

Guideline on Implementing Setoff Debt Collection Act

The Setoff Debt Collection Act (N.C.G.S. Chapter 105A) is designed to facilitate collection of debts owed by an individual to an agency of the State. The act establishes a procedure for setting off any such debt against any refund that is due the debtor under North Carolina income tax law. An outline of the required steps is attached. The North Carolina Department of Revenue has established procedures (attached) for institutions to follow to comply with the requirements of the act.

1. The act defines the constituent institutions, the State Education Assistance Authority, the University of North Carolina Hospitals at Chapel Hill and the Board of Governors in performance of its duties in administering the Scholarship Loan Fund for Prospective College Teachers as "claimant agencies" subject to the act.

2. Compliance with the act by claimant agencies is mandatory but it does not preclude the use of other available remedies to collect debts. Therefore, agencies must annually file with the Department of Revenue a complete list of debtors whose debts are subject to set-off; but, the Attorney General, in the regular process of list review, may decide that the debt can be collected by other means.

3. For a debt to be eligible for set-off, (a) the debt must be at least \$50 (b) the debt must be at least 90 days in arrears or already reduced to judgment, and (c) the tax refund due the debtor must be at least \$50. Since agencies will not know whether a tax refund is due, every individual debtor whose debt is at least \$50 and 90 days or more in arrears or reduced to judgment should be listed on the annual list sent to the Department of Revenue.

4. To obtain the necessary match between the debtor and individuals eligible for a tax refund, the act requires claimant agencies, "whenever possible," to obtain information, including the social security number, "from any person for whom the agencies provide any service or transact any business and who the claimant agencies can foresee may become a debtor" under the act. The federal Privacy Act of 1974 prohibits, in effect, the involuntary disclosure to a state agency of an individual's social security number except in some contexts, such as the "administration of any tax." The Attorney General has taken the position that the federal statutory exemptions are broad enough to include the provisions of the Setoff Debt Collection Act as an "administration of any tax" and, therefore, permit the state agency to require the disclosure by any debtor or potential debtor of that person's social security number in contemplation of possible debt set-off against tax refund. Institutional personnel are advised to review the University's guidelines in this policy manual for use of social security numbers.

5. The act gives the alleged debtor the right to a hearing to contest the validity of the debt. The act also provides that the University claimant agencies "shall conduct hearings according to administrative procedures deemed lawful by the Attorney General." The Attorney General has approved the following procedures to be followed whenever a debtor who receives notice of a debt requests a hearing:

a. The debtor shall be provided written notice of the date, time, and place set by the institution for the hearing, and of the identity of the hearing officer. The notice shall

be sent certified mail, return receipt requested; a model notice is attached to this policy. Any notice used in lieu of the model notice shall address at least paragraphs a., b., e., f., g. and h. of these instructions.

b. The notice shall state, that any further review of the debt will be limited to evidence presented at the hearing, and that if the debtor fails to appear at the hearing (either personally or through an authorized representative pursuant to paragraph h., below), the institution in the debtor's absence shall proceed to determine the validity and amount of the debt as a final agency decision pursuant to paragraph k., below.

c. The chancellor or chancellor's designee shall appoint a hearing officer to hear the evidence and make a final determination, on behalf of the institution, on the validity and amount of the debt owed. The hearing officer shall have no prior involvement in the claim which would constitute a conflict of interest, and the hearing officer shall not be able to offer testimony or evidence on behalf of the institution.

d. The institution shall have the burden of establishing the validity and amount of the debt upon the evidence presented at the hearing.

e. The debtor shall be able to appear and to present evidence, including the testimony of witnesses. Although the debtor cannot compel the attendance of witnesses, the hearing officer shall have the authority to direct the attendance of any witnesses employed by the institution whose possible testimony the hearing officer believes relevant.

f. The debtor shall be able to cross-examine the institution or agency's witnesses.

g. The debtor shall be able to review, prior to the hearing, the documents the institution or agency intends to introduce in support of its claim and to obtain copies of the documents at the debtor's expense.

h. The debtor may be advised or represented by another person, including legal counsel, at the debtor's own expense.

i. The hearing shall provide an opportunity for introduction of credible and relevant evidence, but judicial rules of evidence need not be followed. The hearing officer shall have the authority to exclude irrelevant, immaterial, or unduly repetitious evidence and to limit unnecessary examination of witnesses.

