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FILE NO. S-467

**COUNTIES: Proper Official to
Withhold Federal and State Income
Taxes on Portion of State's Attorney's
Salary Paid by State**

Honorable Richard S. Simpson
State's Attorney of Lawrence County
Court House
Lawrenceville, Illinois 62439

Dear State's Attorney Simpson:

I have your letter in which you request my opinion as to who should withhold Federal and State Income Taxes on that portion of the State's Attorney's salary which is paid by the State of Illinois. Section 7 of "An Act concerning fees and salaries, and to classify the several counties of this State with reference thereto," provides in relevant part as follows:

"§ 7. Each state's attorney shall receive for his services \$7,200 per year, payable monthly from the State treasury, to the county in which he is elected. * * *

Such salaries shall be paid to the state's attorney and the assistant state's attorney in equal monthly installments by such county out of the county treasury provided that the State of Illinois shall reimburse each county monthly from the State treasury the amount of such salary. * * * " Ill. Rev. Stats. 1971, ch. 53, par. 7.

You will note particularly that the statute provides that the State portion of the State's Attorney's salary is paid from the county treasury which is then reimbursed by the State.

Section 3401 of the Internal Revenue Code of 1954 (Title 26, U.S.C.A.), in providing for the withholding of taxes on wages at their source, provides the following definition of employer and employee:

* * * *

(c) Employee.--For purposes of this chapter, the term 'employee' includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term 'employee' also includes an officer of a corporation.

(d) Employer.--For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that--

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' (except for purposes of subsection (a)) means the person having control of the payment of such wages, * * * " 26 U.S.C.A., §3401.

Section 701 of the Illinois Income Tax Act (Ill. Rev. Stats. 1971, ch. 120, pars. 1-101 et seq.) adopts the Federal rules for determining when taxes are to be withheld.

A similar question was considered by one of my predecessors in connection with the Illinois Municipal Retirement Fund (Opinion F-84, September 8, 1961, 1961 Op. Att. Gen. 207), wherein he held that the portion of the State's Attorney's salary paid by the State was in fact paid by the county which was then reimbursed by the State and was therefore subject to the provisions of the Illinois Municipal Retirement Fund Act. I fully concur with that opinion and am further of the opinion that the same reasoning applies to the question you raise.

Honorable Richard S. Simpson

-4

Based upon the foregoing, it is my opinion that Federal law requires the County to withhold income taxes from the State's Attorney's entire salary, since all payments are made through the county treasury. The fact that a portion of the salary is paid quarterly upon order of the County Board and a portion is paid monthly and is reimbursed by the State is not relevant in determining that the county is the employer for tax purposes and has control of the payments.

Very truly yours,

ATTORNEY GENERAL