

#39.31

5/11/71

First Supplement to Memorandum 71-32

Subject: Study 39.31 - Attachment, Garnishment, Execution (Earnings Protection Law--State Taxes)

Summary

The use of the Earnings Protection Law to collect delinquent state taxes presents problems that are difficult and complex. A number of policy questions are presented for Commission consideration in this memorandum. It is unlikely that satisfactory provisions to deal with state tax liability can be incorporated into the Earnings Protection Law in time to permit its distribution for comment after the June meeting. Accordingly, the staff suggests that some notation be made in the Earnings Protection Law that the problem of collection of state tax liability by withholding from earnings is under study and that, with this notation, the Earnings Protection Law recommendation be distributed for comment after the June meeting. During the next few months, the Commission should be able to develop satisfactory provisions to deal with withholding from earnings for state tax liability, and such provisions can be separately distributed for comment later and incorporated into the recommendation before it is submitted to the Legislature.

Existing Law

Under existing law, there are a number of procedures for the collection of unpaid, delinquent state taxes:

(1) The tax liability can be reduced to judgment; and, subject to the various exemptions on execution, the judgment can be collected in the same way any other judgment is collected.

(2) A warrant can be issued by the taxing authority, directed to the sheriff, that has the same effect as a writ of execution. Collection under such a warrant is subject to the exemptions from execution. Code Civ. Proc. § 690.51. Whether an exemption applies is determined in like manner as if the property were levied upon by writ of execution issued by the superior court of the county in which the property is located. Provisions that authorize issuance of such warrants are: Unemployment Insurance Code Section 1785 (unemployment compensation contributions); Revenue and Taxation Code Sections 6776 (sales and use taxes), 7881 (vehicle fuel license tax), 9001 (use fuel tax), 10111 (motor transportation tax), 16071 (gift tax), 18906 (personal income tax), 26191 (bank and corporation taxes), 30341 (cigarette tax), 32365 (alcoholic beverage tax). See also Revenue and Taxation Code Section 14321 (inheritance tax).

(3) A notice to withhold may be given by mail to any person who has in his possession or control any credit or other personal property or thing of value belonging to the person liable for the tax and such person may not dispose of the same without consent of the taxing authority unless tax is paid in full. (This is an attachment type of procedure.) Within a few days after receipt of the notice, the person notified makes a report to the taxing authority of the credits, personal property, or other asset. Provisions that authorize the giving of a notice to withhold are: Unemployment Insurance Code Section 1755 (unemployment compensation contributions); Revenue and Taxation Code Sections 6702 (sales and use taxes), 7852 (vehicle fuel license tax), 8952 (use fuel tax), 10051 (motor transportation tax), 11451 (private car tax), 16101 (gift tax), 18807 (personal income tax), 26132 (bank and corporation taxes), 30311 (cigarette tax), 32381 (alcoholic beverage tax). The personal income tax law provision (Revenue and Taxation

Code Section 18807) and bank and corporation tax provision (Revenue and Taxation Code Section 26132) contain a significant additional provision --they require that the person holding the credit or other personal property or thing of value of the taxpayer pay the amount of the delinquent taxes over to the Franchise Tax Board. The exemptions from execution are not applicable to moneys required to be withheld and paid over to the Franchise Tax Board pursuant to these two provisions. If, however, the Franchise Tax Board utilizes the warrant procedure to collect the delinquent taxes, the exemptions apply. Obviously, the taxing authority is most likely to seek to collect taxes by withholding from an employee's earnings when the delinquent taxes are personal income taxes.

Scheme Suggested at Last Meeting

At the last meeting, the Commission determined that warrants and withholding orders for the collection of state taxes should be given special treatment in the Earnings Protection Law. Basically, the Commission decided that a warrant or tax withholding order should be issued as under existing law for the maximum amount authorized under Section 723.50 and that the taxing authority should have the right to obtain an earnings withholding order from a court to withhold a greater amount than the maximum amount authorized under Section 723.50 subject only to the limitation that the taxpayer was entitled to retain such amount of his earnings as he proves is essential for the support of himself or his family. In addition, the taxpayer was to be permitted to obtain a court hearing to show that the maximum amount authorized to be withheld under Section 723.50 would leave him with an amount less than what is essential for the support of himself or his family.

