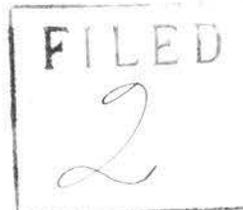


BANKS & BANKING:

Taxes payable by liquidator of failed bank
for taxes assessed before failure.

976-2-1-991-15-1932-10-17-33

11-3
October 31, 1933.



Hon. E. W. Allison
Prosecuting Attorney
Shelby County
Rolla, Missouri

Dear Mr. Allison:

This office is in receipt of your letter of October 9th with request for an opinion from this Department, which letter is as follows:

"The Bank of St. James, in this County, closed its doors and was placed in the hands of the Finance Commissioner about August 22, 1932. It had at the time outstanding capital stock of \$50,000. The assets of this bank are now in the hands of a Special Deputy Finance Commissioner as liquidation officer.

A tax bill for general state, county, road and school purposes has been presented to the Special Deputy Finance Commissioner against the capital stock of this closed bank for about \$700.00. This tax bill is based on the 1932 assessment.

I write to ask your opinion if the above taxes are legally chargeable against the assets of the bank now in the hands of the Special Deputy Finance Commissioner and should be paid by him out of such assets, or whether they should be paid by individual owners and holders of shares of capital stock."

The question is: Are state, county, road and school taxes chargeable against the assets of a failed bank on an assessment made before the failure of the bank, or should the taxes be paid by the shareholders of the bank?

Section 9765, as amended by Laws of Missouri, 1931, page 357, and Section 9766 R. S. 1929, are the sections which pertain to the assessment of banks, which two sections are herein set forth and are as follows:

"Sec. 9765. ASSESSMENT OF MANUFACTURING AND BUSINESS COMPANIES AND STOCK IN OTHER CORPORATIONS.--The property of manufacturing companies and other corporations named in article 7, chapter 32, insurance companies organized under the laws of this state and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as such companies or corporations in their corporate names. Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock, less, also, the value of stock in other corporations held by such bank or joint stock institution or association doing a banking business; Provided, however, that no deduction shall be allowed on account of stock in any one manufacturing or business company in excess of forty per cent. of the capital, surplus and

undivided profits of such bank or joint stock institution or association doing a banking business. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinbefore provided: Provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers in addition to such taxes shall not exceed one hundred dollars per annum. It is hereby made the duty of the county clerk to include in his abstract of the assessor's books required to be sent to the state auditor, valuation of all property assessed under this section under the head of 'corporate companies,' and, in addition thereto, he shall make out from the lists delivered to the assessor as above provided, and send the same to the state auditor to be laid before the state board of equalization, on or before the twentieth day of February, in each year, an abstract of the assessment of all corporations or persons doing a banking business in his county, showing the name of each bank, the number of shares of stock and their face value, the amount of reserve funds, undivided profits, premiums or earnings, and all other values, together with the assessed value thereof, also the value of the real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book."

"Sec. 9766. SUCH TAXES, HOW PAID AND RECOVERED. The taxes assessed on shares of stock embraced in such list shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made."

In an early case in regard to the payment of taxes of a failed bank assessed before the failure of same, the Supreme Court said:

"The state has a right paramount to other creditors to be paid taxes due it from

assets in the hands of a receiver, and the court should see that such taxes are paid before distribution to other creditors, although the demand was not presented by the collector within the time prescribed by the court for the presentation of claims."

Greeley v. The Provident Savings Bank et al., Sexton, Collector, 98 Mo. 458 (Quoting from the syllabus).

In the case of State ex rel. Bay, Collector, v. Citizens' State Bank, 202 S. W. 382, 1. c. 385, 274 Mo. 60, which was a suit by the Collector of Revenue of Shannon County against the Citizens' State Bank for taxes due said County assessed in June, 1913, against the stockholders of the Birch Tree State Bank, which had formerly done a banking business in said county and which bank and its assets had been bought by the Citizens' State Bank, the following was said by the court:

"The legislators of this state evidently contemplated that a large portion of the stock in both state and national banks might be held by nonresidents of the state; that in some of the banks there might be a large number of shareholders whose respective interests were small; that it would be both inconvenient and expensive for the collector to recover the tax from the delinquent stockholders as provided in sections 11461, 11463, and in the Laws of 1913, at pages 739 and 740. Hence section 11359, R. S. 1909, was enacted to meet the above difficulties. Said section reads as follows:

'The taxes assessed on shares of stock embraced in such list (referring to section 11357, supra) shall be paid by the corporations, respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made.'

The language used in this section is plain, unambiguous, and mandatory in its terms. It should receive a reasonable construction at our hands, and unless the Birch Tree State

Bank, without any sale of its assets having been made, in a suit against it for these taxes, could have shown that it had under its control no funds or property with which to pay the same, the collector, on the record before us, would have been entitled to a judgment against said bank for the taxes aforesaid. State ex rel. v. Shryack, 179 Mo. loc. cit. 440, 78 S. W. 808; (Many other cases cited to support this statement) * * * * *

A recovery is not permitted on the theory that the bank is primarily liable for the taxes assessed against the shareholders, but upon the principle that the latter have been legally assessed with the payment of same; that the bank is required by section 11359, supra, to pay the taxes thus assessed; that it has refused to pay the same, although having in its possession funds or property applicable to the payment thereof.

