

02-055

**TAXATION: REVIEW OF LOCAL TAXES – COLLECTION BY DISTRESS, SUIT, LIEN, ETC. – COLLECTION BY TREASURERS — LOCAL OFFICERS – TREASURERS.**

**CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY – ENFORCEMENT GENERALLY.**

**Sheriff is appropriate official to determine reasonableness of levying distress warrant for delinquent taxes and holding public sale of property, proceeds from which will not satisfy secured interests or unpaid taxes. Meaning of 'priority' as term relates to payment of sale proceeds toward satisfaction of delinquent taxes or secured interests. Secured party with lien on distressed property must receive notice of distress sale.**

The Honorable John R. Newhart  
Sheriff for the City of Chesapeake  
September 27, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

### **Issues Presented**

You pose several questions concerning the responsibilities and duties of a sheriff regarding the enforcement of a treasurer's distress warrant. You ask whether a sheriff is required to enforce a distress warrant for delinquent taxes when such enforcement will result in the sale of property from which the proceeds will not fully satisfy a secured party with a lien on the distressed property or the delinquent taxes. You also inquire concerning the definition of "priority," as that term is used in § 58.1-3942(C), which provides that a security interest perfected prior to the distraint of the property shall have priority over the payment of certain delinquent taxes. Finally, you ask whether a secured party has any rights concerning the sale of distressed property on which he has a lien when the sale does not satisfy the secured party's lien.

### **Response**

Under § 8.01-490, a sheriff is not required to make an unreasonable levy. It is my opinion that it is within a sheriff's discretion to determine whether the levy of a distress warrant is unreasonable; however, such discretion should not be exercised arbitrarily. In making such determination, a sheriff should consider

such factors as the divisibility of the property and the quality, quantity, nature, and value of the property in relation to the amount of the levy. The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

It is also my opinion that the term "priority," as used in § 58.1-3942(C), means that a secured party whose security interest is perfected prior to any distraint for taxes shall be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. If the delinquent taxes are specifically assessed against the distrained property, the proceeds of the distress sale must be paid first toward delinquent taxes and any remainder toward secured interests.

Finally, it is my opinion that a secured party with a lien on distressed property is required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492.

### **Background**

You relate that a local treasurer's office has requested the sheriff to levy on and sell for taxes certain tangible personal property such as automobiles, motorcycles, and boats. You also relate that some of the items may have a primary lien on them and that the sale of such items would not satisfy a secured party whose security interest was perfected prior to any distraint for taxes. You are concerned that such sale does not effect satisfaction of the treasurer's distress warrant and is thus an unreasonable levy on the property.

### **Applicable Law and Discussion**

The powers and duties of a treasurer are set out generally in Article 2, Chapters 31<sup>1</sup> and 39<sup>2</sup> of Title 58.1. The treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality served by the treasurer.<sup>3</sup> Section 58.1-3919 grants local treasurers the authority to collect delinquent taxes by distress.<sup>4</sup> Article 3, Chapter 39 of Title 58.1, §§ 58.1-3940 through 58.1-3964, sets forth the requirements for collection of delinquent taxes by distress. Specifically, § 58.1-3941 addresses the use of distress by the treasurer and the sheriff, among others, for collection of such

taxes.<sup>5</sup> Section 58.1-3941 authorizes specified tax collectors to distrain property. The distraint of property for the collection of delinquent taxes may be accomplished without an initial judicial proceeding.<sup>6</sup> Distress for taxes is the seizure of personal property to enforce payment of taxes due, to be followed by its public sale.<sup>7</sup> In acting pursuant to § 58.1-3941, a sheriff may take possession of the debtor's property and remove it from the premises.<sup>8</sup>

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act."<sup>9</sup> In the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his locality.<sup>10</sup> As a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.<sup>11</sup>

A sheriff may use a distress letter from a treasurer to seize property.<sup>12</sup> A sheriff is required to collect the delinquent taxes described in the treasurer's distress letter.<sup>13</sup> Additionally, a sheriff may not require the treasurer to provide an indemnity bond for liability arising from distress.<sup>14</sup> A January 1997 opinion of this Office determined that service by the sheriff of a distress warrant is mandatory.<sup>15</sup> The opinion relies on former § 15.1-79, which provided:

Every officer to whom any order, warrant, or process (*including, but not limited to, any distress warrant, tax lien or administrative summons issued by a city or county treasurer*) may be lawfully directed, shall execute the same within the boundaries of the political subdivision in which he serves and may execute the same in any contiguous county or city in accordance with the provisions of § 19.2-76.<sup>[16]</sup>

Subsequent to the January 1997 opinion, § 15.1-79 was repealed as part of the recodification of Title 15.1.<sup>17</sup> The drafting note pertaining to the recodification provides that "the substance of [§ 15.1-79] is found in §§ 8.01-295<sup>[18]</sup> and 19.2-76."<sup>19</sup> Neither § 8.01-295 nor § 19.2-76 contains the mandatory language in § 15.1-79 requiring a sheriff to execute such distress warrants. Therefore, the statutory provision upon which the determination of the 1997 opinion was based is no longer effective.