An additional complication is that an earnings withholding order based on tax liability, whether or not the tax liability is of a type that would permit the taxing agency to issue a warrant or order to withhold, is to be given priority over all other withholding orders other than one for support.

Obviously, these decisions will require the drafting of a complete separate procedure for earnings withholding orders for state taxes.

Staff Suggestions

The following suggestions are presented for Commission consideration:

1. Under existing law, the state taxing agency is authorized to issue a warrant or withholding order for the collection of taxes without any court proceeding and without first obtaining a judgment.

The staff recommends that no new requirement be imposed that any court proceeding be commenced or order from the court be obtained to use a warrant or withholding order procedure. If the amount to be withheld from earnings is limited (subject to special provisions) to the maximum amount that can be withheld under Section 723.50 (withholding table), there is no need to involve the courts or to require the filing of papers with the court clerk. We would be reluctant to impose a significant paperwork requirement on the taxing authorities unless some significant benefit would result. Accordingly, the staff recommends that the state taxing authorities be permitted to prepare their own earnings withholding orders in cases where a warrant or withholding order is now issued and to send the earnings withholding order to the employer who would be required to withhold and send to the taxing authority the maximum amount permitted to be withheld under Section 723.50.

2. We do not believe that the taxpayer should be entitled to obtain an exemption under Section 723.51 (essential for support) where the earnings withholding order is for state taxes. We believe that the amounts that can be withheld under Section 723.50 are not so burdensome that the additional complexity that would be created by such a provision would be justified. Moreover, as a practical matter, the proposed scheme would significantly benefit the personal income tax delinquent since, under existing law, there is no restriction at all on the amount of his earnings that must be withheld and paid over to the Franchise Tax Board.

3. We believe that the taxing authorities should be permitted to obtain an earnings withholding order from the court to withhold all earnings of the taxpayer (for liability under the personal income tax law) other than that amount which he proves is essential for the support of himself or his family. We suggest that the following procedure be followed to obtain such an order: The Franchise Tax Board would file its determination of the amount of delinquent tax (including penalties and interest) with the court, together with a petition that the court issue an earnings withholding order directed to the employer to withhold all earnings of the taxpayer other than that amount which he proves is essential for the support of himself or his family. The petition, indicating the amount of tax due and other necessary information, would be served upon the taxpayer as in any other court action. At the time set for the hearing, the court would determine only the amount of the taxpayer's earnings that is exempt from the earnings withholding order, which amount could not exceed the amount exempt under Section 723.50. The only issue at the hearing would be the amount of earnings essential for support; the determination of the amount of the tax liability could not be reviewed.

The court would then issue the earnings withholding order in accord with its determination and such order would have continuing effect until paid.

4. Perhaps the procedure outlined in 3 above should also apply to orders under the Bank and Corporations Tax Law.

5. Under existing law, the warrant procedure for collection of state taxes makes available to the taxpayer the various exemptions from execution. The same procedure suggested for withholding orders for personal income tax liability might be authorized where warrants are now authorized. On the other hand, perhaps the taxpayer should be permitted to show that he should be entitled to have exempt more than the exemption provided by Section 723.50 (withholding table) because an additional amount is essential to the support of himself or his family. Since the staff would prefer to permit the taxing authority to itself issue the earnings withholding order in all state tax cases, we suggest that no additional exemption under the essential for support test should be provided. If such an additional exemption were to be provided, it would either be necessary for the taxing authority to file something with the court before sending the order to the employer or to provide a procedure whereby the taxpayer could initiate a proceeding to have the court determine whether he is entitled to the additional exemption. Neither would be desirable. Also, should the taxing authority be able to get a greater amount than that provided in Section 723.50 in all state tax collection proceedings, or should the greater amount be permitted to be obtained only in personal income tax cases or bank and corporation tax cases?

4. It appears that the tax laws generally authorize use of the warrant procedure, thus avoiding the need to reduce the tax liability to judgment.

However, there will be cases where the amount of tax liability will be reduced to judgment. The staff believes that an earnings withholding order based on a judgment for tax liability should be treated the same as the warrant procedure. If greater exemptions were available where a judgment is obtained, the taxing authority would be discouraged from using the judgment procedure.

5. We would give all earnings withholding orders for state taxes priority over all other withholding orders except orders for support.

Respectfully submitted,

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Executive Secretary