

Strategies for Collecting Real Property Taxes

Prepared by:
Michael J. Ciota

The Law Office of
Ciota, Starr & Vander Linden LLP

625 Main Street
Fitchburg, MA 01420
(978) 345-6791

Fax (978) 345-6935

(508) 754-8882
Fax (508) 75

info@cslaw.com

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STRATEGIES FOR COLLECTING REAL PROPERTY TAXES

When taxes become due and unpaid, municipal tax collectors typically record an Instrument of Taking. G.L. c. 60, §§ 53-54. This deed gives the municipality title to the property subject to the right of redemption. The municipality forecloses on this right of redemption by a proceeding in the Land Court. Over the years, cities and towns have come to rely principally on this means for securing taxes due. Often unexplored are the other tools which the statutes provide for collecting taxes. These methods, frequently unused by cities and towns, often result in payment of the overdue taxes more quickly. Foreclosure takes time. During the pendency of the action, buildings on the property may be abandoned. They deteriorate. They become subject to vandalism, open to unlawful uses, and, at risk of destruction by fire. Alternative tax collection strategies may provide cash sooner and avoid the problems associated with delays in the foreclosure process.

Furthermore, the tax taking and foreclosure may result in more than the city bargained for if it becomes the owner of a property with hazardous waste or occupied by tenants. See G.L. c. 21E, § 2(d) (definition of "owner/operator").

With these concerns, alternate collection strategies become more vital.

Alternative approaches to collection include:

- (1) seizure of the tax debtor's property [or person] after a court order;
- (2) collection of the rent or other income from property taken by the municipality;
- (3) file a civil action;
- (4) seize money owed by the municipality to the tax debtor;
- (5) conduct a tax sale;
- (6) deny or revoke licenses or permits;

- (7) assess the mortgagee for the future taxes;
- (8) bring an action to restrain a non-resident debtor from doing business in the Commonwealth.

These remedies are cumulative and not exclusive. *Boston Five Cents Sav. Bank v. Boston*, 318 Mass. 183, 188, 61 N.E.2d 124 (1948). In other words, the municipality can use them all and may use them simultaneously.

When a municipality institutes such statutory tools, it usually notifies mortgagees or lienors of record. Often, this notice results in payment by the mortgagee or lienholder.

DEMAND FOR TAXES

As a prerequisite to distraint of personal property, arrest of the taxpayer, or sale of the taxpayer's land, the collector must serve a demand for payment of the amount due. G.L. c. 60, § 16. Demand may be mailed to the last and usual place of business or abode or to the "address best known" to the collector. *Id.* Failure to receive the notice does not invalidate any tax or the proceedings for enforcement or collection. *Bartevian v. Cullen*, 369 Mass. 819 (1976). However, the collector should use care when mailing to the "address best known" to him "where there is no basis for using that address and another address is shown on the deed by which the taxpayer acquired the property." *Id.* See also *Lancaster v. Foley*, 15 Mass. App.Ct. 967 (1983); *Hilde v. Dixon*, 16 Mass. App. Ct. 901, 983 (1983); *Lamontaigne v. Knightly*, 30 Mass. App. Ct. 647 (1991). Placing the notice in the mail is *prima facie* evidence that it was received. *City of Boston v. Boston Port. Devel. Co.*, 380 Mass 72 (1941).

G.L. c. 60, § 37, provides that: "No tax title and no item included in a tax title account shall be held to be invalid by reason of any error or irregularity which is neither substantial or misleading whether such error or irregularity occurs in the proceedings of the

collector or in the assessors or in the proceedings of any other official or officials charged with duties in connection with the establishment of such tax title or in the inclusion of such item in the tax title account.” See *Hilde v. Dixon*, 16 Mass. App. Ct. 901,983 (rescript 1983) review denied 390 Mass 1104, for the application of this statute to service of the demand. Whether the error is substantial or misleading is a question of fact. *Pass v. Town of Seekonk*, 4 Mass. App. Ct. 447 (1976).

EMERGENCY EXCEPTION TO DEMAND REQUIREMENT

G.L. c. 60, § 19, provides: "If the assessors are of the opinion that the credit of a person taxed is doubtful or that he is about to leave the Commonwealth, they may, by a special warrant, direct the collection forthwith without demand or notice, to compel payment by distress or imprisonment whether the tax is payable immediately or at a future day, by installments or otherwise."

