No. 13-0886 – *EB Dorev Holdings, Inc. v. W.Va. Dep't of Admin., Real Estate Div'n*

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**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

LOUGHRY, Justice, concurring:

While I agree with the majority's decision to affirm the lower court's ruling voiding the sale of the subject tax liens to EB Dorev Holdings, Inc. ("Dorev"), the majority has engaged in a tortured analysis to reach its desired result. Claiming that this Court has previously recognized the doctrine of merger,[1] the majority resolved a case of first impression through an unsigned opinion that lacks the necessary new point of law as required by our state constitution.[2] Because I believe that the majority could have reached the same result without relying on the doctrine of merger, I am compelled to write separately.

Like the majority, I agree that the circuit court erred in finding that the subject property was rendered exempt from 2009 taxes based solely on the Department of Administration's ("DOA") purchase of the properties in August and September of 2008.

[1]It is telling that even the majority acknowledges that the doctrine of merger has only been "recognized" but not adopted into this state's jurisprudence.

[2]*See* W.Va. Const. art. VIII, § 4 (providing that "it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case in which an opinion is written and in which a majority of the justices thereof concurred"); Syl. Pt. 2, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001) ("[N]ew points of law . . . will be articulated through syllabus points as required by our state constitution.").

Because the tax period for the subject tax debt that was assessed on July 1, 2009, began on July 1, 2008, the former property owners (three holding companies that reportedly have been dissolved) were undisputedly responsible for the 2009 property taxes under this state's ad valorem property tax schema. By law, "[t]he taxes upon all property shall be paid by those who are the owners thereof *on the assessment date whether it be assessed to them or others.*" W.Va. Code § 11-3-1(c) (2013) (emphasis supplied). The tax obligation did not simply vaporize as an adjunct to the DOA's purchase of the subject property. Regardless of the sale of the subject property to the DOA, for purposes of tax year 2009, the former land owners remained liable under our tax statutes for the assessed ad valorem taxes based on their property ownership on the statutory assessment date–July 1, 2008.

In an attempt to effectively render the tax liens nonexistent, the majority looks to what it declares to be an "established" doctrine of merger. Application of this principle would require the conclusion that the state's lesser, in comparison, right as a lien holder merges into its greater right as a land owner, and the tax lien is automatically extinguished concurrent with the passing of title. Upon analysis, however, this Court has only *recognized* but never formally adopted the merger doctrine into our jurisprudence. The case upon which the majority relies, *Armstrong Products Corp. v. Martin*, 119 W.Va. 50, 192 S.E. 125 (1937), held that land purchased by the state *at a tax sale* resulted in a merger of the state's tax lien into its purchased title. The logic that underlies that holding clearly does not extend to a non-

tax sale purchase such as that which occurred in this case.[3] Whereas a tax sale purchase typically implies an insolvent land owner (from whom future property tax payments are highly unlikely), the seller of property in a non-tax sale, such as this case, should have had, at least in theory, the necessary funds from which to pay the yet-to-be-billed tax assessment. Typically, the moneys needed to pay for the upcoming property tax bill are set aside in escrow from the proceeds of the property sale for just this purpose.[4] Consequently, by its holding in this case, the majority has arguably eliminated the duty of all future sellers of land to the state to pay the ad valorem tax obligation that the Legislature has decreed to be their responsibility. *See* W.Va. Code § 11-3-1(c). Such a deleterious and unnecessarily reductive effect on the county and state coffers clearly could not have been the majority's intent and, yet, that is likely a potential result from prospective application of this case.

In its haste to find precedent to support the voiding of the subject tax sale, the majority has overlooked additional reasons why the merger doctrine does not apply to this case. In an eminent domain proceeding, the Legislature anticipated a payment to the circuit court of the necessary sum required to pay any tax liens as a predicate to a property transfer.

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[3]Similarly, the case of *Turks v. Skiles*, 45 W.Va. 82, 30 S.E. 234 (1898), has no precedential effect on the issue of whether a property owner should be "forgiven" statutory tax obligations merely because the State of West Virginia purchases the property.

[4]Because the tax bills were sent by the sheriff to the two closing attorneys, it is presumed that the necessary funds were not set aside to pay the forthcoming 2009 tax bill. If in fact this is the case, the failure to provide funds for this tax obligation at the time of closing was clearly an oversight on the parties and their respective counsel's parts.

*See* W.Va. Code § 54-2-18 (2008). As Dorev correctly argued, this enactment disproves the majority's contention that tax liens on real estate disappear with the state's acquisition of title. Dorev persuasively reasoned that "[i]f the State cannot take title to property without ensuring the satisfaction of existing tax liens when exercising powers unique to government, then surely it cannot do so when it stands in the same position as any other buyer on the open market."

