



CPA Juan C. Zaragoza Gómez
Secretary

December 2, 2016

ADMINISTRATIVE DETERMINATION NO. 16-13

**ATTENTION: OFFICE OF COURTS ADMINISTRATION, JUDGES, ATTORNEYS,
MORTGAGEES, AND PROPERTY REGISTRARS**

**SUBJECT: DEPARTMENT OF THE TREASURY PARTICIPATION IN COURT
ACTIONS FILED BY MORTGAGEES REGARDING MORTGAGE
FORECLOSURES ON REAL PROPERTY BELONGING TO DECEASED
INDIVIDUALS**

I. Statement of Motives

Section 2054.01(a) of the Puerto Rico Internal Revenue Code of 2011, as amended (the "Code"), provides that all estate and gift taxes imposed pursuant to Subtitle B of the Code, as well as all other types of taxes already determined, included or includable as a reduction of the estate in accordance with Section 2023.03 of the Code, shall constitute a *priority lien* in favor of the Government of the Commonwealth of Puerto Rico ("Government") on each and every one of the assets of the gross estate or object of a gift, as the case may be. This lien originates on the date of transfer of the property and is preferred over all debts, credits, or liabilities of any kind that originate after such transfer. Furthermore, said lien shall continue in force until it has been cancelled in accordance with the provisions of the Code.

For these purposes, the Code does not establish how to determine the transfer date indicated in Section 2054.01(a) of the Code. Notwithstanding, Article 603 of the Puerto Rico Civil Code provides that the rights to the estate of a person are transmitted from the moment of the decedent's death. Therefore, and according to the above, the lien imposed by Section 2054.01(a) of the Code arises at the moment of death of the owner of the property, that is, on the date of death of the decedent.

With regards to the property subject to the priority lien stated above, Section 2054.05(a)(1) of the Code provides that "no court shall approve the partition or distribution, sale, delivery, transfer or foreclosure of a mortgage without there being deducted and deposited in court,

from the product of the auction, in the name of the Secretary, the amount of the tax that the Secretary has determined or may determine as pertaining to said property.” Although the above section refers to the participation of the Department of the Treasury (“Department”), if any, after the auction has been held, and at the time of distribution of its proceeds, this provision has been interpreted and used by judges, attorneys, and mortgagees to include the Department as a defendant or as a party with interest in many cases regarding mortgage foreclosures in which the mortgagor has died.

Meanwhile, Article 19 of Act 210-2015, known as the Commonwealth of Puerto Rico Property Registry Act (“Registry Act”) provides that “[r]egistered titles shall become effective for third parties from the date of their registration.” It also provides that “[i]n order to determine preference between two or more registrations of the same property, attention shall be given to the date, hour, and presentation number of the respective titles in the Registry.” The same was stated in Article 53 of the Mortgage and Property Registry Act of 1979 (“Mortgage Law”), repealed by the Registry Act.

In the specific case of the mortgage as a real right on a specific real property, Article 54 of the Registry Act, which has its origin in Article 155 of the Mortgage Law, recognizes that “[a] mortgage directly and immediately binds an estate and the rights on which it is imposed, whoever its owner or titleholder may be, to the fulfillment of the obligation for the security of which it was constituted.” According to said article, mortgages are real encumbrances and can be foreclosed regardless of any subsequent right acquired on the same property or mortgage rights.

As stated above, the priority lien created pursuant to Section 2054.01(a) of the Code originates on the date of transfer of the property, that is, on the date of death of the owner of the property. Therefore, a mortgage validly constituted prior to the death of a decedent takes precedence over the lien imposed by Section 2054.01(a) of the Code in favor of the Government. This interpretation was adopted by the Supreme Court of Puerto Rico in *Fernández Rivera v. Tribunal Superior*, 93 D.P.R. 629 (1966), where it was resolved that “there is no doubt about the priority in Puerto Rico of a mortgage with a prior date, duly registered in our Property Registry, over any federal tax lien with a subsequent date.”

