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November 12, 1980

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ATTORNEY GENERAL OPINION NO. 80- 244

Mr. Richard E. Brown
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Mills Building
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--
Department of Administration--Exercise of State's
Right of Set-off by Director of Accounts and Reports

Synopsis: A fundamental right of every creditor is that of set-off. Thus, where the State of Kansas and another party are mutually-indebted for liquidated amounts, the state as a creditor may exercise such right of set-off. The exercise of such right does not compromise the integrity of the appropriation process.

The director of accounts and reports is both impliedly and explicitly empowered by statute to exercise the right of set-off in the state's behalf. However, because requisite "state action" exists, such right must be exercised in consonance with the dictates of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Affirming Attorney General Opinion No. 75-408, but modifying Attorney General Opinion No. 78-297. Cited herein: K.S.A. 75-3731; L. 1980, ch. 260, §1; Kan. Const., Art. 2, §24; 20 U.S.C.A. §1232g; U.S. Const., Amend. XIV.

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Dear Mr. Brown:

You have inquired as to the propriety of the state's use of set-off as a means for collecting National Direct Student Loans (NDSL loans) from defaulting borrowers who are state employees. Although you have posed several specific questions in this regard, in light of actions taken by the 1980 Legislature subsequent to the submission of your opinion request, we believe it more appropriate to consider this issue within the context of such legislative action, rather than address these specific questions.

Attorney General Opinion No. 75-408, to which you have directed our attention, concluded that on the basis of K.S.A. 75-3731 the director of accounts and reports has the implied authority to withhold payment of moneys due from the state to those indebted to the state. This conclusion was reached without benefit of Kansas case law, however, since the specific question considered therein has never been addressed by the Kansas Supreme Court. Thus, it is appropriate at the outset to consider, generally, the right of set-off and the government's exercise of such right.

Set-off has been considered "a fundamental right of any creditor." 20 Am.Jur.2d, Counterclaim, Recoupment, Etc., §7. Even though the doctrine of set-off is normally considered within the context of judicial proceedings to resolve the respective demands of mutually indebted parties, set-off has long been utilized as a "self-help" remedy of creditors that is utilized outside of a judicial setting. The theory that the government, as a creditor, is entitled to this self-help procedure was first expounded in Gratiot v. U.S., 40 U.S. (15 Pet.) 336, 10 L.Ed. 759 (1839), although the most widely-cited case standing for this proposition is United States v. Munsey Trust, 332 U.S. 234, 91 L.Ed. 2022 (1946), which held, in part:

"The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" Gratiot v. United States, 15 Pet (US) 336, 370, 10 L.Ed. 759, 771; McKnight v. United States, 98 US 179, 186, 25 L.Ed. 115, 116."
91 L. Ed. at 2027.

The more recent case of Western Casualty and Surety Co. v. U.S., 109 F. Supp. 422 (Ct. Cl.) (1953), mentioned that "a fundamental

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right of any creditor is that of set-off" (Id. at 426), and held that since the plaintiff owed the government more for unpaid taxes than the government owed him for materials purchased, a set-off of the sums exhausted the funds and precluded plaintiff's recovery.

In Attorney General Opinion No. 75-408, Attorney General Curt Schneider relied on this latter case in construing the provisions of K.S.A. 75-3731. The synopsis of that opinion summarizes his determination of the powers granted to the director of accounts and reports by this statute, as follows:

"In auditing any claim against the state presented for payment, the Director of Accounts and Reports must determine that such claim is due and unpaid, and in making that determination, the Director is entitled to exercise the right of the State as a creditor of such claimant to set-off against such claimed indebtedness such amounts as are known to him to be due to the State from such claimant in determining the final indebtedness which is due and unpaid."

Although, as noted previously, there are no decisions of the Kansas Supreme Court determining whether the provisions of K.S.A. 75-3731 grant to the director of accounts and reports the implied power to apply funds in his hands so as to set-off claims against the state, we concur with the conclusion reached in Opinion No. 75-408. Our concurrence is predicated, in part, on the fact we have discovered no legal authority that would indicate that the rationale of the decisions in Munsey, supra, and Western Casualty, supra, should not apply with equal force in those instances where the State of Kansas is a creditor of any person making claim against moneys in the state treasury. Moreover, since the powers and duties prescribed for the director of accounts and reports in K.S.A. 75-3731 are substantially similar to those of the Indiana State Auditor considered in State v. Burch, 81 N.E.2d 850 (1948), we are persuaded that the decision in this case lends further support for the conclusion reached in Opinion No. 75-408. In Burch, the Indiana Supreme Court stated:

"Section 49-1809 Burns' 1933 dealing with the powers and duties of the Auditor of the State among other things provides: ' . . . the auditor shall examine, with care every demand and claim presented for payment, and shall be satisfied that every claim is just, legal,

and unpaid, before he shall allow, audit, or countersign it.' This provision is broad enough to justify the auditor in refusing to issue a warrant for money owing to one in turn who is indebted to the state, as was the case here. To compel the auditor so to do would deprive the state of its right to set-off." Id. at 851.

It must be recognized, though, that our consideration of the authority to be derived from K.S.A. 75-3731 has been made somewhat moot by the passage of 1980 House Bill No. 3189 (L. 1980, ch. 260). Section 1 of that act provides as follows:

"If any individual, firm, corporation, the federal government or any agency thereof, or any other debtor of the state of Kansas or any of its agencies, fails to pay an amount owed at the time required by any statute, rules and regulations or contract, the director of accounts and reports shall be entitled to set off such amount against any money held for, or any payments owed to, such debtor by the state or any of its agencies. The director of accounts and reports shall maintain such accounts and records, and may make such entries therein, as are necessary and appropriate to implement the provisions of this section. Upon recommendation of the director of accounts and reports, the secretary of administration may adopt rules and regulations in the manner provided in K.S.A. 75-3706 for the implementation and administration of the provisions of this act. The provisions of this section shall not apply to any funds in the Kansas public employees retirement fund."

It is apparent that this statute effectively codifies the right of set-off we find to exist by necessary implication from the provisions of K.S.A. 75-3731. However, even though your request did not inquire as to these specific statutory provisions (since House Bill No. 3189 took effect on July 1, 1980, subsequent to the date of your request), we believe it appropriate to consider the efficacy of this statute in accomplishing its obvious legislative purpose, not only because of its obvious relevance to your questions, but because of the interest expressed in this statute by other public officials.

Regardless of whether the right of set-off is exercised by the director of accounts and reports pursuant to powers necessarily implied from the

provisions of K.S.A. 75-3731 or specifically conferred by section 1 of House Bill No. 3189, we believe it must be examined in light of the due process clause of the Fourteenth Amendment to the U.S. Constitution, which provides in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law;"

Beginning with Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349 (1969), the United States Supreme Court has in recent years rendered a number of rather expansive interpretations of this constitutional provision. In Sniadach, the Supreme Court found unconstitutional a Wisconsin statute which allowed prejudgment garnishment of a debtor's wages without prior notice or opportunity to be heard. The Court held that wages are "a specialized type of property presenting distinct problems in our economic system," (23 L.Ed.2d at 353), and maintained that "[w]here the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing . . . this prejudgment garnishment procedure violates the fundamental principles of due process." (Citation omitted.) 23 L.Ed.2d at 354.

Because the Sniadach decision was predicated on the Court's characterization of wages as "a specialized type of property," subsequent litigation involving the taking of property has necessarily involved a consideration of the type of property involved and whether the Sniadach decision can be distinguished on that basis. In North Georgia Finishing v. Di-Chem, 419 U.S. 601, 42 L.Ed.2d 751 (1975), the U.S. Supreme Court reversed a decision of the Georgia Supreme Court which had sustained the constitutionality of Georgia's pre-judgment garnishment statute, pursuant to which defendant corporation's bank account had been garnished without prior notice and hearing. The Georgia court's decision was based in part upon its perceived distinction between Sniadach and the case before it.

"The Georgia court recognized that Sniadach v Family Finance Corp. 395 US 337, 23 L Ed 2d 349, 89 S Ct 1820 (1969), had invalidated a statute permitting the garnishment of wages without notice and opportunity for hearing, but considered that case to have done nothing more than to carve out an exception, in favor of wage earners, 'to the general rule of legality of garnishment statutes.' 231 Ga, at 264; 201 SE2d, at 323." 42 L.Ed.2d at 756.

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The U.S. Supreme Court rejected this distinction, stating:

"This approach failed to take account of *Fuentes v Shevin*, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983 (1972), a case decided by this Court more than a year prior to the Georgia court's decision. There the Court held invalid the Florida and Pennsylvania replevin statutes which permitted a secured installment seller to repossess the goods sold, without notice or hearing and without judicial order or supervision, but with the help of the sheriff operating under a writ issued by the clerk of the court at the behest of the seller. That the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. 'The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' *Id.*, at 86, 32 L Ed 2d 556." (Emphasis added.) 42 L.Ed.2d at 756, 757.

