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Bankruptcy - Title to Property - Personal Bankrupt's Income Tax Refund Passes to Trustee as Part of Estate

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RECENT DEVELOPMENTS

BANKRUPTCY — TITLE TO PROPERTY — PERSONAL BANKRUPT'S INCOME TAX REFUND PASSES TO TRUSTEE AS PART OF ESTATE.

In re Kokoszka (2d Cir. 1973)

The referees in bankruptcy for the estates of the petitioners ordered them to turn over income tax refunds for the year preceding adjudication of bankruptcy.¹ Each petitioner moved to vacate the turn-over order² arguing: (1) that the refunds were not property which passed to the trustee under section 70(a)(5) of the Bankruptcy Act;³ and (2) that if the refunds were property, then the Consumer Credit Protection Act⁴ (CCPA) required that the trustee return 75 per cent to the bankrupt. The motions were denied by the respective referees whose decisions were upheld by the district court.⁵ Upon appeal, the United States Court of Appeals for the Second Circuit affirmed,⁶ *holding* that personal income tax refunds were property which passed to the trustee under section 70(a)(5) of the Bankruptcy Act and that the CCPA was inapplicable. *In re Kokoszka*, 479 F.2d 990 (2d Cir. 1973), *cert. granted*, 42 U.S.L.W. 3352 (U.S. Dec. 10, 1973) (No. 73-5265).

1. Petitioner Kokoszka was adjudicated a bankrupt on January 5, 1972. His refund was for the year 1971. Petitioners Sands and O'Brien were adjudicated bankrupts on February 4, 1970, and April 30, 1970, respectively. Their refunds were for the year 1969. *In re Kokoszka*, 479 F.2d 990, 993 (2d Cir. 1973), *cert. granted*, 42 U.S.L.W. 3352 (U.S. Dec. 10, 1973) (No. 73-5265).

2. *Id.* Prior to their motions to vacate, Sands and O'Brien spent their refunds and were unable to turn over the funds; as a result their respective trustees moved to deny their discharges in bankruptcy. The referee for Sands' estate denied his discharge, while the referee for O'Brien's took no action prior to petitioners' appeals. Kokoszka turned over his refund to the trustee pending disposition of his appeal, and was given his discharge on August 24, 1972. *Id.* at 993.

A turn-over order is an order issued by the bankruptcy court upon motion by the trustee whereby the bankrupt is directed to turn over property or its proceeds to the trustee or other appropriate officer of the court. *Maggio v. Zeitz*, 333 U.S. 56, 61-63 (1948).

3. 11 U.S.C. § 110(a)(5) (1970) provides in pertinent part:

(a) The trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt . . . to all of the following kinds of property wherever located

(5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered

Id.

4. The Consumer Credit Protection Act, 15 U.S.C. § 1673 (1970), provides in pertinent part:

[T]he maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week

Id.

5. 479 F.2d at 993. The district court had consolidated the three cases. *Id.*

6. As to Sands, the court remanded to the district court on the issue of his discharge, with instructions for the referee to exercise his discretion in regard to the application for discharge. *Id.* at 997. *See* note 3 *supra*.

In order to distribute assets of a bankrupt in a manner which is equitable both to the debtor and his creditors, section 70(a) of the Bankruptcy Act vests the trustee, at the time of the filing of the petition, with title to the classes of property enumerated within that section.⁷ The list of assets included in section 70(a) is exclusive, and any interest not considered "property" under it remains in the bankrupt and does not pass to the trustee.⁸

When dealing with the question as to what constitutes "property" within the meaning of the Bankruptcy Act, the Supreme Court has stated that the policies underlying the Act must ultimately govern.⁹ These policies have been traditionally defined as "[securing] for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition,"¹⁰ while giving the honest debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."¹¹ Thus, the test of whether the interest in question is property within the meaning of section 70(a) is whether it is sufficiently rooted in the pre-bankruptcy past and not materially entangled with the bankrupt's ability to make an unencumbered fresh start.¹²

