



DE-FROSTING FROZEN ACCOUNTS: GUIDANCE ON STATE TAX LEVY ON SOCIAL SECURITY BENEFITS, INCLUDING BENEFITS DEPOSITED INTO OR TRANSFERRED BETWEEN FINANCIAL ACCOUNTS.

Delinquent taxpayers receiving Social Security benefits frequently inquire whether the Hawaii Department of Taxation can levy their benefits or levy their accounts containing their benefits.

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Social Security Benefits Are Not Subject To Hawaii State Tax Levies.

In general, social security benefits (funds) are not subject to creditors' claims made through legal process, including attachment, garnishment, levy, or other legal process.

The applicable legal statute, 42 U.S.C. Section 407(a) states:

(a) In general

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

See also, [*Washington State Dept. Of Social & Health Services v. Guardianship of Estate of Keffeler*](#), 537 U.S. 371 (2003.)

The only exceptions to this general rule are for child support and alimony (42 U.S.C. Section 659(a)), federal taxes (26 U.S.C. Sections 6331(h) and 6334(c)), and certain other federal debts (31 U.S.C. Section 3715(c)(3)(A.))

State tax departments and their legal processes are not included in the list of exceptions, therefore, these agencies may not reach SS benefits at the federal administrative level through the devices of a levy, garnishment, or other legal process.

Can The State of Hawaii Department of Taxation Get To My Social Security Benefits Deposited Into My Bank Account?

Can a state tax department levy or garnish a financial account that contains social security benefits?

The immediate answer is that state tax authorities regularly levy accounts, typically without knowledge of the source(s) of the funds in those accounts. Under Hawaii law, for instance, SS benefits are not expressly exempted from a tax levy. See, HRS [231-25\(b\)\(6.\)](#)

Under a legal doctrine referred to as the [Supremacy Clause](#) (Article VI, Clause 2, United States Constitution¹), however, federal law supersedes state laws (on the same or related subjects.) Therefore, there is a conflict between state and federal law. In this context, pursuant to the Supremacy Clause, federal and state courts have consistently held that ordinary creditors, including state agencies, may not levy social security benefits. [Philpott v. Essex County Welfare Bd.](#), 409 U. S. 413, 416-417 (1973); [Bennett v. Arkansas](#), 485 U.S. 395 (1988)(per curiam.)

Does deposit of the funds into a bank or other financial account cause the social security funds to lose their protected status? The short answer is no.

As 42 U.S.C. 407(a) specifically states that “*none of the moneys paid...shall be subject to execution, levy, attachment, garnishment, or other legal process...*,” Social Security benefits do not lose their statutorily protected status because they are deposited into a bank account or commingled with non-protected funds.

Consistent with the statutory language, federal (and various state) courts have consistently held that commingling (mixing) social security funds with non-exempt funds does not render these funds subject to attachment. See, [In re McFarland](#), 481 BR 243 (BR SD GA 2012), at 249-250, citing [Philpott v. Essex County Welfare Bd.](#), and numerous other cases. The protection will extend to joint bank accounts. [S & S Diversified Services, LLC v. Taylor](#), 897 F.Supp. 549, 552 (D. Wyo. 1995)[Placing initial burden of establishing funds traceable to social security upon depositors (at 552, citing to state law.)]

The question becomes, at most, the manner and method of tracing the SS funds. See, e.g., [NCNB Financial Services, Inc., v. Shumate](#), 829 F.Supp. 178 (Dist. W.D. 1993) aff'd 45 F.3d 427 (4th Cir. 1994)[District Court utilized “first in, first out” method (at 181)]; [In re Lantz](#), 451 BR 843 (N.D. Ill. 2011)[discussing methods of tracing.]

Many of the cases on the subject, including those cited above, represent “victories” on the law but do not have much practical impact: “[t]herefore, Shumate is entitled to the protection accorded to social security benefits...but only as to \$163.15.” 829 F.Supp. 178, at 181.

¹ “This Constitution, and the Laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...”

Practical Suggestions for Recipients of SS Benefits

An ounce of prevention may be worth a pound of cure.

While many courts take the view that an illegal levy may be reversed (see *Ultra Thin, Inc. v. Lane*, 210 P.3d 872 (Okla. App. 2009,)) obtaining a refund from the Department of Taxation could be considerably more difficult than heading off a levy (or having it promptly released.)

Financial institutions are required to follow certain guidelines regarding social security benefits in accounts for which they have received a levy.

Establish a Separate, Social Security-Only Account.

The first step is to establish a social security only account. Do not commingle (mix) funds from other sources in this account. The only deposits into this account will be SS direct deposits. For instance, you would not deposit items such as paychecks, tax refunds, or assistance from relatives into this account.

For reasons beyond the scope of this article, a separate, social security only account may result in your financial institution taking action to protect your interests.

If A Collector Is Actively Working Your Case, Notify The Collector That Your Social Security Only Account Is Social Security Only.

Assuming you establish a social security only account, if you are working with a State Tax Collector, when you complete your CM-2 (Financial Statement) plainly and clearly mark this account as “SS only.”

Thus, on Section III, Line 10, after listing the account information, write “Social Security Funds ONLY” below the relevant account.

Responses To A Levy

Typically, you will learn of a levy from a letter from your financial institution, or, more commonly, when you attempt to withdraw funds and are informed your account is “frozen.”

A. Notify Your Institution In Writing That Your Account Is Social Security Only And Therefore Exempt.

If your financial institution notifies you of an account hold or levy on this account, you should consider providing your financial institution with a written letter to the effect that the only funds in the account are social security funds and you believe that they are exempt from levy, and that you are seeking to have the State Department of Taxation release the levy and need a reasonable amount of time to do so.

You may receive a response from your financial institution that under existing provisions of law, including state law, they are obligated to comply with the tax levy or face sanctions themselves.

Nevertheless, and despite this response, notifying your financial institution may afford you more time and preserve your legal rights should a legal action be required.

B. If Your Account is Not Social Security Only, But Has Funds Traceable to Social Security Benefits.

Inform your financial institution that you are contesting the levy with the tax authority and that you believe certain of the funds in the account are traceable to SS funds. Be prepared to provide documents or other evidence to explain your position.

Follow up immediately with the Department of Taxation.

C. Remind The Department Of Taxation; Provide Evidence.

Similarly, you should provide the Department of Taxation with copies of bank statements from the account establishing that the funds are from your social security benefit. You should request an immediate release of the levy, in writing. The Department should promptly release the levy as to the social security benefits.

In accounts with mixed funds, understand that you may have to demonstrate why certain funds are not subject to levy to obtain a full or partial levy release.

D. Consult Legal Counsel.

Few lawyers may be interested in litigating (filing and pursuing a court case) with the State for the return of limited funds. This is especially true in matters in which tracing is a difficult matter of proof.

Large(r) sums, levies made after notification of the exemption claim, levies maintained despite prompt submission of records, all may be a different matter. State Department of Taxation collection procedures, in the context of a levy on social security funds in a bank account, might be constitutionally infirm and ripe for challenge. See, [Freddy Nobriqg Enterprises, Inc. v. State of Hawaii](#), 295 P.3d 993, 1002-1003 (ICA 2013)[discussing qualified immunity and procedural due process.]

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Disclaimer: Not intended as legal advice. Because of the generality of the information contained in this outline, the information provided may not be applicable in all situations and should not be acted upon without special legal advice based on particular situations.