

residents. The record club's sole contact with Florida, other than its corporate organization, is through such advertising campaigns. Advertising materials destined for Florida residents are, as above stated, deposited in the United States mail system outside the state.

Florida imposes a use tax on the cost of tangible personal property imported into the state for use, consumption, distribution, or storage. Section 212.06, F. S. Although the corporate division in question may for jurisdictional purposes have sufficient contact with the state, through the unitary aspects of its corporate structure, to be required to remit taxes when due, there appears to be authority in recent decisions for considering the specific act in question to be nontaxable, based apparently on the absence of any use of the materials in Florida by or in control of the club or its agents, and the gratuitous character of such transactions so far as the recipients are concerned. Compare *Hoffman-LaRoche, Inc. v. Porterfield*, 243 N.E.2d 72 (Ohio 1968), *Rabren v. Radio Corporation of America*, 252 So.2d 55 (Ala. 1971).

Pursuant to Title 39, United States Code of Federal Regulations, a sender maintains a right of recall over mail and relinquishes legal control, possession, and ownership of the material upon *delivery* to the recipient. [See] 39 C.F.R. §153.5(a), (b) and (c). The opinions above cited, however, rely upon the expense of recall, formal application required for each piece of mail, worthlessness of any returned promotional material, and the unlikelihood of recall as a rationale for concluding that the corporate sender for all practical purposes divests itself of ownership, possession, and control at the time of mailing out of state. *Hoffman-LaRoche, Inc. v. Porterfield*, *supra*, at 74.

In the absence of a conflicting decision or any consideration of the issue by the Florida courts, you may in my opinion conclude against application of the tax based on a finding that the corporate sender under these particular circumstances does divest itself of control of the promotional materials out of state upon deposit in the mail for delivery to the respective Florida resident.

073-62—March 15, 1973

WORKMEN'S COMPENSATION

ADJUSTMENTS DUE TO PENSION OR OTHER BENEFITS RECEIVED BY PUBLIC EMPLOYEES

To: L. K. Ireland, Jr., Secretary, Department of Administration, Tallahassee

Prepared by: Halley B. Lewis, Assistant Attorney General

QUESTIONS:

1. Are the provisions of §440.09(4), F. S. 1971,* relating to adjustments in pension or benefit funds to reflect moneys received under workmen's compensation applicable to benefits paid pursuant to state-administered retirement laws?
2. If §440.09(4) does apply, does it apply to all provisions of all state-administered pension and retirement acts and if not, which provisions are excepted?
3. If retirement benefits must be adjusted to workmen's compensation benefits awarded under Ch. 440, F. S., what is the latest date at which such adjustment must begin?

*Editor's note: Note that §440.09(4) was subsequently repealed by §2, Ch. 73-127.

person may be entitled to receive from any pension or other benefit fund to which the state or municipal body may contribute.

In AGO 053-73, March 31, 1953, Biennial Report of the Attorney General, 1953-1954, p. 474, one of my predecessors in office discussed the applicability of §440.09(4), *supra*, prior to its said amendment in 1953, in relation to the specific question:

May a person receive workmen's compensation benefits deriving from state employment and Chapter 440, F. S., and at the same time receive benefits either under the regular retirement provisions or the disability provisions of Chapter 121, F. S.?

The opinion in part held:

Such a person as contemplated by the question may not receive full workmen's compensation payments and also benefits under the *disability provisions* of Ch. 121. Amounts otherwise payable to such a person during any stated period under the workmen's compensation law shall have credited thereon the amounts payable to him during such period under the provisions of Ch. 121. Hence, it follows that if the amounts otherwise payable to such person under Ch. 121 exceed amounts payable under the workmen's compensation law for any given period, then such person is entitled to receive no workmen's compensation payments. (Emphasis supplied.)

After the 1953 amendment, the then attorney general discussed the applicability of amended §440.09(4), F. S., in relation to disability retirement benefits then available. In this regard, in addition to other things, he commented, in AGO 056-63, as follows:

Under [§440.09(4), F. S.] . . . retirement compensation is required to be reduced by the amount of any award of workmen's compensation; however, [§122.16(1)(d), F. S.] . . . provides that the combined retirement and workmen's compensation benefits shall not exceed the "average final compensation" upon which retirement pay was determined, and in case the retirement pay and workmen's compensation payments exceed such average final compensation the retirement pay is to be reduced by the excess. . . .

