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From the Desk of

The Real e-ditor
Steven D. Sallen

Ok, I admit it. I've had severe writer's block for weeks. Well not actually writer's "block", more like writer's trepidation. After all, I have for the most part avoided using this space to make political statements. I have preferred not to prejudice you, loyal readers, with my own political views. But I can ignore the fiscal insanity in Washington no longer. Our federal government seems intent on declaring war on working Americans. When did "success" and "wealth" become dirty words? And what about that fiscal cliff, just averted? I say: who cares? As our national DEBT careens out of control, it wasn't the fiscal cliff we needed to worry about. It's that towering mountain of DEBT, which our President now seems oblivious to. It is a $16 trillion dollar train wreck that will take generations to repay. And, of course, the notion of repayment presumes that we actually create a lasting legacy of taking in more than we spend; something that has only been done a handful of times in my (53 year) lifetime.

But instead of working to solve the DEBT crisis, the Democrats have fixated on tax increases for "wealthy" Americans. And, of course, the bar for who is wealthy seems to have moved, a lot. Now folks who make $200,000 a year (not a pittance, but hardly easy street!) are mentioned (dare I say, vilified?) as friends of Warren Buffet. All the while, the idea of reigning in out of control government spending seems to be finished as a political concept, for the next four years. After all, their theory seems to be, why cut spending, if you still have room on the credit card? And, as if tax increases are not a foolish enough fiscal strategy in a time of international economic weakness, the cumulative impact of these tax increases seem designed only to do one thing: punish those who have been declared by our President to be "wealthy". But even the proposed tax increases on the so-called "wealthy" will have virtually no impact on reducing our mountainous National DEBT.

So, celebrate if you must, that the fiscal cliff was averted. But that massive DEBT still threatens to wreck our economy. Somehow, some way, Washington must find a collective spine, and break their addiction to this spiraling cycle of *tax-spend-borrow-spend more-repeat*, and come together for a comprehensive strategy to reduce the DEBT and control spending. It has now become a matter of our national security!

Steve Sallen

No Really, It's A Tax

By: Geoffrey N. Taylor

Thinking about selling your home, or know someone who is? If so, you need to know that beginning in 2013 the Affordable Care Act (or ObamaCare, as it's known) imposes a 3.8% Medicare surtax on certain income, including gain from the sale of a residence. The surtax will apply only to those taxpayers with income over a threshold amount (in general, $200,000 for single taxpayers and $250,000 for married taxpayers). In addition, the surtax does not apply to gain that can be excluded on the sale of a principal residence ($250,000 and $500,000 for single and married taxpayers, respectively). The surtax applies to the lesser of two amounts as illustrated below.

For example: an individual with a salary of $220,000 sells his principal residence with a basis of $200,000 in January 2013 for $500,000. The surtax applies to the lesser of (i) his "net investment income," which is $300,000 of gain on the sale, less the $250,000 of gain that can be excluded on the sale); or (ii) the excess of his income ($220,000 salary + $50,000 of taxable gain on the sale) over the $200,000 threshold. He will be liable for a surtax equal to 3.8% of the lesser of (i) $50,000 or (ii) $70,000. In this case, the surtax would be $1,900.00.

Continued On Page 3

People try to live within their income so they can afford to pay taxes to a government that can't live within its income.

~ Robert Half

Penalties Increased for Failing to Report Sales of Real Estate

By: Steven D. Sallen

Recently, the state of Michigan increased the penalties for failing to file a Property Transfer Affidavit (PTA) with the appropriate assessing office upon the sale of real estate, as is required under the General Property Tax Act. Previously, failing to file a PTA form within 45 days after a "transfer" of real property would result in a penalty of $5.00 per day after the 45 day deadline, or a maximum penalty of $200.00.

Effective December 19, 2012, however, the penalty for failing to file a PTA for industrial real property or commercial real property is increased to $20.00 per day, up to a maximum penalty of $1,000.00.

"… the penalty for failing to file a PTA for industrial real property or commercial real property is increased ..."

However, if the sale price of the transferred property is more than $100,000,000.00, then the penalty is a flat $20,000.00, unless the assessing office determines that such failure to notify it of the sale was due to reasonable cause, and not the buyer's willful neglect. In addition to the penalty, the new law makes clear that if the PTA is not filed, the taxing authority is empowered to levy taxes that would have been levied, had the transfer of ownership been properly reported, and interest and penalty may be imposed from the date any increased tax would have been levied, had the sale been properly reported. As to property other than industrial real property or commercial real property, the penalty for non-filing continues to be $5.00 per day up to a maximum penalty of $200.00.

Finally, any penalty levied may be added to the tax roll for collection by the local tax collecting unit, or the county, as applicable.