In concluding this opinion, the Court stated:

"We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause. *Fuentes v Shevin*, 407 US, at 89-90, 32 L Ed 2d 556." *Id.* at 758.

The Fuentes decision, referred to in the foregoing quoted excerpts, also is significant with respect to the U.S. Supreme Court's determination as to the time and nature of the hearing required by procedural due process.

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. . . . Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' *Mullane v Central Hanover Tr. Co.*, 339 US 306, 313, 94 L Ed 865, 872, 70 S Ct 652, and

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'depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any],'
Boddie v Connecticut, 401 US 371, 378, 28 L Ed 2d 113, 119, 91 S Ct 780, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. . . . [Citations omitted.] 'That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v Connecticut, supra, at 378-379, 28 L Ed 2d at 119 (emphasis in original)."
32 L.Ed.2d at 570, 571.

Without belaboring the requirements of the Fourteenth Amendment as to the necessity for notice and an opportunity for a hearing prior to the deprivation of property in order to satisfy the requisites of procedural due process, we would call to your attention the decision in Atwater v. Roudebush, 452 F.Supp. 622 (1976), which considered due process requirements within the context of governmental use of the right of set-off. There, the federal district court for the Northern District of Illinois considered a veterans' administration employee's claim that he had been deprived of procedural due process when back wages due to him upon his retirement were applied automatically to debts owed to the Federal Housing Administration. The court explained that the governmental right of set-off in this case was grounded in the common law and provided by statute as well. Rejecting the government's "contention that the existence of this clear authority excused them from providing any form of notice or hearing" (Id. at 627), the court held that Atwater had been deprived of his procedural due process rights and was entitled to an administrative hearing before his back wages were used to pay past due amounts to the Federal Housing Administration:

"At such a hearing plaintiff would have a right to review the evidence relied upon by the two agencies in effecting the set-off action and the reasons for their decision, and would have an opportunity to submit evidence and arguments challenging the agency actions." Id. at 634.

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Although it deserves little attention here, we would be remiss if we did not note that the condition precedent to invoking Fourteenth Amendment protections is requisite "state action." The Fourteenth Amendment does not afford procedural due process protection to all deprivations of property. This is a well-established principle recognized by numerous U.S. Supreme Court decisions, as well as by other federal and state tribunals. For example, as stated in Atwater v. Roudebush, supra: "The requirement of procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments." 452 F.Supp. at 626. Such principle has been reiterated in decisions of the Kansas Supreme Court. Recently, the Kansas Court interpreted the due process clause in Wertz v. Southern Cloud Unified School District, 218 Kan. 25 (1975). There, the Court held that a non-tenured public school teacher was entitled to a pre-termination hearing before his mid-year dismissal for incompetence. The Court explained that "[t]he U.S. Supreme Court has interpreted this provision of the constitution to protect citizens against the action of any state and its agencies . . . , as distinguished from actions of a private individual in terminating a contract." Id. at 29. The Kansas Court cited the U.S. Supreme Court case of Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, in which the high court said:

"One of the interests protected is termed 'property'. It is a purpose of the constitutional right to a due process hearing to provide an opportunity for a person to secure certain benefits and support claims of entitlement to protected rights, such as an interest in property which is being threatened by the state and its agencies. For due process under the 14th Amendment to the U.S. Constitution to apply, there must be state action and deprivation of an individual interest of sufficient substance to warrant constitutional protection. (Benschoter v. First National Bank of Lawrence, 218 Kan. 144, 542 P.2d 1042.)" (Emphasis added.) 218 Kan. at 29.

Thus, we must conclude that the state's exercise of its right of set-off must be made in accordance with the due process guarantees of the Fourteenth Amendment. Clearly, whether such right is exercised by the director of accounts and reports pursuant to the implied authority of K.S.A. 75-3731 or in accordance with the provisions of House Bill No. 3189, the requisite "state action" is present, since it is action taken by a state officer in pursuance of state law. Moreover, while we cannot state with absolute assurance that in each and

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every instance the state's indebtedness to a person who is mutually indebted to the state constitutes a property interest subject to Fourteenth Amendment protection, we find it difficult to conceive of instances where such property interest would not exist. For these reasons, we believe that prior to exercising the state's right of set-off, the director of accounts and reports must provide the state's debtor with notice of the intended action and an opportunity to be heard upon the matter.