The Supreme Court of Florida in *City of Miami v. Graham*, 138 So.2d 751 (Fla. 1962), stated that the intention of the legislature in enacting §440.09(4), *supra*, was as follows:

Considering §440.09(4), Florida Statutes, F.S.A., in its entirety, the legislative intent seems clear: That an employee shall not receive both a pension and workmen's compensation from his employer when the employer is the state or any political subdivision thereof or a quasi-public corporation therein.

When an employee of the state or a political subdivision thereof or a quasi-public corporation therein, is entitled to a pension, and is awarded workmen's compensation, if such pension is greater than the amount of compensation awarded, the compensation shall be deducted therefrom; and where, as in the case at bar, the pension is less than the amount of compensation awarded, the employer shall pay only the amount of compensation awarded the employee.

Thereafter, in *Purdy v. Covert*, 151 So.2d 891 (2 D.C.A. Fla., 1963), the court cited and discussed the aforesaid AGO 056-63 and went on to hold that §440.09(4), *supra*, applied where workmen's compensation payments were made in lump sum, to the same extent as if such compensation payment had been made periodically.

SUMMARY:

The provisions of §440.09(4), F. S. 1971, when applicable, must be applied in the administration of Florida's pension and retirement acts in relation to disability retirement benefits. Essentially, if disability retirement compensation is greater than the workmen's compensation awarded an employee, the disability retirement compensation shall be reduced by the amount of the workmen's compensation awarded. If the disability retirement compensation is less than such award, the employer shall pay only the amount of workmen's compensation awarded the employee. Section 440.09(4) does not apply to age and service pensions and retirement.

Chapter 321 and §122.34(7) and (8), F. S., specify that employees injured while in the performance of duties who fall into the category of "high hazard" shall receive, in addition to the award made to them under the workmen's compensation law, an annual pension payable monthly. Section 440.09(4), F. S. 1971, has no application to this type of disability retirement benefits.

Section 122.16, F. S., prior to the enactment of Ch. 72-335, Laws of Florida, made an officer or employee eligible to receive both state and county retirement benefits and workmen's compensation benefits under Ch. 440, F. S., so long as the total of retirement and workmen's compensation benefits did not exceed the average final compensation as defined in §122.02, F. S. If such total exceeds the average final compensation, then retirement benefits shall be reduced by the amount of the excess. Chapter 72-335 amended §122.16 by omitting §122.16(1)(d) as it then existed, thereby effecting repeal of such provisions by omission, with the result that those employees who have elected to remain under Ch. 122, F. S., will no longer enjoy the benefit of former §122.16(1)(d), in the absence of any countervailing vested rights accruing before the effective date of Ch. 72-335: July 1, 1972.

Limitations of actions are not applicable to the state or to any officer acting in behalf of the state, except in cases where specified actions are barred after twenty years. In those cases, the statute provides that such a twenty-year bar can be imposed also against the state's claim.

The first question is answered in the affirmative. The remaining two questions are discussed and answered accordingly.

Your attention is called to the fact that §440.09(4), F. S. 1971, has remained unchanged by the legislature since 1953. The 1953 amendment, the same being §1 of Ch. 28236, 1953, Laws of Florida [§440.09(4)], in pertinent part reads:

When any employee of the state . . . or any person entitled thereto on account of dependency upon such employee, receives compensation under the provisions of this chapter by reason of the disability or death of such employee resulting from an injury arising out of and in the course of employment with such employer, and such employee or dependent is entitled to receive any sum from any pension or other benefit fund to which the same employer may contribute, the amount of any payment from such pension or benefit fund allocable to any week with respect to which such employee or dependent receives compensation under this chapter shall be reduced by the amount of the compensation for such week; provided

Prior to said amendment of §440.09(4), *supra*, it read as follows:

If any policeman or fireman or other persons entitled to a pension claims compensation under this chapter there shall be deducted from such compensation any sum which such policeman or fireman or other

Therefore, there can be little doubt in relation to the application of §440.09(4) in the administration of Florida's several pension and retirement acts as the same relates to disability retirement compensation, except for provisions relating to "high hazard" disability as hereinafter mentioned in §122.34(7) and (8), F. S., and §§321.18, 321.19 and 321.20(2), F.S. It is noted that the words used in all of the referenced provisions describe disability "arising in line of duty" or "while in the performance of duty" as giving the one so injured the right to "receive, in addition to the award made to him under the workmen's compensation law" the appropriate annual pension payable monthly. A fine distinction of what is or is not an injury incurred in line of duty or arising out of and in the course of one's employment under workmen's compensation law is a question which must be left to judicial determination.

