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SPRINGFIELD

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FILE NO. S-1447

FINANCE:
Use of 210.05 Offset Against
State Income Tax Refund

Honorable Roland Burris
Comptroller
201 State House
Springfield, Illinois 62706

Arthur Quern, Director
Department of Public Aid
316 South Second Street
Springfield, Illinois 62706

Gentlemen:

I have your letter wherein you request an opinion on whether section 210.05 of the State Comptroller Act (Ill. Rev. Stat. 1977, ch. 15, par. 210.05) permits the Comptroller to withhold all or part of a joint State income tax refund where the State has a claim against only one of the spouses. Section 210.05 provides in pertinent part:

> "Whenever any person shall be entitled to a warrant on the treasury or on other funds held by the State Treasurer, on any account whatever, against whom there shall be any account or claim in favor of the state, then due and payable, the comptroller, upon notification thereof, shall ascertain the amount due and payable to the state,

> as aforesaid, and draw a warrant on the treasury or on other funds held by the State Treasurer, stating the amount for which the party was entitled to a warrant, the amount deducted therefrom, and on what account, and directing the payment of the balance * * *."

There is no question that a refund due an individual taxpayer could be reached by section 210.05. Thus the question to be considered is the individual taxpayer's property interest, if any, in a joint refund. Article 4 of the Illinois Income Tax Act (Ill. Rev. Stat. 1977, ch. 120, par. 4-401) provides generally that identical methods of accounting shall be used to determine liability for State and Federal tax. Section 5-502(c) of the Act provides that a married couple must file a joint return for State tax if they have filed a joint return for Federal tax purposes.

Since the Illinois income tax provisions with respect to joint returns closely parallel those of Federal law, an examination of the treatment accorded Federal joint refunds may assist in answering your question. In an early case considering the question of liability for a tax deficiency based on a joint return, the court in Cole v. Commissioner (1935), 81 F. 2d 485, held that such a deficiency, if attributable to the income of the wife, could not be asserted against the estate of the husband. In a reference to an earlier case, the court noted at page 487:

" * * *

> * * * Each is defined as a taxpayer and the fact that the Congress, having regard to the marital status and in order to eliminate a large number of returns, sees fit to permit the inclusion in the one return of the income of husband and wife, does not serve to deny to these individual taxpayers the other benefits of the taxing statutes. * * *

* * * "

It has further been held that the filing of a joint return creates no property interest as between the parties in the refund check. (In Re Wetteroff (1972), 453 F. 2d 544; In Re Estate of Carson, 83 N.J. Super. 287, 199 A. 2d 407 (1964).) In the absence of State law to the contrary, the individual property interest in a joint Federal refund check is that proportion of the check which is attributable to the individual's income.

Therefore, Illinois property law must be examined to determine whether filing a joint return creates a property interest which is independent of that attributable to income. In Graver v. Dept. of Public Aid (1978), 64 Ill. App. 3d 820, the court considered the question of whether a Federal joint refund check was property belonging to a welfare recipient where the refund was based on income earned by a former spouse. The court held that the tax return did not contain the requisite language to create a joint tenancy or

a tenancy in common. It further noted the absence of any donative intent by the husband. Therefore it held that since the wife had no income to which the refund could be attributed, she had no property interest in the refund check. The application of the holding in Graver to your question leads to the conclusion that section 210.05 can be applied to that portion of the refund check which is attributable to the income of the individual against whom the State has a claim.

This conclusion is further supported by an examination of the Illinois law concerning joint banking accounts. The problems created by a joint bank account are similar to those of a joint tax refund in that "the relationships which it contemplates do not fit readily into common-law categories." (In Re Estate of Schneider (1955), 6 Ill. 2d 180.) Illinois courts have held that a creditor may reach funds deposited in a joint checking account when the debt is owed by only one of the parties:

> " * * *
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> * * * [I]f a garnishee answers that a judgment debtor holds money in a joint bank account, this is sufficient proof to establish a prima facie case for the judgment creditor that the money in the account belonged to the judgment debtor. The burden is then upon the other party to the joint account to prove what part, if any, of the funds in such account belonged to him. * * *
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> * * * "

(Leaf v. McGowan (1957), 13 Ill. App. 2d 58, 65.) It has further been held that even certain joint trust funds may be reached by a creditor. Fisher v. Jacobs (1963), 39 Ill. App. 2d 332.

For the foregoing reasons, it is my opinion that the Comptroller may use the section 210.05 offset against a joint State income tax refund. It is also my opinion that the section 210.05 offset may be used against the entire check and that the spouse against whom the State has no claim carries the burden of proving the proportion of the refund which is attributable to his or her income.

Very truly yours,

ATTORNEY GENERAL