

TAXATION--Salaries, interests, costs and charges relating to collection of delinquent taxes --Effect of Senate Bill No. 80 with relationship thereto.

April 11, 1933.



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

Your letter directed to the Attorney-General has been handed to the undersigned for attention. We will set forth your letter and undertake to make answer to your separate inquiries in the order presented.

"Since the passage of Senate Bill No. 80, countless inquiries have come to this office relative to the application of the provisions of this new statute, I am, therefore, your ruling on the following points:

Does this apply to counties under township organization?

Is this applicable to the taxes for year 1932, as well as all prior years?

Is the county collector entitled to the extra 4% or 5%, as the case may be, allowed for the collection of delinquent taxes, or only to the regular commission allowed for the collection of current taxes?

Is the county clerk entitled to his fees for compiling the back tax books?

Is the collector authorized to make any refund of penalties, interest, etc. on taxes collected prior to the enactment of this law?

Is this law applicable to taxes levied for drainage or levee purposes?

If suit has been filed for delinquent taxes or judgment rendered, is the tax-payer entitled to any remission of costs and penalties by this act?

Is this applicable to the City of St. Louis?"

We assume that your inquiries are made with a view of ascertaining the effect Senate Bill No. 80 will have upon the subject of tax collections and what was intended to be included in the remissions provided for in said bill. As a matter of convenience, we will here insert the bill as finally passed and approved by the Governor:

"Sec. 1. In payment of the taxes assessed against any person whose name appears upon the personal delinquent lists of any year or years prior to January 1, 1933, and in payment of the taxes assessed against any real estate which appears upon the lists of delinquent and back taxes of any year or years prior to January 1, 1933, including delinquent taxes for the year 1932, the collectors of revenue of the counties and cities of this state are hereby empowered and directed to accept the original amount of said taxes as charged against any such person or real estate relieved of the penalties, interest and costs accrued upon the same; Provided, however, that such remission of penalties, interest and costs shall be in full if said taxes are paid not later than June 30, 1933; if paid after June 30, 1933, and not later than August 31st, 1933, then such remission shall be 75 per cent of such penalties, interest and costs; if paid after August 31st, 1933, and not later than October 31, 1933, such remission shall be 50 per cent of such penalties, interest and cost; if paid after Oct. 31, 1933 and not later than Dec. 31, 1933, then such remission shall be 25 per cent of such penalties, interest and costs: Provided, further, that after Dec. 31, 1933, all penalties, interest and costs as aforesaid shall be restored and be in full force and effect for the full period of time since their accrual and as if this act had not been passed.

Sec. 2. The provisions of this act shall cease and be of no effect after January 1, 1934.

Sec. 3. As the expeditious collection of such taxes and lists is necessary for the maintenance of the State Institutions and for the support of Public Schools, an emergency exists within the meaning of Section 57 of Article 4 of the Constitution of this state and also an emergency exists within the meaning of Section 36 of Article 4 of the Constitution of this state, and this act shall be in force and take effect from and after its passage and approval by the Governor."

This bill in its amended form answers your first and second inquiries. It will be observed that its provisions are applicable to the collectors of the revenue of the counties and cities of this state, whether the county be under the regular county organization or under township organization, and that the bill specifically includes the year 1932.

This act is mandatory in that it requires the remission of penalties, interest and costs, and directs the acceptance of the original amount of the tax if paid not later than June 30, 1933. In other words, if paid on or before that date it shall be free from all penalties, interest, costs and charges. If paid at a later date the remission is graduated in accordance with the date of payment. It is important that penalties, interest, costs and charges be classified insofar as the same relates to the item of tax. It would appear from the authorities, which we will hereinafter refer to, that the penalties which have accrued under statutory provisions prior to the passage of Senate Bill No. 80, are not a part of the tax.

It is stated in Cooley on Taxation, Sec. 1821, that,

"Money derived from penalty and forfeiture where taxes are delinquent are not a part of the tax and where imposed by the Legislature it has a right to dispose of such funds as it likes, * * *."

