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Attachment and Garnishment

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Attaching bank accounts and garnishing wages are increasingly popular enforcement remedies for tax collectors, with good reason. Under the Machinery Act the attachment and garnishment process is extremely efficient. It permits the tax collector to seize bank accounts, wages, rents, real estate closing settlements, sale proceeds, or any other funds payable to the taxpayer simply by providing notice to the taxpayer and the party holding those funds. If that party does not pay the seized funds to the tax collector, it becomes responsible for the outstanding taxes.

The attachment and garnishment process is far from a silver bullet, of course. It requires information about where the taxpayer banks, works, or conducts business, information that the taxpayer generally does not want to volunteer. It requires the cooperation of banks and employers, which are usually more worried about their customers and employees than they are about unpaid property taxes. And, unlike most sales at foreclosure or levy, it leaves the property that generated the delinquent taxes in the hands of the offending taxpayer, perhaps increasing the likelihood that tax collectors will have to use enforced collection remedies in multiple tax years.

This bulletin focuses on the law governing the attachment and garnishment process. For details about the mechanics of the process, please see the comprehensive North Carolina Tax Collectors Association's *Collections Procedure Manual* at www.nctca.org/CPM-Update2005.pdf.

1. When may a tax collector use attachment and garnishment?

Attachment and garnishment may be used whenever the tax collector is authorized to pursue enforced collection remedies against personal property under North Carolina General Statutes (hereinafter G.S.) 105-366.[1] This remedy may be employed to collect property taxes on any type of property, be it real or personal, or a registered motor vehicle. No additional order from the governing board or a court is required, because the order of collection made by the board when it delivered the tax receipts to the collector serves as the equivalent of a judgment and execution against taxpayers' property.[2]

The general rule is that tax collectors may not employ enforced collection remedies until unpaid property taxes become delinquent. Most property taxes become delinquent on the date

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1. Although in other contexts the terms "attachment" and "garnishment" have distinct meanings, the Machinery Act uses them interchangeably. This bulletin does likewise.

2. N.C. Gen. Stat. (hereinafter G.S.) § 105-321(b).

interest begins to accrue.[3] Deferred taxes become delinquent on the date a disqualifying event occurs.[4]

Enforced Collection before Delinquency

Tax collectors need not always wait until the date of delinquency to begin enforced collection efforts against personal property, however. G.S. 105-366 permits a tax collector to take action before the date of delinquency when the taxpayer

1. is about to remove the property from the taxing unit;
2. is about to transfer the property to another taxpayer;
3. is in imminent danger of becoming insolvent;
4. goes out of business; or
5. transfers the major part of its inventory, supplies, or fixtures to another taxpayer other than in the ordinary course of business.

G.S. 105-366(c) requires that the tax collector have "reasonable grounds for believing" that the taxpayer is about to take the actions described in numbers 1, 2, and 3. Although North Carolina courts have yet to interpret the exact meaning of this "reasonable belief" requirement, it is safe to assume that it would require something more than an unconfirmed rumor or gossip.

Numbers 4 and 5 are commonly referred to as the "going out of business" provisions. G.S. 105-366(d) authorizes not only "early" enforced collection actions in these instances but also collection actions targeting the new owner of the property, if the tax collector begins the action within six months of the sale or transfer of the property. For more details on this "going out of business" exception, please see Question 4, below.

Order of Remedies

Often a tax collector has potential collection remedies against real property, through foreclosure, and against personal property, through attachment and garnishment or levy and sale. If so, the tax collector normally has the discretion to choose which remedy to use first. The Machinery Act describes only two scenarios in which a tax collector must first target personal property:

1. When the governing body orders a tax collector to do so
2. When the taxpayer or a lienholder requests that the tax collector do so and provides a written statement "describing the personal property to be proceeded against and giving its location"[5]

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3. G.S. 105-365.1(a)(1). Property taxes on property other than registered motor vehicles accrue interest beginning on January 6 following the year in which the taxes were levied. G.S. 105-360(a). Property taxes on motor vehicles accrue interest on the first day of the first month following the date the taxes were due, unless the tax bill is prepared after the due date, in which case the taxes accrue interest on the first day of the second month after the bill is prepared. G.S. 105-330.4(b).

4. G.S. 105-365.1(a)(2). For taxes deferred under the circuit breaker program, G.S. 105-277.1B, the date of delinquency is nine months after the date of the disqualifying event if that event is the death of the owner. G.S. 105-365.1(a)(3). For a more detailed discussion about the circuit breaker program and the seven other deferred tax programs, see Christopher B. McLaughlin, "The Collection of Deferred Taxes," *Property Tax Bulletin* No. 149 (August 2009), available online at www.sog.unc.edu/pubs/electronicversions/pdfs/ptb149.pdf.

5. G.S. 105-366(a)(1) and (2). It is unclear exactly what remedy a taxpayer would have against a tax collector who violated these mandates. Subsection (a) states, "No foreclosure of a tax lien on real property

Tax collectors who proceed first against real property must remember that the Machinery Act bars all collection remedies against personal property once a foreclosure complaint is filed.[6] After starting a foreclosure action, the tax collector may not pursue any other collection remedies other than those available under the Set-Off Debt Collection Act.[7]

2. What kinds of intangible property may be attached or garnished?

The Machinery Act places no limitation on kinds of intangible property that may be subject to attachment and garnishment. Wages, other compensation, rents, bank deposits, and "any other intangible personal property" may be targeted by the tax collector to satisfy delinquent taxes.[8] Bank account and weekly or monthly wages are of course the most common and reliable sources of funds, but tax collectors should consider all possible debts that might be owed to the delinquent taxpayer. If the taxpayer owns rental property, the tenants may be served notices of attachment and be required to pay their monthly rents to the tax collector instead of their landlord.[9] If the taxpayer is closing on the sale of real estate, the closing attorney can be served with a notice of attachment and be required to first satisfy outstanding taxes before delivering the proceeds of the sale to the seller. If another city or county department owes the delinquent taxpayer funds due to a contractual obligation or an overpayment, that department may be served with a notice of attachment and be required to direct those funds to the tax collector instead.