On the facts above stated, the Birch Tree State Bank could have been held as garnishee for the taxes assessed against the respective stockholders. In order to avoid a multiplicity of proceedings against the stockholders, the Legislature saw fit to provide a more direct way of dealing with the subject by the passage of section 11359, which requires the bank to pay the tax, and to become reimbursed as therein provided. We are of the opinion that there is neither hardship nor injustice, under the circumstances aforesaid, in requiring the bank to pay the tax, nor in holding it liable therefor in case of its neglect or refusal to pay the same.

In State ex rel. v. Shryack, 179 Mo. loc. cit. 440, 78 S. W. 812, we said:

'After the assessment is thus made against the shares of stock in the names of the shareholders, it is legal to make the bank pay the tax and recover it from the stockholders. Section 9155, R. S. 1899; National Bank v. Commonwealth, 9 Wall. 353 (19 L. Ed. 701); Aberdeen Bank v. Chehalis Co., 166 U. S. 440 (17 Sup. Ct. 629, 41 L. Ed. 1069).'' (Italics ours.) "

In the case of State ex rel. Donnell, Collector, v. People's Bank of DeSoto, 263 S. W. 205, which was,

"* * a suit, at the relation of the collector of the revenue of Jefferson county, against the People's Bank of DeSoto, in charge, at the time, of a special deputy bank commissioner, appointed under the statute, to assist in the liquidation of the business of the bank, it being insolvent. The action is based on a claim for unpaid back taxes alleged to be due the county for the year 1920, in the sum of \$2,423.66, including interest and the collector's commission.

After the overruling of a demurrer to the petition, alleging that no cause of action was stated, defendant filed, as an answer, a general denial, and the issues thus joined were tried by the court, resulting in a judgment in favor of the plaintiff, and against the defendant, for \$2,512.61, and the further sum of \$251.26, attorney's fees, and that the plaintiff was entitled to priority of payment over the depositors and general creditors of the bank. From this judgment, rendered January 21, 1922, the defendant has appealed."

This case is decisive of the question submitted in your letter above, and the Supreme Court said, in affirming this judgment, the following:

"The manifest purpose of section 12775, supra, is to afford the assessor authentic information as to the owners of the shares of stock in a corporation, that such shares may be properly assessed against them. St. L. Bldg. & Sav. Ass'n v. Lightner, 42 Mo. loc. cit. 426. Why thus assessed when the banking corporation (section 12777, supra), is required to pay the taxes on the shares, and be repaid by the shareholders, is of no concern to us in the solution of the question at issue. The Legislature, in its wisdom, saw fit to prescribe this manner of assessing and collecting

taxes of this character, and therefore our inquiry is limited to ascertaining and determining whether the statute has been substantially complied with in furnishing the assessor with the required information to enable him to make a valid assessment. * * * * *

A more recent case on the question submitted in your letter is the case of *State ex rel. Wyatt, Collector of Revenue, v. S. L. Cantley, State Finance Commissioner*, 325 Mo. 67, 1. c. 74, 26 S. W. 1. c. 979. The court said :

"This brings us to the final contention of appellant which is, 'that the assessment and payment of this personal tax by the corporation itself is a mere matter of convenience, the banking corporation serving as the agent of the stockholders, which agency ceased when the banking corporation closed its doors and discontinued the banking business, said corporation not being responsible for any taxes falling due after the date of the closing of such institution.'

Whether or not, as between the bank and its shareholders, the bank is their mere agent for the payment of their taxes, the statute in plain terms makes the bank directly responsible for the payment of the taxes assessed against the shareholders. The duty of the bank to pay the tax, if it has assets with which to pay it, is a personal liability of the bank to the tax collector. (*State ex rel. Bay v. Citizens State Bank, supra*, pages 68 to 71.) It affirmatively appears from the agreed statement of facts that the Peoples Bank of Charleston had ample assets to pay the taxes and that said assets were transferred to the Peoples Exchange Bank in consideration of the agreement of the latter bank to assume the liabilities of the former bank. Under the facts in this case the Peoples Exchange Bank must be held liable for the payment of the taxes assessed against the shareholders of the Peoples Bank. (*State ex rel. Bay v. Citizens State Bank, supra.*)

The reasons for the existence of the statute requiring a failed or closed bank to pay the tax assessed against its shareholders out of its assets in the hands of its liquidating officer or of the successor bank, which takes over its assets and assumes its liabilities, are, to say the least, just as controlling as they are where the bank is a live and going concern when the assessment against its shareholders is made.

Assuming, as appellant contends, that the collector may proceed against the individual shareholder, if he can reach him, and may collect from him directly the tax on his shares assessed against him, it does not at all follow that the collector may not assert his claim against the assets of the bank made liable for the tax in the first instance and collect the tax from any person, corporation or officer in possession of such assets and standing in the shoes of the bank whose shareholders were assessed."

While the shareholders of the bank are primarily liable for the payment of the taxes on their shares of stock in the bank, yet it is the duty of the bank to pay the taxes assessed on the shares of stock as provided in Section 9766 R. S. 1929, supra, and if, and when, a bank fails and is placed in the hands of the Commissioner of Finance, the Collector of Revenue may look to and compel payment of the taxes out of the assets of the failed bank on a legal assessment made before the failure of the bank.

It is, therefore, the opinion of this Department that the Special Deputy Commissioner of Finance in charge of the affairs of the Bank of St. James, should pay these taxes out of the assets of the bank. However, this does not relieve, in our opinion, the shareholders from payment of same because it is their primary duty to do so.

Should there be any further question relative to this matter, we shall be glad to give the matter further attention.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED: _____
ROY McKITTRICK
Attorney-General.