

Second Supplement to Memorandum 71-2

Subject: Study 39 - Attachment, Garnishment, Execution (Support Orders, Wage Earner Plans, and Tax Liens Under the Earnings Protection Law)

The federal Consumer Credit Protection Act of 1968 provides that earnings of an individual may not be garnished in excess of certain amounts, but that this garnishment restriction does not apply in the case of:

- (1) Any order of any court for the support of any person.
- (2) Any order of any court of bankruptcy under Chapter XIII of the

Bankruptcy Act.

- (3) Any debt due for any state or federal tax.

See 15 U.S.C. § 1673(b). Whether the states are bound by these particular exemptions, or whether they may alter them, is not specified.

Since the primary purpose of the federal act is to protect the individual from excessive garnishment, it is clear that the states may not exempt additional cases from the federal garnishment limitations. However, for the same reason, it seems fairly clear that the states may require that some of the listed exemptions--at least those subject to state control--are subject to garnishment restrictions and still obtain approval of the state statute. The Wage and Hour Division has declared its policy to favor state statutes which "provide the same or greater protections to individuals" as the federal garnishment limitations and exemptions. See 29 C.F.R. § 870.51.

If California is to adopt new earnings execution procedures, it should simultaneously determine which, if any, of the federal exemptions from the garnishment restrictions should also be exempt under state law, and whether any of the exempted cases should be governed by the new procedures.

Court Order Under Chapter XIII of the Bankruptcy Act (Wage earner plans)

Chapter XIII of the Bankruptcy Act (11 U.S.C. §§ 1001-1086) deals with wage earner plans, which the federal act exempts from its garnishment restrictions. A wage earner plan is basically a court-approved and court-enforced payment plan. The plan must include:

provisions for the submission of future earnings or wages of the debtor to the supervision and control of the court for the purpose of enforcing the plan. [11 U.S.C. § 1046(4).]

The wage earner plan thus takes the place of wage execution schemes and becomes the sole means by which the debtor meets his obligations. (For example, the plan may include provisions for rejection of any of the debtor's executory contracts. 11 U.S.C. § 1046(6).) The plan has a certain amount of flexibility to prevent hardship to the debtor through changes in his circumstances, for the plan must provide that:

the court may from time to time during the period of extension increase or reduce the amount of any of the installment payments provided by the plan, or extend or shorten the time for any such payments, where it shall be made to appear, after hearing upon such notice as the court may designate, that the circumstances of the debtor so warrant or require. [11 U.S.C. § 1046(5).]

Because the wage earner plans provide protection to the individual employee, they should be exempt from the garnishment restrictions. And, because they contain their own enforcement mechanisms, they should be exempt from the state earnings execution procedures. And, as a practical matter, they must be exempt from state requirements because of the federal supremacy in and occupation of the bankruptcy field. There is no need to give wage earner plans priority over other creditors because they already encompass prior creditors, and they may control subsequent creditors, by plan or court order. The wage earner plans, then, should be totally excluded from any requirements or provisions of the California Earnings

Protection Law. Moreover, no earnings levy should be permitted while such a plan is in effect.

Debt Due for Any State or Federal Tax

(1) Federal Tax Debts. The federal tax collection process is heartless. The basis of debt collection is the "tax lien" which arises automatically if a taxpayer neglects or refuses to pay a properly assessed tax after demand; the lien covers all assets belonging to the taxpayer, including after-acquired property. See generally Int. Rev. Code of 1954, §§ 6321-6326. The principal means of tax lien enforcement is levy and sale. As a rule, bank deposits and wages due from an employer are levied on first. No state law may exempt or immunize any assets from levy for collection. Int. Rev. Code of 1954, § 6334(c). When a taxpayer's wages are levied on, the levy covers the entire wages, including part which would be exempt by state laws for minimum subsistence. See generally Int. Rev. Code of 1954, §§ 6331-6336; see also Federal Tax Procedure for General Practitioners (Cal. Cont. Ed. Bar 1968).

It should be noted that the federal tax lien is also enforceable by civil action and sale in the federal courts although this collection method is not as widely used as levy and sale. See Int. Rev. Code of 1954, § 7403.