The remedy is not entirely without limits, however. State and federal laws exempt a variety of payments and benefits from attachment by creditors. Funds that are off-limits to tax collectors include:

1. Social Security benefits;[10]
2. federal military veterans' benefits;[11]
3. North Carolina state and county public assistance payments including those for Work First, foster care, adoption assistance, food and nutrition services, and Medicaid;[12]

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may be attacked as invalid on the ground that payment of the tax should have been procured from personal property." If a taxpayer cannot object to a foreclosure action because the tax collector should have proceeded first against the taxpayer's personal property, these mandates seem to lack teeth.

6. G.S. 105-366(b).

7. G.S. Chapter 105A. This act provides local governments the ability to attach and garnish a taxpayer's state income tax refund or lottery winnings. It specifically makes these remedies "in addition to and not in substitution for" any other collection remedies available to the local government. G.S. 105A-3(a).

8. G.S. 105-368(a).

9. Not surprisingly, tenants are usually less than thrilled to receive a notice of attachment for fear that the landlord will respond punitively if they satisfy the attachment obligation. Although no state law expressly protects tenants in this situation, at least two could offer some relief. G.S. 75-51, which makes it an unfair trade practice to attempt to collect a debt by means of any "unfair threat or coercion," could apply to a landlord who threatened to evict a tenant who complied with a legal attachment. A tenant's compliance with an order of attachment could also trigger protection under the retaliatory eviction provisions, G.S. 42-37.1, which offers tenants defenses to a summary eviction proceeding.

10. 42 U.S.C. § 407.

11. 38 U.S.C. § 5301.

12. G.S. 108A-36. Medicaid payments to providers and recipients are also exempted from attachment by 42 C.F.R. § 447.10.

4. North Carolina unemployment benefits;[13]
5. North Carolina teacher and state employee retirement benefits;[14]
6. North Carolina local government retiree benefits;[15] and
7. retirement savings plans covered by the federal Employee Retirement Income Security Act, which includes most pension, profit sharing, and 401(k) savings plans.[16]

All seven of these categories of benefits are exempt from attachment prior to payment. That is, a tax collector may not send a notice of attachment to the agency or institution responsible for paying these benefits and ask that future benefits be paid first to the tax collector.

However, the first four categories—Social Security benefits, veterans' benefits, state and county public assistance payments, and unemployment benefits are also exempt from attachment *post-payment*, so long as those payments are not mingled with other funds. For example, if a taxpayer receiving Social Security benefits deposits them into a bank account that contains no other funds except those Social Security benefits, then that bank account is exempt from attachment. If the taxpayer deposits funds from other sources into that bank account, then the bank account is subject to attachment, at least up to the amount of nonexempt funds that have been deposited into the account. For example, assume Tom Taxpayer has been depositing $1,000 of monthly Social Security benefits into Account A since he opened the account two years ago. Tom has also deposited into the account roughly $100 per month from other sources. Account A should be subject to attachment at least up to $2,400, the total amount of nonexempt funds that has been deposited into the account since it was opened. [17]

3. Whose intangible personal property may be subject to attachment and garnishment?

The answer depends on the type of tax being collected.

For property taxes on real property, the responsible taxpayers are the owner of record on the date of delinquency and all subsequent owners.[18] A responsible taxpayer is defined as the person or entity whose property may be targeted for collection efforts. For real property taxes that were not deferred, this means that the tax collector may attach wages or bank accounts of the owner as of January 6 in the fiscal year for which the taxes were levied and of all subsequent owners.

13. G.S. 96-17(c).
14. G.S. 135-9.
15. G.S. 128-31.
16. 29 U.S.C. § 1056(d)(1); 26 U.S.C. § 401(a)(13)(A).
17. The unemployment benefits anti-assignment clause explicitly states that the protection from attachment terminates when the benefits are mingled with other funds. G.S. 96-17(c). This means that if a taxpayer deposits any funds from any other source into a bank account that otherwise contains only unemployment benefits, the entire bank account would be subject to attachment. The Social Security, veterans' benefits, and public assistance anti-assignment clauses are less explicit, meaning it is unclear whether mingling these benefits with other funds in a bank account would subject the entire account to attachment. Tax collectors would be wise to adopt a conservative approach and attach only the nonexempt deposits, as in the above example.
18. G.S. 105-365.1(b)(1). This is true for taxes arising in 2006 and subsequent years. For taxes from 2005 and earlier, the responsible taxpayer for real property taxes is the owner of record as of the listing date—the same rule that currently applies to personal property taxes.

For real property taxes that were originally deferred, the responsible taxpayers are the owner of the real property on the date the disqualifying event occurs and all subsequent owners.

For property taxes on personal property other than registered motor vehicles, the responsible taxpayer is the owner of record as of the listing date, January 1 prior to the beginning of the fiscal year for which the taxes were levied.[19] Subsequent owners are not responsible for taxes on personal property, unless the "going out of business" provisions in G.S. 105-366(d) apply. (More on this issue below in Question 4.)