Petitioners advanced two arguments in support of their contention that the refund was not section 70(a) property. They initially argued that the court should follow *In re Cedor*,¹³ a Ninth Circuit decision which held that personal income tax refunds were simply a return of "excess withheld wages"¹⁴ and as such were similar to the vacation pay exempted

7. Bankruptcy Act § 70(a)(5), 11 U.S.C. § 110(a)(5) (1970), provides in pertinent part that "[t]he trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . ." *Id.* (emphasis added). Thus, the critical date for determining the rights and powers of the trustee and the rights of both debtor and creditors is the date of filing of the petition. *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 607 (1961); *In re Lustron Corp.*, 184 F.2d 789, 793 (7th Cir. 1950), *cert. denied*, 340 U.S. 946 (1951). However, certain property of the bankrupt is exempt from the operation of section 70(a). Bankruptcy Act § 6, 11 U.S.C. § 24 (1970).

Generally, state law determines exemptions under the Act although federal law controls in a few areas. Exemptions include, *inter alia*, wearing apparel, household furniture, homesteads, insurance policies, and pension monies. For a detailed list, see 1A W. COLLIER, COLLIER ON BANKRUPTCY ¶ 6.13 (14th ed. 1971).

8. *Ruebush v. Funk*, 63 F.2d 170, 173 (4th Cir. 1933); *In re Huffman-Salvar Roofing Paint Co.*, 234 F. 798, 799 (D.C. Ala. 1916). See 4A W. COLLIER, COLLIER ON BANKRUPTCY ¶ 70.07 at 90-91 (14th ed. 1971).

9. *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

10. *Lines v. Frederick*, 400 U.S. 18, 19 (1970), quoting *Segal v. Rochelle*, 382 U.S. 375, 379 (1966).

11. *Lines v. Frederick*, 400 U.S. 18, 19 (1970), quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

12. *Segal v. Rochelle*, 382 U.S. 375, 380 (1966).

13. 337 F. Supp. 1103 (N.D. Cal.), *aff'd mem. sub. nom. In re James*, 470 F.2d 996 (9th Cir. 1972), *cert. denied*, 411 U.S. 973 (1973). The Ninth Circuit stated in a memorandum decision that the case was affirmed on the authority of the district court opinion and *Lines v. Frederick*, 400 U.S. 18 (1970). 470 F.2d at 996.

14. *Cedor* held that the portion of the bankrupt's tax refund attributable to an excess of withholding tax deducted by an employer who withheld the minimum amount required by law, was not section 70(a)(5) property and as such remained

from section 70(a) by the Supreme Court in *Lines v. Frederick*.¹⁵ In addition, petitioners argued that most, if not all, of the refund would be consumed by administrative expenses, leaving nothing for the creditors, whenever the assets of the estate are merely nominal.¹⁶ Thus, creditors would not be benefited were the refund determined to be section 70(a) property,¹⁷ whereas the bankrupt would be aided in pursuing a "fresh start" in life if allowed to retain title to the fund.¹⁸

The court rejected the argument based on *Cedor* by distinguishing a tax refund from the vacation pay of *Lines*. It noted that the Court in *Lines* indicated that the function of vacation pay was to provide basic week to week support during those particular periods where, because of vacation or brief layoff, the employee would be without any weekly wage.¹⁹ Since the vacation pay would be used as a wage substitute, it was considered essential to a bankrupt's "fresh start" in life.²⁰ However, although a refund, like vacation pay, may in fact be used for basic necessities, it is not specifically earmarked to meet basic needs during a

in the bankrupt. 337 F. Supp. 1103, 1105 (N.D. Cal. 1972). That portion of the refund attributable to optional withholding was held to be section 70(a) (5) property which passed to the trustee. *Id.* The distinction was required to prevent one from increasing the level of withholding and then filing for bankruptcy. For a comment on the distinction the court made, see Lee, *Title to Property — Employee Bankrupts' Income Tax Refunds*, 47 REF. J. 239, 243 (1973).

15. 400 U.S. 18 (1970). *Lines* held that a bankrupt wage earner's vacation pay, accrued but unpaid at the time of filing of his petition, was not section 70(a) (5) property, and thus did not pass to the trustee. *Id.* at 20-21.

