

Alicia G. Limtiaco
Attorney General



Alberto E. Tolentino
Chief Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

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LEGAL MEMORANDUM

TO: Senator Ben C. Pangelinan
29th Guam Legislature

CC: Director, Department of Revenue and Taxation

FROM: Attorney General

SUBJECT: Off-Set of Rebate Checks



This office is in receipt of your letter dated May 22, 2008 regarding the Department of Revenue and Taxation's off-set of rebate checks. The Attorney General referred your inquiry to me for response. In that letter, you have indicated that Mr. Art Ilagan will not off-set rebate checks of taxpayers who have payment plans in place and where the payments are current. To that end, you have requested that this Office "provide Mr. Ilagan with an updated list of individuals who have past obligations with the Office of the Attorney General and clearly identify taxpayers who have existing payment plans with the Attorney General's Office, further identifying taxpayers who are current with the payment and those who are not."

Please be advised that Guam Territorial Income Tax (GTIT) §6402(c) is mandatory. That is, "the amount of any overpayment to be refunded to the person making the overpayment *shall be* reduced by the amount of any past-due child support owed by that person..." (emphasis added). There is no provision under the tax code which prohibits the tax authorities from intercepting a tax rebate should an installment agreement be in place with the child support agency. This is in contrast to GTIT §6331(k)(2)(C) which prohibits the tax authorities from levying upon funds for collection of taxes owed to the Department of Revenue and Taxation during the period an installment plan is in effect. With respect to collection for amounts owed for child support, there is no such prohibition and as such, any payment plan for past due child support is not the exclusive method for collecting child support.

The rebate payments are subject to GTIT §6402. GTIT §6428 as amended by Pub. L. 110-185 which enacted the rebate provision specifically provides that these "rebates" are a credit against the tax. GTIT §6428(c) outlines how this credit is to be treated. Specifically, these "rebates" are to be treated as a refundable credit. Because this credit has the effect of being an overpayment it is subject to GTIT §6402(c). As such, the Department of Revenue and Taxation is mandated by §6402(c) to intercept the rebate checks of individuals who owe past-due child support regardless of whether they have entered into a payment plan or not. Furthermore, 5 GCA §34125 provides for the mandatory attachment of territorial income tax refund or other sums of money which the government of Guam or the Government of the United States owes to a person.

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With respect to payments owed to Guam Memorial Hospital, the interception of such "rebate" is also permitted under GTIT §6402(d). Specifically, §6402(d) provides for the interception of an overpayment for debts owed to Federal agencies once notice is given to Revenue and Taxation by such agency. The term "Federal agency" is defined in 6402(g) as follows:

the term "Federal agency" means a department, agency, or instrumentality of the United States, and includes a Government corporation (as such term is defined in section 103 of title 5, United States Code).

Under the mirror income tax code, the term "Guam" is to be substituted for the term "United States". See 48 U.S.C.A. §1421i(e). As such, the term "Federal agency" means a department, agency or instrumentality of Guam. The income tax regulations, specifically Treas. Reg. §301.6402-6(a) provides that when a Federal agency has entered into an agreement with the Department of Revenue and Taxation in the tax refund offset program and that it is owed a past-due legally enforceable debt, such agency may refer the past-due legally enforceable debt to the Department for collection. In this case, Guam Memorial Hospital has entered into an agreement with the Department in accordance with the regulations.

Recently, the Legislature passed P.L. 29-113:VI §72. This provision provides:

Section 72. Garnishment of Rebates and Refunds. If the taxpayer has a current payment arrangement agreement with the government entity for the payment of the outstanding liability of the taxpayer to such entity, the Director of the Department of Revenue and Taxation *shall not* garnish the income tax refunds and the economic stimulus payment owed to the taxpayer pursuant to United States Public Law 110-185.

The Director of Revenue and Taxation *shall* garnish the income tax refunds and the economic stimulus rebate payments pursuant to United States Public Law 110-185 of any taxpayer who is *not* in compliance with the payment arrangement for the outstanding liability of the taxpayer with the government entity.

The Director of any agency who has a memorandum of understanding for the garnishment of income tax refunds and the economic stimulus rebate payments pursuant to United States Public Law 110-185 with the Department of Revenue and Taxation *shall* forward the names of taxpayers who are *not* in compliance with their payment arrangement for garnishment of the taxpayer's income tax refunds and the economic stimulus rebate payments pursuant to United States Public Law 110-185.

The Organic Act of Guam, specifically 48 U.S.C.A. §1421i(a) provides in part "that the income-tax laws in force in the United States of America and those which may hereafter be enacted *shall* be held to be likewise in force in Guam." Use of the word "shall" creates a mandatory obligation. See *City of Los Angeles v. U.S. Dept. of Commerce*, 307 F.3d 859, 880 (9th Cir. 2002) (noting "To the contrary, long established Supreme Court law describes the word "shall" as creating a mandatory obligation."). Thus the Government of Guam is mandated to abide by the income tax code in effect in Guam. Furthermore the Guam Legislature does not have authority to amend or deviate from the GTIT. See *Bank of America v. Chaco*, 539 F.2d 1226, 1229 (C.A. Guam 1976) ("the Government of Guam is powerless to vary the terms of the Internal Revenue Code as applied to Guam, except as permitted by Congress"). Section 72 of P.L. 29-113:IV is an attempt to amend or deviate from GTIT §6402 in that it would not give effect to GTIT §6402. As such, it is contrary to the Organic Act and the powers given to the Director of Revenue and Taxation under that Act.

In sum, the Department of Revenue and Taxation has the authority to intercept the tax "rebates" pursuant to GTIT §6402 whether or not a person is currently making payment on a debt owed to the Office of Child Support. Furthermore, it is within the statutory authority of the Department of Revenue and Taxation and the Guam Memorial Hospital to enter into an agreement which will provide for the seizure of the tax rebates to collect on amounts owed to the hospital.



J. PATRICK MASON
Deputy Attorney General

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