For property taxes on registered motor vehicles, the responsible taxpayer is the owner of record as of the date on which the current vehicle registration is renewed or the date on which a new registration is applied for.[20]

Here is how these rules work in practice. Assume Tina Taxpayer lists real property (Parcel A), a boat, and a registered automobile for 2009 taxation in Carolina County. Tina fails to pay any of her 2009 property taxes. In February 2010 Tina sells Parcel A, the boat, and the automobile to Cindy Citizen. If the Carolina County tax collector wishes to use the attachment and garnishment process to collect these outstanding taxes, whose intangible personal property may be targeted, Tina's or Cindy's?

For the taxes on Parcel A, the record owner as of January 6, 2010, and all subsequent owners are the responsible taxpayers. This means both Tina and Cindy may be subject to attachment and garnishment for the taxes on Parcel A. For the taxes on the boat, only the listing taxpayer is responsible.[21] This means only Tina may be subject to attachment and garnishment for the taxes on the boat. For the taxes on the registered automobile, only the owner as of the date the registration was renewed is the responsible taxpayer. Assuming Tina renewed the registration in 2009, only Tina's intangible personal property may be subject to attachment and garnishment for taxes on the automobile.

Owner of Record

Before deciding which taxpayer to target with enforced collection remedies, G.S. 105-365.1 requires a tax collector to determine the "owner of record" as of either the listing date (for personal property), the delinquency date (for real property), or the date on which a motor vehicle registration was renewed or applied for. The Machinery Act does not define the term "owner of record," nor have the courts. How, then, is a tax collector expected to make this determination? Thankfully, record ownership of most taxable property can be determined by documents such as titles, deeds, and court orders.

For personal property that is subject to title documents, such as motor vehicles, airplanes, and boats, the owner of record should be the party whose name is on the title document as of the relevant date. Title documents do not exist for many types of taxable personal property, however. For example, when one landscaper sells used lawnmowers to another landscaper, no title documents change hands. If there is a contract or sales receipt involved, that document

19. G.S. 105-365.1(b)(2).

20. G.S. 105-365.1(b)(3).

21. Note that because Tina listed both the boat and Parcel A in Carolina County, the taxes on the boat create a lien on Parcel A. G.S. 105-355(a). Although Cindy's personal property may not be subject to enforced collection remedies to satisfy the taxes on the boat, the tax collector could enforce the county's lien on Parcel A through a foreclosure action to satisfy the taxes on the boat. For a more detailed discussion of tax liens on real property, please see Christopher B. McLaughlin, "Tax Liens on Real Property," *Property Tax Bulletin* No. 151 (October 2009).

could serve as proof of record ownership. But when no such documents exist, ownership as of a particular date may more difficult to prove. Possession is generally considered the "strongest evidence of ownership,"[22] but what if both landscapers claim *not* to have had possession of the property as of the listing date? The best solution would seem to be for the assessor to keep the property listed in the name of the original owner until that owner provides proof that ownership has been transferred to another party.[23]

For real property, the owner of record is the party identified in a document recorded either in the county register of deeds office or in Superior Court. Normally, ownership of real property is transferred by deed. A valid deed transfers title from the grantor to the grantee regardless of when or if it is recorded.[24] However, that transfer is not effective against lienholders, such as the county tax office, until that transfer is recorded with the register of deeds.[25] Similarly, a consent agreement between divorcing spouses that calls for the transfer of real property to one of the soon-to-be ex-spouses must be incorporated into a divorce judgment and recorded with the register of deeds to change the owner of record.[26]

When the owner of real property dies, tax officials should not change the owner of record until the clerk of superior court records either a certificate of probate (if the owner died with a will)[27] or a final accounting by the personal representative for the estate (if the owner died intestate without a will).[28] Under intestacy law title passes to the heirs effective as of the date of death, even if the heirs are not identified until much later. [29] For example, if an owner dies on December 15, 2009, but the heirs are not determined until February 1, 2010, the heirs are the

22. Boyce v. Williams, 84 N.C. 275 (1881).

23. For example, see G.S. 105-312(f), which creates a presumption that property discovered in the hands of a taxpayer should be listed in that taxpayer's name for the preceding five years unless that taxpayer can demonstrate that another taxpayer owned the property and therefore had the duty to list it for taxation in any of those years.

24. Patterson v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939).

25. G.S. 47-18(a).

26. G.S. 1-228. Even then, the divorce judgment needs to include or incorporate an adequate description of the real property and indicate that the transfer is effective as of the date of the judgment for that transfer to be effective against third parties. See Martin v. Roberts, 177 N.C. App. 415, 628 S.E.2d 812 (N.C. App. 2006) (consent order in divorce proceeding did not transfer title to real property because it lacked a legal description of the property and it contemplated a future conveyance, not a completed conveyance). For example, a judgment of divorce containing the following provisions would be sufficient to transfer ownership without the recording of a deed: "The Wife hereby conveys and releases unto the Husband all of her right, title and interest in said real property. The legal descriptions contained in the deed wherein the parties took title to the property are incorporated herein by this reference. This is a completed conveyance and does not remain executory; however, to further evidence this transaction the Wife shall execute and deliver to Husband a quitclaim deed for the property." Compare that language to the following provision, which likely would not be sufficient to transfer ownership: "It is agreed that Wife convey to Husband all right, title and interest she may have in and to said lot or parcel of real estate. The parties agree to execute for one another such documents of title or other documents as may be necessary to accomplish the purposes of this agreement."

