

VOLUME NO. 41

OPINION NO. 9

CORPORATIONS - Authority of Department of Revenue to levy on wages of nonresidents employed by foreign corporation;

GARNISHMENT - Authority of Department of Revenue to use warrant for distraint to garnish wages of nonresidents;

JUDGMENTS - Collection of delinquent income taxes by warrant for distraint;
JURISDICTION - Authority of Department of Revenue to collect delinquent income taxes by levying on wages of nonresident employees of foreign corporation doing business in Montana;
REVENUE, DEPARTMENT OF - Authority of Department of Revenue to collect delinquent income taxes by levying on wages of nonresidents;
TAXATION AND REVENUE - Collection of delinquent income taxes from nonresidents by warrant for distraint;
MONTANA CODE ANNOTATED - Title 15, chapter 1, part 7; Title 15, chapter 30; Title 35, chapter 1, part 10; Title 39; sections 15-1-201, 15-1-202, 15-30-105, 15-30-311, 25-13-501, 25-13-502, 25-13-614, 35-1-1005;
MONTANA LAWS OF 1981 - Chapter 439;
UNITED STATES CODE - 15 U.S.C. §§ 1671 to 1677.

HELD: The Department of Revenue has authority to collect delinquent income taxes by levying on wages of nonresidents employed by a foreign corporation doing business in Montana.

17 April 1985

John LaFaver, Director
Department of Revenue
Room 455
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Helena MT 59620

Dear Mr. LaFaver:

Your predecessor, Ellen Feaver, requested my opinion on a question which I have stated as follows:

Does the Department of Revenue have authority to collect delinquent income taxes by levying on wages of nonresidents employed by a foreign corporation doing business in Montana?

According to the inquiry, the Department has been collecting delinquent income taxes from nonresidents by serving a levy upon their employers, pursuant to the provisions of Title 15, chapter 1, part 7, MCA. If the employer is a foreign corporation doing business in Montana, the levy is served upon the corporation's registered agent, who forwards the levy to the corporate

headquarters outside Montana. In the past, the levy has usually been honored by the foreign corporation; however, one employer has notified the Department that it will no longer honor levies for nonresident employees. The employer has both resident and nonresident employees working in Montana and has a long and substantial history of operations within the state. The employer operates in over half of the counties in Montana, with substantial real and personal property holdings located or based within the state.

I have concluded that the Department has authority to collect delinquent income taxes from nonresident employees of foreign corporations doing business in Montana by using the procedures set forth in Title 15, chapter 1, part 7, MCA.

Section 15-30-105, MCA, imposes an income tax on nonresidents with respect to net income derived from property owned and business or occupational activities carried on in Montana. The Department of Revenue is authorized and directed by statute to administer and enforce the state revenue laws, which include the income tax provisions of Title 15, chapter 30, MCA. §§ 15-1-201, 15-1-202, MCA. With respect to the collection of delinquent individual income taxes, the Department is authorized to issue a warrant for distraint as provided in Title 15, chapter 1, part 7, MCA. § 15-30-311, MCA.

Part 7 of Title 15, chapter 1, MCA, sets forth the law and procedure regarding the collection of delinquent taxes by means of a warrant for distraint. Section 15-1-701, MCA, defines a warrant for distraint as an order, under the official seal of the Department, directing the sheriff or any agent authorized by law to collect a tax to levy upon and sell the real and personal property of the delinquent taxpayer. Section 15-1-702, MCA, provides that if a tax administered and collected by the Department is not paid within 30 days of the due date, the Department may issue a notice to the taxpayer that unless payment is received within 30 days of the date of the notice a warrant for distraint may be issued. Either prior to or at the time of this notice, the Department must also notify the taxpayer of his right to request a hearing on the matter of tax liability; if the Department receives a written request for a hearing within 30 days of the date of this notice,

section 15-1-705, MCA, forbids any execution upon the warrant until after the hearing.

Section 15-1-704, MCA, allows the Department to file its warrant with the clerk of a district court. The warrant is filed in the judgment docket, with the taxpayer listed as judgment debtor, and creates a lien against all real and personal property of the taxpayer located in the county where the warrant is filed. Section 15-1-701(2), MCA, provides that the resulting lien is treated in the same manner as a properly docketed judgment lien and that the Department may collect the delinquent taxes and enforce the tax lien in the same manner as a judgment is enforced.

Pursuant to section 15-1-704, MCA, the Department may send a copy of the filed warrant to the sheriff or agent authorized to collect the tax. When the sheriff or agent receives the copy of the filed warrant and notice from the Department that the applicable hearing provisions have been complied with, he is authorized and directed by section 15-1-706, MCA, to execute upon the warrant in the same manner as prescribed for execution upon a judgment. Under subsection (2) of this statute, a notice of levy may also be made by means of a certified letter by an agent authorized to collect the tax.

Sections 15-1-703 and 15-1-707, MCA, provide for the issuance of an execution upon a warrant for distraint in certain emergency situations. Finally, section 15-1-709, MCA, states that the warrant for distraint is not an exclusive remedy for the collection of tax debts; the Department is authorized to use any other remedy provided by law.

These statutes provide the Department with authority to collect delinquent income taxes by means of summary administrative proceedings which are variously referred to in the literature as distress or distraint. See 84 C.J.S. Taxation § 694. Collection of taxes by summary administrative proceedings has long been sanctioned and has always been held to constitute due process of law, subject only to the fundamental principle that the taxpayer must have notice and opportunity to be heard as to the amount of tax owing to the state. See 72 Am. Jur. 2d State and Local Taxation §§ 866, 868.