COLLECTION BY DISTRAINT OF PROPERTY / ARREST OF PERSON

G.L. c. 60, § 29, gives the collector a remedy in District Court similar to the supplementary process remedy available to a judgment creditor.¹

If the taxes remain unpaid fourteen days after the collector makes demand, he has to issue a warrant to collect the tax. G.L. c. 60, § 29. Before applying to the district court, the collector must serve this warrant to collect. Then, the collector can invoke the remedy created by this statute. The collector files an application for a hearing asking the court for a date and for an order that the taxpayer appear on a future date. The court issues a summons ordering the taxpayer to appear. The collector serves the summons and other filed documents. The collector should also serve a subpoena requiring the debtor to bring various financial records to the hearing.

The purpose of the hearing is to examine the tax debtor as to his ability to pay or the availability of property to be applied to the debt. The collector examines the debtor under oath using the financial records and any other evidence available to show the debtor's ability

¹Because of a constitutional challenge, the statute was rewritten in 1980 to require the district court hearing. See St. 1980, c. 64, § 4-7; *Porter v. Treasurer & Collector of Taxes of Worcester*, 385 Mass. 335 (1982).

to pay the debt. "If the court finds that the debt is owed and there is sufficient property and an ability to pay, a warrant to distrain or commit and take the body of such person and commit him to jail shall issue to the collector or his designee to serve upon said person, according to law."

In other words, the court can issue a warrant to seize property or arrest the debtor. G.L. c. 60, § 29. At this point, the collector may, without unnecessary delay, levy the tax by seizure and sale of his goods. See *Boston v. Rockland Trust Co.*, 391 Mass. 48 (1984), for the rights third parties with claims of security interests in seized goods.

This proceeding is like a supplementary process, G.L. c. 60, § 31, and the collector has the remedies available to a creditor in supplementary process. *Id.* See G.L. c. 224. Very often the mere initiation of the process is enough to get the tax debtor to pay or to negotiate a payment plan. This plan can be made an agreement filed with the court. Because this proceeding is not common, counsel is advised to review the forms and procedures with the court before filing any cases.

COLLECTION BY TAKING TITLE

The collector can take title to the property. G.L. c. 60, § 37 and §§ 53-57, enables the collector to take title to the assessed property. Recording the instrument of taking vests the "fee, seisin and title paramount free from all other ownership interests or encumbrances previously existing except for the right of redemption." *Wiggins v. Lowell Five Cents Savings Bank*, 299 Mass. 518 (1938); *Chadwick v. City of Cambridge*, 230 Mass. 580 (1918); *Hunt v. Boston*, 183 Mass. 303 (1903). See G.L. c. 60, § 54.

This title gives the city: (1) the right to take possession and

collect rents or other income, G.L. c. 60, § 53; (2) the right to require the owner to protect, care for and maintain the property and to purchase insurance; and, if the owner fails to do so, the city may do so and add the cost to the tax debt, G.L. c. 60, § 50A; and (3) the right to enact regulations for the possession management and sale of the land, G.L. c. 60, § 52.

Kurtigan v. Worcester, 348 Mass. 284 (1965), established that the municipality exposed itself to liability for nuisance by taking title to the property. This tort is outside the immunities provided by G.L. c. 258. *Asiala v. Fitchburg*, 24 Mass. App. Ct. 13 (1987). While the legislature appears to have overturned *Kurtigan*, the liability issue is not finally resolved.² The statute answered the undecided question in *Kurtigan*: Did the city's right to possession vested immediately upon the taking or two years thereafter? *Kurtigan* at 287. The statute provides that the collector "shall take immediate possession of [the] land." The statute also granted immunity to the municipality for liability "caused by possession." An outstanding issue is the meaning of the statutory language "caused by the possession." Presumably the municipality has no liability for Sanitary Code violations (105 CMR 410.00 et seq.), since this liability is triggered by possession. *Com. v. Advantage Bank*, 406 Mass 885 (1990). (Bank not criminally liable for lead paint violations because although collecting rent, it was not in possession.) However, the statute also imposes a limited duty to make repairs from the rents. When the city collects rents, it must apply the funds for "the necessary expenses in the care, repair and management of" the property. G.L. c. 50, § 53. Is the municipality exposed to a claim for negligence in caring for, repairing and managing the

²St. of 1970, c. 85 added the second and third paragraphs to the present version of Section 53. The second paragraph permits the municipality to "take immediate possession" of the property and "collect the rent." The third paragraph immunizes the municipality (1) for failure to collect rent or other income and (2) from liability "**caused by the possession of land** under the section."

property? Or is the city immune from this kind of claim because it is “caused by” possession? Doesn’t G.L. c. 258, § 10(d), immunize the municipality because possession under Chapter 60 “arises out of the ... collection of any tax ... “?

