

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 27

LIENS - Definition of "owner" of real property being purchased under a contract for deed;
TAXATION AND REVENUE - Definition of "owner" of real property being purchased under a contract for deed;
MONTANA CODE ANNOTATED - Sections 15-8-601;
15-16-402(1);
OPINIONS OF THE ATTORNEY GENERAL - 9 Op. Att'y Gen. at 440 (1920-22), 23 Op. Att'y Gen. No. 114 (1950).

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- HELD: 1. One who is purchasing land under a contract for deed is not the "owner" of the property for purposes of section 15-16-402(1), MCA.
2. The procedure for revising erroneous tax assessments is set forth in section 15-8-601, MCA.

18 September 1987

Thomas R. Scott
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Beaverhead County Courthouse
Dillon MT 59725

Dear Mr. Scott:

You have asked my opinion on several questions concerning the existence of a lien upon real property created by the nonpayment of property taxes.

The specific facts of your request involve real property purchased by B from S in 1975 under a contract for deed. The deed to the property was apparently placed in escrow until the conditions of the contract were met, i.e., full payment was made. B defaulted on the required payments and the contract was never fully executed. See § 28-2-104, MCA. A quitclaim deed from B to S was recorded in 1987.

Your inquiry involves a lien which attached to the land in question when B failed to pay taxes on real and personal property in 1985-86. S disputes that portion of the lien which represents B's unpaid personal property taxes.

Section 15-16-402(1), MCA, makes taxes assessed on account of personal property a lien upon the real estate of the owner.

Tax on personalty lien on realty--separate assessment. (1) Every tax due upon personal property is a prior lien upon any or all of such property, which lien shall have precedence over any other lien, claim, or demand upon such property, and except as hereinafter provided, every tax upon personal property is also a lien upon the real property of the owner thereof from and after 12 midnight of January 1 in each year. [Emphasis added.]

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Your first question deals with whether B was the "owner" of the land purchased under contract for deed, to the extent that a lien could attach for nonpayment of taxes on his personal property.

Montana's statutes distinguish between a purchaser under contract for deed and the record owner of the property being purchased. A "purchaser under contract for deed" is defined as one who "has entered into a contract with the record owner of real property in which it was agreed that the record owner will deliver the deed to the property to the purchaser when certain conditions have been met, such as completion of payments by the purchaser; and ... has recorded the contract." § 70-20-115(1), MCA. When legal notice is required by statute to be given to the "owner" of real property, notice must also be given to a purchaser of that property under a contract for deed. § 70-20-115(2), MCA. See also §§ 7-13-2304(2)(c) (notice of intention to levy tax); 15-7-102 (notice of classification and appraisal); 15-7-208 (reclassification notice); 15-18-202 (notice of application for tax deed); 15-23-102(2)(a) (notice of assessed value), MCA.

The relevant case law suggests that in Montana a purchaser under a contract for deed, while the contract is executory, does acquire a right of property in the land, but that right lacks legal title and is equitable only. See First State Bank of Thompson Falls v. United States, 92 F.2d 132, 134 (9th Cir. 1937) (purchaser of realty under a contract for deed is the owner for purpose of liability for costs of extinguishing forest fire on the property); Pollard v. City of Bozeman, 44 St. Rptr. 1436, ___ P.2d ___ (1987) (pending final payment under a contract for sale, title remains with seller for purpose of assessment of taxes); and Calvin v. Custer County, 111 Mont. 162, 167, 107 P.2d 134, 136 (1940) (purchaser of realty under a contract for deed is owner for purposes of determining exemption from taxes). See also Glacier Campground v. Wild Rivers, Inc., 182 Mont. 389, 405, 597 P.2d 689, 698 (1978); State v. Kistner, 132 Mont. 437, 441, 318 P.2d 223, 225 (1957), and Kern v. Robertson, 92 Mont. 283, 288, 12 P.2d 565, 567 (1932). Once a purchaser under a contract for deed defaults and surrenders the property to the vendor, there is no property or right to property to which a tax lien against the purchaser may attach, in the absence of a showing of any unjust enrichment to the vendor. Greenup v. United States, 239 F. Supp. 330, 333 (D. Mont. 1965) (tax lien may attach to a purchaser's cause of action for unjust enrichment). See also M & R Construction Co. v. Shea, 180 Mont. 77, 80, 589 P.2d 138, 140 (1979) (a mere executory contract of purchase

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between others does not furnish a sufficient basis upon which to predicate a mechanic's lien against the owner of the land).

In 23 Op. Att'y Gen. No. 114 (1950), Attorney General Olsen concluded that the purchaser of real property under an executory contract of sale is the "owner" of the property. However, the facts there dealt with a purchaser's right to vote in local elections, and the opinion should not be broadly applied to other factual situations. 9 Op. Att'y Gen. at 440 (1920-22), which actually dealt with tax liens, concluded that personal property taxes assessed to the purchaser of land under a contract for deed would not constitute a lien upon the land, since title remains in the seller until the contract is finally executed.

There is no clear statutory authority for treating the purchaser of real property under a contract for deed as the "owner" of the property for purposes of attaching a tax lien. Indeed, as I have noted, the tax notice statutes suggest that an "owner" and a "purchaser under contract for deed" are different persons. Although some court decisions have held that a purchaser under a contract for deed is deemed to be the beneficial or equitable owner of such property and may be treated as the "owner" for some purposes, I have found no decisional authority that concludes such a purchaser is to be treated as the "owner" under section 15-16-402(1), MCA. Thus, I conclude that the holding in 9 Op. Att'y Gen. at 440 (1920-22) remains valid.

Because I conclude that the tax lien did not properly attach to the land in question during the life of the contract for deed, your second question does not need to be addressed.

Your last question is: If the taxes upon B's personal property are not properly a lien on the real property purchased under the contract for deed, what is the proper procedure for reassessing those taxes? The procedure for revising erroneous tax assessments is set forth in section 15-8-601, MCA. That procedure should be followed in the situation you have described.

THEREFORE, IT IS MY OPINION:

1. One who is purchasing land under a contract for deed is not the "owner" of the property for purposes of section 15-16-402(1), MCA.

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2. The procedure for revising erroneous tax assessments is set forth in section 15-8-601, MCA.

Very truly yours,

MIKE GREELY
Attorney General