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**From:**

**Sent:** Wednesday, February 16, 2011 10:34:59 AM

**To:**

**Cc:**

**Subject:** Injured Spouse & Community Property Question

Hello this is in response to your request for advice.

**ISSUE:**

You have asked whether a wife who lives with her husband in California, a community property state, is eligible for injured spouse relief from the offset provisions of I.R.C. § 6402.

**FACTS:**

The couple filed a joint return. The couple had wages withheld for taxes throughout the year, and would have gotten a refund but for the offset provision of section 6402, which allowed the Service to apply that refund towards a tax liability that the husband occurred prior to this marriage. The wife claims that she is entitled to a refund of part of this offset as an "injured spouse," arguing that her wages are separate property because they are directly deposited into a separate bank account. She bases her claim that her wages are separate property on Cal. Fam. Code § 911, which provides:

Earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount.

**CONCLUSION:**

The wife is not eligible for a refund because the amount of the refund comes from community property. The amount withheld never reached her bank account.

**ANALYSIS:**

In California, wages earned by either of the spouses is community property. Cal. Fam. Code § 760; In re Marriage of Haines, 39 Cal. Rptr. 2d 673, 681 (1995); Martin v. Southern Pacific Co., 130 Cal. 285 (1900). Here, the amount that the wife is requesting to be refunded is the amount of her withheld wages that went towards satisfaction of her husband's pre-marriage tax liability. Those wage withholdings never went into any separately maintained bank account. Therefore, she is not entitled to a refund because

wages are community property and the amounts withheld from those wages are of the same character. Further, the amounts withheld from those wages and subjected to refund offset to pay the tax liability were never available for deposit into a separate account maintained by her.

In addition, we note that Cal. Fam. Code § 911 is a state exemption statute, which does not bind the Service for collection purposes. In U.S. v. Mitchell, 403 U.S. 190 (1971), the United States Supreme Court addressed the issue of whether state exemption statutes affect the Service's authority to collect by levy. The Court held that they do not, stating, "exempt status under state law does not bind the federal collector. Federal law governs what is exempt from federal levy." Mitchell at 205.

Please let me know if you have any further questions. Thank you!