27. G.S. 31-39.

28. G.S. 28A-21-2; 28A-23-1.

29. G.S. 28A-15-2.

owner of record as of the listing date (January 1) for 2010 taxes and the delinquency date for 2009 taxes (January 6), even though they were not identified until a month later.[30]

Married Taxpayers

Tax collectors must take care to target the property of the responsible taxpayer and not property that is owned by related taxpayers. This is especially true for married taxpayers. Real property owned by a husband and wife as tenants by the entirety is considered to be owned by the marital unit, not by the husband and wife individually.[31] This means that there may be three different taxpayers involved with a married couple: the husband for property he owns individually, the wife for property she owns individually, and the marital unit for real property they own as tenants by the entirety and for personal property they own jointly. [32]

Property owned by a husband or wife individually is not subject to enforced collection actions for unpaid taxes on real property owned jointly by the husband and wife. If a husband and wife own a tract of land as tenants by the entirety, the tax collector may not garnish the husband's wages or the wife's wages to satisfy the taxes on the land. Although many tax collectors may follow a different practice, technically wages belong to the individual spouse and not to the spouses jointly and therefore are not property owned by the responsible taxpayer. However, if those individual wages are deposited into a joint bank account, then that joint account could be attached by the tax collector to satisfy the taxes on the land because the bank account is property of both spouses. A joint bank account also may be attached for the tax obligation of an *individual* spouse, because each spouse has the right to withdraw all of the funds in a joint account.

Corporations

A corporation is a separate legal entity from its shareholders, officers, and incorporators.[33] This means that property owned by a corporation is not subject to enforced collection actions for taxes owed by a shareholder, even if that shareholder owns the entire corporation. The reverse is also true: property owned by a shareholder is not subject to enforced collection actions for taxes owed by a corporation. These principles apply to "traditional" corporations organized under G.S. Chapter 55, to professional corporations organized under G.S. Chapter 55B, and to limited liability companies organized under G.S. Chapter 57C.

How can a tax collector collect a delinquent tax from a corporation that has gone out of business or no longer owns any assets? Unfortunately, the answer is often, "with difficulty, if at all." If the corporation formally dissolves by filing articles of dissolution with the secretary of state, then it is required to provide notice to all creditors.[34] Creditors who do not receive the required

30. Note that upon the death of the owner, real property may be listed in the names of "the heirs" (for an owner that died without a will) or "the devisees" (for an owner who died with a will) until probate proceedings begin. Once such proceedings begin and the court names an executor or administrator, the property may be listed in the name of the executor or administrator in his or her fiduciary capacity until the court confirms the heirs or devisees with title to the real property. G.S. 105-302(c)(6).

31. Davis v. Bass, 188 N.C. 200 (1924).

32. Only real property may be owned as tenants by the entirety. However, *personal* property owned jointly by a husband and wife should also be considered to be owned by the marital unit and not by the husband and wife individually. This follows from the requirement in G.S. 105-306(c)(7) that personal property owned by a husband and wife be listed under both their names as an undivided interest.

33. See G.S. 55-6-22 (shareholders not liable for the acts of the corporation).

34. G.S. 55-14-06 and G.S. 55-14-07.

notice are authorized to satisfy the obligations owed to them from assets that were distributed at dissolution to the corporation's shareholders.[35] Often no formal dissolution occurs, however: the shareholders simply distribute the corporation's assets and stop doing business under the corporate name. In this situation a tax collector may have no viable collection options other than attempting to convince a court to disregard the corporate form and hold the shareholders liable for the corporation's debts. Known as "piercing the corporate veil," this remedy is rarely granted by the courts. It generally applies only in egregious cases when the controlling shareholder uses the corporation as the shareholder's "instrumentality" to shield activities in violation of public policy or statute.[36] Before attempting to attach a shareholder's intangible property based on this theory, a tax collector would be wise to consult with his or her local government's attorney.

Unlike corporations, sole proprietorships are not separate legal entities from their owners. Taxpayers who run businesses but have not incorporated those businesses are personally liable for taxes on property owned by those businesses.[37]

Partnerships

Partnerships, like corporations, are required to list their property for taxation separately from that of their owners. However, unlike corporate shareholders, partners may be targeted by enforced collections resulting from the partnership's tax obligations. G.S. 105-366(8) permits a tax collector to attach and garnish the intangible personal property of a partner to satisfy the taxes on property owned by the partnership but only after the tax collector has exhausted all remedies against the partnership's property.

4. How do the "going-out-of-business" provisions work?

As mentioned above, G.S. 105-366(d) creates exceptions to the rules about when and against whom enforced collection remedies against personal property may be pursued. These provisions are triggered when a merchant or retailer goes out of business or transfers the "major part of its stock of goods, materials, supplies or fixtures, other than in the course of business." For the purposes of these provisions, "retailer" is broadly defined to include retail sellers of tangible personal property as well as manufacturers and producers of tangible personal property.[38]

Within thirty days of the transfer, the parties must satisfy the taxes on the transferred property that are due or will become due on September 1 of the year of the transfer. If not, then the tax collector is permitted to levy or attach *any* personal property of the taxpayer to whom the property was transferred, so long as the levy or attachment occurs within six months of the transfer. The collector may also attach any property held by the taxpayer that originally owned the equipment.