A distraint letter issued by a treasurer is a command to the sheriff to seize the specified property of the delinquent taxpayer. The sheriff levies on the specified property and conducts a sale of such property to satisfy the delinquent taxes. Section 8.01-490 provides

that "[o]fficers shall in no case make an unreasonable distress or levy." It is this provision that prompts your first question.

Although there is no comparable statutory language to replace the requirement in repealed § 15.1-79 that a sheriff execute a distress warrant, it appears that § 8.01-490, standing alone, allows a sheriff to refuse to perform an unreasonable levy of a distress warrant. Under § 8.01-490, it is within the sheriff's discretion to determine whether a levy is unreasonable.<sup>20</sup>

The sheriff's discretion in determining the unreasonableness of a levy, however, may not be exercised arbitrarily.<sup>21</sup> Each specific levy will have different circumstances bearing on whether the action to be taken by the sheriff is unreasonable. For instance, as noted in a prior opinion of this Office, if the value of a car is less than the amount of the prior lien, it raises a question of reasonableness in levying on the property.<sup>22</sup> A levy on property that does not appear to have a fair market value sufficient to fully satisfy a secured party or the delinquent taxes, however, is not per se unreasonable. The mere act of distraint may prompt a delinquent taxpayer to pay the taxes due and owing. Additionally, until the sale actually occurs, the fair market value of the distrained property is not truly known. Although there may be resources that give an indication of the fair market value of the property, it is the distress sale that determines the ultimate value of the property. If the delinquent taxes against the distrained property are specifically assessed, either per item or in bulk, the proceeds of the tax sale will be applied first to the delinquent taxes.<sup>23</sup> As such, the treasurer has an interest to distraint such property even when the sale will not fully satisfy the delinquent tax amount or the secured party.

Determining whether a given levy is "unreasonable" depends on the circumstances of a particular situation.

Several factors must be considered in the determination of whether the levy in a particular case is unreasonable or excessive. These considerations include the divisibility of the property, the quality, quantity, and nature of the property, and the value of the property in relation to the amount of the levy.<sup>[24]</sup>

For example, the distraint of substantially more property than is necessary to satisfy the delinquent taxes may be considered unreasonable if the property is divisible in such a way as to only levy against the items necessary to pay the debt owed.<sup>25</sup> Additionally, the person making the levy does not necessarily know

the amount of the lien of the secured party against the distrained property. As such, the person may not be able to determine whether the levy is in fact "unreasonable," since he does not know whether the sale proceeds would be available to satisfy at least part of the delinquent tax obligation. Arguably, a levy is reasonable, with regard to the economic value of the property, as long as at least one creditor receives some payment. Conversely, an "unreasonable" levy would be one where no creditor would get anything. The determination of "unreasonable distress or levy" in these circumstances is also impacted by which creditor is paid first from the proceeds of the tax sale, as discussed below.

The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law.<sup>26</sup> Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

You next ask the meaning of "priority," as that term is used in § 58.1-3942(C). Section 58.1-3942(C) provides that "[a] security interest perfected prior to any distraint for taxes shall have priority over all taxes, except those specifically assessed either per item or in bulk against the goods and chattels so assessed." The term "priority" is not defined in Title 58.1. Consequently, the term must be given its ordinary meaning within the statutory context.<sup>27</sup> The term "priority" means "precedence in rank" or "an interest having prior claim to consideration."<sup>28</sup>

The practical meaning of § 58.1-3942(C) is that a secured party, whose interest is secured before the distraint, will be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. For example, if a taxpayer fails to pay the personal property tax assessed against a specific vehicle and the treasurer decides to distraint the taxpayer's vehicle for payment of the delinquent taxes, the proceeds from the sale of the vehicle would be paid first to the treasurer.<sup>29</sup> Any proceeds remaining after payment of the personal property taxes would be paid to the secured party, whose interest is secured before the distraint, up to the amount of the lien. Because the secured party may not receive any proceeds from such a sale does not necessarily mean the levy is unreasonable.

