

Delinquent personal property tax

secrets

revealed



he township treasurer is responsible for interacting with the public in one of the most sensitive areas of public office—collecting taxes. Collecting delinquent personal property taxes is an even more difficult task because it may involve seizing property. Because this can be a complicated procedure conducted under tight deadlines, treasurers should be familiar with the statutory requirements for collecting delinquent personal property taxes.

Delinquent personal property tax collection procedures were written over a century ago and have not been changed to keep pace with the modern notions of due process. When judicial interpretation of a tax statute is required, it is strictly construed against the taxing authority in favor of the taxpayer. For these reasons, it is recommended that even the most experienced treasurer seek legal counsel advice throughout the delinquent personal property tax collection process.

This article identifies some pitfalls to avoid when collecting delinquent personal property taxes and offers practical suggestions for successful collections. Treasurers who persevere in collecting delinquent personal property taxes provide a valuable community service.

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Personal property taxes must be collected by the township treasurer

For the 1998 tax year, the taxable status of personal property was established by the township assessor as of December 31, 1997. The 1998 personal property taxes become a lien on assessed property on December 1, 1998 (MCL 211.40) and are due without penalty on February 16, 1999.

Unlike taxes on real property, personal property taxes cannot be returned delinquent and collected by the county treasurer unless there is a written agreement between the township board and the county commission with the concurrence of the county treasurer to transfer delinquent personal property tax collecting to the county treasurer (MCL 211.56). The tax roll is the legal basis for collecting the personal property tax. If the tax is on the roll, the treasurer must collect it. He or she cannot forego collection because the taxpayer claims that the assessment is incorrect, unfair or causes an undue financial burden.

If a person, firm or corporation neglects or refuses to pay a tax on property assessed to that person, firm or corporation, the township treasurer must collect the tax by seizing the personal property of that person, firm or corporation in this state, in an amount sufficient to pay the tax, fees and charges for subsequent sale of the property. No personal property is exempt from seizure (MCL 211.47(1)).

The treasurer may also opt to bring suit in the Small Claims Division of District Court for amounts up to \$1,750 to collect the debt (MCL 211.47(2)). A lawsuit may be preferable when the debtor is available to be served and a satisfactory judgment through court procedures seems likely. However, property seizure is the sometimes the most effective method of collection.

A cautionary tale

The collection process appears straightforward on paper. However, property seizure has severe pitfalls for the treasurer. Witness the case of *Fidlin vs. Collison* (9 Mich App 157, 1967), which illustrates some of the potential complications of seizing personal property. City Treasurer Collison learned that the plaintiff's restaurant take-out business was closed and personal property was being removed from the premises. He went to the property and, looking through a doorway window, observed that two grills had been removed from underneath their hoods. Collison learned from the county assessor's office that the take-out business was being operated by Mr. Fidlin and the personal property, including the building on leased land, was assessed at \$10,500. He then proceeded to the city attorney's office where a jeopardy assessment affidavit was made out claiming personal property tax in the amount of \$629.32.

After filing a copy of the jeopardy assessment affidavit with the register of deeds, Collison attempted unsuccessfully to find Fidlin. He went to the closed take-out premises, padlocked both doors and posted a notice certifying that he had seized the personal property and warning all persons against removing or disturbing the property or notice in any way. Fidlin subsequently telephoned

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Collison and was informed that the padlocks would be removed when he paid the \$629.32 due for personal property taxes.

Fidlin chose not to pay, and Collison proceeded to conduct a tax sale. The six items sold in the tax sale—a small safe, milk machine, thermostat griddle, fan, cash register and an electric oven—had a total value of \$665. They sold as a unit for \$675. Collison subsequently sent Fidlin a check for the excess amount obtained on the tax sale. Fidlin refused to cash the check and brought suit against Collison alleging conversion. Under the theory of conversion, a property owner whose property is unlawfully seized can sue the person who seized it for its fair market value.

What could be wrong with this seizure? Collison scrupulously followed the Jeopardy Assessment of Personal Property Taxes Act (MCL 211.691, *et seq*) and was assisted by competent legal counsel.

The Michigan Court of Appeals ruled that two things were wrong with Collison's seizure. First, the Jeopardy Assessment Act's language must be construed as adopting and incorporating the collection procedures in the General Property Tax Law. MCL 211.46 requires that the treasurer personally call or mail a letter to the taxpayer at his or her usual place of residence or business to demand payment of the personal property tax.

The ruling stated, "Such execution of levy upon a statutory lien without a prior demand for payment or the providing of an opportunity for making such payment, is without statutory authority and violates the constitutional provision mandating due process of law where there is a taking of property."

