

Taxation: Cigarette tax collections should be deposited  
in state treasury pending outcome of litigation  
CIGARETTE TAX: regarding its constitutionality.



January 20, 1956

Honorable M. E. Morris  
Director of Revenue  
Jefferson Building  
Jefferson City, Missouri

Dear Sir:

We have received your request for an opinion of this office,  
which request reads as follows:

"This department has started collection  
of the new Cigarette Tax, which is to be  
deposited with the State Treasurer, to  
the credit of the Public School Moneys  
Fund.

"In view of the appeal in the case,  
which attempts to have the new law  
declared unconstitutional, I am writing  
to inquire whether or not we should im-  
pound the collections, pending the dis-  
posal of the litigation or, if your  
advice would be to deposit the money  
with the State Treasurer."

Section 149.100, RSMo, 1955 Supp., dealing with the cigarette  
tax, provides:

"All taxes collected pursuant to this  
chapter shall be deposited in the state  
treasury to the credit of the state school  
moneys fund."

Section 15 of Article IV of the Constitution of Missouri,  
1945, provides, in part, as follows:

"The state treasurer shall be custodian of  
all state funds. All revenue collected and  
moneys received by the state from any source  
whatsoever shall go promptly into the state

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treasury, and all interest, income and returns therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. \* \* \*

Section 136.110, RSMo 1949, provides, in part:

"The state collector of revenue shall promptly record all sums of money collected or received by him and shall immediately thereafter deposit the same with the state treasurer. \* \* \*"

There is no statutory authority giving the Collector of Revenue any right to impound in a special fund a tax collected by him. The case of *Brown et al. v. Morris et al.*, now pending in the Missouri Supreme Court, to which you refer in your opinion request, is an action for a declaratory judgment. No relief by injunction against collection of the tax was requested. There has been no judicial order requiring the impounding in a separate account of the proceeds of the tax pending determination of the cause.

Under such circumstances, we are of the opinion that the Collector of Revenue has no discretion as to the disposition of the proceeds of the tax and must, under the constitutional and statutory provisions above quoted, deposit the proceeds in the state treasury. His disposing of the proceeds of the tax in such manner would not, in our opinion, impose personal liability upon the Collector of Revenue even should the statute eventually be held unconstitutional. In the case of *Kleban v. Morris*, 247 SW2d 832, the court discussed the question of personal liability of a tax collector who collects a tax and transmits it to the treasury when the tax is subsequently found illegal. In that case the court stated, 247 SW2d 1.c. 838:

"State ex rel. American Mfg. Co. v. Reynolds, 270 Mo. 589, 600(II), 194 S.W. 878, 880(II) (American Mfg. Co. v. Alt, Mo. App., 184 S.W. 1167, 1169) review denied, 245 U.S. 635, 650, 38 S. Ct. 189, 10, 62 L. Ed. 523, 531, was a suit against the License Collector of St.

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Louis, Missouri, for the refund of a State tax, held to be illegal, after the tax had been transmitted to and deposited in the state treasury. The court took judicial knowledge of the fact that the collector had transmitted and paid the tax into the state treasury, and followed *Lewis County v. Tate*, 10 Mo. 650, 651, which states: 'The money thus collected was paid over into the county treasury. Whatever may be the liability of the county - and of this we are not authorized to give an opinion - it is clear that the collector is not liable.' The court also quoted statements from Meechem's *Public Offices and Officers*, § 649, and *Cooley on Taxation* (3rd Ed.), p. 1482, to the effect that a collector, who collects taxes, although by compulsion, under color of law and pays the taxes over to the proper receiving officer, is protected and is not responsible in instances where his authority was void for unconstitutionality or other reasons. The court remarked: 'To hold a collector responsible individually would be a harsh rule, and one which we do not care to follow. The Legislature, upon proper application, would no doubt reimburse the plaintiff from the state treasury.' \* \* \*"

#### CONCLUSION

Therefore, it is the opinion of this office that the fact that there is now pending an appeal to the Missouri Supreme Court in which it is sought to have the Cigarette Tax law declared unconstitutional does not require the proceeds of said tax to be impounded in a special fund pending outcome of the litigation and that the proceeds of such tax should be deposited with the State Treasurer.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Robert R. Welborn.

Yours very truly,

JOHN M. DALTON  
Attorney General

RRW:ml