Under this statute, the municipality can serve the owner and occupants of the property notice that the collector is taking possession for unpaid taxes and demand that all rents be paid to the city. The city having the superior right to possession should be able to evict occupants who do not pay the rent. While G.L. c. 239, §1, does not list a municipality in these circumstances as a potential plaintiff,³ G.L. c. 184, § 18, seems to establish the city’s right to judicial process to evict. Once the tax debtor is deprived of the income from the property, he may pay the debt to regain the income. In the meantime, the city is collecting income from the property.

COLLECTION BY SUIT

The right to collect taxes by suit does not exist at common law. It is solely a creature of statute. *Boston v. Turner*, 201 Mass 190 (1909); *Crapo v. Stetson*, Met 106 (1844); *Harrington v. Glidder*, 179

³ The statute does provide for a municipality holding title after foreclosure ~ “if a tax title has been foreclosed by decree of the land court” ~ but does not specifically provide for a title before foreclosure. But see G.L. c. 184, § 18.

Mass. 486 (1901). G.L. c. 60, § 35, gives municipalities a statutory right to sue to collect taxes.

The owner of the property on January 1st is the person legally assessed and personally liable for the tax. *Kearns v. Cunniff*, 138 Mass. 434 (1885). Even though the tax is assessed by reason of the ownership of real estate, the tax is a personal obligation of the taxpayer. *Webber Lumber Co. v. Shaw*, 189 Mass. 366 (1905); *Equitable Trust Co. v. Kelsey*, 209 Mass. 416 (1911).

The collector can sue for a tax committed to him which "remains unpaid after it has become due and payable." G.L. c. 60, § 35. The tax is "due and payable on July first of each year for all purposes except for the calculation of interest ..." G.L. c. 59, § 57; *Boston v. DuWors*, 340 Mass. 402, 403 (1960). An action can be brought notwithstanding the right to apply for abatement. *Id.* The demand, required by G.L. c. 60, § 16, is not a prerequisite to an action under Section 35. "Our statutes have provided that there may be a suit for taxes before the taxpayer has received a bill and before interest accrues for non-payment. This is not for delinquency, but to assure the receipt of taxes and is within the legislative province ... [because of] 'the paramount interest of public authority in assuring a stable and sound method of providing funds for the operation of government.'" *Id.* at 405.

The "action" to which the statute refers is not "restricted to the ordinary forms of action at law, but the word is used in its comprehensive sense as meaning the pursuit of a right in a court of justice without regard to the form of legal proceedings and consequently includes a bill in equity or other process provided the person assessed can be properly made a party defendant," Taxation in Massachusetts, Philip Nichols, Third Ed. 1938, p. 381 (hereinafter

“Nichols”). See *Boston v. Turner*, 201 Mass. 190, 196 (1909) (“The word ‘action’ is here used in its comprehensive sense as meaning the pursuit of a right in a court of justice without regard to the form of legal proceedings (citations omitted) and not in the narrow significance in which it is sometimes employed to indicate a specific remedy at law.”) The statute can be used to sue in contract and to enjoin the taxpayers from collecting rents in conjunction with the municipality’s efforts to collect rents. In *Warr v. Collector of Taunton*, 234 Mass. 279 (1920), the court held that the collector could maintain a bill in equity to reach and apply stock in a domestic corporation belonging the person assessed.

While the taxpayer's defenses are limited, Nichols, p. 382-383, the statute of limitations may bar recovery. See *Boston v. Gordon*, 342 Mass. 586 (1961); *Rich v. Tuckman*, 121 Mass 222 (1876). It is also a defense that the tax is void. *Tax Collector of Braintree v. J. G. Grant & Sons*, 26 Mass. App. Ct. 731 (1989). While the statute of limitations may bar a contract action it may not bar another “appropriate action, suit or proceeding.” that the statute permits. *Decota v Stoughton*, 23 Mass. App. Ct. 618 (1987).

Filing a civil action has many strategic advantages. The town can seek injunctive relief or use trustee process. All of the judicial remedies available to a creditor are available to a municipality under § 35.

COLLECTION BY SETOFF

G.L. c. 60, § 93, gives municipalities the right to “withhold payment of any money payable to any person from whom there are then due taxes” or other charges. The collector’s rights are not “affected by any assignment, trustee process or attorney’s lien.” Any money due to the tax debtor can be applied against the taxes due. The collector can

take payments due under a contract, an employment arrangement, an award for an eminent domain taking. See G.L. c. 79, § 44A, or due under an abatement of taxes for another of the taxpayer's properties. The right to a setoff is not barred by the statute of limitations applicable to actions brought under G.L. c. 60, § 35. *Decota v. Town of Stoughton*, 23 Mass. App. Ct. 618 (1987) review denied 399 Mass. 1105.