j. To assure compliance with the judicial review provisions of N.C.G.S. § 150A-47, the hearing officer shall record the proceedings in a manner which can be reduced to a verbatim transcript in the event of an appeal. The hearing record shall include this recording or transcript and all documents offered or received into evidence at the hearing.

k. The hearing officer shall issue a written determination on the validity and amount of the debt owed, if any, which by resolution of the Board of Governors dated April 13, 1984 (attached), shall be the final institutional or agency decision pursuant to N.C.G.S. § 150A-43. The determination shall state the hearing officer's decision and summarize the facts relied on in making that decision.

l. The determination shall be sent to the debtor by certified mail, return receipt requested. If the determination is against the debtor in any respect, there shall be included with it a notice of right to appeal to Superior Court within 30 days of receipt of the written determination, pursuant to N.C.G.S. § 150A-43.

m. Within 20 days of the issuance of a written determination pursuant to paragraph k. above, the institution or agency shall notify the Department of Revenue of the determination and of the amount of any debt determined therein to be due and owed.

Please note the following consideration. In the context of a student debt, a hearing under the act likely will involve presentation of "education records" as defined under the Family Educational Rights and Privacy Act of 1974 (the "Buckley Amendment"). Such documents are protected under the Buckley Amendment from disclosure, other than to the student, unless particular conditions specified in the Buckley Amendment are present. Thus, a hearing on a student's contested debt should not be a public hearing unless one of these Buckley provisions pertains:

- The student has waived the right to privacy (if the records to be used include financial records of the student's parents, their waiver also is needed);
- The contested debt is based upon records generated "in connection with a student's application for, or receipt of, financial aid"; or
- The records are produced at the hearing "pursuant to any lawfully issued subpoena" (the procedures approved by the Attorney General do not provide for agency subpoenas).

6. The act provides that a hearing outcome adverse to the debtor may be taken to court by the debtor "except that the place of initial review shall be the superior court for the county in which the debtor resides." The Attorney General has ruled that "residence" is to be defined as one's "domicile or place of business." The Attorney General has also ruled that "superior court" as used in the act refers only to superior courts of North Carolina. Therefore, a debtor contesting a debt who is neither a domiciliary of North Carolina nor established in business in this State must still look to the superior courts of North Carolina for debt review, logically either the county in which the institution is located or Wake County (the usual situs for judicial review under the Administrative Procedures Act).

Compliance

Each constituent institution should cooperate fully with the Department of Revenue in establishing the debt set-off machinery required of it by N.C.G.S. Chapter 105A and, in supplying the annual list of debtors. For each institution this machinery should include a designated agent or office to receive notice from a debtor of the debtor's intent to contest an asserted debt.

[This is a rewrite of Administrative Memoranda #127 and #195.]

Steps in Set-Off Procedure North Carolina Department of Revenue

1. Claimant agencies annually submit lists of debtors by December 1 showing name, social security number and address and the award of the obligation for each debtor.
2. Department runs lists against refunds.
3. When match occurs, department notifies in writing the claimant agency giving the amount of refund and the debtor's address listed on the tax return.
4. The claimant agency must notify the debtor within 10 days of receipt of the department's notice of its intent to claim the refund and send a copy of such notice to the department so as to be received within 15 days from the date the department mailed its notice that a match had occurred.
5. Debtor may contest agency's claim by giving written notice to agency within 30 days from the date of the mailing of the agency notice to the debtor.
6. If claim is not contested within the required 30 days, within 20 days thereafter, the claimant agency must certify the debt to the department.
7. If claim is contested, the period for certification is 20 days following completion of the hearing process.
8. The department shall transfer by check the net proceeds collected (gross minus 15% collection assistance fee) to the appropriate claimant agency together with the following information:
 - Full name of the debtors
 - Social Security number of debtors
 - Gross Proceeds per set-off
 - Net Proceeds per set-off
 - Collection fee per set-off
9. Claimant agency will credit the debtor with gross proceeds.
10. Department notifies taxpayer of action taken and refund any remaining balance.

