

Opinion No. 62-121

October 1, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General George Richard Schmitt,
Assistant Attorney General

TO: Joe Callaway, State Treasurer, State Land Office Bldg., Santa Fe, New Mexico

QUESTION

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1. What are the rights of the State of New Mexico and the federal government to the unclaimed proceeds from certified checks, drafts or money orders payable to the federal government on income tax accounts which have remained outstanding and uncollected by the federal government for a period of 10 or more years?
2. Is the State Treasurer, acting in his capacity as Administrator of the Unclaimed Property Act, entitled to keep an abandoned U.S. Savings Bond, or must he return the unclaimed bond to the U.S. Treasury?
3. Is the State of New Mexico entitled to escheat an abandoned U.S. Savings Bond and receive its liquidated value from the federal government?

CONCLUSIONS

1. See Analysis.
2. The State Treasurer is authorized to retain the bond under the provisions of the Uniform Disposition of Unclaimed Property Act.
3. See Analysis.

OPINION

ANALYSIS

The administrator of the Uniform Disposition of Unclaimed Property Act (§ 22-22-1 to 22-22-29, N.M.S.A., 1953 Comp. (P.S.)), who is the State Treasurer, is entitled to receive any sums payable on checks, drafts or other written instruments certified by banks in this state, if the amount owed by the banking institution has been outstanding and unclaimed for more than 10 years since at that time it is presumed abandoned under § 22-22-3, subdivision "C" of the Unclaimed Property Act. After the State Treasurer and the banking institution have complied with the various procedures

pertaining to unclaimed sums or property, the unclaimed sums or property must be delivered to the State Treasurer pursuant to Section 22-22-14.

The specific statutes above noted, as well as the remainder of the Act, make no exception to the sums payable to the federal government by checks, drafts or money orders that have remained outstanding and uncollected by the federal government for a period of 10 or more years. For some unknown reason the Internal Revenue Department has never presented any of these checks for payment, and the bank which has certified the checks has never been able to return the money to the drawer of the check for a period of 10 years or more. If the Internal Revenue Department of the federal government has a legitimate claim to any of the above, they must file a claim pursuant to Section 22-22-19 of the Unclaimed Property Act. This section provides that any "person" may file a claim on the form prescribed by the State Treasurer. The federal government must also comply with this statutory requirement since the definition of "person" includes "government", according to Section 22-22-1, subsection "G" of the Unclaimed Property Act.

It would appear that any claim for an amount owed to the Internal Revenue Department on unpaid taxes evidence by certified checks, or drafts, that have remained outstanding for a period of 10 or more years, would be barred under federal law -- namely, by a specific statute of limitations governing the same.

2. Your second problem pertains to a U.S. Savings Bond that has been presumed abandoned under the Uniform Disposition of Unclaimed Property Act and subsequently turned over to you by the Carlsbad National Bank. The federal government has denied your request for payment, and has "suggested" that you return this bond to them which they will keep, subject to a claim by the registered owner.

In answer to your question, may we "suggest" that you retain the bond since it is presumed abandoned pursuant to Sections 22-22-3 (D) and 22-22-10 of the Unclaimed Property Act, and you are entitled to retain the bond under Section 22-22-14, *supra*. As far as we can ascertain, the federal authorities have no right to force the state to deliver an unclaimed and abandoned savings bond to a federal treasury for safekeeping, which is undoubtedly why they have only "suggested" that you return the bond to them.

3. The U.S. Treasury Department has denied your claim for payment on the ground that our procedure for escheat does not come within the specific provisions of the regulations governing the bonds which are a part of the bond contract, nor does the state acquire title to the bonds under our Uniform Disposition of Unclaimed Property Act. The decision is in accordance with various cases on the matter of escheat.

The courts have held that the power to escheat has universally been considered within the residual powers of the states (**Standard Oil Co. v. New Jersey**, 341 U.S. 428 (1951)), but when applied to funds over which the federal government has regulatory interest state abandoned property laws may not infringe upon the regulations of federal

policy. See cases listed in **67 Yale Law Journal** 479 (1957-58). The rule, generally speaking, is also set out in **1 Am. Jur. 2nd. 11**, as follows:

"The power of a state to determine escheat of property within its jurisdiction does not extend to a subject matter over which congress has exercised its power and directed a result, not only inconsistent, but also incompatible, with escheat by the state."

The U.S. Supreme Court in **Clearfield Trust Co. v. U.S.**, 318 U.S. 363 (1943), has also held that the federal law must determine the rights and liabilities of the U.S. upon its commercial paper.