It is well to note that *Purdy v. Covert*, *supra*, on appeal to the Supreme Court of Florida, was dismissed without an opinion in *Covert v. Purdy*, 159 So.2d 652 (Fla. 1963).

In *City of Miami v. Herndon*, 209 So.2d 487 (3 D.C.A. Fla., 1968), the appellate court stated:

The plain meaning of the language of §440.09(4), Fla. Stat., F.S.A. is that the City of Miami is not authorized to reduce Herndon's retirement allowance by the amount of workmen's compensation benefit payments made to Herndon while he was still employed by the City of Miami and *before* he retired from that employment.

Further, *City of Miami v. Clark*, 223 So.2d 387 (3 D.C.A. Fla., 1969), held that a municipality was entitled to deduct from the disability pension payments of its employees the amount of workmen's compensation payments awarded such employees allocable to the weeks covered by the pension payments. In so doing, the court gave a resume of the treatment of §440.09(4), *supra*, as follows:

At the time our opinion in the Herndon case was filed the District Court of Appeal for the Second District had already decided *Purdy v. Covert*, Fla. App. 1963, 151 So.2d 891. The Purdy decision was cited in our opinion in the Herndon case. *Purdy v. Covert* squarely upholds "the right of the city to make the deductions in accordance with the statute, notwithstanding the previous lump sum payment." The language of the statute and the authorities cited in *Purdy v. Covert* fully support that holding.

In the case of *City of West Palm Beach v. Holaday*, 234 So.2d 24 (4 D.C.A. Fla., 1970), the court asserted its view that §440.09(4), *supra*, was promulgated by the Florida Legislature to prevent "double recovery for a single injury."

The court, explaining by example, said:

If, for example, a state or city employee was receiving a *disability* pension, then he could not be heard to complain about having his pension reduced because of workmen's compensation that he had received, since this disability pension would represent compensation for his injuries, and having collected compensation pursuant to ch. 440 he would not be entitled to double compensation for the same disability.

The service pension provision under which the plaintiff retired has no relation to any *disability* which he may have suffered. He did not retire on a *disability retirement*, and therefore should not be subject to any offset for workmen's compensation benefits. . . . (Emphasis supplied.)

The court further stated:

It is our conclusion that the defendant-city is not entitled to reduce pursuant to F. S. Section 440.09(4), F.S.A., the plaintiff's *service*

retirement benefits by deducting workmen's compensation paid to the plaintiff in a lump sum and awarded subsequent to his retirement. In making this determination we are well aware and have not overlooked *Purdy v. Covert*, Fla.App. 1963, 151 So.2d 891; *Miami v. Graham*, Fla. 1962, 138 So.2d 751. However, we are of the opinion that the issues raised here were never determined by those cases. (Emphasis supplied.)

Thus it is made abundantly clear by the foregoing authorities that if one does not retire on *disability* retirement, his *service* retirement compensation is not subject to any offset for workmen's compensation benefits.

Finally, mention is made of the fact that the Supreme Court of Florida in *City of West Palm Beach v. Holaday*, 240 So.2d 152 (Fla. 1970), on certiorari, approved *City of West Palm Beach v. Holaday*, 234 So.2d 24 (4 D.C.A., Fla., 1970), stating that the decision of the district court was correct and actually adopting it as the opinion of the Supreme Court.

In concluding a discussion of a response to the first question, it may be summarized as follows, *viz*: If *disability* retirement compensation is greater than the workmen's compensation awarded an employee, the *disability* retirement compensation shall be reduced by the amount of the workmen's compensation awarded. If the *disability* retirement compensation is less than such award, the employer shall pay only the amount of workmen's compensation awarded the employee.

