JULY 19, 1956

HON. ROBERT L. FINLEY
Deputy State Treasurer
State House
Trenton, New Jersey

FORMAL OPINION, 1956—No. 12

DEAR MR. FINLEY:

Our opinion has been requested by the Hon. Archibald S. Alexander, State Treasurer, as to the right of the United States Treasury Department, Internal Revenue Service, to levy upon the accrued salaries of an employee of the State of New Jersey to obtain satisfaction of the employe's unpaid federal income taxes.

In our earlier study of this problem involving a levy upon the salary of an employee of one of the State Hospitals, we concluded "that there is no warrant in law for the action and procedure proposed by the Federal Government." *Formal Opinion* 1952, No. 4. Our subsequent study has only served to reinforce and confirm that conclusion, though not necessarily for the reasons there propounded.

Section 6321 of the Internal Revenue Code of 1954 provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount of the tax shall be a lien in favor of the United States upon all property and rights of property, whether real or personal, belonging to such person. Section 6331 further provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, collection of such tax is authorized by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which the lien provided in section 6321 exists. Section 6334 enumerates the property exempt from seizure, and further provides that notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by said section. Section 6332(a) imposes upon any person in possession of (or obligated with respect to) property or rights to property, subject to levy, upon which a levy has been made a duty to surrender such property or rights upon proper levy and demand. This duty is subject to an exception not pertinent to the present inquiry. The section further provides a penalty for violation of its requirements. Subsection (c) of section 6332 defines the term "person" as used in subsection (a) as including "an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation." "Person" is also defined in section 7701(a). There it is stated that when the term "person" is used in the Internal Revenue Code and where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, such term "shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."

From a study of the foregoing provisions a crucial question would seem to be whether the State is a "person" in possession of property or rights to property of the taxpayer, within the meaning of section 6332. A State has sometimes been held to be included within the meaning of "person." *State of Georgia* v. *Evans*, 316 *U.S.* 159 (1942) [Sherman Anti-Trust Act]; *California* v. *United States*, 320 *U.S.* 577 (1944) [Federal Shipping Act]; *United States* v. *Graham*, 96 F. Supp. 318 (D.C.S.D. Cal. 1951), affirmed *sub nom.; State of California* v. *United States*, 195 F. 2d 530 (9th Cir. 1952), *cert. denied*, 344 U. S. 831 (1952) [Section 3678 (b), 1939 Internal Reve-

nue Code]; *State* v. *Longo,* 132 N.J.L. 515 (Sup. Ct. 1945), affirmed 133 N.J.L. 301 (E. & A. 1945) [forgery statutes]. It has also been held that the term does not include a state. *Banton* v. *Griswold,* 95 Me. 445, 50 A. 89 (Sup. Jud. Ct. 1901) [attachment statute]; *Baker* v. *Kirschnek,* 317 Pa. 225, 176 A. 489 (Sup. Ct. 1935) [state statute re sale of intoxicating liquors]; *McBride* v. *Board of Commissioners of Pierce County,* 44 Fed. 17 (Cir. Ct., D. Wash. 1890). See *Onondago County Sav. Bank* v. *Love,* 166 Misc. 697, 3 N.Y.S. 2d 428 (Sup. Ct. 1938); *State* v. *Ambrose,* 191 Md. 353, 62 A2d 359, 364 (Ct. App. 1948); *In the Matter of Will of Fox,* 52 N.Y. 530 (Ct. App. 1873) affirmed *sub nom.; United States* v. *Annie Fox,* 94 U.S. 315 (1877); *United States* v. *Cooper Corporation,* 312 U.S. 600 (1941), indicating that the term usually does not include the state. The decisions upon this question are not easily reconciled. The term "person" may mean and include states, but such a meaning must be founded in legislative intent as it is expressed or gathered from the purpose of the enactment, the subject matter, the context, the legislative history, and the executive interpretation of the statute.

In *United States* v. *Graham, supra,* it was held that a state was a "person" within the meaning of section 3678 (b) of the Internal Revenue Code of 1939 (now section 7403(b), 1954 I.R.C.). It reads as follows:

> "All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court."

This section is concerned with the parties to a proceeding to enforce a lien on property. That Congress did not mean to exclude the state from those who could be made a party to such a proceeding is consonant with reason and the objective there sought to be achieved—the adjudication of the rights of *all* claimants. But a decision that the state may be brought in as a party along with other claimants does not establish that there was a Congressional intent to include the state within the meaning of the term "person", wherever said term may appear in the Internal Revenue Code. The legislative environment of each section must be examined.