16. 479 F.2d at 995. See notes 49 & 51 *infra*. Bankruptcy Act § 48(c)(1), 11 U.S.C. § 76(c)(1) (1970), sets forth the schedule of compensation for trustees who do not conduct the business of the bankrupt, and provides that the trustee is entitled, in the court's discretion, to a percentage of the total assets of the estate. The section further provides that if the assets are not sufficient to produce a \$150 fee, the court in its discretion may award a fee to the trustee of up to \$150. *Id.* In practice, trustees are usually awarded the maximum fee. *In re Schautz*, 390 F.2d 797, 800 (2d Cir. 1968). Thus, in the small asset estate the trustee's fee and other expenses absorb the majority of the proceeds, leaving nothing for creditors. *In re Kokoszka*, 479 F.2d 990, 995 (2d Cir. 1973).

17. See note 16 *supra*.

18. *In re Kokoszka*, 479 F.2d 990, 996 (2d Cir. 1973).

19. *Id.* at 994-95.

20. *Id.* One of the main purposes of the Bankruptcy Act is to give the debtor a "fresh start" in life. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Essentially this means converting the assets of the debtor, as of the time of filing, to cash for payment to creditors, thus allowing the bankrupt to start anew without the burden of pre-existing debt. *Id.* In *Lines* the Court stated that turning over the vacation pay to the trustee would deny the bankrupt a "fresh start" since the debtor would be forced to take a vacation without income for basic support or, alternatively, to forego a vacation. 400 U.S. at 20-21. Since this result was viewed as in conflict with the purpose of the Act in that it impaired the debtor's right to future wages, the Court found for the bankrupt. *Id.* at 20. See text accompanying notes 36-48 *infra*. It should be noted that there has been severe criticism of the rationale of *Lines*. See Lee, *Title to Property — Employee Bankrupts' Vacation Pay*, 45 REF. J. 115 (1971); 49 N.C.L. REV. 738 (1971). Justice Harlan, dissenting in *Lines*, felt: (1) that the case should not be disposed of summarily by the Court but should be set for full argument, and (2) that the majority decision gave the bankrupt a "head start" rather than a "fresh start," since a non-bankrupt employee who begins work on the day the debtor's bankruptcy petition is filed — the first day of the "fresh start" in life — does not have the benefit of vacation pay accrued before bankruptcy, sums which the *Lines* decision allows the bankrupt to retain. 400 U.S.

particular period.²¹ Thus, the *Kokoszka* court concluded that to allow the lump sum type refund to pass to the trustee would not deny the debtor a "fresh start" in life.²² Moreover, the court noted that the mere fact that the refund had its origin in wages was not controlling since many assets held by a bankrupt, such as savings accounts or automobiles, may also have their origin in wages yet are treated as section 70(a) property.²³ Nor was the court persuaded that the receipt of a refund was an expected annual event.²⁴ As the court pointed out, many individuals rely on dividends from stock and Christmas Clubs at year's end to provide income, yet such property is subject to section 70(a)(5).²⁵ The court stated that allowing a bankrupt to retain a refund would amount to giving him a "head start" rather than a fresh start.²⁶

The court also rejected the petitioner's second argument.²⁷ Noting that in nominal or no asset estates the refund might indeed be of little or no benefit to the creditors, the court nevertheless, refused to give blanket exemption treatment to all tax refunds, since some refunds, may be fairly large or only one of many assets of an estate.²⁸ In the latter situation, the creditors would be deprived of the benefit of the refund when, in fact, other assets were available to defray administrative expenses. In order to avoid such an inequity to creditors yet provide adequate relief for debtors, the court suggested that the bankrupt move for an order of abandonment.²⁹ By this

21. 479 F.2d at 994-95.

22. *Id.* at 995-96.

23. *Id.* at 995.

24. *Id.*

25. *Id.* See *In re Brantman*, 244 F. 101 (2d Cir. 1917) (trustee succeeds to bankrupt's rights to declared and undeclared dividends from corporate stock); *In re Negri*, 30 F.2d 717 (W.D. Pa. 1928) (title to bankrupt's bank account vests in trustee).

26. 479 F.2d at 995.