For example, assume Blue Devil Chickens Inc. sells its poultry processing equipment to Tar Heel Turkeys Inc. on March 1, 2010, when the 2009 taxes on the equipment are delinquent. If

35. G.S. 55-14-08 and G.S. 57C-6-09.

36. See State v. Ridgeway Brands Mfg., LLC, 362 N.C. 431 (2008) (permitting state to proceed with attempt to pierce the corporate veil based on controlling shareholders' efforts to avoid required payments to state tobacco litigation settlement escrow fund).

37. See G.S. 105-306(6) (property held in connection with a sole proprietorship must be listed in the name of the owner, not in the name of the business).

38. G.S. 105-164.3(35).

the parties do not satisfy *both* the 2009 and 2010 taxes on the transferred equipment by April 1, 2010, then the tax collector is permitted to satisfy those taxes by attaching any personal property held by Blue Devil Chickens. The collector may also attach any personal property held by Tar Heel Turkeys so long as that attachment occurs within six months of the transfer, which in this case would be September 1, 2010. This is true even though the 2010 taxes normally would not be delinquent until January 6, 2011. If the tax collector fails to act before September 1, 2010, then Tar Heel Turkeys is no longer subject to Machinery Act remedies for the 2009 and 2010 taxes and may be held responsible only through a civil lawsuit.

5. May the tax collector attach or garnish funds in a different county?

Yes. G.S. 105-321(b) makes the governing board's order of collection the equivalent of a court judgment. Court judgments may be executed against property located anywhere in the state.[39] This means attachment can occur anywhere in the state. The tax collector should use the sheriff in the county where the funds reside to serve the notice of attachment rather than relying on certified mail. The process can be even simpler for out-of-county bank branches, if the bank in question also has a branch in the tax collector's county. In that situation the tax collector may serve a notice of attachment on the branch in the tax collector's county to reach any account held at *any* other branch of that bank, be it in another county or even another state.[40]

Although some tax collectors have had success convincing out-of-state employers to honor North Carolina notices of attachment, such employers are under no obligation to do so. The tax collector has no ability to enforce a notice of attachment outside state borders.

6. Are members of the United States military subject to garnishment and attachment?

Not usually. Both state and federal law restrict a tax collector's ability to use enforced collection remedies against military personnel.

Under state law taxes on property owned by military personnel serving in Iraq or Afghanistan do not accrue interest or become delinquent until ninety days after their deployment ends.[41] Tax collectors therefore must wait until 90 days after a servicemember's deployment in Iraq or Afghanistan ends to initiate any enforced collection remedies for taxes that became due during that deployment.

Under the federal Servicemembers' Civil Relief Act (SCRA), tax collectors may not sell the tangible personal property or real property of military personnel to satisfy a tax obligation without a court first determining that the servicemember's military service did not materially affect his or her ability to pay the taxes. [42] Even if a court grants permission to sell the property, the servicemember has the right to redeem the property—in other words, to reverse the sale—up to 180 days after his or her military service ends.

39. G.S. 1-308.
40. Letter from N.C. Attorney General to Aubrey S. Tomlinson Jr. (Dec. 10, 1987).
41. S.L. 2001-508, S.L. 2003-300.
42. 50 U.S.C. app. § 501.

A separate section of the SCRA permits a court to stay or vacate an attachment or garnishment up to ninety days after the servicemember's military service ends.[43] Further, the federal garnishment statute forbids a garnishment of a servicemember's pay unless the garnishment has been "determined by a final judgment of a court of competent jurisdiction."[44] In North Carolina that would generally not happen until after a garnishee has refused to respond to a notice of garnishment and the tax collector initiates a civil lawsuit in state court.

In light of these provisions, tax collectors are wise to refrain from any enforced collection actions against active-duty military personnel until well after their deployment or military service ends. Waiting may increase the risk of the taxpayer removing his or her property from the state, but the local government's interests will not otherwise be harmed. Interest will accrue as usual if the servicemember is not deployed in Iraq or Afghanistan. Equally important, the period during which a taxpayer is a member of the active-duty military does not count against the Machinery Act's ten-year statute of limitation.[45] Even if a taxpayer is in the military for more than ten years, the tax collector will be still be able to rely on enforced collection methods to recover those taxes after the taxpayer's military service ends.

7. How can a tax collector locate the taxpayer's intangible property?

Tax collectors have developed many creative solutions to this problem, including saving copies of checks used to pay taxes, obtaining employers' names from the Employment Security Commission, and searching the N.C. Escheat Fund.[46]

Many tax collectors also use the authority granted by the Machinery Act to require employers to disclose the names and addresses of all employees "who may be liable for taxes."[47] This provision has led to two ongoing disagreements between tax offices and some employers.

The first concerns state employers. They are concerned that providing the addresses of their employees to a tax collector will violate their obligations under the state personnel records provision that makes employee addresses confidential.[48] In 1983 the state attorney general concluded that an exception to these provisions permitted a state agency to share employees' addresses with a local tax collector to assist collection efforts.[49] However, recent conversations with state attorneys indicate that the attorney general's office no longer honors that 1983 opinion and is advising state agencies to not release addresses to local tax collectors. Absent another reversal of course by the attorney general, a local tax collector may need to accept only employees' names from state agencies. The collector can proceed with an attachment if a match results, even though without the address the collector will be less certain that the delinquent taxpayer and the state employee are one and the same.

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43. 50 U.S.C. app. § 204.

44. 5 U.S.C. § 5520a(k)(2)(A).