Conversely, if taxes have not been assessed against specific property prior to its distraint,<sup>30</sup> the proceeds from the sale of the

distrained property would be paid first to the secured party, whose interest was secured prior to distraint of the property, with the remainder paid toward the delinquent taxes. In each case, any proceeds remaining after satisfaction of the delinquent taxes and any secured interests would be paid to the taxpayer.

Section 58.1-3942(C) does not require that the secured party's lien be totally satisfied prior to levying and selling an item to satisfy any portion of a distress warrant. In certain cases, as described above, it does mean that the secured party would be paid first; however, the statute does not provide a guarantee of full payment to the secured party before property may be distrained and sold. Said another way, whether the secured party's lien is completely satisfied from the proceeds of the tax sale is of no consequence to the authority of the treasurer to distraint the property and have it sold. Section 58.1-3942(C) merely prioritizes the circumstances under which creditors are to receive payment from a distrained property sale.

Therefore, as a general matter, the term "priority" in § 58.1-3942(C) means that the secured party, whose interest is secured before the distraint, is paid first from the proceeds of a sale of distrained property, to the extent of his lien, before the treasurer is paid the remainder for delinquent taxes, unless the delinquent taxes for which the property is being distrained have been specifically assessed against the distrained property. If the delinquent taxes for which the property is being distrained were specifically assessed, either per item or in bulk, the proceeds of the sale of the distrained property are paid first to the treasurer, with any remaining funds paid to the secured party, to the extent of his lien and, finally, to the former owner of the property.

You also inquire whether a secured party with a security interest in distrained property has any rights concerning the sale of the property when the sale will not satisfy the amount owed to the secured party. Section 58.1-3942(B) makes applicable certain notice requirements when distress goods are subject to a security interest and sale by the treasurer and sheriff. Additionally, § 8.01-492 details the procedure for the sale of distressed property by these officials. A prior opinion of this Office concludes that the procedure set forth in § 8.01-492 should be followed in such sales.<sup>31</sup> Section 8.01-492 provides that the officer conducting the sale of property

shall fix upon a time and place for the sale thereof and post notice of the same at least ten days before

the day of sale at some place near the residence of the owner if he reside in the county or city and at two or more public places in the officer's county or city.

### **Conclusion**

Under § 8.01-490, a sheriff is not required to make an unreasonable levy. Accordingly, it is my opinion that it is within a sheriff's discretion to determine whether the levy of a distress warrant is unreasonable; however, such discretion should not be exercised arbitrarily. In determining whether a levy is unreasonable, a sheriff should consider such factors as the divisibility of the property and the quality, quantity, nature, and value of the property in relation to the amount of the levy. The reasonableness of a levy, in any given circumstance, is a determination of fact. Attorneys General consistently have declined to render official opinions when the request involves determinations of fact rather than questions of law. Therefore, I am unable to render an opinion regarding whether the levy you describe is unreasonable.

It is also my opinion that the term "priority," as used in § 58.1-3942(C), means that a secured party whose security interest is perfected prior to any distraint for taxes shall be paid first out of any proceeds from the sale of the distrained property, unless the taxes for which the property was distrained were specifically assessed against the distrained property. If the delinquent taxes are specifically assessed against the distrained property, the proceeds of the distress sale must be paid first toward delinquent taxes and any remainder to secured interests.

Finally, it is my opinion that a secured party with a lien on distressed property is required to receive notice of a distress sale as provided in §§ 58.1-3942(B) and 8.01-492.

<sup>1</sup>Va. Code Ann. §§ 58.1-3123 to 58.1-3172.1 (Michie Repl. Vol. 2000 & LexisNexis Supp. 2002).

<sup>2</sup>Va. Code. Ann. §§ 58.1-3910 to 58.1-3939 (Michie Repl. Vol. 2000 & LexisNexis Supp. 2002).

<sup>3</sup>Section 58.1-3127(A) (Michie Repl. Vol. 2000); § 58.1-3910 (LexisNexis Supp. 2002).

<sup>4</sup>1997 Op. Va. Att'y Gen. 203, 204.

<sup>5</sup>"Any goods or chattels, money and bank notes in the county, city or town belonging to the person or estate assessed with taxes, levies or other charges

collected by the treasurer may be distrained therefor by the treasurer, sheriff, constable or collector." Va. Code Ann. § 58.1-3941 (Michie Repl. Vol. 2000).