27. See text accompanying note 16 *supra*.

28. 479 F.2d at 995-96.

29. *Id.* at 996. See note 53 and accompanying text *infra*. One authority has stated:

[Trustee generally may abandon assets which are] (1) inherently worthless, (2) so heavily encumbered that the equity of the bankrupt available for unsecured creditors is virtually or actually worthless, (3) so expensive to collect, care for, and dispose of that any equity would be consumed in the process, (4) of a value so speculative that the expense of realizing such value is a poor risk, (5) of a nature that the time involved in collection does not justify keeping the estate open, or (6) unable to be sold after all reasonable efforts in spite of appraised values.

COWANS, BANKRUPTCY LAW AND PRACTICE § 587 (1963). These principles are well established by case law. *In re Ira Haupt & Co.*, 398 F.2d 607, 612-13 (2d Cir. 1968). See generally 4A W. COLLIER, COLLIER ON BANKRUPTCY ¶ 70.42 (14th ed. 1971). Although the decision to abandon is within the trustee's discretion, it is subject to judicial review. *Dushane v. Beall*, 161 U.S. 513, 515 (1896). The precise action to be taken by a trustee who has decided to abandon an asset is regulated by local procedural rules and therefore varies among districts. *Schmidt v. Esquire, Inc.*, 210 F.2d 908, 913-14 (7th Cir.), cert. denied, 348 U.S. 819 (1954). Certain jurisdictions do not require the trustee to motion the referee for an order before abandonment. 210 F.2d at 913; *In re Yalden*, 109 F. Supp. 603, 604 (D. Mass. 1953). However, other jurisdictions require notice to creditors and a hearing, pursuant to the referee's order of abandonment. *In re Humeston*, 83 F.2d 187, 188 (2d Cir. 1936); *In re*

means, the equities of each situation could be determined on a case by case basis.³⁰

The petitioners further urged that if the refund were found by the court to be section 70(a)(5) property, the trustee should be subject to the CCPA's limitation on garnishment and, therefore, could succeed to only 25 per cent of the refund.³¹ Since the CCPA's definition of earnings was broad enough to include a tax refund and garnishment was defined as the withholding of earnings to pay debts,³² the petitioners argued that the trustee was a garnishor as to the refund and subject to the limitations of the Act.³³

The *Kokoszka* court rejected this argument, reasoning that the purpose of the CCPA was to protect 75 per cent of a wage earner's periodic pay to meet basic needs and thereby keep the honest debtor out of bankruptcy.³⁴ The court felt it clear from the legislative intent that "earnings," as defined in the CCPA, was limited to periodic payments such as wages and did not include lump sum payments³⁵ which were not designed to provide the basic necessities of life.

The determinative factor in the *Kokoszka* court's decision that a tax refund is property within the meaning of section 70(a) was its conclusion that a refund did not possess the basic characteristic of a future wage. It is submitted that this conclusion is justified in light of the purposes of the Bankruptcy Act and existing case law.

A trustee in bankruptcy has no claim on property acquired by the bankrupt after the petition is filed,³⁶ including future wages.³⁷ The bankrupt's

Yalden, 109 F. Supp. 603, 604 (D. Mass. 1953). See generally 53 COLUM. L. REV. 415 (1953).

The *Kokoszka* court stated:

[The referee should grant the motion] if it is reasonably clear that the assets, otherwise available for creditors, will be entirely consumed by the trustee's fees and other administration expenses, that no creditor has shown that there was a likely opportunity for a trustee to recover additional assets, and that the absence of a trustee will not, under the circumstances, cast a substantial additional burden on the Bankruptcy Court.

479 F.2d at 996.

30. See text accompanying note 53 *infra*.

31. 479 F.2d 996. See note 4 *supra*.

32. 15 U.S.C. § 1672 (1970) provides in pertinent part:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

Id.

33. 479 F.2d at 996. The Ninth Circuit in *Cedor* had adopted this very reasoning. 337 F. Supp. at 1106-07.

34. 479 F.2d at 996-97. See note 59 *infra*.

