

923

CREDITOR OR JUDGMENT CREDITOR—AUTHORIZED TO MAINTAIN PROCEEDING IN ATTACHMENT OR GARNISHMENT AGAINST STATE OF OHIO ONLY WHEN— § 115.46, R.C.

SYLLABUS:

1. Section 115.46, Revised Code, authorizes a creditor or judgment creditor to maintain an action or proceeding in attachment, garnishment, or in aid of execution against the State of Ohio only when (a) the debtor is an employee or official of the state, (b) the property sought to be sequestered in salary, wages, or other compensation earned by such employee or official and (c) the order and notice of attachment, garnishment, or proceeding in aid of execution sets forth the name of the office, department, division, board, bureau or commission in which the state employee or official is employed.

2. Where the Auditor of State is in possession of (or obligated with respect to) property or rights to property subject to levy by the United States Treasury Department, upon which a levy has been made, Section 6332, Internal Revenue Code, requires that the Auditor shall, upon demand of the Secretary of the Treasury or his delegate, surrender such property or rights to the Secretary or his delegate, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process.

3. Under Section 6332, Internal Revenue Code, the Auditor of State must honor levies from the United States Treasury Department both on salaries of state employees and on other persons where payments to such persons are made on warrants of the Auditor, except such part of the salary or payment as is, at the time of such demand, subject to an attachment or execution under any judicial process.

Columbus, Ohio, November 13, 1959

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“The Auditor of State is requesting a formal opinion on garnishment procedure by the State Auditor. Revised Code 115.46 authorizes the Auditor to make deductions on state employees for attachments, garnishment or proceedings in Aid of Execution. For procedure on this law, the Auditor of State follows Revised Code sections 2329.62, 2329.66, 2329.67, 2329.70. On U.S. Treasury Department Internal Revenue Service, Internal Revenue Code of 1954 is followed. (copy attached).

“Senate Bill 321 which becomes law November 9, 1959, amends R.C. sections 2329.62, 2329.66 and 2329.67.

“The Auditor of State requests a formal opinion on the following questions:

1—Should the Auditor of State honor a garnishment, attachment or Aid to Execution on other but state employees? (Such as vendors, contractors, Sundry Claim payments, or individuals doing business with state agencies and the payments being made by the State Auditor).

2—Should the Auditor of State honor levies from the U.S. Treasury Department Internal Revenue Service on other but state employees? (Such as vendors, contractors, Sundry Claim payments, or individuals doing business with state agencies and the payments being made by the State Auditor.”

In the case of *Palumbo v. Industrial Commission*, 140 Ohio St., 54, decided June 3, 1942, it was held as shown by the second branch of the syllabus:

“2. The 1912 amendment to Section 16 of the Ohio Bill of Rights, providing that ‘Suits may be brought against the state, state, in such courts and in such manner as may be provided by law,’ is not self-executing. The authority therein granted has not been exercised by the General Assembly so as to provide for garnishment actions against the state, its agencies or officers.”

The following year the Legislature passed House Bill No. 176 which was approved by the Governor on June 175, 1943. This bill is now Section 115.46, Revised Code, reading as follows :

“Any creditor or judgment creditor of an employee or officer of the state is entitled to maintain against the state any action or proceeding in attachment, garnishment, or in aid of execution to subject to the payment of his claim or judgment any salary, wages, or other compensation owing to any such employee or officer from the state, in the same manner, to the same extent, and in the same courts that any creditor or judgment creditor might ,under the laws of this state, subject moneys due his debtor or judgment debtor from any person, partnership, firm, or corporation.

“In any such action or proceeding against the state, the order and notice of attachment, garnishment, or proceeding in aid of execution shall be served upon the auditor of state and shall set forth the name of the office, department, division, board, bureau, or commission in which such debtor or judgment debtor is employed.”

In the *Palumbo* case the Supreme Court approved and followed *Raudabaugh v. State*, 96 Ohio St., 513, holding that a state is not subject to suit in its own courts without its express consent. Since express consent. Since express consent is required, the provisions of Section 115.46, Revised Code, may not be amplified by inference. By this section the state has only consented to be sued by a creditor who has a claim against a state employee or officer and the creditor's objective is to subject to the payment of his claim, any salary, wages or other compensation owign by the state to such employee or officer. Obviously, vendors, contractors, sundry claim claimants and other individuals doing business with state agencies are neither state employees nor officials. They are not employed by any state office, department, division, bureau, or commission as indicated by the requirements of the second paragraph of Section 115.46, Revised Code, and the state owes them no salary or wages.