The Court also ruled that seizing the building and all of its contents was excessive. It held that the treasurer must exercise sound discretion as to what property is seized and, where different articles of property are available, the treasurer is bound to select those which will best satisfy the tax with the least expense and inconvenience to the taxpayer. If the amount of property seized is excessive, the seizure is illegal.

This case points out an important fact. When seizing property, particularly when imposing a jeopardy assessment, the treasurer is acting under urgent circumstances to

Statutory Personal Property Tax Collection Dates

December 31, 1998	1999 Tax Day: Taxable status of personal property established for 1999 tax collection.
February 16, 1999	1998 personal property taxes due. <i>*February 15, 1999, is President's Day.</i>
December 1, 1999	1999 Tax Lien Day: 1999 taxes become lien on taxable personal property.
December 31, 1999	2000 Tax Day: Taxable status of personal property established for 2000 tax collection.
February 15, 2000	1999 personal property taxes due.



prevent the taxpayer from removing and disposing of the property. On the other hand, the taxpayer and his or her attorney can take months to think of ways to nitpick the treasurer's actions. Any doubt as to the treasurer's actions is construed against the treasurer in favor of the taxpayer.

Statutory procedures must be followed to collect or seize

It cannot be emphasized enough: The treasurer must be familiar with and carefully follow the statutory procedures for collecting delinquent personal property taxes. The following recommendations target those areas of property tax collection that cause the most problems for treasurers.

1. What constitutes personal demand? For personal property taxes unpaid on February 15, the treasurer must, during that month, demand payment either personally or by mail. For companies or corporations, the demand may be made at the principal office or other office of the company or corporation, or by mail directed to the corporation or company or its principal officer at its usual place of business. If the demand is made by mail, it must state the tax amount and the place and time that the taxes may be paid (MCL 211.46).

Consider for a moment that the treasurer may later be required to prove that he or she complied with this statute. Every treasurer should make it a routine recordkeeping practice to prepare a written record of the date, time and manner of contact. If contact is made in person, it should be witnessed and noted in the statement. Such written records routinely kept in the ordinary conduct of the treasurer's office should be admissible evidence, if necessary, without further authentication.

Remember that *Fidlin vs. Collison* requires that the demand for payment be made prior to seizure. If the February demand fails to produce results within a reasonable time, it is recommended that the treasurer send additional notices, including certified mail notices, to the taxpayer. Any type of notice from township legal counsel may also be effective. As a matter of fact, we recommend that seizure be preceded, if possible, by personal demand made by the treasurer with township legal counsel present.

2. What property can be seized? Unfortunately, there is no statutory definition of personal property. Generally, the specific items over which a person has a legal right to exercise dominion and control are considered property and classified into two types, based on whether they are moveable or immovable. Immovable items,

such as land and items attached to the land, are called real property. Real property can include land, land improvements and structures, farms, business and industrial facilities, residences, timber cut-over land, and developmental property. Movable items are considered personal property and can include thousands of different items, such as furniture, fixtures, equipment and machinery belonging to a business, inventories, certain public utilities, oil wells, structures on leased properties, and other similar tangible property.

Personal property assessed in a township as of December 31 is subject to seizure even if it is subsequently removed from the township to another jurisdiction. The treasurer of the taxing unit can prepare a sworn statement for seizure and collection by the treasurer of the jurisdiction where the property is located (MCL 211.48).

MCL 211.18 requires the supervisor or other assessing officer to ascertain the taxable property in the township and the person(s) to whom it should be assessed. The supervisor must require each owner or holder of personal property to file a personal property statement of all the personal property of the person, firm or corporation.

Even so, the treasurer's duty to identify the property subject to a personal property assessment can be a problem. Examining the personal property statement upon which the assessment was predicated will be of little or no help. The personal property statement merely lists machinery and equipment, furniture, and fixtures under generic titles by cost and year of acquisition. More often than not, the assessor does not know and cannot identify the actual personal property items for which he or she determined the assessment.

This can be a daunting problem when seizure is necessary. The job description of every township assessor should include a requirement that he or she maintain an inventory of the property assessed by item and identification number, if available. If the assessor were responsible for personal property tax collection, proper inventories would probably be routine.

3. How should property be seized? While posting large, red "Notice of Seizure" signs on the premises warning of dire consequences for tampering or removal can produce successful results, it is legally inadequate, particularly when a property owner has declared bankruptcy.