All of the cases we have found on this subject, including the ones cited above, are not exactly in point with the question at hand, since the factual situations before the courts involve the powers of the state to escheat federal funds other than proceeds from war bonds. However, on the basis of these decisions, the federal government has apparently refused to recognize the powers of the states to escheat savings bonds under their Unclaimed Property Acts.

The answer to this problem rests with federal escheat legislation which was introduced by U.S. Senator McClellan in 1959, and which is Proposed Chapter 2-A, Sections 135 to 139 of Title 31 of the U.S. Code. In essence, the Bill provides that the Federal government recognizes the undelegated rights of the states and the delegated right of any territory to escheat unclaimed property in the custody of officers, departments and agencies of the United States, and prescribes the procedure for acquiring the same.

This matter was seriously considered this year at the Conference of Attorneys General in Puerto Rico, and the Conference of the Unclaimed Property Administrators in Florida. It will be taken up again at the Unclaimed Property Administrators' meeting in Chicago next month, with the hope that a plan may be formulated which will insure the cooperation of all the states in an all-out attempt to have this law passed as quickly as possible.

However, even though the federal escheat law is passed, the problem will not be resolved for our state since the New Mexico Supreme Court in **Clovis National Bank v. Callaway**, 69 N.M. 119, 128, 364 P. 3d. 748 (1961) declared the escheat provision of Section 22-22-20 of the Unclaimed Property Act unconstitutional and which is set out as follows:

". . . After any separate sum has been collected from any holder and the amount collected paid into the reserve investment fund by the state treasurer and the amount deposited has resided in the reserve investment fund for a period of forty (40) years without the owner asserting a claim and collecting upon his claim, then the amount of the original deposit shall escheat to the state and be credited to the current school fund of the state."

The above quoted portion of the statute was declared unconstitutional because it violated due process of law. In this case our court stated:

"there is no requirement that the true owners shall have title title without known heirs, nor is there any means provided for judicially making such a determination after notice of the opportunity to be heard by the interested persons."

As a result of this decision our Unclaimed Property Act is now only custodial in nature. This means that the state does not acquire title to the abandoned property but only acts as a trustee holding the property for the owner. Since the state cannot escheat federal unclaimed property or funds unless it has title to the same, (as stated in the recent U.S. Treasury Department letter to you), it follows that we must amend our unclaimed property law in accordance with the decision in **Clovis National Bank v. Callaway**, supra, and in our proposed legislation on the subject meet the requirements of procedural due process as noted in this decision. Such an amendment to the unclaimed property law when passed, will of course, authorize the state to escheat and hold title to the property.

Another possible solution to the problem which warrants some discussion is the filing of a probate action under the statute of Descent and Distribution, requesting a determination of heirship to the unclaimed bond. If the probate court found that no heirs existed, the property would escheat to the state. Since the state by this procedure would then acquire title to the property, the U.S. Treasury Department might at that time honor a claim from the state for payment of the bond's liquidated value. However, the cost to the state in bringing such an action would practically nullify the small liquidated value of Twenty Five dollars and to follow such a procedure at this time is obviously inappropriate.

There is one other method in which the state can acquire title to the bond, which also rests in amended legislation. Section 31-13-1, N.M.S.A., 1953 Compilation (P.S.) provides as follows:

"Surviving husband, wife or next-of-kin may collect three hundred dollars (\$ 300.00) without administration. -- The surviving husband or wife or next-of-kin, of any deceased person, may without procuring letters of administration, collect from the state of New Mexico, or any political subdivision thereof, any corporation, co-partnership, association, individual, bank or trust company, any sum of money which the state of New Mexico, or any political subdivision thereof, said corporation, co-partnership, association, individual, bank or trust company may have owed such deceased person at the time of his or her death, for wages or salary earned by such deceased person while in the employ of the state of New Mexico, or any political subdivision thereof, such corporation, co-partnership, association, individual, bank or trust company, provided said sum of money shall not exceed three hundred dollars (\$ 300.00). Or any sum which said deceased may have left on deposit with a bank or trust company, or a corporation, individual or firm doing business as bankers, Provided said sum shall not exceed the sum of three hundred dollars (\$ 300.00)."

Under the above quoted provision, by amendment, the "state" could be included with persons authorized to collect without administration, and the "sum" to be collected could also include the liquidated value of savings bonds up to \$ 300.00. If this revised law were passed, the state would not only acquire title to the bond, but would also avoid all the costs connected with the bringing of a probate action.

Therefore, in view of the above analysis, there appears to be no feasible manner in which the state can properly escheat abandoned U.S. Savings Bonds until both the proposed federal and state legislation explained above has been passed and put into effect.