45. 50 U.S.C. app. § 206.

46. Details on these and other productive approaches are described in the Collections Procedures Manual at www.nctca.org/CPM-Update2005.pdf.

47. G.S. 105-368(i).

48. G.S. 126-22 and 126-23.

49. Opinion of Attorney General to Dr. Sarah T. Morrow, Secretary of Department of Human Resources, 52 N.C.A.G. 85 (1983).

The second disagreement focuses on whether an employer can require a list of delinquent taxpayers from the tax collector to which the employer can then compare its employee list or whether the employer must simply turn over its complete employee list. The spirit of G.S. 105-368(i) seems to favor the latter, seeing that *all* employees "may be liable for taxes" now or at some point in the future. However, because the provision is not entirely clear on this issue, tax collectors may wish to cooperate with employers as much as possible to expedite the garnishment process.

8. What notice is required to initiate an attachment or garnishment?

The tax collector must serve notice of an attachment and garnishment on both the taxpayer and the garnishee—that is, the bank, employer, or other party that holds the funds due the taxpayer. The Machinery Act allows notice to be served personally or through one of the methods permitted by Rule 4 of the North Carolina Rules of Civil Procedure.[50] "Personal service" means that the notice is hand-delivered by an employee in the tax collector's office, the sheriff, or a deputy sheriff. The most commonly used method under Rule 4 is service by registered or certified mail, return receipt requested. First-Class Mail is *not* one of the authorized methods of service, nor is e-mail. That said, if a tax office routinely serves a large number of attachment notices on a major bank or employer and that garnishee requests that it be provided notice electronically so that it can more easily and quickly comply with the attachment, it seems reasonable to do so even though it may not satisfy the technical service of process requirements.

Service by publication is permitted under Rule 4 when the tax office does not have valid addresses for the parties, but that is generally only effective for missing taxpayers, not missing garnishees. If the tax office cannot locate the bank or employer that holds the taxpayer's funds, the attachment is unlikely to be successful.

Timing

The Machinery Act is silent as to the appropriate timing of notices with respect to the taxpayer and the garnishee. Experience suggests that it makes most sense to serve a bank before serving the taxpayer, so that the taxpayer does not have the opportunity to withdraw funds from the targeted account before the bank freezes that account. In contrast, it is best to serve an employee before serving the employer, in the (perhaps overly optimistic) hope that the employee will be prompted to pay the tax bill to prevent his or her employer from learning of the employee's tax problems.

Fees

G.S. 105-368(g) requires that the fee for service of the notice of attachment be the same as that charged in civil lawsuits, which is currently $15 per service.[51] The fees are added to the amount of taxes to be recovered by the attachment. Normally, this will be $30: $15 for service on the taxpayer and $15 for service on the garnishee. However, if multiple notices of attachment are serviced simultaneously on one garnishee, then only one $15 fee is charged for service on that garnishee. That fee is then allocated equally among the delinquent taxpayers. For example,

50. G.S. 105-368(b); G.S. 1A-1, Rule 4(j).
51. G.S. 7A-311(a)(1).

assume that ABC Corp. employs ten delinquent taxpayers. If the tax collector attaches the wages of all ten of these taxpayers simultaneously, then the total service fee will be $165: $15 for the one service on ABC Corp. plus $150 for the ten services on the individual taxpayers. Each taxpayer will have $16.50 added to the taxes they owe: $15 for their individual service plus $1.50 for one-tenth of the fee for the single service on ABC Corp. If the sheriff's office serves the notices, then the fees collected must be paid to the sheriff's office. If the tax office serves the notices, the tax office retains the fees.

Who Must Be Served

Both the taxpayer and the garnishee must receive notice. If the tax collector is attaching a joint bank account, all account holders should receive notice. Rule 4 of the North Carolina Rules of Civil Procedure provides detailed procedures for service on corporations, partnerships, and associations. Generally, service on those parties should be made to an officer, director, managing agent, general partner, or other individual authorized to accept service. For banks, the usual practice is to serve the branch manager.

G.S. 105–368(h) mandates different procedures for service on state and local employers. For a local government employee, the statute requires service on "the officer charged with making up the payrolls of the political subdivision." For example, to garnish the wages of a county employee, in most cases service should be made on the county finance officer. For a state employee, the statute requires service on "the head or chief fiscal officer of the department, agency, instrumentality or institution by which he is employed." In practice, however, many state agencies will prefer that service be made on the office responsible for payroll. For example, if a School of Government faculty member is responsible for delinquent property taxes (Perish the thought!), technically the statute requires notice be served either on the UNC–Chapel Hill chancellor or the UNC–Chapel Hill vice-chancellor for finance and administration. But collectors at the Orange County tax office who have extensive experience garnishing the wages of UNC employees report that the standard practice is to serve UNC–Chapel Hill Payroll Services with the notice of garnishment. The better the communication between the garnishee and the tax office, the more effective and efficient the garnishment will be.

Federal employees are also subject to garnishment for local taxes, although federal law modifies the standard process and priority.[52] Federal agencies have thirty days, rather than ten days, to respond to a notice of garnishment and must give priority to garnishment orders for child support and alimony, regardless of when the notice was served. See Question 9, below, for more on priority of garnishments.

Contents of Notice

The notice must contain as much identifying information about the taxpayer as the tax office possesses, including Social Security number; the amount of taxes, interest, fees, and penalties owed by the taxpayer, broken out by year; the name of the taxing unit(s) that levied the taxes; a description of the property to be attached, such as wages or bank accounts; and a copy of G.S. 105-366 and G.S. 105-368. See the appendix for a sample notice of attachment from Orange County.