Set-Off Debt Collection Program Proposed Rules and Procedures

The function of the Department of Revenue under the Set-Off Debt Collection Program is to assist claimant agencies, upon request, in the collection of qualifying delinquent accounts. From lists of qualifying debtors furnished by the various claimant agencies, the department will identify those entitled to individual income tax refunds of at least \$50 and, upon receipt of a final certification of the debt from the respective claimant agency, set-off the applicable amount. Periodically, the department will remit the respective claimant agencies the net proceeds collected which shall be the gross proceeds collected less than 15% collection assistance fee. A transmittal statement will be included reconciling the amount of the remittance with the gross proceeds collected per individual set-off so that the claimant agency can credit the debtor's obligation with gross proceeds collected as required by N.C.G.S. § 105A-14(b).

Claims for set-off must be filed with the Department of Revenue in accordance with the provisions of Article 1 of Chapter 105A and the rules and procedures set forth below and authorized under N.C.G.S. § 105A-16.

Each claimant agency must submit its complete list of debtors for which set-off is sought to the department annually by December 1 of the year preceding the calendar year during which refunds would have been paid. For example, a list of debtors submitted by December 1, 1979, will be matched against taxpayers entitled to refunds in the calendar year 1980. The list must include the full name, social security number, address and the amount of the obligation for each debtor. The amount of the obligation is required to facilitate the processing of multiple claims. A new list must be submitted each year. Magnetic tape specifications and record layouts are available upon request. Claimant agencies that have the capability and volume to justify it are urged to send debtor information on magnetic tape. [N.C.G.S. § 105A-6(a).]

To participate in the set-off procedure, each claimant agency must register with the Department of Revenue. A registration form is available for this purpose.

Claims for obligations of less than \$50 should not be submitted (N.C.G.S. § 105A-4).

No debt should be certified for set-off that is less than 90 days in arrears unless there is an outstanding judgment for the debt. In the case of debts that are less than 90 days in arrears, it shall be presumed that an alternative means of collection is pending and believed to be adequate.

"Debtor" means any individual owing money to or having a delinquent account with any claimant agency which obligation has not been adjudicated satisfied by court order, set aside by court order, or discharged in bankruptcy. [N.C.G.S. § 105A-2(2).]

"Debt" means liquidate sum due and owing any claimant agency which has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for that sum. [N.C.G.S. § 105A-2(3).]

The claimant agency, upon receipt of notification from the Department of Revenue that a debtor is entitled to a refund, shall within 10 days send a written notification to the debtor and a copy of the same to the department of its assertion of rights to the refund or any part thereof. **SUCH NOTICE SHOULD CLEARLY INDICATE TO THE DEBTOR THAT ANY OBJECTIONS TO THE CLAIM SHOULD BE DIRECTED TO THE CLAIMANT AGENCY, NOT THE DEPARTMENT OF REVENUE.** In this connection the

Department of Revenue prefers that the notice also give the name and telephone number of the appropriate contact person within the claimant agency. [N.C.G.S. § 105A-7(a).]

If a claim is contested, the claimant agency should notify the Department of Revenue and indicate a date by which final determination of this claim might reasonably be expected.

If a claim is paid or otherwise settled, the claimant agency should notify the Department of Revenue immediately so that the tax refund can be promptly released.

_____, 20____

Dear (Debtor):

You are hereby notified that a hearing to determine the validity and amount of the debt described in our notice to you of *(date)* will be held before *(hearing officer name)* at *(time)* on *(date)* in *(location)*. Any time prior to that day and time you may appear at *(location)* during regular business hours to inspect (and copy, at your expense) the documents the university intends to present in support of its claim. If you desire to review the university's documents but cannot come to the campus, you should contact the hearing officer to make alternative arrangements (*telephone ___ - ___*).

During the hearing you will be allowed to cross-examine the university's witnesses and present relevant evidence in your own behalf, including the testimony of any witnesses you may bring with you. If you believe an employee of the university has information helpful to your case, you should notify the hearing officer of the employee's name and the nature of the information; if the hearing officer determines that the information may be relevant, the employee can be directed to attend the hearing. You may, if you choose, have the advice and representation of another person at your own expense, including legal counsel.

You will have the right to appeal to Superior Court any adverse decision made at the conclusion of the hearing, but judicial review will be limited to the evidence presented during this hearing. If you fail to appear at this hearing, the university shall in your absence proceed to determine the validity and amount of the debt. Any further correspondence in this matter should be directed to *(hearing officer's name, campus address and telephone number)*.