We note that neither under K.S.A. 75-3731 nor under section 1 of House Bill No. 3189 is there made provision for pre-deprivation notice and hearing. However, under the latter statute, the secretary of administration, upon recommendation of the director of accounts and reports, may adopt rules and regulations "for the implementation and administration of the provisions of" House Bill No. 3189. Pursuant to this authority, therefore, rules and regulations providing for the requisite pre-deprivation notice and opportunity for hearing may be adopted, thus engrafting on this law the procedural due process guarantees necessary to withstand scrutiny under the Fourteenth Amendment.

Although counseling the necessity of incorporating procedural due process into the state's set-off procedures, our conclusion should not be construed as mandating the use of any particular procedures. To be sure, the decisions of the U.S. Supreme Court suggest the impossibility of attaching to the Fourteenth Amendment any specific procedural requirements. This problem was addressed by that Court in Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18 (1976), in reviewing some of its prior decisions concerning the due process clause.

"These decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v McElroy, 367 US 886 895, 6 L Ed 2d 1230, 81 S Ct 1743 (1961).
' [D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v Brewer, 408 US 471, 481, 33 L Ed 2d 484, 92 S Ct 2593 (1972).
. . . More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

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and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., *Goldberg v Kelly*, supra, at 263-271, 25 L Ed 2d 287, 90 S Ct 1011." 47 L.Ed.2d at 33.

Later in this same opinion, the Court stated:

"The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' *Joint Anti-Fascist Comm. v McGrath*, 341 US, at 171-172, 95 L Ed 817, 71 S Ct 624 (Frankfurter, J., concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' *Goldberg v Kelly*, 397 US, at 268-269, 25 L Ed 2d 287, 90 S Ct 1011 (footnote omitted), to insure that they are given a meaningful opportunity to present their case." 47 L.Ed.2d at 41.

Although provision for a judicial-type hearing prior to exercising the right of set-off would certainly comport with the essence of procedural due process, in light of the Eldridge decision and other cases relying upon its holdings (see, e.g., Memphis Light, Gas and Water Div., supra), we cannot advise that such is required in each instance. All that the Court found necessary in Memphis Light, Gas and Water Div., supra, was that, prior to terminating a customer's utility service for nonpayment of disputed bills, the utility should provide "an opportunity for the presentation to a designated employee of a customer's complaint" 56 L.Ed.2d at 43. However, the following statement made by the court in Atwater v. Roudebush, supra, in connection with its discussion of Eldridge should be noted:

"A full evidentiary hearing prior to termination may not be required, but an effective opportunity to press one's claims prior to administrative action must still be available." 452 F. Supp. at 630.

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Accordingly, since your request specifically concerns the use of the state's right of set-off as a means of collecting delinquent NDSL loans made by state colleges and universities to persons who are now state employees, we believe the following general caveat is pertinent: In those instances where a debt owing the state is to be set-off against the wages of a state employee, careful consideration should be given to the necessity for holding an oral evidentiary hearing to insure compliance with the dictates of the due process clause. Even though such a hearing may not be required in every instance, we believe the Sniadach decision's characterization of wages as "a specialized type of property presenting distinct problems in our economic system" (23 L.Ed.2d at 353) compels an abundance of caution in the state's use of its self-help remedies to offset wages due its employees.

Other moneys held by the state for payment also may well enjoy the same type of consideration to be afforded wages. This is suggested by the decision of the U.S. Supreme Court in Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287 (1969). As Mr. Justice Brennan, writing for the Court, explained:

"The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment." 25 L.Ed.2d at 292.

The Court determined that the procedures followed by New York City welfare officials surrounding termination of benefits were inadequate. The following discussion of the Goldberg decision in Mattern v. Weinberger, 519 F.2d 150 (1975), is instructive:

"[T]he Supreme Court held that due process requires that welfare officials provide notice and an oral hearing prior to any termination of benefits. The Court relied heavily on the welfare recipients 'brutal need' for continued payments. A 'crucial factor,' in its view, was that 'termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.' Adopting a balancing test, the Court

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concluded that 'the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in fiscal and administrative burdens.' Goldberg supra, 397 U.S. at 266, 90 S.Ct. at 1019." (Emphasis added.) 519 F.2d at 159.