Although harsh, there is nothing the state may do about the federal collection practice. The procedures are entirely a matter of federal law, as are any exemptions from levy which the government decides to allow. And federal law specifies the priority of federal tax liens over any other claims (with exceptions) on the debtor. See Int. Rev. Code of 1954, § 6323 and 31 U.S.C. § 191. Federal tax debts, then, are excluded by federal law from the requirements or provisions of the California Earnings Protection Act.

(2) State Tax Debts. The state may collect its tax debts through several methods, depending upon the type of tax involved. Typical collection methods include attachment, civil suit, security deposit, tax lien, warrant for collection, seizure and sale, and writ of execution. Whenever, pursuant to these methods, there is involved an execution sale, that sale is subject to the normal exemptions of certain property from execution, including restrictions on wage garnishment. See, e.g., the seizure and sale of property by the State Equalization Board to collect delinquent sales and use taxes:

6796. Any seizure made to collect a sales tax due shall be only of property of the retailer not exempt from execution under the provisions of the Code of Civil Procedure. [Cal. Rev. & Tax. Code § 6796.]

There is a similar limitation on the state's ability to collect through tax warrants issued by the State Controller. Code of Civil Procedure Section 690.51 provides:

690.51. In cases in which a warrant is issued by the State of California, or a department or agency thereof, pursuant to Section 1785 of the Unemployment Insurance Code, or Section 6776, 7881, 9001, 10111, 18906, 26191, 30341, or 32365 of the Revenue and Taxation Code, for the collection of tax liability owed to the state, a department or agency thereof, the tax debtor shall be entitled to the exemptions provided in Sections 690.1 to 690.29, inclusive, and all the provisions of Section 690.50 shall be applicable to the assertion and determination thereof. . . .

The federal act, by exempting state tax debts from garnishment restrictions, would have the effect of allowing the state to go much further than it presently does in executing upon wages. Such an allowance in California would be out of harmony with both prior legislative policy determinations and with the philosophy of the Earnings Protection Law. Any state levy upon earnings to satisfy a tax debt should be expressly subject to limitations on the amount that can be taken. In addition, in case the state proceeds by writ of execution (e.g., Rev. & Tax. Code §§ 16081-16083) or by warrant

subject to civil procedures (see, e.g., Code Civ. Proc. § 722.5), the Earnings Protection Law should control the execution process.

A tax claim of the state does not have preference over other claims unless the statute creating the particular tax gives it specific priority, e.g., sales and use taxes. Rev. & Tax. Code § 6756. For a discussion, see Jackson, California Debt Collection Practice §§ 22.23-22.28 (Cal. Cont. Ed. Bar 1968), attached as Exhibit I. Whether state tax claims should have priority under the Earnings Protection Law is a question that should be considered by the Commission.

Court Order for Support of any Person

There are numerous obligations imposed on individuals by law to support other people. These obligations are mainly familial in nature (e.g., parents must support children, Civil Code Section 196, and children must support impoverished parents, Civil Code Section 206; husband and wife are both obligated to support family, Civil Code Sections 242-243); but they need not be familial (e.g., a trustee may be required to support the beneficiary of a trust from its income, Civil Code Section 726; the victor in a duel must support the family of his slain opponent, Civil Code Section 3347). The issue of support rises most frequently in the breakdown of the family situation--death (e.g., family allowance during estate settlement, Probate Code Sections 680-684) and dissolution of marriage (e.g., temporary support during dissolution and custody proceedings, Civil Code Sections 4357, 4453, 4455, and following dissolution, Civil Code Sections 4700-4703, 4510).

Wherever there is a duty to support, a court may issue an order to enforce that duty. See, e.g., Code Civ. Proc. § 166. And, wherever a court orders payment of money, that order may be executed upon, as in a civil action. See Code Civ. Proc. § 1007. Of course, there are means other than execution by which a court order for support may be enforced. The Family Law Act (Civil Code Section 4540), for example, provides:

4540. Any judgment, order, or decree of the court made or entered pursuant to this part may be enforced by the court by execution, attachment, the appointment of a receiver, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary.

Other techniques available for particular types of support orders are irrevocable wage assignment with priority (child support, Civil Code Section

4701), independent civil action (child support, Civil Code Section 4703), security deposit (spouse support, Civil Code Section 4801(a)), temporary restraining order (Civil Code Sections 4359, 4518), criminal prosecution and fines (Penal Code Sections 270-273), property liens (Code of Civil Procedure Section 674.5), contempt (Code of Civil Procedure Sections 1209-1222), and writs of enforcement and possession (Code of Civil Procedure Section 684 et seq.).