As a general rule, the Department appears in these lawsuits through special appearances and requests, among other things, to be excused from appearing at proceedings before the court during the process of mortgage foreclosure, and that it be notified when the foreclosed property is sold in public auction. The Department's participation in these cases is a passive one, since the Government's interest arises after the sale in public auction of the foreclosed property and, mainly, if there is a surplus.

The purpose of this Administrative Determination is to clarify the official position of the Department regarding its participation, in accordance with the provisions of Section 2054.05(a)(1) of the Code, with regards to judicial actions filed by mortgagees on foreclosures of real property belonging to deceased individuals when such mortgages were validly constituted prior to the death of the debtor.



II. Determination

A. Lien under Section 2054.01(a) of the Code

The priority lien in favor of the Government on each and every one of the assets of the gross estate or object of a gift, as the case may be, established by Section 2054.01(a) of the Code, and which originates on the date of transfer of the property, shall be understood to arise at the moment of death of the owner of the property. Therefore, a judicial action for the foreclosure of a mortgage lien validly registered on the property of a deceased mortgagor, shall take precedence over the lien imposed by Section 2054.01(a) of the Code in favor of the Government, because the latter does not arise until the date of death of the deceased or mortgagor. This interpretation is consistent with the provisions of Article 54 of the Registry Act, which states that a mortgage has preference as to the property on which it is imposed and can be executed regardless of any subsequently acquired right over it. Nevertheless, in order for the mortgage lien to have priority over the priority lien created pursuant to Section 2054.01(a) of the Code, it must have been validly constituted and registered prior to the death of the decedent.

Pursuant to the above, the provisions of Section 2054.05(a)(1) of the Code shall *not* apply to a mortgagee whose lien was validly constituted and registered prior to the death of the mortgagor. To such effects, mortgagees will not be required to include the Department as a defendant or as a party with interest from the beginning of the legal action, nor will it be necessary to notify documents, motions, interlocutory orders, including notices of the sale in public auction, issued during the judicial process of such cases of mortgage foreclosures in which the mortgagor has died.

In summary, and in accordance with all of the above, a court may authorize the foreclosure of a mortgage constituted on property belonging to a decedent without being subject to the provisions of Section 2054.05(a)(1) of the Code, in those cases in which the mortgage at hand was validly constituted and registered prior to the death of the decedent.

B. Sale of the property in public auction

In those cases in which the proceeds from the sale of the property in public auction are *equal to or less* than the amount of the balance owed to the mortgagee, the mortgagee will *not* be required to execute any proceedings before the Department. Likewise, in those cases where the property is awarded to the mortgagee in full or partial payment of the debt, the mortgagee will also not be required to execute any proceedings before the Department.

However, if the proceeds from the sale of the property in public auction *exceed* the balance owed to the mortgagee, which lien was validly registered before the death of the decedent, Section 2054.05(a)(1) of the Code will be applicable, and no distribution of the surplus may be made without first deducting and depositing in court, in the name of the Secretary, the amount owed in taxes. Additionally, the surplus may *not* be withdrawn without first complying with the provisions of Section 2054.02 of the Code for the cancellation of the lien.



In all the situations described above, the court shall order the Puerto Rico Property Registrar to perform the transfer of the foreclosed property without the need to present the corresponding Certificate of Release of Estate Tax Lien established in Section 2054.02 of the Code. In these cases exclusively, the Registrar is authorized to register the transfer of ownership, despite the provisions of Section 2054.05(a)(1) of the Code.

C. Transition

As a transitional measure in active and in-process cases, in which the appearance of the Department has been required, the Department's Office of Legal Affairs will be accepting summons, documents, motions, interlocutory orders, including notices of the sale in public auction, related to such cases, until October 31, 2016. As of that date, the Department will not be receiving said documents relating to those cases of mortgage foreclosure in which the mortgagor has died and which have been filed by a mortgagee whose lien was validly constituted and registered prior to the death of the mortgagor.

The provisions of this Administrative Determination may be used by mortgagees and/or their legal representatives to notify the courts and Property Registrars of the official position established by the Department through this publication.

III. Effectiveness

The provisions of this Administrative Determination are effective immediately.

For additional information regarding the provisions of this Administrative Determination, you may contact us at (787) 725-0750.

Cordially,



Juan Zaragoza Gómez