In *State of Ohio* v. *Helvering,* 292 U.S. 360 (1934) the federal statute involved imposed a tax upon "every person who sells . . . distilled spirits". The State of Ohio which was engaged in the sale of alcoholic beverages through its stores was held to be conducting a nongovernmental proprietary function and was embraced within the meaning of the word "person" as used in the statute. Income taxes were not involved there and, moreover, as it was previously noted, there is little to be gained in drawing analogies as the interpretation of each statute, or sections of the same statute, depends upon its legislative environment which includes many varying factors. There is no common thread running through all statutes or even, in many instances, through sections of the same statute. With so many variables underlying statutes, a result attained solely on the basis of analogy (particularly the meaning of a term) would be subject to an inherent impairment.

Since in common usage, the term "person" does not include the sovereign, and since we are not persuaded by the legislative history that Congress meant to include the State as a "person" within the meaning of section 6332, we cannot subscribe to the view that has been advanced by the Internal Revenue Service. With due deference to their position, we must point out that it is not our function to speculate as to what Congress probably intended by the words used or to lend enforcement to the

supposed policy underlying the Internal Revenue Code by adding words which Congress might have incorporated but omitted.

It is also to be noted that before *Helvering* v. *Gerhardt,* 304 U.S. 405 (1938) [holding that salaries of state employees are not exempt from federal income taxes], the Internal Revenue Service, United States Treasury Department, held that under the Revenue Act of 1926 the compensation of certain municipal officers and employees was subject to federal income tax, but that their salaries while in the hands of city treasurer were not subject to distraint. *I.T.* 2405, *VII*-1, *C.B.* 72 (1928). This ruling was not revoked until recently when it was held that the State and local governments and their agencies and instrumentalities were subject to levy for amounts owed as accrued salaries to their employees who are delinquent in the payment of their federal taxes. *Rev. Rul.* 55-227, *C.B.* 1955-1, 551. Also see *U. S. Treasury Department Regulations, Section* 301, 6331-1(4) (ii) promulgated under the 1954 Internal Revenue Code. Against the Treasury's prior longstanding and consistent administrative interpretation, its more recent contention, in the absence of substantial statutory changes, cannot be accorded the weight normally afforded executive interpretation in the construction of statutes. *Cf. United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956). And further, was not there implied Congressional acquiescence in the interpretation?

There appears to be only one case bearing on the present problem. In *United States* v. *Newhard,* 128 F. Supp. 805 (D.C. Pa. 1955) a levy was made upon the County Treasurer of Fayette County, Pennsylvania to attach the accrued wages of a county employee who was indebted to the Federal Government for various withholding and social security taxes. The levy was not honored and an action was brought to enforce the tax lien against the wages of the county employee. The County and its fiscal officers joined with the taxpayer in moving for a dismissal of the action on the ground, *inter alia,* that the County and its officers were agents of the Commonwealth of Pennsylvania and as such were not subject to service of process attempting to "garnish" the wages of one of its employees. On the Federal Government's subsequent motion for summary judgment the court ruled in its favor.

The *Newhard* case was brought under section 3678 of the 1939 Internal Revenue Code (now section 7403, 1954 Internal Revenue Code) and not under section 3710 of said Code (now section 6332, 1954 Internal Revenue Code). Thus, that case is not authority that the Federal Government may proceed against the State as a "person" under section 6332 of the present Code. That question was neither involved nor considered.

There is a strong public policy in this jurisdiction disfavoring the stripping of a public servant of his remuneration, voluntarily or involuntarily. The philosophy underlying the position which New Jersey takes is quite aptly stated in *Schwenk* v. *Wyckoff,* 46 N.J. Eq. 560 (E. & A. 1890).

> "It was apparent that the salary or remuneration incident to a public office, as a rule, were essential to a decent and comfortable support of the incumbent. If the officer should be deprived of this support, there would arise a hazard of his being driven to an inappropriate meanness of living, of his being harassed by the worry of straightened circumstances and tempted to engage in unofficial labor, and of the likelihood of his falling off in that official interest and vigilance which the expectation of pay keeps alive. It was because of these probable consequences, that the courts refused to countenance any act or proceeding which might result in stripping the officer of his anticipated reward." (at pp. 562, 563).

In *Cahn* v. *Allen,* 124 N.J.L. 159 (Sup. Ct. 1940), where the salary of a federal employee was sought to be rendered subject to execution, the court held that in the absence of a clear mandate from the Legislature evincing an intent to abrogate the policy theretofor existent, it would not extend the enactment beyond those members of the class specifically mentioned in the statute. Thus the salary of a federal employee was not subject to execution. But see now *N.J.S.* 2A:17-64.