Although contempt proceedings are apparently the most common means of enforcing support orders arising out of dissolution proceedings, execution is also one of the more important enforcement remedies for all types of support orders. See generally II The California Family Lawyer § 30 (Cal. Cont. Ed. Bar 1963). It should be noted, however, that execution as a means of enforcement of support orders under the Family Law Act is discretionary with the court.

Execution upon wages pursuant to spouse or child support orders may extend to the exempt as well as to the nonexempt portion of wages. See 3 Witkin, Parent and Child § 59(3). To the same effect is II The California Family Lawyer § 30.94 (Cal. Cont. Ed. Bar 1963):

As against a judgment for alimony or child support, the remaining one half of a judgment debtor's earnings (above the exempt one half) are not exempt from execution even if necessary for the support of his present family. See Bruton v. Tearle (1936) 7 C.2d 48, 59 P.2d 953; Henry v. Henry (1960) 182 C.A.2d 707, 6 C.R. 418. But when the debtor has remarried, the court has power to make an equitable division of his earnings between the two families. Rankins v. Rankins (1942) 52 C.A.2d 231, 126 P.2d 125 (decided before the 1955 amendment); see Henry v. Henry, supra.

This result is logical in view of the fact that the reason for the wage exemption is to enable the debtor to support his family, and a court support order is basically for support of "family."

However, although support orders are given a preferred position in not being subject to exemptions from execution, they are not given any priority in the execution scheme. It is clear that obligor and obligee in a support situation are not "debtor" and "creditor"; the obligee should not have to vie with commercial creditors for the court-ordered support.

The "Earnings Protection Law" provides potentially valuable procedures by which an obligee under a support order may reach the obligor's earnings. However, the act should make clear that the obligee is not subject to garnishment restrictions and that his claim has priority over others. The staff suggests, then, that support orders be enforceable through the procedural mechanisms of the Earnings Protection Law. The support order, however, will not be deemed a collection by a "judgment debtor," and, hence, will not have to compete for priority, will not be limited to a period of four months, and will not be subject to any 25% maximum restrictions. This result can be accomplished by specifying that the amount of the support order is deducted from the debtor's income in determining "disposable income" for purposes of other creditors. In this way, support recipients will be assured of getting their full allotment, without eating up the whole of a debtor's 25% exemption, and thus shutting others out.

Respectfully submitted,

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EXHIBIT I

B. Priority of State Taxes

1. [§22.23] STATUTORY BASIS

No general rule on priority of state or county taxes can be given. A tax claim of the state of California, or a county, does not have a preference over specific liens, such as those of attachments, created in favor of third parties before the state or county commences proceedings to enforce its claim, unless the statute creating the tax shows legislative intent to give it priority. *State v Biscailuz* (1950) 95 CA2d 635, 213 P2d 753; *Home Owners' Loan Corp. v Hansen* (1940) 38 CA2d 748, 102 P2d 417. The legislative intent to give priority to a tax lien need not be declared in express terms if the intent appears by reasonable inference. *Guinn v McReynolds* (1918) 177 C 230, 170 P 421.

Claims of the state for sales and use taxes (Rev & T C §6756), bank and corporation income taxes (Rev & T C §26163) and unemployment insurance contributions (Un Ins C §§1701-1702) are given priority in certain cases. Each of the California priority statutes contains a provision that the statute "does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid [to the state] became a lien."

See *San Francisco Redevelopment Agency v Pacific Vegetable Oil Corp.* (1966) 241 CA2d 606, 50 CR 676, holding that by enacting Rev & T C §2192.1, the legislature has given expression to its intent that tax liens be afforded priority over private liens and that the section is a statute declaratory of the intent of prior legislation and should be given retroactive effect.