Upon this same subject we find the law declared in the case of State ex rel. Pierce v. Coos County, 237 Pac. 678 l.c. 679, as follows:

"We have heretofore held that the increased percentage and other burdens prescribed by the Legislature for non-payment of taxes are in the nature of penalties and not part of the tax * * * they may have been prescribed as a means of inducing the taxpayer to pay promptly, but they are distinctive from the tax itself. Taxes are a contribution prescribed by the statute and levied by the authorities for the support of the government; * * * ."

The Texas courts, defining "tax penalties" in the case of State v. Galveston, 100 Texas 153; 97 S. W. 71, had this to say,

"The penalties are somewhat in the nature of a fine upon a delinquent taxpayer for his delay in paying his taxes they are not levied by the counties as a part of the tax and are creatures of the statute, and what the statute can impose by way of penalty, the statute can remit."

The Oregon court in an earlier case than the one hereinabove cited, treating this same subject matter, in Colby v. City of Medford, 85 Ore. 485; 167 Pac. 487, says,

"In passing, it may be noted that when interest is charged on a delinquent tax, it is not regarded as interest in the sense that it is a consideration for the forbearance of money, but it is deemed to be a penalty; and when interest, so called, is charged, it is sustained on the theory that it is a means to insure prompt payment of the tax, and is not a part of the tax."

We have heretofore stated this act is mandatory. It directs the collectors " to accept the original amount of said taxes as charged against any person or real estate relieved of the penalties, interest and costs accrued upon the same". It is intended to be in full discharge of the taxpayer's obligation. This would not permit of the adding of any fees or commissions of any kind to the original tax bill and the statutory provisions providing for such fees and charges would be inoperative insofar as they are in conflict with this latest enactment. If this four or five per cent commission, referred to in your communication, is to be termed either as penalty or as costs, the bill specifically provides for its remission and the collectors are directed to accept the tax relieved of the penalties, interest and costs accrued upon the same.

Approaching this subject from another angle: - If this percentage charge is to be construed or treated as compensation to the collectors, the Legislature, under the construction of the law as hereinafter noted, would have power to fully and completely extinguish such compensation.

We find this declaration or principle of law in 61 Corpus Juris, p. 1519, Sec. 2231:

"Where a statute provides that the tax collector shall be allowed ten per cent on all taxes collected after a designated date, by distress or otherwise, the ten per cent is not in the nature of a penalty but is allowed as compensation as additional services to be performed by the collector, * * *"

Following this principle of law, we are then confronted with the problem as to whether or not the collector has any vested interest in these statutory commissions. All of our statutes in respect to this additional compensation read that the commission is to be added to the face of the tax bill and is to be collected from the taxpayer when the payment of tax is made, and provides that in no event shall the county, state or municipality be liable therefor.

According to the weight of authority in this state, the collector has no vested interest in this compensation and such compensation is subject to be cancelled or withdrawn at and by the will of the Legislature.

Our Supreme Court in the case of Givens v. Daviess County, 107 Mo. 1.c. 608, 609, passing upon this proposition says:

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of the law, and as an incident to the office. Dammon v. Lafayette County, 76 Mo. 675; Koontz v. Franklin County 76 Pa. State 154; Fitzsimmons v. Brooklyn 102 N. Y. 536, * * * * * In the absence of

constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of its payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158.
* * * *"

The above opinion of the court has been quoted many times in more recent decisions and approved as a law of this state on that question. Insofar as the constitutional restrictions are concerned, there are none which would bar an increase or diminution of the collector's salary. Accordingly, it being the evident intention of the Legislature to remit any charges or fees or commissions of any kind in addition to the original amount of the tax, and it further appearing that these penalties and charges and commissions may be legally and lawfully remitted and removed from the tax bill by the Legislature, it is the opinion of this office that if a tender of the original amount of the tax is made before June 30, 1933, the entire commission, penalty, interest and cost should be remitted and such amount accepted in full payment of the tax. If paid at later dates, the remission thereof should be made in accordance with the graduated scale as in said bill provided.

