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About DOR

[Home](#) > [Businesses](#) > [Help & Resources](#) > [Legal Library](#) > [Directives](#) >
[Directives - By Decade](#) > [2013 Directives](#) > [DD 13-2: Offset Against Funds Payable](#) >

Directive 13-2: Right of Offset Against Funds Payable by the Commonwealth to Collect Delinquent Taxes

Introduction/Purpose

Pursuant to chapter 62C, § 2 of the General Laws, the Commissioner of Revenue ("Commissioner") is charged with the administration and enforcement of the Massachusetts tax laws imposed by General Laws chapters 60A, 62 through 65C, inclusive, chapter 121A, § 10, and chapter 138, § 21. The Commissioner is granted statutory authority to collect delinquent taxes owed the Commonwealth through a number of methods. These methods include, among others, a statutory lien on property (G.L. c. 62C, § 50); levy (G.L. c. 62C, § 53); seizure (G.L. c. 62C, § 54); contract actions brought in the name of the Commonwealth (G.L. c. 62C, § 47); and intercept of tax refunds (G.L. c. 62D). The Commissioner also has a statutory right of offset against funds payable by the Commonwealth to delinquent taxpayers under G.L. c. 60, § 93. The purpose of this Directive is to explain this statutory right of offset.

Issue 1: May the Commissioner offset an unpaid Massachusetts tax liability owed by a delinquent taxpayer against an amount payable to that taxpayer by any separate governmental entity or office of the Commonwealth?

Directive 1: Yes. Pursuant to G.L. c. 62C, § 46, and c. 60, § 93, the Commissioner is authorized to offset any unpaid Massachusetts tax liability owed by a delinquent taxpayer against any amount payable to that taxpayer by any separate governmental entity or office of the Commonwealth.

Issue 2: Is the Commissioner's statutory right of offset under G.L. c. 60, § 93 limited by the statute of limitations for collection of taxes set forth in G.L. c. 62C, § 65?

Directive 2: No. The statute of limitations for collection of taxes set forth in G.L. c. 62C, § 65 does not apply to DOR's statutory right of offset under G.L. c. 60, § 93.

Discussion

A. Issue 1: Statutory authority for the Commissioner's right of offset

Chapter 60, section 93, of the General Laws authorizes the collector of cities and towns to request the treasurer to “withhold payment of any money payable to any person from whom there are then due [unpaid] taxes” and pay or credit the same to the collector. Section 93 provides in full as follows:

The treasurer or other disbursing officer of any town may, and if so requested by the collector shall, withhold payment of any money payable to any person from whom there are then due taxes, assessments, rates or other charges committed to such collector, which are wholly or partly unpaid, whether or not secured by a tax title held by the town, to an amount not exceeding the total of the unpaid taxes, assessments, rates and other charges, with interest and costs. The sum withheld shall be paid or credited to the collector, who shall, if required, give a written receipt therefor. The person taxed or charged may in such case have the same remedy as if he had paid such taxes, assessments, rates or other charges after a levy upon his goods. The collector's rights under this section shall not be affected by any assignment or trustee process or attorney's lien.

G.L. c. 60, § 93.

Pursuant to G.L. c. 62C, § 46, inserted by St. 1976, c. 415, § 22, the Commissioner of Revenue is granted “all the powers and remedies provided by chapter sixty for the collection of taxes on personal estate by collectors of towns.” *See, also, Levin v. Commissioner of Corps. & Tax'n*; 349 Mass. 20, 22-23 (1965). Accordingly, the statutory right of offset provided to cities and towns by G.L. c. 60, § 93 is equally available to the Commissioner. In *Decota v. Town of Stoughton*, 504 N.E. 2d 672, 23 Mass. App. Ct. 618, 621 (1987), *review denied* 507 N.E. 2d 1056, 399 Mass. 1105, the Massachusetts Appeals Court stated: “[t]he Legislature could, and we think did, determine that where public funds are to be paid to a delinquent taxpayer it is appropriate and in the public interest that, by a set-off procedure, the taxpayer satisfy his outstanding proportionate obligation (to the extent of the available payment) to fund the operation of the government. . . .” This principle has been applied to collection of taxes owed to the Commonwealth, as well as collection of taxes owed to local government, in the cases cited in section B, Issue 2, below.

The Commissioner's statutory right of offset set forth in G.L. c. 60, § 93 is not equivalent to, and is separate and apart from, a lien enforcement action. *See Nebes v. Department of Conservation and Recreation et al.*, C. A. No. 05-2976 (2008), 2010 Mass. App. Unpubl LEXIS 1249, 78 Mass. App. Ct. 1110, 937 N.E. 2d 522 (Mass. App. Ct. 2010), *rev. den.* 495 Mass. 1103 (2011), discussed further below. The statutory language of G.L. c. 60, § 93 does not require a lien or a notice of lien as a prerequisite for purposes of seeking to enforce an offset against funds held by the Commonwealth that would otherwise be payable to a delinquent taxpayer.

B. Issue 2: Statute of limitations for collection of taxes in G.L. c. 62C, § 65 is not applicable to offset remedy under G.L. c. 60, § 93

In *Decota v. Stoughton*, 23 Mass. App. 618 (1987), the Massachusetts Court of Appeals stated that "[t]he Legislature intended the remedy provided by G.L. c. 60, § 93, to be not only cumulative, but unaffected by any statute of limitations." *Id.* at 620. Since the Commissioner of Revenue is granted "all the powers and remedies provided by chapter sixty for the collection of taxes on personal estate by collectors of towns" (G.L. c. 62C, § 46), the statute of limitations for collection of taxes imposed by G.L. c. 62C, § 65 does not affect the Commissioner's statutory right of offset. This principle was affirmed by the decision in *Nebes v. Department of Conservation and Recreation et al*, supra, in which the Court held that the Commissioner was entitled to enforce an offset of the tax liability owed by the plaintiff against an eminent domain award payable to the plaintiff by the State Treasurer pursuant to G.L. c. 60, § 93, without regard to any statute of limitations, including the statute of limitations for collection of taxes imposed by G.L. c. 62C, § 65. The Superior Court's decision was affirmed by the Massachusetts Appeals Court in an unpublished decision under Rule 1.28, and further review by the Supreme Judicial Court was denied. See *Nebes v. Department of Conservation and Recreation et al*, 2010 Mass. App. Unpubl LEXIS 1249, 78 Mass. App. Ct. 1110, 937 N.E. 2d 522 (Mass. App. Ct. 2010), *rev. den.* 495 Mass. 1103 (2011) The Superior Court and the Appeals Court cited and relied on *Decota v. Stoughton*, 23 Mass. App. 618, 620 (1987) as the controlling decision.

Conclusion

The Commissioner is entitled to intercept and offset funds payable by the State Treasurer to any taxpayer that has an outstanding and unpaid tax liability owed to the Commonwealth. The above decisions confirm the Department's long-standing position on this matter. The Commissioner will continue to enforce this statutory right of offset under G.L. c. 60, § 93 without regard to the statute of limitations governing collection of taxes set forth in G.L. c. 62C, § 65. With respect to other collection remedies governed by G.L. c. 62C, the usual rules that govern the application of the statute of limitations in G.L. c. 62C, § 65 continue to apply. See Department of Revenue Technical Information Releases 04-27 and 08-8 for a detailed explanation of these rules.

/s/Amy Pitter

Amy Pitter
Commissioner of Revenue

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DD 13-2

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