In the administration of the provisions of the pension and retirement acts, therefore, the provisions of §440.09(4), F. S. 1971, must be observed when *disability* retirement benefits are being administered, except in the case of "high hazard" benefits payable under §§122.34(7) and (8) and 321.20(2), F. S., hereinafter discussed.

In answer to question 2, with respect to the exceptions from §440.09(4), F. S. 1971, §§122.34 and 321.20, F. S., contain exceptions therefrom. Section 321.20 (2), originated as Ch. 59-307, Laws of Florida, and became effective on June 15, 1959. Section 122.34(7) and (8) originated in Ch. 67-193, Laws of Florida, and became effective July 1, 1967. These enactments became effective subsequent to §440.09(4), *supra*, and must be construed as an exception to its provisions to the extent thereof since they treat special classes subject to special conditions. Therefore, *disability* retirement pay shall be administered as therein directed in cases falling within these high hazard categories. In other words, if a "high hazard" employee, such as a law enforcement officer, suffers an on-job injury which permanently disables him and he is determined to be so disabled under the provisions of Ch. 440, F. S., and if he retires on a disability pension, he would be entitled to receive, in addition to the award of workmen's compensation, the pension benefits provided for by Chs. 122 and 321, F. S.

It is important to note, at this time, that §122.16, F. S., was substantially rewritten by Ch. 72-335, Laws of Florida, in the course of which, provisions of §122.16(1)(d), F. S. 1971, hereinabove referred to (*see* AGO 056-63) were omitted, and such provisions are in law considered to be repealed.

In *State v. County of Duval*, 3 So. 193 (Fla. 1887), it was stated that "where a section, expressly amendatory of another section of a statute, purports to set out in full all it is intended to contain, any matter which was in the original section, but is not in the amendatory section, is repealed by the omission." (*See also* 82 C.J.S. *Statutes* §294, and AGO 071-395 and the authorities therein cited.)

Therefore, state and county employees (other than those under Ch. 321, F. S., and high hazard employees under Ch. 122, F. S.) who elected not to become members of the Florida Retirement System and to remain under Ch. 122, F. S., upon retirement subsequent to July 1, 1972, the effective date of said Ch. 72-335, no longer enjoy the benefits of former §122.16(1)(d) in the absence of any countervailing vested rights heretofore accruing under said section.

Sections 121.091, 122.09, and 238.07, F. S., provide for certain disability

pensions or retirement which in some circumstances, such as injuries or disability incurred on the job, are subject to §440.09(4), F. S.

In sum, then, those members who retire on disability or pension under Chs. 121, 122 [other than §122.34(7) and (8)], and 238, F. S., are subject to §440.09(4), F. S. 1971, and to the offset for any workmen's compensation benefits received for the injury or disability for which they received such disability pension.

Section 440.09(4), F. S., 1971, as hereinabove indicated, has no application to age and service pensions.

In those instances in which §440.09(4), F. S. 1971, applies to such employees, I again emphasize that if disability retirement compensation is greater than the workmen's compensation awarded an employee, the disability retirement compensation shall be reduced by the amount of the workmen's compensation awarded. If the disability retirement compensation is less than such award, the employer shall pay only the amount of workmen's compensation awarded the employee.

The observation contained in your letter that local employing agencies were not required to make matching contributions for their employees in the State and County Retirement System between July 1, 1955, and July 1, 1967, such matching contributions having been paid during that period from the State Intangible Tax Trust Fund, has been noted. However this circumstance has nothing to do with the applicability of §440.09(4), F. S. 1971, to state-administered retirement systems, either during that period or thereafter.

In answering question 3, comments are made in regard to §§121.131, 122.15, 238.15, and 321.22, F. S. Summarized, each is, among other things, designed to place benefits beyond reach of execution, attachment, or any other legal process whatever commenced or prosecuted by any legal entity other than the state and its agencies. Substantially the same provisions are found in §440.22, F. S. The language of the last mentioned provision was considered in AGO 056-63, aforementioned. Thus, that which was there said in relation to §440.22, F. S., is valid today in relation to the other like-worded provisions and puts such questions to rest. The attorney general in this regard said:

Under §440.22, F. S., workmen's compensation benefits "shall be exempt from all claims of creditors, and from levy, execution and attachments or other remedy for recovery and collection of a debt, which exemption may not be waived." Under usual rules of statutory construction "the government, whether federal or state, and its agencies are not ordinarily considered as within the purview of a statute, however general and comprehensive the language may be, unless intention to include them is clearly manifest, as where they are expressly named therein or included by necessary implication." (82 C.J.S. 554-5, §317)

As to the right of the state to set off its claim against a retired employee, the several authorities set forth in AGO 056-63 are applicable here. The following is furnished as additional authority in this regard.