The Supreme Court in Goldberg mentioned that welfare payments helped the poor meet the "basic demands of subsistence" (25 L.Ed.2d at 297), and that the welfare system was "a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'" The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." (Emphasis added.) Id. Thus, it is evident from these decisions that the Supreme Court considers money received for sustenance, whether it be in the form of wages or of welfare, as entitled to special and specific procedural safeguards.

However, the Mattern case, cited above, dealt with a statutory recoupment procedure which enabled the Secretary of Health, Education and Welfare to "adjust or reduce the amount of social security payments without affording the beneficiary the right to a prior oral hearing." 519 F.2d at 153. The court explained the gradual expansion of the protections of the due process clause as interpreted by the Supreme Court in recent years, and somewhat in contrast with the Goldberg decision concluded "the requirements of due process do not depend on the severity of the impact resulting from the deprivation" (Id. at 162), and that not all recoupments would require a pre-deprivation hearing. For example, the court said that in cases which involve "matters of a purely arithmetical nature," an oral hearing would not be of much benefit to the claimant. Id. at 165. In such instances, the court found it would be sufficient to resolve such disputes initially by documentary proof, as for example, "an examination of social security records and cancelled checks." Id. Such actions would satisfy due process requirements if the pre-recoupment procedures permitted written evidence and provided for an examination of written documents, as well as a post-recoupment hearing. Id.

From the foregoing we can only conclude that each of the various instances in which the state may have occasion to exercise its right of set-off must be evaluated in light of the general principles enunciated by the courts. Obviously, it is not possible for us

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to speculate in this opinion as to the particular procedures necessary to satisfy due process requirements in each such situation. However, since you also have inquired as to the state's ability to set-off state employees' delinquent NDSL loans against income tax refunds due such employees, as well as against such employees' wages, we believe that Brown v. Lobdell, 36 Or.App. 397, 585 P.2d 4 (1978), should be noted, in that it is instructive as to the extent of due process protection that is necessary when the state exercises its right of set-off with respect to income tax refunds.

In Brown, the Oregon Court was concerned with a procedure of the Oregon Department of Revenue "known as SOIL (an acronym for set off liability)," whereby income tax refunds are withheld and credited "to the alleged taxpayer-debtors' accounts with various state agencies." Id. at 399. After finding that such procedure is founded upon the common law remedy of set-off (Id. at 402), the court considered whether the procedures employed under the SOIL program afforded adequate procedural due process. Such consideration was predicated on the three basic factors noted previously herein that were enunciated in Mathews v. Eldredge, supra, with the court finding as follows:

"In this case, the due process question is what procedures are necessary to protect against the risk of error arising from post-liquidation institutional mistake or events. A taxpayer whose refund is to be withheld by defendant must be afforded the opportunity to inform defendant, for example: that it has mistaken him for another taxpayer; that it has miscalculated the balance of his debt; that he has paid or compromised the debt; that the debt has been the subject of an unrelated adjudication; or that his refund is not a proper subject for setoff for some other reason. An evidentiary hearing is not necessarily required because such issues can normally be resolved by documentation. It is sufficient if defendant informs the taxpayer that his tax refund is being applied to a debt which the notice identifies and that he may submit any objections in writing to defendant or to the creditor agency. If the taxpayer's claim of error raises an unresolved factual issue, then an evidentiary hearing is appropriate. These procedures comport with due process because they are sufficient to protect against probable types of error but do not impose an unreasonable burden on defendant's administration of the SOIL program." (Footnote omitted.) Id. at 408, 409.

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We believe that this decision's approval of a procedure that does not provide for an evidentiary hearing emphasizes our prior comments in this regard. It should be noted, however, that the Oregon court distinguished this case from the decisions in Sniadach, supra, and Goldberg, supra, due to the fact that the SOIL procedure is applicable only to liquidated debts for which the various creditor state agencies have afforded the alleged debtor a prior opportunity to contest the validity thereof. Id. at 408. Even so, we believe there is a basis for concluding that the character of the debtor's property being affected in this case was implicitly persuasive to the court's approval of a less-formalized procedure than that which might be required for a set-off of wages. Of relevance to such conclusion is a recent U.S. District Court case, Enfinger v. Enfinger, 452 F.Supp. 553 (M.D. Ga. Columbus Division, 1978), where it was held that a tax refund was not subject to a wage garnishment action, because it was not "remuneration for employment" as defined by the Social Security Act. The court said:

"Tax refunds, however, are only made when taxes are overpaid and are not 'due from or payable by the United States' as a result of an employment relationship. Even where all income is derived from wages, the taxes withheld on those wages immediately lose their identity as 'remuneration for employment' as soon as they are deducted. In P.C. Pfeiffer Co. v. The Pacific Star, 183 F.Supp. ¶32 (D.C.Va. 1960), the court held that once an employer has withheld taxes from the gross wages due to an employee under the ordinary employer-employee relationship, the amounts withheld then become due to the United States as taxes and not as wages. And in American Fidelity Co. v. Delaney, 114 F.Supp. 702 (D.C.Ut. 1953), the court stated that when an employer withholds tax from an employee's wages and pays him the balance, the employee has been paid in full. These cases indicate that income taxes deducted from an employee's wages are not part of his 'remuneration for employment' and, therefore, any refund due as a result of overpayment of the taxes would not fall into that category either." Id. at 555.

None of the conclusions we have reached in responding to your request is in contradiction of Attorney General Opinion No. 75-408, which recognized the state's right of set-off, even though we have determined

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herein that such right must be exercised in consonance with the Due Process Clause of the Fourteenth Amendment. However, Attorney General Opinion No. 78-297 is not so easily harmonized. Even though that opinion recites the conclusions of Opinion No. 75-408 in apparent reliance thereon, the synopsis of Opinion No. 78-297 states as follows:

"When money is claimed to be due to a contractor for work on one construction project of the state, which is funded by one appropriation, and the state has claims against that same contractor for allegedly defective work performed on another construction project, funded by a different appropriation, the constraints imposed by the appropriation process forbid the state to assert a right of setoff respecting monies due from the former appropriation to satisfy the claims arising concerning the latter building."

Although this synopsis details to some extent the factual circumstances presented for Attorney General Schneider's consideration, it does not accurately reflect the fact disclosed in the body of the opinion that the amount of the claims for the allegedly defective construction work had not yet been ascertained, and such claims had neither been reduced to judgment nor been presented to the contractor in the form of a demand. Thus, the alleged indebtedness of the contractor to the state had not been fully ascertained. There was not in fact a liquidated sum due and owing from the contractor to the state.

Under such circumstances, we agree with the ultimate conclusion reached in that opinion that the state could not exercise its right of set-off. The right of set-off exists only where each of two mutually-indebted parties owes an ascertained amount to the other. 20 Am.Jur.2d, Counterclaim, Recoupment, Etc., §2. In the situation considered in Opinion No. 78-297, there was no ascertained amount due and owing the state by the contractor, and we concur that set-off could not be utilized by the state.

However, even though concurring in that opinion's ultimate conclusion, we cannot agree with the language thereof that suggests that the state's rights as a creditor to set-off debts is incompatible with the state's appropriation process. While we recognize the legal constraints on the expenditure of moneys in the state treasury deriving from the requirement of Article 2, Section 24 of the Kansas Constitution that

"[n]o money shall be drawn from the treasury except in pursuance of a specific appropriation made by law," we do not find that the state's use of set-off compromises such requirement. We do not believe that exercising the state's right of set-off results in diverting moneys in the state treasury from the purpose for which they were appropriated.

In our judgment, the language in Opinion No. 78-297 concerning the relationship of the right of set-off to the appropriation process should be considered as gratuitous, at best. It was unnecessary to the ultimate determination made in that opinion. Moreover, it should be recognized that such language is inconsistent with that opinion's earlier finding, with which we have concurred at length herein, that the state, like any other creditor, may lawfully exercise the right of set-off. In so doing, that opinion quotes United States v. Munsey Trust Co., supra. However, that earlier opinion fails to recognize that acknowledgement of the state's right of set-off on the one hand is inconsistent with the subsequent determination that, under the facts presented for consideration therein, the right of set-off "compromises the integrity of the appropriation process," because it results in a diversion of appropriated moneys. In our judgment, no such diversion exists.

Initially, it must be realized that set-off, particularly where exercised by the state, is principally a matter of accounting. No "expenditure" of money is being made; no money is being "drawn from the treasury." Rather, set-off in actual practice results in debiting a particular fund, or account within a fund, in the state treasury and, correspondingly, crediting another such fund or account. Thus, under these circumstances, no money is withdrawn from the state treasury, and the proscription of Article 2, Section 24 of the Kansas Constitution as it applies to the withdrawal of moneys from the treasury has not been compromised.