35. Cf. text accompanying notes 19-22 *supra*.

36. *Hudson v. Wylie*, 242 F.2d 435, 444-45 (9th Cir.), cert. denied, 355 U.S. 828

37. *Id.*

future earning power has been recognized as essential to his fresh start in life³⁸ both as a matter of private necessity for the wage earner and his family³⁹ as a matter of public concern.⁴⁰ This policy mandates that any asset sufficiently analogous to the future wage remain in the bankrupt, despite the fact that such asset may have roots in the pre-bankruptcy past.⁴¹

As noted previously, in *Lines* the Court found that vacation pay can be characterized as a substitute for the weekly wage during brief vacation periods or in the event of a layoff.⁴² The employer provides for the accrual of such a fund so that a wage earner and his family will have resources to draw upon to provide the basic necessities of life during those particular periods when the weekly wage is not forthcoming.⁴³ Conversely, when an employer deducts sums from the weekly wage for withholding taxes, he does so under a statutory directive and not for the purpose of providing the employee with a tax refund.⁴⁴ Moreover, since vacation pay is accumulated *specifically* to perform the function of the weekly wage during those particular periods in the future when the wage earner and his family are without sums for basic support, the subjection of that asset to the operation of section 70(a) would leave the employee with a choice of taking a vacation without income, or not taking a vacation at all.⁴⁵ The Court in *Lines* felt that a bankrupt faced with such a decision had not been given a fresh start in life.⁴⁶ In contrast, a tax refund, when returned to the bankrupt, *may* be used to provide support for a wage earner. However, it lacks the quality of vacation pay in that it is not *specifically* earmarked to fill the economic void created when funds are not forthcoming for a particular period of time.⁴⁷ In this respect a refund is analogous to a savings account which has been traditionally

38. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

39. *Id.* at 245. The wage has been characterized as a "specialized type of property presenting distinct problems in our economic system." *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340 (1969). This is obviously true since the wage is used to provide basic support for the wage earner and his family. *Id.* at 340. The specialized nature of the wage is reflected in various types of statutes. *See, e.g.*, Consumer Credit Protection Act, 15 U.S.C. § 1673 (1970) (limiting garnishment of wages to 25 per cent of the weekly wage); CONN. GEN. STAT. ANN. §§ 52-361(g), 36-236 (Supp. 1973) (prohibiting wage assignment). Case law also supports this view. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (striking down Wisconsin statute permitting pre-judgment garnishment of wages as violative of due process).

40. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934). This obviously refers to the fact that the individual without funds to support himself and his family can only look to society and the government, through welfare, to provide these funds.

41. Although a literal reading of section 70(a)(5) might include an asset with roots in the pre-bankruptcy past, the fresh start rationale requires that the bankrupt retain the asset, if its transfer from the debtor to the trustee would deprive him of that fresh start. *Frederick v. Lines*, 425 F.2d 215, 216-17 (9th Cir.), *aff'd*, 400 U.S. 18 (1970). *See* notes 7 & 11 and accompanying text *supra*.

42. *Lines v. Frederick*, 400 U.S. 18, 20 (1970).

43. *Id.*

44. *See* INT. REV. CODE OF 1954, § 3402 (directing employers to withhold appropriate tax on wages); *id.* § 6413 (directing excess of amounts withheld from wages over the tax due to be refunded to the employee).

45. *Lines v. Frederick*, 400 U.S. 18, 20 (1970).

46. *Id.*

47. *See* text accompanying note 41 *supra*.

recognized as section 70(a) property.⁴⁸ A tax refund, therefore, is properly characterized as a lump sum payment which does not retain the unique quality of wages.

Perhaps the strongest argument made by the petitioners was that administrative expenses would consume most of the tax refund leaving little or no proceeds for the creditor.⁴⁹ Petitioners correctly pointed out the futility of allowing the refund to vest in the trustee since the ultimate sum available for creditors would not be increased while the bankrupt would be denied possession of a small sum of money which would help ensure a "fresh start" in life.⁵⁰ However, upon a close examination, petitioners' argument proves fallacious in part.