Claims by the state are not barred by statutes of limitations unless barred by express language. Authority for such is found in *Heidt v. Caldwell*, 41 So.2d 303 (Fla. 1949). There a claim was made that the State of Florida was barred from maintaining a claim for care and maintenance filed November 26, 1943, for services rendered between April 23, 1923, and August 3, 1936. The court said no reason existed to prevent collection. Section 95.02, F. S., provides that limitations on actions are not applicable to the state or to any officer acting in behalf of the state; but §95.021, F. S., makes the provisions of any existing laws barring any actions not commenced within twenty years applicable to the state or its officers acting in behalf of the state. *See* AGO 058-235, holding that the state and its agencies are not governed by limitations of actions unless the obligations come within the twenty-year limitation provided by statute. Of like tenor is AGO 059-252.

The several administrative officials concerned with the administration of pension and retirement laws or with the disbursement of public money in payment of workmen's compensation benefits or disability retirement benefits are under a duty to make or cause to be made the offset for any workmen's compensation benefits received by any member of any retirement system as a result of the same injury or disability for which he or she received disability retirement benefits under any of the several state-administered retirement systems to which §440.09(4), F. S. 1971, applies as hereinabove discussed. Any improper or unauthorized payment of workmen's compensation or disability pension may be recovered by recoupment, setoff, or other means or proceedings appropriate to the individual case as the peculiar circumstances attending it require.

073-63—March 15, 1973

TAXATION

USE OF NINTH CENT MOTOR FUELS TAX

To: *Ted Randell, Representative, 112th District, Fort Myers*

Prepared by: *Winifred L. Wentworth, Assistant Attorney General and James D. Whisenand, Legal Intern*

QUESTION:

May the Lee County Board of County Commissioners use the 9th cent gas tax provided in §336.021, F. S., to construct roads and bridges within the county, providing the referendum is approved?

SUMMARY:

The tax imposed for the purpose of paying the costs of a transportation system, pursuant to §336.021, F. S., may not be used to construct roads and bridges within the county because the statutes limit such proceeds to establishment and operation of a transportation system.

Your question should in my opinion be answered negatively. Chapter 72-384, Laws of Florida (§336.021, F. S.), permits, by referendum and county ordinance, the imposition of a one cent tax on all motor fuels and special fuels taxed under Ch. 206, F. S., which are sold within the county. The tax is "for the purpose of paying the costs and expenses of establishing, operating and maintaining a transportation system." Additional revenue for the referenced transportation system may be drawn from county general funds, special taxing district funds, or other such funds as may be authorized by special or general law. *See City of Waldo v. Alachua County*, 249 So.2d 419 (Fla. 1971). *Cf.* AGO's 072-170, 072-77, and 072-8.

The preamble to Ch. 72-384, *supra*, sets forth the legislative intent to promote a "transportation system" that will *reduce all aspects* of highway administration, the *need* for roads, highways and parking facilities, and *enhance* the service of a *transit system* that serves the urban-metropolitan counties. The word "transportation" is generally defined as "system and modes of conveyance of persons or goods from place to place." *Borough of Brielle v. Zeigler*, 179 A.2d 789 (N.J. 1962). In *Yellow Bus Lines v. Atkins*, 310 S.W.2d 181 (Tenn. 1958), the court concluded a "transportation system" was present, for tax purposes, when a bus company maintained a terminal and routine routes within certain designated areas.

Chapter 336, F. S., generally provides for the county road system. Section 336.59 authorizes the levy of an ad valorem tax for road and bridge purposes, and certain other "gas taxes" and funds are used for similar purposes. Sections 206.41, 206.60, 336.62, and 550.13, F. S. The intent of the legislature is, of course, the paramount concern. If that intent had been to permit the tax to be diverted to road