

TAX ATTORNEY - ALLOWANCE OF FEES ALLOWED under Sec. 12941 - *RS Feb 1919*
COLLECTOR : Employment of tax attorney; fees allowed. *Sec 12941*

February 3rd, 1933

Op. 7/11

FILED
3

Hon. Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

Your letter of January 30th requesting an opinion from this department has been handed the undersigned for attention. In your inquiry you state the following facts:

"We would like to ask you for an opinion regarding the fees allowed the tax attorney appointed to assist the collector in his collection of taxes.

It is our understanding that prior to 1921 the statutes provided that such attorney should receive his fees only for bringing suit for the collection of taxes, but this section, after the amendment of 1921, at present reads that such attorney shall be employed " for the purpose of collecting such taxes and prosecuting suits for taxes under this article. "

The question, as it has been brought to us, is, after the collector has filed his back tax bill with his tax attorney, and collection of the tax is made before suit has been filed in Circuit Court, is the tax attorney entitled to any fees? "

By section 12944, R. S. Mo. 1919, it was made the duty of the collector to enforce payment of back taxes by suit; and, for that purpose, he was authorized to employ such attorneys as he deemed necessary who should receive as fees in any suit not to exceed ten per cent of the amount actually collected and paid into the treasury, as agreed upon between such collector and attorneys in writing, and after approval by the county court. The fee of the tax attorney was to be taxed as costs and no fee or compensation could be paid him for such services except as provided for in said section.

As suggested in your letter, the above section was amended by the laws of 1921, page 676, and as amended now appears in the 1929 statute as Section 9952.

The only changes made by this amendment of Section 12944 was by adding the words "collecting such tax and" immediately following the words " and for the purpose of" in the 13th line of Section 9952, and adding the words " and an additional sum not to exceed \$3.00 for each suit instituted for the collection of such taxes where publication is not necessary and not to exceed \$5.00 for each suit where publication is necessary" which wording follows "and paid into the treasury" in the 22nd line thereof as will be disclosed by a comparison of the two section.

That portion of the section pertinent to your inquiry, as amended and brought forward into the 1929 statutes, reads as follows:

"Sec. 9952. Enforcement of payment of taxes by suit, etc.---If, on the first day of January of any year, any of said lands or town lots contained in said 'back tax Book' remain unredeemed, it shall be the duty of the collector to proceed to enforce the payment of the taxes charged against such tract or lot, by suit in a court of competent jurisdiction of the county where the real estate is situated, which said court shall have jurisdiction, without regard to the amount sued on, to enforce the lien of the state or *such cities; and for the purpose of collecting such tax and prosecuting suites for taxes under this article, the collector shall have power, with the approval of the county court, or in such cities, the mayor thereof, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed ten per cent of the amount of taxes actually collected and paid into the treasury, and an additional sum not to exceed \$3.00 for each suit instituted for the collection of such taxes, where publication is not necessary, and not to exceed \$5.00 for each suit where publication is necessary, as may be agreed upon in writing, and approved by the county court, or in such cities the mayor thereof, before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs, and no such attorney shall receive any fee or compensation for such services except as in this section provided * * * * *"

After the first day of January of any year under the above section, it shall be the duty of the collector to proceed to enforce payment of the taxes remaining unredeemed in the "back tax books" for this purpose (which is the enforcement of the taxes), the collector is authorized and empowered to employ attorneys with the approval of the county court, and for their services in that behalf the statute provides that such attorneys shall receive a sum not in excess of ten per cent. of the back tax which may be actually collected, together with a definite fee dependent upon the character of service obtained upon the delinquent taxpayer in the event of suit.

Prior to the amendment of the statute there was no provision for a fee except upon the filing of suit, therefore such statute was susceptible of but one interpretation or construction.

"The words 'and' and 'or' when used in a statute are convertible as the sense may require. A substitution of one for the other is frequently resorted to in the interpretation of statutes when the evident intention of the lawmakers requires it." (Words and Phrases, Vol. 1, page 388, par. 1 and cases thereunder cited.)

The Legislature no doubt realizing that the real purpose of the law originally was the collection of the back tax, not necessarily by suit, but by any method which would accomplish that end, added the words "collecting such tax and"; being aware also that in many cases the court costs occasioned by a suit would greatly exceed the tax and all penalties assessed thereon, was no doubt actuated in making the amendment in relation to a nominal fee on the filing of suit as above noted.

One could hardly construe the words "for the purpose of collecting such tax and prosecuting suit for taxes under this article" as requiring a double duty before the attorney should receive any compensation. If a tax is collected by the attorney, it would necessarily release any duty upon his part for the prosecution of a suit therefor. Then, too, it occurs to us, that the Legislature anticipated that a collection might be made without an actual suit and the costs necessarily connected therewith, by providing for a percentage fee upon the amount actually collected and turned in to the treasury and an additional sum for each suit instituted by such attorney. Having stated what, in our opinion,

2/3/33

was the legislative intent, we interpret this section as meaning that where the attorney has been duly appointed with the approval of the county court, an agreement reached between him and the collector as to what his percentage fee should be, and the back tax bills actually delivered to him for action, he would be entitled to add the contracted percentage agreed upon with the collector as a part of the costs to be recovered from the taxpayer. He could not, however, add the additional fee of three or five dollars provided for in said section, unless and until he had actually instituted suit.

Very truly yours,

Carl C. Abbington,
Assistant Attorney-General

CCA/N