Although the petitioners' blanket approach of exempting all tax refunds would leave the position of the creditors unchanged in the great majority of personal bankruptcies,⁵¹ the result would be inequitable in those cases where the refund was substantial or comprised but one of many assets of an estate. In such a case the creditor would be put in a worse position since the bankrupt's estate, from which payment of administrative expenses comes, would be reduced — a result clearly not in keeping with the purpose of the Bankruptcy Act.⁵² Thus, the court's suggestion that in an appropriate case a bankrupt file a motion of abandonment would appear to afford a more equitable remedy in accord with policies underlying the Act. The debtor would be given an opportunity to demonstrate that the fund out of which creditors would be paid would not be increased, notwithstanding the inclusion of a refund after administrative expenses were deducted, and thus establish his claim to the refund, while the creditor could protect his interest by opposing such a motion.⁵³

48. 479 F.2d at 995. See note 25 *supra*.

49. See D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 20 (1971). The authors estimate that administrative expenses comprise 41 per cent of the amounts paid out in personal bankruptcy cases. *Id.* at 91. They further note that income tax refunds usually produce only small amounts which are used to pay the trustee. *Id.* at 85.

50. 479 F.2d at 995-96.

51. See D. STANLEY & M. GIRTH, *supra* note 49. The authors report that in 1969, 85 per cent of the bankruptcy cases unreported were of the no or nominal asset variety. *Id.* at 20. Of this number 11 out of 12 were personal as opposed to business bankruptcies. *Id.*

52. See text accompanying notes 10-11 *supra*.

53. 479 F.2d at 996. See note 29 *supra*. Although not expressly provided by the Bankruptcy Act, the trustee's power to abandon an asset is not in dispute. First Nat'l Bank v. Lasater, 196 U.S. 115, 118 (1905); 4A W. COLLIER, *COLLIER ON BANKRUPTCY* ¶ 70.42, at 502 & n.4 (14th ed. 1971). Since the practice is regulated largely by local rules it varies considerably even within states. See Calverley, *Income Tax Refunds Due Wage Earners*, 39 REF. J. 8, 10 (1965). The main obstacle to successfully petitioning for abandonment is a practical one — refunds frequently are the only asset of the estate and are used to pay the trustees. Without assets, the trustee receives only a nominal fee, thus, making it difficult to recruit and retain skilled trustees. *Id.* As a result tax refunds are not among those assets most frequently abandoned. Certain jurisdictions, however, have overcome these obstacles, leaving the process a workable, feasible one. *Id.* See D. STANLEY & M. GIRTH, *supra* note 49, at 86-87.

After establishing that a tax refund was property within the meaning of section 70(a), the *Kokoszka* court dismissed the petitioners' alternative contention that the CCPA applied to tax refunds in bankruptcy cases. Although the *Cedor* court adopted this argument,⁵⁴ the *Kokoszka* court concluded that the CCPA merely pertained to weekly or other periodic wages and not to lump sum payments.⁵⁵ Although a literal reading of the CCPA's definition of earnings might include a lump sum payment,⁵⁶ the legislative intent clearly indicates a narrower scope.⁵⁷ The purpose of the garnishment provisions was to protect the uneducated, unwary, or uninformed consumer who had accumulated an excessive amount of debt from attack by creditors.⁵⁸ The drafters of the Act noted a high causal connection between harsh garnishment laws and personal bankruptcies, and hoped that the establishment of fair and uniform garnishment guidelines would decrease their number.⁵⁹ Since the CCPA was designed to assist the debtor in avoiding bankruptcy, it would be incongruous to construe it as contemplating inclusion of one who had already filed a petition.⁶⁰

The *Cedor* court's conclusion that the trustee takes control of a refund by means of a "garnishment" and that a refund represents "disposable earnings" is subject to criticism. The trustee in bankruptcy does not take by garnishment but is *vested* by operation of law with title to any asset which is within the enumerated classes of section 70(a).⁶¹ Subsection 70(a)(5) encompasses all property which is capable of being transferred.⁶² Since a tax refund may be transferable,⁶³ it would be

54. 337 F. Supp. at 1106-07.

55. 479 F.2d at 996-97.