The act of seizure is legally significant because it "perfects the lien." In law, a lien gives rise to a security interest that allows the secured party the legal right, following the proper procedure, to seize and sell property to satisfy indebtedness. There is a big difference, however, between having a mere lien and having a perfected lien. The only way to perfect a property tax lien is to take physical possession of the property being seized. Therefore, merely posting notices on the property is no good, particularly against a trustee's claims in bankruptcy. If a bankruptcy petition is filed before actual physical possession is taken, the bankruptcy court has the first prior, superior and paramount lien, notwithstanding provisions of the General Property Tax Law.

In some cases, the threat of seizure may be enough to make a delinquent personal property owner pay his or her taxes. In the presence of the township attorney and township police officer or deputy sheriff, the individual may come out with a check when the treasurer slowly backs a truck to the taxpayer's door. If not, the treasurer must be prepared to actually seize property, which can be very serious business requiring considerable equipment and labor. Always have a law officer and, ideally, the township attorney present.

A treasurer should only seize property in an amount sufficient to pay the taxes, fees and charges for subsequent sale. Do not seize an excessive amount. Under Michigan law, seizing property to pay taxes is an administrative duty. The treasurer has no tort immunity

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and may be sued for the full value of the property seized in the event that 1) the treasurer fails to scrupulously follow each statutory step in the proceedings, and 2) the seizure is declared excessive.

What should the treasurer do if the taxpayer comes to the door and orders the treasurer off the property? The treasurer's right to come onto the property under the General Property Tax Law is implied, but not otherwise articulated or defined. We will know the proper answer to such a circumstance when the Court of Appeals gets a set of facts like this in a case before it. Are there any volunteers? We suggest the treasurer assume that he or she is a business invitee and, when possible, property should be seized during regular business hours.

4. How should seized property be sold? Seized property must be sold by public auction. The property may be sold in the jurisdiction where it was seized or in the treasurer's township. Following seizure, the treasurer must give public notice of an auction sale at least five days prior to the sale by posting written or printed notices in three public places in the township, village or city where the sale is to be made. Once the property is seized and advertised, the sale may take place. It is recommended, however, that the township publish additional notice in other media, such as a shopping circular or newspaper of general circulation, intended to attract the greatest number of bidders.

The treasurer should satisfy the tax debt by selling the assessed property, if this is possible. If the personal property sale brings more than the amount of the taxes and charges, the balance must be returned to the taxpayer.

If the property seized cannot be sold for want of bidders, the treasurer should adjourn and readvertise the sale by the most effective means possible to attract the largest number of bidders.

5. How are uncollected taxes removed from the roll? Uncollected personal property taxes remain a debt of the taxpayer, an asset of the taxing jurisdictions and an obligation of the township treasurer covered by bond until they are either collected and disbursed or discharged by Circuit Court order. The debt can be discharged by the Circuit Court if the taxes remain unpaid for five years.

On or before May 1 in the sixth year after a personal property tax became delinquent, the treasurer must petition the Circuit Court to discharge the debt. The treasurer must make a record book ➤

Bankruptcy affects personal property tax collections

When a property owner who owes personal property taxes files for bankruptcy, the township's collection efforts must stop. The township becomes a creditor whose claim is subject to the decisions of the U.S. Bankruptcy Court.

There are basically four types of bankruptcy proceedings: 1) Chapter 7 liquidation, 2) Chapter 11 business reorganization, 3) Chapter 12 family farm reorganization and 4) Chapter 13 wage earner plan. Each is commenced by filing the appropriate petition and schedules with the Bankruptcy Court.

The Bankruptcy Court must send a bankruptcy proceedings commencement notice to all creditors. A commencement notice has two primary functions: to notify creditors as to the fact and type of bankruptcy and to give notice of automatic stay. Once a bankruptcy proceeding has commenced, a creditor—including a township—cannot take any further action, such as filing a jeopardy assessment, to collect the debt without the bankruptcy court's approval. Violating the court's stay order can result in contempt charges, paying the trustee's attorney fees and punitive damages.

The treasurer's first step upon receiving a bankruptcy commencement notice should be to contact the Bankruptcy Court and obtain copies of the bankruptcy petitions and schedules. If they are too voluminous to copy, they should at least be examined at the courthouse. To enable the township attorney to prepare a complete proof of claim, the treasurer must identify the bankruptcy type, amount of assets involved, the property owner and the property owner's attorney.

The second step is to file a proof of claim on the appropriate official bankruptcy form, usually supplied by the court with the commencement notice. Since the township is typically involved in collecting delinquent personal property taxes and the county collects delinquent real property taxes, the township and county treasurers should alert each other to the bankruptcy declaration.

Get in line: The township becomes a creditor

The township's tax claim will fall into one or more of the following three claim categories: administrative expense, secured or unsecured.

