

1980 WL 121057 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 16, 1980

***1 Re: House Bill No. 3237**

Honorable Richard W. Riley
Governor of the State of South Carolina
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:

On May 14, 1980, the General Assembly adopted and sent to you for approval a bill that would amend [Section 12-7-2240 of the South Carolina Code of Laws \(1976\)](#) so as to prohibit the South Carolina Tax Commission from making refunds to persons who have defaulted on educational loans. The amendment is as follows:

Upon receipt of notification from the appropriate authorities which have authorized educational loans under Chapters 111, 113 or 115 of Chapter 59 of default on an educational loan, the Commission shall determine if a refund is due to any person who has defaulted on such loan and the entire refund shall be applied to the balance of the loan, or if the refund exceeds the loan balance, the Commission shall apply part of the refund to the loan balance and issue the balance of the refund to the taxpayer.

You request that we advise you as to whether or not the proposed amendment is constitutional. We do not believe so.

The right of setoff, of course, is a common law remedy [[Korlann v. E-Z Day Plan, 247 Or. 170, 428 P.2d 172 \(1967\)](#)]; and it is a right that is available to government as well as private citizens. [United States v. Munsey Trust Co., 332 U.S. 234, 91 L.Ed.2d 2022 \(1961\)](#). A setoff statute which does not grant to the State any greater right of recovery against its debtors than a private creditor might have in similar circumstances does not deny equal protection. See, [United States v. Munsey Trust Co., supra](#); [Gratiot v. United States, 40 U.S. 336, 10 L.Ed. 759 \(1841\)](#); cf., [James v. Strange, 407 U.S. 128, 32 L.Ed.2d 600 \(1972\)](#). But a setoff statute must accord a debtor procedural due process. U.S.CONST.Amend. SIV; S.C.CONST. art. I, § 3; cf., [Simmons v. Western Union Tel. Co., 63 S.C. 425, 41 S.E. 521 \(1902\)](#).

Due process of law requires that a person shall have a reasonable opportunity to be heard before binding action by the government can affect his rights to life, liberty or property. [Dacus v. Johnson, 180 S.C. 329, 185 S.E. 491 \(1936\)](#); [State v. Brown, 178 S.C. 294, 182 S.E. 838 \(1935\)](#); [State v. Earle, 66 S.C. 194, 44 S.E. 781 \(1903\)](#). The procedural protections which due process requires are those which the particular circumstances demand. [Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 \(1972\)](#); [Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287 \(1970\)](#).

The scope and nature of the required opportunity to be heard will be determined in large part by the nature of the issues likely to arise, the risk of agency error, and the likelihood of reducing that risk by additional procedural safeguards that do not impose excessive or unnecessary burdens on the agency. [Mathews v. Eldridge, 434 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 \(1976\)](#); [Floyd v. Motor Vehicles Div., 27 Or.App. 41, 44, 554 P.2d 1024 rev.den. \(1976\)](#). [Brown v. Lobdell, 36 Or.App. 397, 585 P.2d 4 at 10-11 \(1978\)](#).

*2 Here, unlike the State setoff scheme discussed and upheld in [Brown v. Lobdell, supra](#), there are no procedures set forth in the proposed amendment that would protect an educational loan debtor against the risk of error arising from post-liquidation¹ institutional mistake or events.² A taxpayer whose refund is to be withheld by the Commission is nowhere afforded by the

proposal the opportunity to tell the Commission or loaning authority either that he has been mistaken for another taxpayer, that the balance of his debt has been miscalculated, that he has paid or otherwise satisfied the debt, or that his refund is not a proper subject for setoff for some other reason. Compare, [Brown v. Lobdell, supra, 585 P.2d at 11](#). Because an educational loan debtor is not given any opportunity by the proposed amendment to be heard by the Commission or loaning authority with regard to the withholding of his tax refund and the use of his refund as a setoff for the repayment of all or a portion of an educational loan, we do not believe that it affords procedural due process to the debtor. We feel, therefore, that House Bill No. 3237 is unconstitutional.

kindest personal regards,

C. Tolbert Goolsby, Jr.

Footnotes

[1](#) Presumably, the proposed amendment refers only to liquidated debts. Compare, ORS 293.250(3)(b).

[2](#) The Oregon statute provides in part:

At the time any setoff is made the debtor shall be notified by the Department of Revenue of its intention to apply sums due from a state agency against the debtor's delinquent account. The notice shall provide that the debtor within 30 days may request a hearing before the claimant agency. . . . ORS 293.250(3)(c).

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