In 1981 the Montana Legislature revised, clarified, and unified the procedures for issuance of a warrant for distraint by the Department. 1981 Mont. Laws, ch. 439. This legislation collected the provisions for summary administrative proceedings which were contained in the various chapters of Title 15, MCA, set out a single procedure for the issuance of a warrant, and provided for notice and hearing on tax liability. The purpose of the revisions was to create "a remedy that is fair to the taxpayer and effective for the Department." Testimony of Larry Weinberg re: SB 272, Senate Judiciary Committee, February 13, 1981. The notice and hearing provisions bring this collection procedure within the due process requirements of such cases as Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). See also Abrams v. Feaver, 41 St. Rptr. 1588, 1590, ___ P.2d ___ (1984).

Unlike many states, Montana has not adopted specific income garnishment procedures. Instead, the judgment debtor's right to receive income is treated as a debt or credit and is thus subject to execution under the provisions of sections 25-13-501 and 25-13-502, MCA. The amount which may be garnished will depend upon the application of state and federal exemption statutes. See § 25-13-614, MCA; 15 U.S.C. §§ 1671-77; White v. White, 195 Mont. 470, 636 P.2d 844 (1981). However, there is no doubt that under Montana law the wages of a judgment debtor are liable to execution upon a judgment or, as in this case, upon a warrant for distraint which is the statutory equivalent of a judgment.

Given the Department's authority to issue a warrant and levy upon wages to collect delinquent income taxes, the next query is whether that authority extends to reach the wages of nonresidents employed by a foreign corporation doing business in Montana. It is assumed (although the assumption is not necessary for this holding) that the foreign corporation has procured a certificate of authority to transact business in Montana, pursuant to Title 35, chapter 1, part 10, MCA, and has designated a registered agent and office in this state.

Generally, a state may enforce payment of a nonresident's income tax as far as it can by the exercise of a just control over persons and property

within the state, as by garnishment of credits and requiring persons within the state paying money to nonresidents to withhold the amount of the tax. As applied to a foreign corporation employing nonresidents, such mode of enforcement is not an unreasonable regulation of the corporation's business within the state nor an impairment of the validity of contracts between employer and employee. See 85 C.J.S. Taxation § 1107; Travis v. Yale & Towne Manufacturing Co., 252 U.S. 60 (1920). In Travis, a Connecticut corporation doing business in New York and elsewhere challenged the jurisdiction of the state of New York to require it to withhold New York state income taxes from the salaries of employees who were not residents of New York but who were engaged in the corporation's business activities in New York. Citing Shaffer v. Carter, 252 U.S. 37 (1920), decided the same day, the Supreme Court held that the New York withholding provision was the practical equivalent of a garnishment of credit, which was a permissible exercise of control over property within the state to enforce payment of a nonresident's income tax imposed upon income arising from business or occupational activities carried on within the state. The court further observed:

The taxes required to be withheld are payable with respect to that portion only of the salaries of its employees which is earned within the state of New York. It might pay such salaries, or this portion of them, at its place of business in New York; and the fact that it may be more convenient to pay them in Connecticut is not sufficient to deprive the state of New York of the right to impose such a regulation.

252 U.S. at 77. The salaries or wages of nonresidents employed by a foreign corporation doing business in Montana may therefore be considered "property within the state" which is subject to garnishment for delinquent income taxes, even if the compensation is paid through the corporate headquarters located outside Montana.

This conclusion is consistent with section 35-1-1005, MCA, which allows a foreign corporation authorized to transact business in Montana to enjoy "the same but no greater rights and privileges as a domestic corporation" and subjects the foreign corporation to "the same

duties, restrictions, penalties, and liabilities" imposed on domestic corporations. In effect, a licensed foreign corporation is treated as a domestic corporation; since a domestic corporation, as garnishee of an employee's wages, has no right or privilege to refuse to honor a levy on a writ of execution or warrant for distraint, it follows that a foreign corporation licensed to do business in Montana has no greater right of refusal.

Requiring the foreign corporation to honor the levy does not offend the notions of "fair play and substantial justice" which govern assertions of both jurisdiction in personam and jurisdiction in rem. International Shoe Co. v. Washington, 326 U.S. 310 (1945); Shaffer v. Heitner, 433 U.S. 186 (1977). Both the foreign corporation and the nonresident employee who works for the corporation in Montana have sufficient "minimum contacts" with the state to permit it to assert jurisdiction to collect its taxes. By exercising the privilege of conducting activities within the state and enjoying the benefits and protections of the laws of the state, the foreign corporation has established a "presence" which requires it to respond to suits brought to enforce obligations arising out of or connected with its activities within the state. International Shoe. Furthermore, the employee's presence within the state while working for the foreign corporation, together with the presence of his wages (the state's claim to a portion of which is the source of the underlying controversy here), allows the state to exercise jurisdiction over the employee's interests in those wages. Shaffer. See also Rule 4B, Mont. R. Civ. P., which subjects any person (including nonresident individuals and corporations) to state court jurisdiction as to any claim arising from the transaction of business within the state or contracts for services to be rendered in the state.

Finally, it may be noted that under Title 39, MCA, Montana courts are available to the nonresident employee for the enforcement of wage and other employment-related claims against a foreign corporation arising from employment within the state. It follows, under the reasoning of such cases as Cole v. Randall Park Holding Co., 95 A.2d 273 (Md. 1953), that the foreign corporation may be made a garnishee by these same state courts; in essence, garnishment is viewed as an action

by the judgment debtor against the garnishee for the benefit of the judgment creditor and is available in a forum which has jurisdiction over claims between the judgment debtor and the garnishee.

THEREFORE, IT IS MY OPINION:

The Department of Revenue has authority to collect delinquent income taxes by levying on wages of nonresidents employed by a foreign corporation doing business in Montana.

Very truly yours,

MIKE GREELY
Attorney General