informed that the FDIC owns the property. To assist local taxing authorities, the FDIC has adopted its own rules that set out when the FDIC may pay property taxes. Those rules provide the following:

1. The FDIC may timely pay taxes that come due after the FDIC acquires property. Therefore, appraisal districts and tax offices should update their ownership information when they become aware that the FDIC has acquired property and mail all appraisal and tax notices to the FDIC. Remember to continue to list the property in the name of the insolvent bank that the FDIC has placed into receivership and send all tax and appraisal notices in care of the FDIC or its agent.
2. The FDIC may delay payment of the taxes (current or delinquent, and the penalties and interest) until it sells the property. Tax assessor-collectors should mail tax notices to the FDIC, but, note, the FDIC may elect not to make payment until it sells the property. Ultimately when the FDIC sells the property, it may request tax assessor-collectors prepare a tax certificate listing the amount of outstanding delinquent taxes, penalties and interest due. In order to properly calculate the amount due, the tax assessor-collector may have to make adjustments based on both the Texas Property Tax Code and FIRREA.
3. The FDIC may never pay the taxes and abandon the property. This may occur without notice to the taxing authorities. MVBA consistently monitors all delinquent accounts, including those owned by the FDIC and will advise you on the steps necessary to recover the taxes on accounts that the FDIC has abandoned.

Recalculating the amount of taxes, penalties and interest due on property acquired by the FDIC will not be an easy task. Recently received correspondence and notices from the FDIC and their servicing agents indicate that they are not up to speed with the federal law and cases that control the payment of current and delinquent property taxes, penalties and interest to taxing authorities in the state of Texas. Unfortunately, for them as well as Texas tax assessor-collectors, its *déjà vu all over again*.

The following examples may illustrate some of the complexities when calculating the amount of taxes due on property acquired by the FDIC. Should you have questions, or need assistance concerning these matters, as always the attorneys and professional staff of McCreary, Veselka, Bragg & Allen, are available, please contact us when the need arises.

## *Collection of Property Taxes & the FDIC*

### EXAMPLE NO. 1:

The FDIC acquires property on December 1, 2009. The 2009 taxes are due. The FDIC sells the property in May 2010. What is due?

When the 2009 taxes are not paid by February 1, 2010, the taxes are delinquent, but taxing authorities may not charge penalties against the property owned by the FDIC. Therefore on February 1, 2010, only interest may be charged against the property. When the FDIC sells the property in May 2010, the taxes and interest due from February 1, 2010 until May 2010 (4%) are due.

### EXAMPLE NO. 2:

Suppose in EXAMPLE NO. 1, the FDIC acquires the property in May 2010, and sells it in August 2010, what is due?

The amount of delinquent taxes, penalties and interest due in May 2010 (9% penalty and 4% interest, for a total of 13%) are due and secured by a tax lien against the property. However, for the months on June, July and August only interest may be charged (3%). The tax assessor-collector, will add to the delinquent taxes, penalties and interest due in May 2010, the interest only for June, July and August, for a total of 16%.

### EXAMPLE NO. 3:

Suppose in July 2009 the FDIC forecloses on a property that has outstanding delinquent taxes due for 2008 and the property is ultimately sold by the FDIC in August 2010. What is owed?

1. 2008 Taxes. The delinquent taxes, penalties and interest assessed against the property when the FDIC acquires it in July 2009 are due. This would normally be 12% penalty and 6% interest, for a total of 18% penalty and interest, plus the attorney fees. The amount due in August 2010 is 12% penalty and 19% interest for a total of 31% penalty and interest, plus attorney fees. A tax lien exists to secure the payment of these taxes, penalties and interest.
2. 2009 Taxes. The 2009 taxes are also due, but if the 2009 taxes become delinquent on February 1, 2010, only interest, not penalty, is charged for these taxes. The total amount of interest in August 2010 is 7%, no penalties and no attorney fees.
3. Total Taxes Due. The total amount of taxes due in August 2010, will be the 2008 taxes, penalties, interest and attorney fees due as of August 2010, (31%, plus attorney fees) and the 2009 taxes and interest (7%). The property will also be subject to taxation for 2010.