Increasingly, banks are refusing to process an attachment unless the tax office provides a taxpayer's Social Security number. This demand seems to violate a garnishee's obligations under the

52. 5 U.S.C. § 5520a.

Machinery Act. If the tax office possesses the taxpayer's Social Security number, the Machinery Act requires the tax office to provide it to the garnishee. But the Machinery Act does not require the tax office to obtain a Social Security number before proceeding with an attachment. Regardless, in the interest of maintaining a cooperative relationship with its garnishees, a tax office might consider doing what it can to obtain taxpayers' Social Security numbers before sending notices of attachment.

9. What are the obligations of the garnishee?

Immediately upon receiving the notice of attachment, the garnishee is liable to the tax collector for all taxes, interest, fees, and penalties identified in the attachment up to the amount of funds the garnishee owes the taxpayer. Within ten days of the notice, the garnishee must either raise an objection to the attachment or provide the attached funds to the tax collector.[53] If the garnishee raises an objection, the tax collector has ten days to respond. If the tax collector does not agree, then the matter must be tried in superior court in the garnishee's home county with the losing party responsible for the winning party's costs and attorneys fees.[54]

The attachment effectively freezes all funds owed the taxpayer at the time of notice. For banks this means that they must freeze the taxpayer's accounts immediately upon receiving notice and, assuming no objections are raised, pay to the tax collector within ten days as much of those funds as are needed to satisfy the tax obligation. If the bank permits the taxpayer to withdraw funds from the attached accounts between the notice date and the date on which the bank forwards the funds to the tax collector, the bank will be liable for the withdrawals if the funds remaining in the account are not sufficient to satisfy the taxes.

For employers the garnishment requires them to provide to the taxpayer 10 percent of the taxpayer's gross wages each pay period. "Gross wages" means wages before taxes, retirement contributions, or other voluntary withholdings such as charitable contributions or parking fees. An employee may be subject to multiple garnishments simultaneously, the priority of which will generally be determined by order of attachment.[55]

Here is how this works in practice. Assume Tina Taxpayer earns $500 in gross wages per pay period and that Carolina County garnishes Tina's wages for a $1,000 delinquent tax bill. Tina is already subject to a state tax wage garnishment of $50 per pay period. Tina's employer must provide to Carolina County $45 per period until the county tax bill is satisfied. This amount is calculated as follows: $500 in gross wages, less the $50 state tax garnishment that has priority because it attached before the local garnishment, leaving $450 in gross wages subject to garnishment, times ten percent.

Unlike other tax garnishments, child support garnishment orders never reduce the amount of gross wages available for a local tax garnishment. In other words, local tax garnishments always have priority over child support orders, for two reasons. First, unlike a notice of garnishment for

53. G.S. 105-368(c) and (d). Objections must be served in writing upon the tax collector by registered or certified mail.

54. G.S. 105-368(g).

55. For a detailed discussion of the priority of tax liens on wages and other property, see Christopher B. McLaughlin, "The Property Tax Lien," *Property Tax Bulletin* No. 150, (October 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/ptb150.pdf.

property taxes, a child support order is not a judgment lien on the taxpayer's property.[56] Second, even if a child support order were the equivalent of a lien, child support garnishments are limited to "disposable income," which excludes amounts withheld for federal, state, and local taxes.[57]

Employers sometimes claim that all state and local tax garnishments are subject to a cumulative 10 percent cap, an assertion that is not supported by the applicable statutes.[58] *Each* tax garnishment is subject to a separate 10 percent cap. As in the above example, each 10 percent cap is applied the amount of gross wages available after the senior garnishment has been applied.

Employers have also attempted to avoid property tax garnishments by relying on the federal Consumer Credit Protection Act (CCPA), another losing argument. The CCPA limits wage garnishments to 25 percent of disposable income and forbids garnishments from reducing an employee's weekly disposable wages below an amount equal to the wages for thirty hours of work at the federal minimum hourly wage.[59] However, the CCPA exempts from its restrictions garnishments for state and federal taxes. Although property taxes in North Carolina are levied and collected by local governments, they are a creature of *state* law and therefore should qualify for the CCPA exemption.

10. For how long is an attachment or garnishment effective?

G.S. 105-368(a) obligates the garnishee to turn over all funds "due the taxpayer or to become due to him within the calendar year." Technically, this means that a notice of garnishment should be effective until the taxes have been satisfied or the calendar year ends, whichever comes first.

Despite this limitation, most employers continue to honor the garnishment obligation until the taxes are satisfied without requiring a new notice at the beginning of a new year. In contrast, banks generally assume that their obligation ends when they turn over the funds in their possession at the time of notice. Tax collectors need to decide how forceful they wish to be with banks who take this approach, recognizing the need for a strong working relationship with institutions that can help greatly with the collection process. Clearly, banks must make available all funds that are in their possession from the time of notice until the expiration of the ten-day waiting period. This includes funds that are in the bank's possession but not yet due to the taxpayer, such as a certificate of deposit that will mature before the close of the year. Beyond that, it may be counterproductive for a tax collector to demand that a bank make available funds the taxpayer deposits into the attached account after the ten-day waiting period expires. It is likely better practice simply to serve the bank with a second notice of attachment if the tax collector believes that the bank has received new funds.

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56. G.S. 110-136.

