

**STATE BOARD OF EQUALIZATION**

450 N STREET, SACRAMENTO, CALIFORNIA  
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)  
(916) 445-6496

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*Controller, Sacramento*

April 23, 1993

BURTON W. OLIVER  
*Executive Director*

Mr. R--- R. M---  
Law Offices of --- and ---  
XXX --- --- Street  
---, CA XXXXX

Re: [A] Inc.  
SR -- XX-XXXXXX

Dear Mr. M---:

Your letter to Dina M. Hay of the Board's Arcadia office has been forwarded to the Legal Division for reply. In your letter dated March 17, 1993, you state that you are unaware of any case or statute, which supports the Board's claim that a notice of levy has priority over a bank's lien or right to set off.

The Board served a Notice of Levy on --- --- Bank. The bank responded that the Notice of Levy attached \$18,894.03 in the taxpayer's account. Subsequently, the Board received a check for \$2520.29 with an explanation that the balance was applied to satisfy an outstanding delinquent loan with the bank.

California Code of Civil Procedure section 700.140(a) provides that a levy on a deposit account reaches amounts in the account at the time of service on the financial institution. Code of Civil Procedure section 701.040 provides:

“(a) Except as otherwise ordered by the court upon a determination that the judgment creditor's lien has priority over the security interest, if property levied upon is subject to a security interest that attached prior to levy, the property or obligation is subject to enforcement of the security interest without regard to the levy unless the property is in the custody of the levying officer; but, if the execution lien has priority over the security interest, the secured party is liable to the judgment creditor for any proceeds received by the secured party from the

property to the extent of the execution lien.

“(b) After the security interest is satisfied, the secured party shall deliver any excess property, and pay any excess payments or proceeds of property, remaining in the possession of the secured party to the levying officer for the purposes of the levy, as provided in Sections 9502 and 9504 of the Commercial Code, unless otherwise ordered by the court or directed by the levying officer.”

Code of Civil Procedure section 701.040 establishes that only a security interest in the property levied upon will have priority over the levy. The bank has no right of set off on the funds levied upon if it does not have a prior security interest in those funds.

Although California Commercial Code section 9301(1)(b) provides that an unperfected security interest is subordinate to a person who becomes a lien creditor before the security interest is perfected, Commercial Code section 9302(1)(g) provides an exception to the usual requirement of a filing of a financing statement to perfect a security interest in a “deposit account.” If the deposit account is maintained with the secured party, the security interest is perfected when the security agreement is executed.

Commercial Code section 9105(e) defines “deposit account” as

“a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a negotiable certificate of deposit.”

If the bank can show that the taxpayer has signed a security agreement in which the taxpayer granted the bank a security interest in the funds in the account levied upon and that security agreement was executed prior to the levy, the bank has a right to retain amounts due to it on the defaulted loan and must remit any excess funds to the Board. If the bank has no such security agreement, the funds in the levied account must be turned over to the Board without any deduction or set off.

If you need any additional information, please contact this office.

Very truly yours,

Thomas Cooke  
Tax Counsel

TC:cl