COLLECTION BY RESTRAINT ON BUSINESS

G.L. c 60, § 91, empowers municipalities to bring an action in equity to restrain “any foreign corporation or non-resident person” from “doing business in the commonwealth.” The term “doing business” is a term of art and, in this context, the statute uses the power of the commonwealth to limit foreign corporations from acting within this jurisdiction. Much of the law in this area is ancient and appears to be premised on the basic notion that corporations have no existence outside the state of their charter. See *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L.Ed. 274 (1839). States, under older law, have the power to bar foreign corporations from doing business within their borders. *Waters-Pierce Oil Co. v. Texas*, 177 U.S.28, 20 S.Ct. 518 (1900); *Parker v. Rising Sun Street Lighting Co.*, 229 Mass. 494 (1918); *Opinion of the Justices*, 251 Mass. 569 (1925). But the statute also bars any non-resident person from doing business in the Commonwealth. The full scope of the modern application of this remedy appears to be left for future litigation. However, if any foreign corporation owes taxes a suit under this statute should require it to take notice.

COLLECTION BY TAX SALE

(1) G.L. c. 60, § 37, establishes a lien upon the property of a taxpayer. The lien arises from January 1st in the year of assessment. It terminates, unless perfected by sale or a taking, at the expiration of three years from October 1st of that year or on a recorded alienation of the property.

To perfect the lien, the collector may sell a tax title to the land at public auction. *Id.* The procedures for conducting a tax sale auction, the effects of a sale and related matters are described at G.L. c. 60, §§ 37-52. The municipality may purchase the title at the sale. G.L. c. 60, §§ 48, 50. The deed from the collector “conveys the land to the purchaser, subject to the right of redemption.” G.L. c. 60,

§ 45.

(2) G.L. c. 60, §§ 52-54, describes an alternate method for perfecting the lien. The collector can record an instrument of taking vesting the municipality with a tax title. The municipality can assign this tax title after public auction (G.L. c. 60, § 52). The tax title cannot be assigned for less than the amount necessary for redemption. *Id.* It may be assigned only to the highest bidder at the auction. *Dennehy v. Town of Walpole*, 26 Mass. App. Ct. 930 (1988), review denied, 403 Mass. 1103.

COLLECTION BY LICENSE/PERMIT/REVOCATION/DENIAL

G.L. c. 40, § 57, if accepted by the municipality, permits it to enact a by-law creating a process to "deny any application for, or revoke or suspend any local license or permit including renewals and transfers" for any person, corporation or business enterprise who has neglected or refused to pay any local taxes, fees, assessments or betterments or any other municipal charges or with respect to any activity, event or other matter which is the subject of such license or permit and which activity, event or matter is carried out or exercised or is to be carried out or exercised on or about real estate whose owner has neglected or refused to pay any local taxes ... (etc.).

The following conditions apply:

- (a) the municipality must accept the statute and enact an ordinance/by-law;
- (b) taxes or other debt must be at least 12 months overdue;
- (c) the taxpayer cannot have filed a good faith application for abatement;
- (d) the ordinance must include the statutory procedures;
- (e) the municipality must provide for an opportunity to enter

- into a payment agreement;
- (f) the statute does not apply to the licenses listed in Section 57 (open burning, bicycle permits, sales of articles for charitable purposes; children's work permits; clubs, associations dispensing food or beverage; dog licenses; fishing, hunting, trapping licenses; marriage licenses; theatrical events and public exhibition permits).

COLLECTION BY ADVISING INTERESTED PARTIES

One of the most effective remedies for collecting taxes involves a simple title search to discover the names and addresses of any persons or corporations with an interest in the property. Mortgagees or lienors of record have a strong interest in avoiding municipal remedies for tax collection. A letter to any of these persons, giving the details of the municipalities powers and tools and describing the municipality's intentions for collecting the taxes and the municipality's intentions, is often sufficient to get payment. The mortgagee also has an interest in preventing the municipality from taxing it directly.

COLLECTION BY FORECLOSING THE RIGHT OF REDEMPTION

The municipality can bring an action, in the exclusive jurisdiction of the Land Court, to foreclose the right of redemption. G.L. c. 60, §§ 64 -76A. The judgment vests title absolute in the petitioner. G.L. c. 60, § 64. The foreclosure operates to discharge the taxpayer's liabilities as reflected in the tax title account but only to fair market value on the day of the decree. *Boston v. Gordon*, 342 Mass. 586, 593 (1961). The municipality can file an action for the deficiency. The value of the locus on the date of the decree is applied first to the taxes in the tax title account in the chronological order of their commitment to the collection. *Ibid* at 596.

