

## Opinion No. 63-136

October 10, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Charles C. Brunacini Commissioner of Revenue State Capitol Santa Fe, New Mexico

### QUESTION

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1. If an employer subject to the New Mexico withholding tax act has filed a petition in bankruptcy, what priority in the bankruptcy proceeding is due state income taxes that have been withheld by the employer?
2. If state income taxes have been withheld but not remitted to the state, and the state is unable to collect the taxes because of the employer's intervening bankruptcy or for other reasons, are the employees from whose wages the taxes were withheld entitled to credit for the amount withheld against income taxes due the state?

#### CONCLUSIONS

1. See analysis.
2. Yes.

### OPINION

#### {\*301} ANALYSIS

Priority in bankruptcy proceedings is governed by the federal bankruptcy laws. Title 11, U. S. C., Section 104 (a) sets up priorities for certain claims against bankrupt estates. After secured claims have been paid, claims are paid as follows: (1) costs of administration, (2) wage claims, (3) certain expenses of creditors in marshalling and preserving the bankrupt estate, (4) taxes legally due and owing by the bankrupt to the United States or any state or subdivision thereof, (5) certain debts due the United States and to landlords, and (6) general creditors.

Taxes withheld on wages paid prior to bankruptcy are entitled to the fourth priority described above, if they are legally due and owing at the time the petition in bankruptcy is filed, **In re John Horne Company**, 220 F.2d 33. Whether a tax is legally due and owing is determined by reference to state law. **In re Davenport Dry Goods Company**, 9 F.2d 477.

Under our state law, every employer who withholds income taxes for the federal government is required to do so for the state government, and is liable to the state for the amount required to be withheld, whether or not he actually withholds it. See Sections 72-15-51 and 72-15-53, N.M.S.A., 1953 Compilation. Under Section 72-15-54, N.M.S.A., 1953 Compilation, an employer who owes a combined total in any month except March, June, September, and December of more than \$ 100.00 under the withholding tax, school tax, compensating tax, and municipal sales tax, is required to deposit the combined total with the Bureau of Revenue not later than the 20th day of the following month. Otherwise, the employer will file a quarterly return not later than the last day of April, July, October, and January, remitting all taxes due. Section 72-15-54 (C) then provides:

"For the purposes of the Withholding Tax Act, the time a tax is due is that time a remittance or deposit is required to { \*302 } be made to the bureau under the provisions of this section."

This would seem to indicate that the withholding taxes are not due until a remittance or deposit is required to be made, which may be the 20th day of the following month, or the last day of the month following the end of the quarter, as described above. If this is a correct interpretation of our law, then the state's claim for taxes would lose its priority if an employer withheld the taxes but filed a petition in bankruptcy prior to the date he was required to make a remittance or deposit; this for the reason that not until that date are the taxes due and owing.

But other considerations enter into the picture here. The statute quoted above says that it is limited to the purposes of the withholding tax act. Moreover, Section 72-15-52, N.M.S.A., 1953 Compilation, provides in part, as follows:

"Amounts deducted under the provisions of the Withholding Tax Act shall be a collected tax. . ."

In our opinion, the employer is liable to the state of New Mexico for this "collected tax" just as soon as he makes, or should have made, the deduction from wages. Our law simply permits him to remit the taxes at a later date; the employer owes the taxes in the meantime, even though the date of payment has not arrived. The time of accrual of the obligation to pay a tax determines whether the tax is "due and owing", rather than the time when the tax obligation is to be discharged by payment. **In re International Match Company**, 79 F.2d 203. The fact that a tax is not payable or collectible until after bankruptcy does not mean that the tax is not "due and owing", if it is assessed prior to bankruptcy. **New Jersey v. Anderson**, 203, U.S. 483, 51 L. Ed. 284, 27 S. Ct. 137; **Bates v. Archer**, 288 Fed. 182. In our opinion, withholding taxes are "due and owing" within the meaning of the bankruptcy act at the time the taxes are withheld from wages, or should have been withheld from wages, even though actual payment of the taxes to the state is deferred until a later date.

There are other situations that should be mentioned. If the trustee in bankruptcy continues to operate the bankrupt's business during the pendency of the bankruptcy proceedings, the trustee is liable to pay all taxes normally attributable to the business operation, and withholding taxes that accrue during such an operation are entitled to the first priority as expenses of administration. **In re John Horne Company**, 220 F.2d 33; **United States v. Sampsell**, 193 F.2d 154. Moreover, if an arrangement proceeding under Chapter XI of the bankruptcy act has been entered into, and taxes have accrued during that proceeding, and the proceeding is later superseded by a proceeding in bankruptcy, then the taxes that accrued during the arrangement proceeding are entitled to be preferred even above the expenses of administration of the later bankruptcy proceeding. **In re Airline-Arista Printing Corp.**, 156 F. Supp. 403; **City of New York v. Rassner**, 127 F.2d 703.

It is readily seen that situations may arise in which the state will never actually receive the income taxes that have been withheld by an employer. This leads us to your second question, whether the employee from whose wages the taxes were withheld is entitled to a credit against state income taxes for the amount that was withheld.

Section 72-15-59, N.M.S.A., 1953 Compilation, provides, in part, as follows:

"The amount of wages deducted {\*303} and withheld under the provisions of the Withholding Tax Act during the taxable year shall be credited against any state income tax liability for that taxable year."

This section speaks only of wages **deducted** and **withheld**; it says nothing about whether the amounts so deducted and withheld are actually remitted to the state. The statute does not penalize the employee for his employer's failure to remit the taxes withheld, or for his employer's inability to remit the taxes because of intervening bankruptcy or other reasons. The theory is that the employer is a tax collector for the state, and the state, not the employee, should bear the loss of the employer's failure or inability to remit the taxes he has collected. Accordingly, it is our opinion that, if state income taxes have been withheld, but have not been remitted to the state, and the state is unable to collect the taxes because of bankruptcy of the employer or for other reasons, the employees from whose wages the taxes were withheld are still entitled to a credit against state income taxes for the amounts withheld from their wages.

By: Norman S. Thayer

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