What we have said respecting the four and five per cent commission to which the county collector would be entitled, absent the enactment of Senate Bill No. 80, applies with equal force in regard to the fees and charges of the county clerk for the making up of the back-tax book. This act undoubtedly relieves the taxpayer from the payment of this collector-commission and upon the same theory and reasoning likewise relieves him from the payment of the clerk's fee, it being a part of the cost.

In answer to your fifth inquiry, to-wit, whether or not the collector is authorized to make any refund of penalties, interest, etc., on taxes already collected, we beg to advise that there is no authority in the bill for the refund of any such penalties, interests or costs, which may, prior to the passage of the bill, have been collected.

The bill applies only to those who on the date of the passage of the act were indebted for delinquent taxes, and it thereby placed all such persons in one class to be governed by the provisions of this bill. Upon the right of the Legislature to make such classification and to the reasonableness of such provision, we call your attention to the case hereinabove cited, State ex rel. Pierce v. Coos County 237 Pac. 1.c. 679, wherein the court said:

"It is urged that the act is unconstitutional because of the lack of uniformity, and that it is discriminatory in character. But it is not discriminatory because it applies to all persons in a particular class, to-wit, taxpayers who paid their taxes prior to May 1st, 1925,

as a class. Such a provision would not seem to be unreasonable as urged by counsel, because others who have previously paid their taxes, together with interest and penalties, are not included."

The pertinent parts of the statute under consideration by the Oregon Court when it made the above statement, reads as follows:

"Sec. 1. The county courts of the several counties of the state may and are hereby authorized to remit all interest, penalties and costs which have been or may be incurred on all taxes levied in their respective counties on the tax rolls for the years 1921, 1922, and 1923, to all taxpayers who prior to May 1st, 1925, * * * may have paid the original amount of such delinquent taxes on the property affected."

In other words, the Oregon Court held that those delinquent taxpayers who paid their taxes under that act prior to May 1st, 1925, constituted a class, that being the class affected by the act, and that such classification was not discriminatory or unreasonable.

In answer to your sixth inquiry, to-wit, is this Senate Bill applicable to taxes levied for drainage or levee purposes, be advised that it is the opinion of this office that this bill applies to such taxes. It is by legislative enactment that these taxes bear a penalty, and if a penalty happens to go to the drainage or levee district it is by virtue of the statute so providing. If the Legislature can provide that the district can have the benefit of penalties, so it may deprive the district of penalties. See Cooley on Taxation, 4th Ed., p. 3573:

"Penalties for delinquent taxes generally follow the tax and go to the district entitled to the tax unless it is otherwise provided by statute. On the other hand, if the penalties are imposed by the Legislature their disposition rests in its discretion."

Upon this proposition we also call your attention to *Livesey v. De Armond et al*, 284 Pac. 166. In this case a statute very similar to Senate Bill No. 80 is considered and construed by the court. That act was found in Chapter 82, Session Laws of 1929, of the State of Oregon, which reads as follows:

"The county court or board of county commissioners of any county may at its discretion, waive or reduce the penalty or interest, or both, imposed for the failure to pay taxes within the time provided by law, for any year or years prior to and including 1927, if, in its opinion, such action would facilitate the collection of such taxes."

It appears that the complainant was a taxpayer of Deschutes county, who was not delinquent in the payment of his taxes and was bringing action against the county court, complaining that their order in accepting taxes and issuing receipts in full therefor without the

payment of delinquent penalties and interest, was unlawful. Complainant was also a taxpayer in the Central Oregon Irrigation District and was the owner of a bond issued by the Iroquois-Creek Irrigation District. Dealing with the question as to whether or not the act was applicable to the irrigation districts, the court held as follows:

"While we are aware of the fact that the Legislature has at times provided that the penalties and interest accruing upon the portion of the tax due to an irrigation district shall be paid to the districts, we believe that this circumstance does not prevent the county board from waiving or reducing this portion of these charges as well as the remainder of the penalty and interest."