<sup>6</sup>See, e.g., 1997 Op. Va. Att'y Gen., *supra*, at 204 (noting statutes detailing procedure for collection of delinquent taxes by distress that does not require initial judicial proceeding).

<sup>7</sup>1972-1973 Op. Va. Att'y Gen. 380, 380.

<sup>8</sup>*Id.* (citing repealed § 58-1001, now codified at § 58.1-3941).

<sup>9</sup>Va. Const. art VII, § 4.

<sup>10</sup>0 C.J.S. *Sheriffs and Constables* § 55 (2000); 1980-1981 Op. Va. Att'y Gen. 322, 322.

<sup>11</sup>See *Hilton v. Amburgey*, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933); 80 C.J.S., *supra* § 52, at 153-54.

<sup>12</sup>1997 Op. Va. Att'y Gen., *supra* note , at 203.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 204.

<sup>16</sup>1995 Va. Acts ch. 17, at 38.

<sup>17</sup>See 1997 Va. Acts ch. 587, at 976 (enacting cl. 1); *id.* at 1401 (enacting cl. 13, 14).

<sup>18</sup>Section 8.01-295 provides:

"The sheriff may execute such process throughout the political subdivision in which he serves and in any contiguous county or city. If the process appears to be duly served, and is good in other respects, it shall be deemed valid although not directed to an officer, or if directed to any officer, though executed by some other person. This section shall not be construed to require the sheriff to serve such process in any jurisdiction other than in his own."

<sup>19</sup>5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia*, S. Doc. No. 5, at 420 (1997).

<sup>20</sup>Although a sheriff is responsible for determining whether a levy is unreasonable, such a decision is subject to judicial review, should the decision be challenged in court, at which point a trier of fact will determine whether the sheriff made an unreasonable levy.

<sup>21</sup>See 80 C.J.S., *supra* note , § 52, at 154.

<sup>22</sup>1982-1983 Op. Att'y Gen. 71, 72, 73 n.3 (determining that, even though vehicle was not worth amount necessary to satisfy lien, once judgment creditor has satisfied indemnifying requirements and sheriff is directed to sell property, he must do so, in spite of its value).

<sup>23</sup>See § 58.1-3942(D) (LexisNexis Supp. 2002); see also 1972-1973 Op. Va. Att'y Gen., *supra* note , at 380 (if property is subject to security interest perfected prior to any distraint for taxes, only amount of taxes assessed against property subject to such interest may be paid over to treasurer, and balance must be paid to secured party to extent of debt due to him.)

<sup>24</sup>Horbach v. Traverse Technologies, Inc., 35 Va. Cir. 249, 249 (1994) (holding that sheriff's levy on 1,000 shares of stock valued in excess of \$1 million to satisfy judgment for \$210,542 was unreasonable and excessive).

<sup>25</sup>See *id.*

<sup>26</sup>See op. no. 01-118 to Michael M. Collins, Alleghany Co. Att'y (Apr. 12, 2002), available at <http://www.vaag.com/media%20center/Opinions/01-118.htm>; 1997 Op. Va. Att'y Gen. 195, 196 & n.8.

<sup>27</sup>See Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); Loyola Fed. Savings v. Herndon, 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978) (construing ordinary meaning of statutory terms "prescribe" and "owner," respectively).

<sup>28</sup>The Oxford American Dictionary and Language Guide 791 (1999).

<sup>29</sup>Please note that the lien derived from an assessment specifically against the property not only has priority over prior secured creditors, but also may be enforced after the property has been sold to a bona fide purchaser. See § 58.1-3941 ("Property on which taxes were specifically assessed, whether assessed per item or in bulk shall be subject to distress after it passes into the hands of a bona fide purchaser for value."); see also 1982-1983 Op. Va. Att'y Gen. 618 (citing Chambers v. Higgins, 169 Va. 345, 350-51, 193 S.E. 531, 533 (1937) (noting that tangible personal property that has passed out of possession of delinquent owner is not liable for delinquent taxes, unless treasurer has assessed tax against each specific item of property)). Such specific assessments constitute liens on each specific piece of personal property for the taxes due thereon. See Drewry v. Baugh and Sons, 150 Va. 394, 401, 143 S.E. 713, 715 (1928).

<sup>30</sup>An example of this type of tax would be the business, professional and occupational license tax assessed pursuant to §§ 58.1-3700 to 58.1-3735.

<sup>31</sup>1953-1954 Op. Va. Att'y Gen. 204 (citing former § 8-422.1).

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