2. PRIORITY OF TAX LIENS

a. [§22.24] Property Taxes Incured by Real Property

Every tax on real estate is a lien against the property assessed. Rev & T C §2187; Govt C §43001. Taxes on improvements may be made a lien on the property improved. Rev & T C §§2188-2188.3. Unless otherwise specifically provided, these tax liens attach annually on the first Monday in March preceding the fiscal year for which the taxes are levied. Rev & T C §2192. *Crawford v Hopper* (1943) 61 CA2d 636, 143 P2d 526. They have the effect of an execution levied on the property subject to the lien. Rev & T C §2193. A tax deed issued after a sale under a tax lien conveys "the absolute title to the property, free of all encumbrances," except certain taxes, assessments, and water rights, and easements and restrictions of record. Rev & T C §3520. Accordingly, tax liens on real property have been held to be a paramount lien. *California Loan & Trust Co. v Weis* (1897) 118 C 489, 50 P 697.

In 1966, the Second District Court of Appeals held in *San Francisco Redevelopment Agency v Pacific Vegetable Oil Corp.* (1966) 241 CA2d 606, 50 CR 676, that the city's tax lien for unpaid property taxes was entitled to priority over the private mortgage lien out of the proceeds of the condemnation award being held in escrow. Notwithstanding the provisions of Rev & T C §2192.1, the court held that the determination of priority is governed by the Supreme Court's opinion in *California Loan & Trust Co. v Weis, supra*, which determined that, based on the expression of the legislature in former Political Code §§3716 and 3788 (reenacted substantially unchanged in Rev & T C §§2194 and 3712 in 1939) tax liens are afforded priority over private contract or mortgage liens.

b. [§22.25] *Personal Property Taxes and Liens on Real Property*

Revenue and Taxation Code §2189 provides that "a tax on personal property is a lien on any real property on the secured roll also belonging to the owner of the personal property, if the personal property is located upon such real property on the lien date, and if the fact of the lien is shown on the secured roll" See also §2189.3 (tax lien on real property when personal property not located on the real property), §2189.5 (tax lien on leasehold when personal property on oil lease), §2189.6 (tax lien on land with improvements constituting parts of water distribution system).

A duly recorded certificate of delinquency in excess of \$150 on personal property not secured by a lien on any real property (together with interest and penalty) constitutes a lien on all personal and real property in the county owned by the taxpayer or acquired by him before the lien expires, except that the lien on personal property is not valid against a bona fide purchaser or encumbrancer without notice. The lien has the force, effect, and priority of a judgment lien and continues for three years from the time of the recording of the certificate unless sooner released or otherwise discharged. And the lien may be extended by filing for record a new certificate in the county recorder's office. See Rev & T C §§2191.3-2191.4. Section 2191.4 does not give the county a preference over any other lien that attached before the date when the certificate of delinquency of personal property tax was recorded, and the lien set forth in that section is subordinate to the preferences given to claims for personal services by CCP §1204 (wage claims in insolvency) and §1206 (wage claims on attachment, garnishment, or execution). Rev & T C §2191.5.

In *Rand Corp. v County of Los Angeles* (1966) 241 CA2d 585, 50 CR 698, the appellate court upheld taxes levied by the City and County of Los Angeles and the City of Santa Monica on Rand Corporation's possessory interest in property owned by the federal government that acquired the character of realty for purposes of taxation under California law. Rejecting the application of the federal law regarding the character of the property, the court stated: "The taxation of possessory interests in personal property of the government which has been attached to the land so as to become realty for taxation purposes under state law is not in conflict with any federal law." 241 CA2d at 594, 50 CR at 703.

c. [§22.26] *California Unemployment Insurance Contributions*

In *State v Biscailuz* (1950) 95 CA2d 635, 643, 213 P2d 753, 759, it was stated that former Unemployment Insurance Act §46(d) (now Un Ins C §1701(d))

grants the state a priority where there has been a levy upon property of an absconding, concealed, or absent employer even though he may be solvent. It appears to have been a legislative intention to give the state priority over an attachment or execution levied in such cases. . . [T]he state will enjoy no preference over valid liens created by the debtor or through action of his creditors before the state has reduced its claim to a lien.

The state is given no priority or preference in the absence of the perfection of a lien on the property of a debtor. *State v Biscailuz* (1951) 107 CA2d 71, 236 P2d 591. Section 1701(d) is the only provision in the code relating to liens created by levies under process of law, and under any other circumstances the state will have no preference over a prior attachment or execution. *State v Biscailuz* (1950) 95 CA2d 635, 213 P2d 753.