Though the Legislature has deemed it desirable to render the salaries of State employees subject to execution, *N.J.S.* 2A:17-50, *et seq.,* those salaries are not available to an unlimited extent. Only a portion thereof may be so obtained. Here the Internal Revenue Service seeks to levy upon the entire salary due the delinquent taxpayer in contravention of New Jersey's strong policy disfavoring such action. The State should not in such areas allow its policy to be subordinated in the absence of clear constitutional authority and Congressional manifestation that such was intended.

We are, of course, no longer concerned with the power of the Federal Government to tax the income of State officers and employees. The decisions of the United States Supreme Court, (*Helvering* v. *Gerhardt,* 304 U.S. 405 (1938); *Graves* v. *N. Y. ex rel O'Keefe,* 306 U.S. 406 (1939)) and the enactment of the Public Salary Tax Act of 1939 have removed that problem from the field of controversy. But the *Gerhardt* and *Graves* cases concerned the power to *tax,* not the power to *collect.* The question of the immunity of public employees from levy on their salaries for unpaid federal taxes was not before the Court, and it is not to be assumed that the Supreme Court would have arrived at the same result, had that been the issue.

Among the enumerated powers of the Federal Government is the power to lay and collect taxes. *U. S. Const., Art I, Sec.* 8. And the Congress is invested with the authority to make all laws which shall be necessary and proper for carrying such power into execution. *Ibid.* But it was recognized more than a century ago that there are limitations on the collection power of Congress. One of the first cases testing the power to collect taxes was *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272 1855). There the United States Supreme Court stated:

> "The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, *unless some such means should be forbidden in some other part of the Constitution.*" (p. 281) [Italics supplied].

Among the matters which are implied, though not expressed, in the United States Constitution is that the Federal Government and the State are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. *South Carolina* v. *United States,* 199 U.S. 437, 451 (1905). It is a principle implied from the necessity of maintaining our dual system of government. The Federal Government may not unduly impair the State's function of government or unduly interfere with the performance of its sovereign duties.

It is to be noted that the Court in the *Newhard* case, *supra,* was careful to point out that "there was no allegation or suggestion (except by the court) that the enforcement of the attachment would in the slightest degree interfere with, handicap or endanger the public welfare of Fayette County. True, it was said that Newhard resigned, but it was not averred that he was irreplaceable or that his resignation jeopardized any vital governmental interests. Obviously, he was not an elected official, and apparently his work did not require continuous service." (at p. 810).

The validity of the collection process is to be determined by the practical effect of the enforcement. When a levy is effected by a collection officer of the Internal Revenue Service on the accrued salary of a State employee, it necessarily must be made upon the *entire* accrued wages of the employee rather than upon a percentage thereof as in garnishment proceedings. The employee would be stripped of his entire anticipated reward. The effect on the State of an employee being placed in such dire circumstances is not difficult to envision. Completely deprived of income to support himself and his family, would he not be tempted to engage in unofficial labor? Certainly there would be a falling off of that official interest, incentive and vigilance which the expectation of pay keeps alive. There would be a preoccupation with matters not conducive to efficient service. These are but a few of the probable consequences, and these on the assumption that the individual would continue in the State's employment. It is not unlikely that he would resign and thereby the State would be completely deprived of his services. This is not an instance where the effect upon the State is speculative and uncertain. There would definitely be a serious impairment, if not a curtailment, of essential State functions. Thus the immunity does not redound to the exclusive benefit of the delinquent taxpayer, but reflects an equivalent public advantage.

The doctrine of sovereignty, as respects the effect of the collection procedure on State activities, is not to be chipped away on the basis of easy assumptions which ignore practicalities. To subject the State of New Jersey, in the performance of its constitutional functions, to the law sought to be invoked here is an unthinkable result and one so clearly unconstitutional that we need not dwell further on the interference with, or indeed, the complete frustration of many State activities. Despite the inroads into the immunity doctrine, true intergovernmental immunity remains.

Aside from the denial of the employee's service which the proposed procedure would cause, there is imposed on the State the attendant administrative details of effecting payment of the employee's salary to the Federal Government. This additional administrative burden would hamper, impede, and perhaps delay the timely payment of other State employees, which timeliness is so essential for the maintenance of morale and efficient service to the public. Underlying all theory of intergovernmental immunity is the premise that one sovereign government should not be subject to the domination of the other, and its application is peculiarly apposite here.

We discern no basis for disturbing the conclusion reached in our earlier opinion, *Formal Opinion* - 1952 No. 4, and reaffirm our position that a levy upon the salaries of State employees to obtain satisfaction of unpaid federal income taxes is unwarranted in law.

Very truly yours,

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