If there be doubt as to the meaning of the words “or other compensation owing to any such employee or officer,” it should be observed that such words are associated with specific words. The phraseology is “salary, wages, or other compensation.” When two or more words having a similar and well defined meaning are grouped together with words whose meaning is not so comprehensive, the general words take on the color and meaning of the specific words. The expression “or

other compensation” must be regarded as earned compensation or perquisites of office as distinguished from contract consideration. To regard the expression “or other compensation” as including every type of monetary obligation other than salary and wages, would be to render the entire expression as being redundant and confusing.

Coming now to your second question, I find that Section 6321, Internal Revenue Code, provides for a lien in favor of the United States upon all real and personal property and upon rights of persons who have neglected or refused, after demand, to pay any federal tax. Section 6331, Internal Revenue Code, provides for the collection of delinquent taxes by levy upon all property belonging to delinquent taxpayers with certain presently unimportant exceptions. It is further provided that :

“* * * Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d) of such officer, employee, or elected official. * * *”

It seems significant that this procedure is confined to the United States Government and its agencies. The several states are not included.

In paragraph (b) of this section it is stated that the term “levy” includes the power of distraint and seizure by any means. When the United States Treasury Department has levied upon property of a delinquent taxpayer consisting of property or rights to property in the possession of another person, the federal government may acquire such property or rights to property by proceeding under Section 6332, Internal Revenue Code. Paragraph (a) of this section reads :

“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 shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.”

If the State of Ohio is included within the meaning of the word “person” as sued in paragraph (a), then the duty of the auditor of state is apparent as far as the federal statute is concerned. Paragraph (c) of Section 6332, Internal Revenue Code, defines the word “person” as follows :

“The term ‘person’ as used in subsection (a), includes 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.”

It may be noted that the several states have not been included within the definition and it might reasonably be concluded that their exclusion was deliberate. Further, the rule of law has apparently been that the term “corporation” as used in the Acts of Congress touching Internal Revenue, does not include a state. (*Lowenstein v. Evans*, 69 Fed. Rep., 908; *United States v. Baltimore & Ohio Railroad Co.*, 17 Wall., 322; *Georgia v. Atkins*, 10 Fed. Cas., 241).

The question, however, appears to have been determined in the case of *Sims v. United States*, 3 L. ed. 2d 667, decided by the Supreme Court of the United States no March 23, 1959, headnote 3 of said case reading:

“Although the definition of ‘person’ in Section 6332 of the Internal Revenue Code, defining the duties of “any person” in possession of property subject to levy for assessed and unpaid taxes upon which a levy has been made, does not mention states or any sovereign or political entity or their officers among those it ‘includes,’ it does not exclude them, in view of the provision in Section 7701 (b) of the Code that the term “includes” and ‘including’ when used in a definition contained in the Code shall not be deemed to exclude other things otherwise within the meaning of the term defined.”

Regarding the responsibility of a state auditor to comply with Section 6332, Internal Revenue Code, headnote 11 of *Sims v. United States*, *supra*, reads:

“Under Section 6332 of the Internal Revenue Code of 1954 providing that any person obligated with respect to property or rights to property subject to levy for assessed and unpaid taxes, upon which a levy has been made, shall, upon demand, surrender such property or rights to the appropriate federal authorities, the state auditor of West Virginia, being a person who, under the law of West Virginia, is obligated with respect to the salaries of state employees covered by the federal government’s levies, is personally liable to the federal government in a sum equal to the amount, not exceeding the delinquent taxes, which he refused to surrender to the government but surrendered instead to the taxpayers in defeat of the government’s levies.”

It follows, therefore, that pursuant to Section 6332, *supra*, the auditor of state must honor levies from the United States Treasury Department on state employees and on other persons where payments to such persons are made on warrants of the auditor.

Accordingly, it is my opinion and you are advised :

1. Section 115.46, Revised Code, authorizes a creditor or judgment creditor to maintain an action or proceeding in attachment, garnishment, or in aid of execution against the State of Ohio only when (a) the debtor is an employee or official of the state, (b) the property sought to be sequestered is salary, wages, or other compensation earned by such employee or official and (c) the order and notice of attachment, garnishment, or proceeding in aid of execution sets forth the name of the name office, department, division, board, bureau or commission in which the state employee or official is employed.

2. Where the Auditor of State is in possession of (or obligated with respect to) property or rights to property subject to levy by the United States Treasury Department, upon which a levy has been made, Section 6332, Internal Revenue Code, requires that the Auditor shall, upon demand of the Secretary of the Treasury or his delegate, surrender such property or rights to the Secretary or his delegate, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process.

3. Under Section 6332, Internal Revenue Code, the Auditor of State must honor levies from the United States Treasury Department both on salaries of state employees and other persons where payments to such persons are made on warrants of the Auditor, except such part of the salary or payment as is, at the time of such demand, subject to an attachment or execution under any judicial process.

Respectfully,

MARK MCELROY
Attorney General