Section 1702 expressly specifies that §1701 "does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien," and that the state's lien is "subordinate to the preferences given to claims for personal services by [CCP §§1204, 1206]." In *State v Warfel* (1958) 162 CA2d 400, 328 P2d 456, on the question whether the state's right to collect interest and penalties in preference to other creditors ceases with assignment for benefit of creditors (see Un Ins C §§1113, 1701), the court held that the right to interest and penalties is not cut off by assignment but continues as a prior right until all have been actually paid.

d. [§22.27] State Personal Income Tax

Revenue and Taxation Code §§18861-18933 set up provisions for the collection of delinquent state income taxes that are similar to the provisions of Un Ins C §§1701-1702. When an attachment or execution is levied before any state income tax lien has been created, the creditor has priority, except that a state income tax lien shall be satisfied first, as against personal property, whenever the taxpayer is "an absconding, concealed, or absent person." Rev & T C §18933(d).

The preferences given to claims for personal services by CCP §§1204 and 1206 are given priority over state income taxes. Rev & T C §18933. Under Rev & T C §18908, when a levying officer is directed to perform services under the tax warrant, "the Franchise Tax Board shall pay or advance the sheriff, constable, or marshal, the same fees, commissions, and expenses as are provided by law for similar services pursuant to a writ of execution. The Franchise Tax Board, and not the court, shall approve the fees for publication in a newspaper." These fees and expenses may be collected from the taxpayer. Rev & T C §18909.

The superior court in the county where the property is levied has jurisdiction to determine third party claims of ownership (CCP §689) and claims of exemption (CCP §690.26) filed on property levied under a state warrant for collection. CCP §§689d, 690.27.

Revenue and Taxation Code §18882 provides that the lien is on "all property of the taxpayer in the county," and in its second sentence provides: "The lien has the force, effect, and priority of a judgment lien . . ." But since the first sentence makes the lien attach to all property of the taxpayer in the county, it is broader than the ordinary judgment lien. See *Schriber v Alameda County Title Ins. Co.* (1958) 156 CA2d 700, 320 P2d 82.

In *U.S. v Zuetell* (SD Cal 1956) 138 F Supp 857, in passing on the priority between the liens of the United States under 1939 IRC §§3670-3671 (now IRC §§6321-6322) and the lien of California to secure unpaid state income taxes under Rev & T C §§18881-18882, the court held that by the terms of the 1939 Revenue Code, the state lien is not the lien of a "judgment creditor" (under 1939 IRC §3672(a), now IRC §6323(a), and thus having priority over liens of the United States), and the liens of the United States arose before the date of the recordation of the certificate of lien by California. But see *U.S. v Gilbert Associates, Inc.* (1953) 345 US 361.

e. [§22.28] State Sales and Use Taxes

Revenue and Taxation Code §§6701-6778 provide for the collection of delinquent state sales and use taxes in almost the same manner as is provided

for the collection of state income taxes and unemployment insurance contributions. (See §§22.26-22.27.) In addition, Rev & T C §§6796-6799 authorize the State Board of Equalization to seize and sell any property of the delinquent taxpayer not exempt from execution. When the board sells the property, "the bill of sale or deed vests the interest or title of the person liable for the amount in the purchaser." Rev & T C §6798.

Even though the debtor is insolvent, no preference is given over prior attachments or executions except on personal property when the taxpayer is an "absconding, concealed, or absent person." Rev & T C §6756. *Durkin v Durkin* (1955) 133 CA2d 283, 284 P2d 185. Preferred labor claims are expressly given priority over these tax liens. Rev & T C §6756; CCP §§1204, 1206. The lien imposed by Rev & T C §6757 is not valid insofar as personal property is concerned against a purchaser for value without actual knowledge of the lien. On the sufficiency of a certificate of delinquency, see *State v Clauson* (1964) 231 CA2d 374, 41 CR 691.

When a tax warrant for collection is issued, the board "may pay or advance to the sheriff, marshal or constable the same fees, commissions, and expenses for his services as are provided by law for similar services pursuant to a writ of execution. The board, and not the court, shall approve the fees for publication in a newspaper." Rev & T C §6777. Fees and expenses may be collected from the taxpayer. Rev & T C §6778.

The superior court of the county where the property is levied has jurisdiction to determine third party claims of ownership (CCP §689) and claims for exemptions (CCP §690.26) filed on property levied under a state warrant for collection. CCP §§689d, 690.27.