Moreover, such procedure of debiting and crediting various funds or accounts in the state treasury does not divert moneys from the purpose for which they were appropriated. In this regard, the following excerpt from the decision in State, ex rel., v. Fadely, 180 Kan. 652 (1957), is relevant:

"The term 'specific appropriation made by law' may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officials, to apply a distinctly specified sum from out of the state treasury, in a given period, for a specified objective or demand against the state. In general terms

a 'specific appropriation made by law' is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law. . . ." (Citations omitted.) Id. at 661.

In a situation which gives rise to the state exercising its right of set-off, there would exist mutual indebtedness of the state and some other party. Where, as contemplated in the foregoing quoted excerpt from Fadely, the legislature has set money apart to satisfy the "demand against the state" of such other party, the state exercises its right of set-off by withholding all or a portion of such appropriated moneys such as is necessary to satisfy in whole or in part the debt of such party to the state, and credits the moneys so withheld to the fund or account to which such party's indebtedness is applicable. In so doing, the appropriated moneys have not been diverted. The "demand against the state" for which they were appropriated have in fact been satisfied.

By debiting a particular fund or account in which moneys to satisfy the other party's demands have been placed by act of the legislature, and crediting such moneys to another fund or account in the state treasury, the purpose or objective of the legislature in appropriating such moneys has been met. The moneys so debited, even though not drawn from the treasury, are reflected as an expense of such fund or account--an expense that is in consonance with the purpose of the legislature in setting moneys apart in such fund or account. At the same time, of course, the corresponding credit of such moneys to the fund or account to which such party's indebtedness is applicable satisfies, in whole or in part, such party's indebtedness to the state. But this fact, in our judgment, does not detract from or compromise the legislature's purposes and objectives underlying its various appropriation measures.

In support of this conclusion, it should be recognized that, even though the moneys set-off are credited to another fund or account, in total or partial satisfaction of the other party's indebtedness to the state, the act of crediting such moneys to the other fund or account does not in itself constitute an authorization to expend such moneys. Such authority can be derived only from an appropriation act of the legislature, and where the legislature has limited the amount of money which can be expended from such fund or account, no authority exists to expend moneys in such fund or account in excess thereof.

Mr. Richard E. Brown
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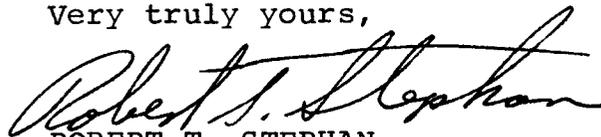
Therefore, for the foregoing reasons we are of the opinion that the exercise of the state's right of set-off does not compromise the integrity of the appropriation process. To the extent that the conclusions of Attorney General Opinion No. 78-297 are in conflict with the opinions expressed herein, they should be disregarded.

Because you have inquired specifically as to the application of the state's right of set-off to delinquent NDSL loans obtained by persons who are now state employees, one final caveat is appropriate. By letter dated November 4, 1980, this office advised Patrick J. Hurley, Secretary of Administration, that exercising the state's right of set-off in this instance might jeopardize the availability of federal funds for institutions under the jurisdiction of the State Board of Regents which attempt to collect delinquent NDSL loans by this means. Such collection efforts would necessarily involve disclosure of information to the director of accounts regarding the recipients of such loans, and we believe that there is a possibility that such information might be considered "personally identifiable information" under the provisions of the so-called Buckley Amendment. 20 U.S.C.A. §1232g.

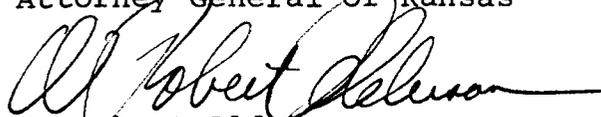
Although the Buckley Amendment does not preclude an educational institution from releasing personally identifiable information regarding students or former students of such institution, if such information is within the purview of that law and is released in contravention of its terms, the potential consequences of such action is a restriction of federal funds to such institution.

Because of our understanding that Secretary Hurley is pursuing through the appropriate federal agencies a determination of the federal government's interpretation of the Buckley Amendment's applicability to this situation, we do not believe further comment on this matter herein is warranted, other than to suggest that regents' institutions would be well-advised to be certain of their rights and liabilities under the Buckley Amendment before proceeding to collect delinquent NDSL loans by means of the state's right of set-off.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:phf