The Supreme Court of Texas had occasion to pass upon a like statute in the case of Jones v. Williams, 45 S.W.(2d) 1.c. 139. We quote from the opinion:

"The act before us not only releases all accrued 'interest and penalties' on delinquent state taxes, but makes the remission apply to named districts and subdivisions of the state. This does not affect the validity of the act. The districts named are merely subdivisions of the state, and the Legislature has the same power to provide or change the remedies for the collection of taxes, including the remission of penalties, due its subdivisions as it has for the state at large."

The courts of Oklahoma, North Dakota, Washington, Kansas, Maryland and Maine have held in accordance with the foregoing declaration of law. While Senate Bill No. 80, does not specifically set out political subdivisions to which the act is applicable, it particularly states that it shall affect all persons whose names appear "upon the personal delinquent list and taxes assessed against real estate which appears upon the list of delinquent back-taxes". Accordingly, any taxes upon the lists above mentioned would be affected by the act just as clearly and certainly as though the political subdivisions had been named one by one.

In accordance with the foregoing, it is the opinion of this office that this act applies to the City of St. Louis for the reasons stated above.

In reply to your last inquiry, to-wit, whether or not the taxpayer is entitled to any remission of costs, penalties and charges after judgment, we find that under the common law such was not the case. See 25 Corpus Juris, p. 1213:

"The English authorities are uniform to the effect that the King may discharge his own share in a penalty as well after as before a judgment, but that after judgment he cannot remit the share of an informer, because

the share of an informer is by the judgment vested in him."

The Supreme Court of the United States in the case of North v. Crocker, 14 Law Ed. 1.c. 214, has followed this ruling, to-wit, that prior to judgment there is no vested interest in a penalty. In this case the court stated as follows:

"The suits were pending below when the act of September 18, 1850 was passed, and was for the penalty of Five Hundred Dollars, * * * * * as the plaintiff's right to recovery depended entirely on the statutes, its repeal deprived the court of jurisdiction of the subject matter. And in the next place, as the plaintiff had no vested right in the penalty, the Legislature might discharge the defendant by repealing the law."

And the same court in the case of United States v. Tynen, 20 Law Ed. 1.c. 55, stated as follows:

"The repeal of the law imposing the penalty is of itself a remission."

The Supreme Court in the State of Texas in a recent decision heretofore referred to, has gone farther and held as follows in the case of Jones v. Williams, supra:

"The statutes from time to time have contained provisions for the collection of delinquent taxes by attorneys or others by contract for a percentage of the tax, or taxes, interest, and penalties collected. * * * * * The power to make contracts under these statutes is subordinate to the general legislative power to impose, increase, diminish, or remit penalties for tax delinquencies and the existence of such contracts, where taxes have neither been paid nor reduced to judgment, does not prevent the remission statute from being effective, and the delinquent taxpayer has the same right to pay his taxes without paying penalties and interest (so called) that he would have, had such contracts never been made. The remission statute applies unless prior to the effective date of the statute, the taxes had actually been collected or reduced to final judgment."

It is interesting to note that in the foregoing case the Texas court held the remission statute applied to contingent fees with lawyers employed to obtain payment of delinquent taxes under contract with the collector, as such contracts are at all times subject to the legislative will. It is, accordingly, the opinion of this office that the penalty, interest, costs and charges on delinquent taxes, which have not been reduced to judgment, are subject to the effect of this act and are accordingly remitted,

Hon. Forrest Smith

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providing the tax is paid in the time required by the Senate Bill under consideration.

Respectfully submitted,

CARL C. ABINGTON
Assistant Attorney-General.

APPROVED: _____

ROY McKITTRICK
Attorney-General.

CCA:EG