56. See note 32 *supra*.

57. H.R. REP. NO. 1040, 90th Cong., 2d Sess. 20-21 (1967).

58. *Id.* at 9-10.

59. The House Committee on Banking and Currency, noting the increasing rate of personal bankruptcies, stated:

The limitations on the garnishment of wages adopted by your committee, while permitting the orderly payment of consumer debts, will relieve countless honest debtors driven by economic desperation from plunging into bankruptcy in order to preserve their employment and insure a continued means of support for themselves and their families.

Id. at 21.

60. *In re Kingswood*, 343 F. Supp. 498 (C.D. Cal.), *rev'd* 470 F.2d 996 (9th Cir. 1972), also held that the CCPA does not apply to a tax refund. The district court appended to its opinion the memorandum of decision of James E. Moriarty, one of four referees in bankruptcy who testified in support of what later became the CCPA's garnishment provisions. *Id.* at 501. See H.R. REP. NO. 1040, 90th Cong., 2d Sess. 21 (1967). Referee Moriarty was also of the opinion that the CCPA did not apply to the question of title to bankrupt's tax refund. 343 F. Supp. at 501-02. However, the United States Court of Appeals for the Ninth Circuit reversed the district court opinion on the authority of *Cedor*. 470 F.2d 996-97 (9th Cir. 1972).

61. See note 7 and accompanying text *supra*; see also 4A W. COLLIER, COLLIER ON BANKRUPTCY ¶ 70.04, at 48-50 (14th ed. 1971).

62. See note 3 *supra*.

63. It was not disputed in the instant case that the refunds were transferable, 479 F.2d at 993, n.1. Whether the property could be transferred, or levied upon and sold, or sequestered is usually a matter of state law, although federal law governs where property is controlled by federal statute. 4A COLLIER, COLLIER ON BANKRUPTCY ¶ 70.04, at 48-50 (14th ed. 1971).

illogical to hold that the trustee has garnished the property when it has vested at the time of filing.⁶⁴ Further criticism may be directed at the Ninth Circuit's decision that a tax refund is "disposable earnings" within the definition of the CCPA.⁶⁵ At least one court has held that when an employer withholds wages for taxes, such funds lose their status as wages, and that status is not regained when a refund is paid to the taxpayer.⁶⁶ Rather, the payment is classified as the realization of a potential tax refund.⁶⁷ Thus, the CCPA is inapplicable and does not afford protection to the bankrupt debtor.

In evaluating the decision of the Second Circuit in *Kokoszka* in light of the Ninth Circuit's determination in *Cedor* several conclusions may be drawn. First, *Kokoszka* is clearly more consistent with the definition of section 70(a) property as outlined in *Lines* and *Segal*.⁶⁸ Moreover, in those situations where other assets are available, *Kokoszka* yields a result clearly more equitable to the creditor.⁶⁹ Although it may be true that in certain instances the tax refund of the no asset debtor may be consumed by administrative expenses, the remedy of abandonment is readily available.⁷⁰ However, in order to remove the practical impediments to this remedy, courts must endorse the practice of those districts where abandonment is in fact a workable tool.⁷¹

Further, the *Kokoszka* court, in rejecting the *Cedor* approach, has avoided the practice of justicially carving out a national exemption policy by restricting the definition of property in section 70(a)(5) of the Bankruptcy Act.⁷² Certainly, if such a policy is necessary it is a more appropriate area for Congressional rather than judicial action.

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64. For at least one commentator's view that the argument adopted by *Cedor* is in fact illogical, see Lee, *Title to Property — Employee Bankrupts' Income Tax Refunds*, 47 REF. J. 239, 244-45 (1973).

65. 337 F. Supp. at 1107. See note 32 *supra*.

66. *In re Rosner*, [1949-1952 Transfer Binder] ¶ 56,566 BANKR. L. REP. (E.D. Pa. 1949).

67. *Id.*

68. See text accompanying notes 45-47 *supra*.

69. See text accompanying notes 51-53 *supra*.

70. See note 29 *supra*.

71. See note 53 *supra*.

72. See Lee, *Title to Property — Employee Bankrupts' Vacation Pay*, 45 REF. J. 115, 118-19 (1971).