Yet another reason to reject the application of the merger doctrine to this case is gleaned from the reasoning for such doctrine as discussed in *State v. Locke*, 219 P. 790 (N.M. 1923), a case cited in *Armstrong* and heavily relied upon by the DOA. As support for the merger doctrine, the Supreme Court of New Mexico elaborated:

> The object of taxing property is to produce the revenues with which to conduct the business of the state; it is entirely inconsistent with our theory of government for the property of the state to be taxed, or sold for taxes, in order to produce the money to be expended by the state. Such a procedure is but taking the money out of one pocket and putting it in the other. Another consideration, which should not be overlooked, is that if public property, . . . is to be burdened with a tax lien, the public might lose it entirely through oversight or carelessness. . . .

*Id.* at 792. In seeking to distinguish *Locke,* Dorev argued that the rationale for adopting the merger doctrine was the prevention of nonsensical monetary transfers from one state coffer to another. Because our ad valorem property taxes are exponentially used in greater proportions for non-state taxing units, with the largest share going to county boards of

education,[5] Dorev advocated not only that the merger doctrine was inapplicable under the rationale of *Locke* but also that its application would defeat the legislative purpose underlying the statutory tax lien procedures. *See* W.Va. Code § 11A-3-1 (2010) (recognizing necessity of statutory tax lien sale mechanism for providing "regular tax income . . . particularly for school purposes").

While the distinction Dorev seeks to make fails on one hand, it succeeds on another. That the larger recipient of ad valorem tax receipts is a county entity instead of a state agency does not, of its own, defeat the basis articulated in *Locke* for relieving states from the unwanted effects of a tax lien sale. What the attempted distinction does, however, is to underscore the need to preserve these tax dollars rather than discarding the taxpayer's obligation to pay its ad valorem tax bill in one fell swoop simply because the state, rather than a private entity, is the buyer of the property.[6] While the objective of preventing the loss of public property through tax lien sales is certainly a laudable objective, there are other ways of securing that goal.

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[5]*See* W.Va. Code §§ 11-8-4 to -6(d) (2013).

[6]It is important to consider that not every property sale to the state will involve a judgment proof seller, as is purportedly the case here. Yet, in every property sale involving the state, the majority's opinion will effectively extinguish the seller's obligation to pay the ad valorem taxes accruing, but not yet legally assessed, as part of that sale. In so doing, the majority has effectively reduced the tax burden of solvent taxpayers lucky enough to sell their property to the state and correlatively decreased the tax receipts of the affected public bodies.

Inherent in our existing tax laws is a mechanism by which a sheriff can suspend a tax sale. Pursuant to West Virginia Code § 11A-3-7(a) (2010),

> Whenever it shall appear to the sheriff that any real estate included in the list has been previously conveyed by deed and no tax thereon is currently delinquent, or that the tax lien thereon has been sold previously and not redeemed, or that the *tax lien thereon ought not be sold for the amount stated therein, he shall suspend the sale thereof and report his reasons therefor to the county commission and to the Auditor*.

*Id.* (emphasis supplied). As this statutory provision makes clear, the Kanawha County sheriff had the authority to recognize the financial lunacy of allowing property worth more than $5,000,000,000 to be purchased for $57,000 in tax liens. Clearly, the Legislature foresaw the need to permit a sheriff to suspend a tax lien sale when the inadvisability of permitting that sale to proceed is made evident. A case such as this, where the amount of the tax liens is exceedingly disproportionate in comparison to the value of the property, is arguably one such scenario where a suspension would be statutorily warranted.[7]

Rather than choosing to void the subject tax sale under the merger doctrine, the circuit court could have set the sale aside by finding that the sheriff abused his discretion in failing to suspend the tax sale pursuant to his clear statutory authority. *See id.* Given the current ownership of the property by the state combined with the absurdity of allowing this

[7]As the majority makes clear, Dorev is entitled to a refund of the amount it paid to purchase the subject tax liens.

patently inequitable tax sale to go forward, a suspension was clearly required. Not only would Dorev be getting two pieces of property at considerably less than bargain basement prices, but it is worth recognizing that one additional consequence of the sale would have been the displacement of numerous state workers. Instead of trying to make an existing tax obligation vanish,[8] the interests of this state would have been better served had the majority turned its focus to addressing why state-owned properties are not subject to sale through the statutory tax lien procedures.[9] Accordingly, I respectfully concur.

[8]Critically, the tax obligation for 2009 still exists. Given the undisputed ownership by the former land owners on July 1, 2008, combined with the clear statutory tax obligation based on property ownership on such date, a tax obligation remains. *See* W.Va. Code § 11-3-1(c). The majority has utterly failed to consider the harmful effect to the county of much needed tax funds as a result of its ruling that the tax lien merged at the time of the sale. As demonstrated herein, that tax obligation did not vaporize with the sale; it remains due and owing to this date.

[9]Perhaps this is a matter for our Legislature to pursue.