For more information on this recent development, contact your Maddin Hauser attorney.

College Park: Court of Appeals Rules that Mortgage Lenders Are Permitted to Recover Rents Received Prior to Borrower's Default

By: Jason M. Fisher

In a recent dispute between a mortgage lender and a borrower, the Michigan Court of Appeals rejected a borrower's argument that an assignment of rents associated with mortgaged property was limited to only those rents that accrued after the borrower's default.[1] The dispute arose after a foreclosure sale by advertisement leaving a deficiency owed. A receiver was appointed for the property and the receiver took possession of funds retained by the borrower, some of which represented rental income received by the borrower before the occurrence of the default.

Michigan law provides that an assignment of rents as additional security on mortgaged property is binding upon the assignor only in the event of default.[2] However, an assignment of rents is effective during the period the mortgage is in effect from the date the mortgage is recorded.[3] Thus, the borrower's default merely finalizes the lender's interest in the rents as against the borrower.[4]

In order to satisfy the deficiency after the foreclosure sale, the Court held that a lender may enforce any obligations under an assignment of rents, even with a nonrecourse mortgage, as the lender is seeking to collect income generated from the property itself, not seeking a personal judgment against the borrower for the deficiency. In addition, the Court held that Michigan law does not impose a temporal limitation preventing collection of rental income collected before default.

The Court also held that where an assignment of rents is clear, that the mortgage lender is entitled to "all rents" associated with the mortgaged property, such assignment is not limited to rents received after the borrower's default, but also includes rents received before the borrower's default. Specifically, the mortgage here provided that the assignment of all current and future rents to the lender was absolute; it was primary security securing payment of the indebtedness, and the lender granted a revocable license to the borrower to collect and retain the rents from the subject property. The borrower's license to collect and retain rents from the property was immediately terminated upon the borrower's default. Once the default occurred, the lender was entitled to any rental income from the subject property received by the borrower.

Where the assignment acts as primary security to secure payment of the underlying indebtedness, and the assignment and mortgage themselves are clear that the assignment applies to "all rents", then the statute does not limit the lender to collecting only post-default rents.

The Court's opinion, however, did leave a gap in its reasoning by not mentioning that if a deficiency remains after a foreclosure sale, the mortgage's lien on the subject property is discharged by the sale and the terms of the mortgage and security agreement may survive the foreclosure sale.[5] Specifically, the assignment of rents provision in the mortgage was a mortgage term which was not extinguished by the foreclosure sale. Thus, enforcing the assignment of rents provision was not pursuing the borrower personally for the deficiency.

Moreover, the Court's opinion was limited to the facts of the case at hand. The opinion leaves unanswered the question, whether a lender is permitted to recover rental income that was received prior to default but which has already been distributed to the partners. In the case at hand, the borrower was insolvent and therefore it could not make any distributions. It is not clear whether the Court would have reached the same result had the borrower distributed the rental income while it was still solvent.

Given this opinion, borrowers should understand that, absent limiting language, all rents may be claimed by a lender when a loan is in default without regard to whether the rents were received before or after an event of default. Accordingly, a borrower should carefully review the mortgage, assignment of rents and security agreement language to determine what rights a lender will have against the borrower after a foreclosure sale. In addition, a borrower should attempt to negotiate to include clear language in the documents that resolves any question as to what rents are available to the lender after an event of default.

The borrower in this case has sought permission to appeal to the Michigan Supreme Court. It will be interesting to see what the Supreme Court has to say about this decision.

Stay tuned for further information.

"The mortgage lender is entitled to "all rents" associated with the mortgaged property … including rents received before borrower's default."

1 *7800 W. Outer Road Holdings L.L.C. v. College Park Partners, L.L.C.*, Not Reported in N.W.2d, 2012 WL 2402010, Docket No. 303182., June 26, 2012 (Mich.App.).

2 MCL 554.231.

3 MCL 554.232.

4 *7800 W. Outer Road Holdings L.L.C., supra* note 1 at 2, citing *Otis Elevator Co. v. Mid-Am Realty Investors*, 206 Mich. App. 710, 713-714; 522 NW2d 732 (1994).

5 See *Security Trust Co. v. Sloman*, 252 Mich. 266 (1930) (stating that an assignment of rents may, but need not, be included in the mortgage itself).

No Really, It's A Tax

By: Geoffrey N. Taylor

Continued From Page 1

If a home is not the taxpayer's principal residence (*e.g.*, a vacation home or rental property), his net investment income is $300,000, the excess of his income ($220,000 + $300,000) over the $200,000 threshold is $320,000. In that case, the taxpayer would be liable for a surtax of $11,400 (3.8% of the lesser of $300,000 or $320,000).

The surtax will be in addition to capital gains taxes, which are also expected to increase in 2013.

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