If the bankruptcy is under Chapter 11, Chapter 12 or Chapter 13, taxes that accrue and become payable during court-supervised reorganization proceedings could be paid along with administrative expenses.

If the tax debt is secured (has become a lien) and the Bankruptcy Court recognizes the security interest, it may or may not be fully paid depending upon the court-determined status of other security interests.

If the tax debt is for taxes last payable without penalty less than one year before the bankruptcy petition was filed, it is unsecured and almost last in claim priority.

The township can improve its creditor status

Between December 31 and the following December 1, the township is an unsecured creditor for the taxes that become lien on December 1. To give the township the status of a secured creditor, the General Property Tax Act was recently amended to add MCL 211.40(a). This section allows the treasurer of a county, township, city or village to file an affidavit to designate December 31 as the date upon which real or personal property taxes become a lien. Pages 14-15 provide information on accelerating the tax lien date. ♦

—Richard D. Reed



stating each unpaid tax, the name of the person assessed and the uncollected tax amount, plus any collection fees or charges. A copy of the record book statement must be filed with the Circuit Court. The first page of the book must include a petition to the court stating:

1. The personal property taxes remain unpaid for more than five years after they were returned to the county treasurer as delinquent;
2. The treasurer and his or her predecessors have exercised due diligence in an effort to collect the taxes, and
3. To the best of the treasurer's knowledge and information, the taxes are uncollectible (MCL 211.56a).

The Circuit Court is obligated to schedule a hearing on the treasurer's petition not less than 30 or more than 45 days after it is filed with the court. The township treasurer is obligated to give at least 10 days' prior notice of the hearing date to the taxing jurisdictions. Taxing jurisdictions are entitled to be present at the hearing and object to the discharge. One ground for objection could be that the taxing jurisdiction believes the taxes are in fact collectible. A more likely ground for objection is a claim that the treasurer and previous treasurers failed to exercise due diligence in attempting collection. If that fact is established, it would constitute a default for which a claim could be made against the treasurer's bond.

If the township treasurer can satisfy the Circuit Court that he or she and his or her predecessors in office have exercised due diligence in an effort to collect the taxes and have been unable to do so, then the taxes may be stricken from the tax rolls by the court. At that point, the tax debt is no longer an asset of the taxing jurisdictions and an obligation of the treasurer (MCL 211.56a).

Many treasurers are accustomed to being the only person present at the hearing. Be warned, however, that if a taxing jurisdiction shows up and contests discharging the debt, the treasurer will be required to prove his or her and possibly his or her predecessor's due diligence. If the treasurer's office has maintained complete records of collection endeavors during the preceding six years, due diligence will be easy to prove. However, if the records are unavailable, the proceedings' outcome may be questionable. For this reason, we strongly recommend that every treasurer enter court armed with evidence of his or her office's due diligence collection efforts. Failure to do so could be just as costly as a wrongful seizure. ♦

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"If a taxing jurisdiction shows up and contests discharging the debt, the treasurer must prove due diligence."



Treasurers can *accelerate* the tax due date



Treasurers are required by law to exercise due diligence when collecting taxes. Sometimes this requires being one step ahead of a risky taxpayer. This is especially true of personal property taxes, because the personal property being assessed can be moved or disposed of relatively easily. If a treasurer believes a tax debt is at risk, he or she can use one of two statutes to issue an early tax bill and accelerate collection proceedings.

Option 1: Jeopardy assessment

If the treasurer believes that a personal property tax collection is at risk prior to the December 1 tax lien day, he or she may accelerate the date on which personal property taxes may be collected (MCL 211.691, *et seq.*). This jeopardy assessment may be made for cause any time after tax day, December 31. The jeopardy levy is in lieu of the normal levy, billing process and schedule.

For example, a treasurer notices in July that a local business has a "Going Out of Business Sale" sign. MCL 442.212 prohibits a person from advertising or representing a sale as a going out of business sale unless he or she first obtains a license to conduct the sale from the township, city or village clerk. The treasurer knows the clerk has not received such a notice, but that is not unusual since few business owners know of the requirement.

The treasurer has heard through the grapevine that the business owner may move to Florida. Given good reason to believe that the business owner is attempting to dispose of the business' inventory and fixtures and may leave the state, the treasurer begins jeopardy assessment proceedings to make immediately due the personal property taxes that would normally be due on December 1, 1999.