WHO CAN REDEEM

G.L. c. 60, § 62, grants: "any person having an interest in land taken or sold for non-payment of taxes including those assessed under [G.L. c. 59, §§ 11 & 12] or his heirs or assigns" the right to redeem the property at any time before the filing of the petition for foreclosure as described in G.L. c. 60, § 65. This right is exercised in different ways depending on the circumstances:

(1) by paying the City "if the land has been taken or purchased by the town and has not been assigned"

(a) the amount of the tax title account and 16% interest together with all charges lawfully added to the tax, or

(b) by paying quarterly installments of at least 25% of the amount due.

(2) by paying to the purchaser or assignee of the tax title, other than the municipality as follows:

(a) to a purchaser - the original sum, i.e., the amount paid at the tax sale, see *McNeil v. O'Brien*, 204 Mass 594 (1910), intervening taxes and costs paid by him and interest at 16%;

(b) to an assignee of a tax title the amount stated in the instrument of assignment with interest at the rate of 6-1/2% from the date of assignment; or

(c) by paying the treasurer the above sums plus \$1.00. Upon receipt of the payment, the collector provides a certificate acknowledging satisfaction of the tax title account. (See G.L. c. 60, § 63 for the consequences of this method of redemption.)

G.L. c. 60, § 63, provides that if payment is made to the treasurer instead of to a purchaser or assignee from the city, the treasurer gives a certificate so indicating which, upon recording, extinguishes all right and title acquired under the collector's deed

(see *Hebda v. O'Brien*, 6 Mass. App. Ct. 661 (1978). The treasurer gives all but \$1.00 of this sum to the person entitled to receive it. If the amount is less than the city's assignee or purchaser paid for the tax title, he may seek the difference, with 16% interest, by an action in the nature of contract if he commences the suit within three months of the payment. Apparently a person making payment to the treasurer does not become vested with the tax title and is not entitled to bring a foreclosure action. *Polep v. Joseph P. Manning Co.*, 309 Mass. 552 (1936).

A wide array of persons have the right to redeem the property. The phrase "any person having an interest in land" is broadly construed. It "includes all varieties of titles and rights ... It comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments and every kind of claim to land which can form the basis of a property right." *Union Trust Co. v. Reed*, 213 Mass. 199, 201 (1912).

A mortgagee may redeem the title. If the mortgagee does, he may add the sum paid to the mortgage debt. G.L. c. 60, § 62; G.L. c. 60, § 58.

G.L. c. 60, § 62, grants the right of redemption "at any time prior to the filing of [a] petition for foreclosure ..." G.L. c. 60, §§ 65 & 68, describes the right to redeem after filing the petition to foreclose. G.L. c. 60, § 65, creates the right to file a foreclosure action. Section 68 provides that "any person claiming an interest, on or before the return day [or at a later date if allowed by the court] may file an answer and an offer to redeem upon such terms as may be fixed by the court."

CONCLUSION

Every city and town should carefully scrutinize the list of its tax debtors and the use of the related properties. If the property is income producing, **consider rent collection**. If the tax debtor receives other funds from the municipality, the collector should consider **seizing the amount due the taxpayer** to pay the taxes. If the tax debtor owns other properties or has income or assets, consider filing a **supplementary process**. Perform a **simple title examination** to locate encumbrances on the property. **Tell mortgagees** and other lienors of record about the municipality's intent with respect to the property. Very often they do not even know that the municipality has taken title. This simple step often results in payment by the mortgagee. **Adopt an ordinance** allowing the municipality to deny or terminate licenses. Each board or commission which issues licenses or permits can help by using its licensing authority to help collect taxes. **Conduct auctions** of tax properties. **File suit** to seek a court order forbidding an out of state tax debtor from doing business in the state. If possible the municipality should dedicate one person to review the tax accounts and develop a strategy to collect the money owed from each of the properties. Finally announce to the public the municipality's plan to collect the past due taxes.

This article is only a summary about one aspect of the law. The summary presents information about the law through the date of its publication. Legislatures amend statutes. Courts interpret the law and statutes and by doing so affect legal rights and duties. This article is not intended as, and cannot be substituted for, legal advice which always must be tailored to each unique circumstance. Therefore, you should always consult a lawyer before simple relying on opinions or statements in this summary.