57. G.S. 110-129(6).

58. G.S. 105-242, which creates a 10 percent cap for state tax garnishments, is part of Article 9 of G.S. Chapter 105. The definitional section of Article 9, G.S. 105-228.90, makes clear that Article 9 applies only to subchapters I, V, and VIII of G.S. Chapter 105, as well as certain taxes and requirements found in other chapters. Article 9 does *not* apply to Subchapter II of G.S. Chapter 105, which is the local property tax subchapter. Because local property taxes are not covered by Article 9, the restrictions on garnishment in 105-242 do not apply to garnishments for local property taxes.

59. 15 U.S.C. § 1673.

11. What should the tax collector do if the garnishee provides more funds than the law requires or permits?

The tax office should keep the funds, unless the taxpayer or the garnishee raises an objection within the ten-day waiting period. This situation may arise when a bank mistakenly attaches the wrong account or an employer forwards more than 10 percent of the taxpayer's wages. Assuming that the tax office was not the source of the error, the tax office is under no obligation to return the funds. In fact a refund may violate the restrictions on refunds and releases found in G.S. 105-380 and G.S. 105-381. Those provisions permit refunds only for illegal actions or clerical errors by the tax office, not for errors by a taxpayer or garnishee. If a bank attaches the wrong account due to its own error, then the bank must resolve that issue with its customer. If an employer garnishes too large a percentage of the taxpayer's wages, then the employer must resolve that issue with its employee. The tax office should not get involved.

The one exception to this rule might be the case in which the taxpayer claims after the fact that the tax collector attached exempt funds such as Social Security benefits or state public assistance payments. If the taxpayer can prove this claim to the satisfaction of the tax office, the funds probably should be returned on the premise that the attachment was void from the beginning and never could have been legally performed by the garnishee. See Question 3, above, for more details on funds exempt from attachment.

12. What is the statute of limitations for use of the attachment and garnishment remedy?

The ten-year limitation on enforced collections found in G.S. 105-378(a) applies to attachments and garnishments. This statute of limitations provides a taxpayer with a defense to any attachment and garnishment that is attempted more than ten years after the tax for which the levy is conducted came due. Property taxes on real property and personal property other than registered motor vehicles become due on September 1 of the fiscal year for which the taxes are levied.

For example, 2000 property taxes on real property became due on September 1, 2000. Any enforced collection action for 2000 property taxes must have been started by August 31, 2010, else G.S. 105-378(a) would provide the taxpayer with a statute of limitations defense to the action.

This statute of limitation requires only that the collection action begin within ten years, not that it be completed within ten years. Accordingly, the statute of limitations is satisfied if the notice of attachment or garnishment is served within ten years of the due date even if funds continue to be paid to the tax collector after the ten-year period expires. An attachment or garnishment may continue indefinitely so long as it begins before the ten-year period ends.

For example, if a tax collector provides notice of wage garnishment on August 30, 2010, for delinquent real property taxes from the 2000 tax year, the statute of limitations is satisfied. The tax collector may continue to receive funds garnished from the taxpayer's wages in September 2010 and beyond without regard for the ten-year limitation.

Appendix

NOTICE OF ATTACHMENT AND GARNISHMENT SAMPLE

To: **GARNISHEE**

Street ADD
City, State, ZIP

PLEASE REMIT PAYMENT TO:
ORANGE COUNTY TAX COLLECTOR
P.O. BOX 8181
HILLSBOROUGH, NC 27278

The person owing or having in his possession wages, rents, bank deposits, debts, or other property of the taxpayer sought to be attached (hereinafter called garnishee) and the following taxpayer:

To: **TAXPAYER**

Each of you will take notice that pursuant to Sections 105-366 and 105-368 of the General Statutes of North Carolina authorizing the attachment and garnishment of wages, rents, bank deposits, proceeds of property subject to levy, and other intangible personal property, the property described below for the taxpayer is hereby attached to the extent stated below for taxes levied by the County of Orange and which are unpaid.

Year/Bill Number	Account #	Tract #	Total
Total taxes, plus penalties and interest			$
Cost of serving notice			$30.00
Total due and attached			$

(additional interest will accrue monthly on unpaid balance)

The property sought to be attached is [WAGES or FUNDS ON DEPOSIT] due the taxpayer, or subject to his demand, or to become due him during calendar year ____.

Within ten (10) days after service of this notice, the garnishee is directed to answer the notice by sending to the tax collector of Orange County by registered mail a statement that he has no defense or set-off against the taxpayer, and by remitting the amount demanded; or, if the garnishee does offer a defense or set-off, he shall proceed as provided Section 105-368(d) of the North Carolina General Statutes. If the amount due the taxpayer has not matured at the date of service of this notice, the garnishee's statement shall set forth that fact, and the demand shall be paid to the tax collector upon the maturity. If the property attached is wages or other compensation for personal services, the garnishee shall remit to the tax collector ten percent of such compensation per any period, and he shall continue to remit ten percent of the taxpayer's compensation each pay period until the total amount demanded is satisfied. Pursuant to the requirements of G.S. 105-368(b)(5), G.S. 105-366 and 105-368 are printed on the reverse side.

_____ _____
Date Notice Prepared Orange County Tax Collector

RETURN
(for use in personal service only)

I certify that this notice was received on the ____ day of, ____, ____, and was served as follows:

1. On _____(garnishee) by leaving a copy with _____ on the ___ day of ___, ___.

_____
Officer

2. On _____(taxpayer) by leaving a copy with _____ on the ___ day of ___, ___.

_____
Officer