A jeopardy assessment is initiated when the treasurer makes a jeopardy assessment affidavit. An affidavit is a voluntary written or printed declaration or statement of facts, confirmed by the oath or affirmation of the person making it before an officer, such as a notary, with authority to administer such an oath. The affidavit must:

1. State that the taxpayer owned certain personal property on tax day;
2. Describe the property;
3. State that the property was located in the treasurer's tax collecting district on tax day;
4. State the assessed value, amount of the jeopardy rate and the tax due;
5. Name the taxing unit or units on whose behalf the jeopardy assessment is made, and
6. State that the treasurer knows or has good reason to believe that:
 - a) The taxpayer has or will abscond from or is hiding within the state;
 - b) The taxpayer has or is about to assign, dispose of or conceal any of the property;
 - c) The taxpayer is removing or about to remove any of the taxpayer's property from the state, or
 - d) Other facts that tend to jeopardize collection of the tax (MCL 211.692).

The amount of the tax statement in the affidavit is determined by estimating the authorized rate for the taxing unit for the current year. This rate cannot be more than 10 percent of the rate authorized for the taxing unit for previous years and must be stated in the treasurer's affidavit as the jeopardy tax rate (MCL 211.695).

The Jeopardy Assessment of Personal Property Taxes Act requires the township treasurer's affidavit to include a jurat, which is a notary public or other authorized officer's oath added to an affidavit stating when, before whom and where the affidavit was made. Jurat comes from the Latin word *jurare*, meaning "to swear."

On a jeopardy tax assessment affidavit, the township treasurer states the information required by MCL 211.692. At the bottom of the affidavit, the County Register of Deeds adds his or her jurat and seal, stating "Sworn to and subscribed before me on this (day, month, year), in (county, state)."

No later than the next business day after the date of the jurat on the affidavit, the treasurer must file an exact copy with the register of deeds in the county where the property was located on tax day. The treasurer must notify the taxpayer by mailing the affidavit to the address at which the personal property is located or, if unknown, to the address where the property was located on tax day (MCL 211.693).

When the affidavit is filed, the personal property tax is immediately due and payable and becomes a lien against the personal property in the manner prescribed by the General Property Tax Act (MCL 211.694). Remember that before seizure can take place, a personal or written demand for payment must be made as required by MCL 211.46. In this circumstance, the demand will be made without regard to the February deadline.

When the jeopardy tax statement is collected, the treasurer discharges the jeopardy tax affidavit from the register of deeds'

records. All money received in collecting a jeopardy tax must be retained by the treasurer in a special jeopardy tax account until he or she receives the next regular tax roll from the taxing unit on whose behalf the jeopardy assessment was made (MCL 211.696).

By statute, using the jeopardy tax assessment procedure constitutes "diligent inquiry in the exercise of due diligence in the effort to collect the taxes in satisfaction of the condition of the treasurer's bond" (MCL 211.697).

One important exception to jeopardy assessment is that, under the federal Bankruptcy Code, a jeopardy tax assessment cannot be filed if the tax collection is at risk due to bankruptcy proceedings. See Page 13 for information on bankruptcy.

Option 2: Accelerating the tax lien day

A recent statute gives the treasurer another option for collecting a risky tax bill prior to December 1. This option allows the treasurer to accelerate the tax date for both real and personal property, including property subject to bankruptcy proceedings.

Public Act 143 of 1995, effective October 9, 1995, authorizes the treasurer to designate the tax day, December 31, as the tax lien day on which real or personal property taxes become a lien on the assessed real or personal property—instead of the following December 1.

The treasurer can accelerate the tax lien day by filing an affidavit with the register of deeds in the county where the real or personal property is located, attesting that one or more of the following events have occurred:

1. The owner or person otherwise assessed has filed a bankruptcy petition under the federal Bankruptcy Code (11 U.S.C. 101-1330);
2. A secured lender has brought an action to foreclose on or to enforce an interest secured by the real or personal property assessed;
3. For personal property only, the owner, the person otherwise assessed or another person has liquidated or is attempting to liquidate the personal property assessed;
4. The real or personal property assessed is subject to receivership under state or federal law;
5. The owner or person otherwise assessed has assigned the real or personal property assessed for the benefit of his or her creditors;
6. The real or personal property assessed has been seized or purchased by federal, state or local authorities, or
7. A judicial action has been commenced that may impair the ability of the taxing authority to collect any tax due in the absence of a lien on the real or personal property assessed (MCL 211.40a(1)).

The affidavit to accelerate the tax lien day must include all of the following:

- a) The year for which the taxes due were levied,
- b) The date on which the taxes due were assessed,
- c) The name of the owner or person otherwise assessed who is identified in the tax roll, and
- d) The tax identification number of the real or personal property assessed (MCL 211.40a(2)). ♦

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