

TAXATION AND REVENUE:

Penalties, interest, commissions and attorneys fees as allowable on delinquent taxes against railroad undergoing re-organization under Section 77 of Bankruptcy Act.

January 2, 1935.

Hon. John B. Owen,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of December 7, 1934, such request being in the following terms:

"The Treasurer and Ex-officio Collector has for collection the taxes of the Chicago, Rock Island & Pacific Railway Company state, county, school and other taxes for the year 1933. Said taxes are of course delinquent and would ordinarily carry with it the commission of one percent per month from January 1, 1934, 2% on principal and interest and a ten percent attorney fee on principal and interest. The principal amount of the tax is something in excess of \$1600.00.

The Treasurer and Collector received a memorandum entered apparently by Judge Barnes in the District Court of the United States for the Northern District of Illinois Eastern Division in the matter of The Chicago, Rock Island & Pacific Railway Company, bankrupt. Docket #33209. The memorandum recites that this is a hearing on the claim of State of Missouri at the relation and to the use of the Collector of the Revenue within and for Cole County, Missouri, the Collector for Miller County, Missouri, the Collector for Morgan County, Missouri, and the Collector for Benton County, Missouri, for taxes including interest and penalties, commissions and attorney fees. The Court recites, that "The Court is of the opinion that taxes legally due and owing are 'debts' within the meaning of the Bankruptcy Act; that Section 57 (j) (Section 93 (j) Title 11, U.S.C.A.) forbidding the allowance of claims based on penalties, includes penalties imposed for non-payment of taxes; that all the exactions imposed by the Missouri statute upon a delinquent tax-payer over and above the principal

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amount of taxes are penalties; and that the same are imposed upon the delinquent not only for the purpose of general deterrence of delinquency but as a punishment (See State vs Koeln, 61 S.W. (2nd) 750.

The court then in the memorandum says there may be an order directing the trustees of the debtor's estate to pay, in the due course of administration, the principal amount of taxes in question and a further order denying the petitions of the State of Missouri for judgment for penalties, commissions and attorney fees.

The Henry County Treasurer and Ex-officio Collector is in receipt of a check for the principal amount of the taxes but said check does not include interest, penalties, commissions or attorney fees. He is willing to accept said check but the County Court is unwilling to advise him so to do unless an opinion is obtained from your office stating that the State of Missouri is not entitled to collect commissions and penalties. In other words, the Treasurer and Collector does not want to be liable to the County in case the State should claim said penalties and commissions should be paid.

The County Court and Treasurer Ex-officio Collector have requested me to furnish an opinion on the subject and requested that I secure an opinion from your office. Would appreciate the opinion from your office as quickly as possible so the County Treasurer and Collector can either cash or return the check."

We have examined certain orders entered by the court in The Chicago, Rock Island & Pacific Railway Company debtor proceeding referred to in your letter, including Order No. 31 entered December 15, 1933, ordering the trustees of the debtor to pay the principal amount of Oklahoma taxes due for the tax year 1932-33, Order No. 31-A entered September 20, 1934, directing such trustees to pay the principal amount of Oklahoma taxes for the tax year 1933-34, Order No. 58 dated July 24, 1934, authorizing the Collector of Benton County, Missouri, to file petition and claim against the debtor for taxes, penalties, commissions and costs, and authorizing said Collector to accept and receive from the debtor the principal of said taxes without prejudice to his claim for penalties, commissions and costs, and reserving said claim for penalties, commissions and costs for further determination by the court, Order No. 59, dated July 24, 1934, with respect to the Collector of Miller County, Missouri, making the same provisions for such Collector

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as Order No. 53 made for the Collector of Benton County, Order No. 65, dated December 14, 1934, ordering the trustees of the debtor to pay the principal amount of the taxes for the year 1933 to the Collector of Miller County, Missouri, and denying the motion, petition and claim of said Collector for judgment for tax penalties, commissions, costs and attorneys fees, similar orders being made simultaneously with respect to the several motions, petitions and claims of the Collectors of Morgan, Benton and Cole Counties, Missouri. We have likewise examined the memorandum of the court in the above proceeding, dated November 24, 1934, referred to in your letter, pursuant to which Order No. 65 of the court was entered.

11 U.S.C.A., Section 93 (j) provides as follows:

"Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law." (July 1, 1898, c 341, Sec. 57, 30 Stat. 560, as amended February 5, 1903, c. 487, Sec. 12, 32 Stat. 799).

In the case of *New York v. Jersawit*, 263 U. S. 493 (1924), the Supreme Court of the United States held that where a State Franchise Tax Law provided for the payment of the tax in advance, and if not paid by January 1st, "in addition to the amount of such tax * * * ten per centum of such amount, plus one per centum for each month the tax * * * remains unpaid", the addition of 10% where the tax was not paid by January 1st was a penalty within the meaning of this statute, and that the further addition of 1% for each month the tax remained unpaid was not statutory interest, but part of the penalty, and that neither could be allowed the State in a bankruptcy proceeding.

The Supreme Court of Missouri sitting in banc in the case of *State ex rel Crutcher v. Koeln*, 61 S. W. (2nd) 750 (1933) held that "as used in the chapter on taxation in the Revised Statutes the expressions 'commissions', 'interest', 'fees', and 'costs' are included in the generic term 'penalty' ". (61 S.W. (2nd) 753). From this recent construction of the revenue statutes of this State by the Missouri Supreme Court it is apparent that that court regards the principal of a tax as one thing, and all amounts over and above the principal which the statute provides shall be collected in the event the tax is not paid when due as something separate and distinct from such principal, and on the same page the court says that these latter "are imposed upon his property as a punishment to him as well as for the purpose of general deterrence

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of delinquency. They are essentially of a penal nature, since they imply punishment." Thus it would seem that commissions, interest fees and costs imposed on delinquent tax payers under our statutes in addition to the principal amount of the taxes, are penalties within the meaning of the act of Congress above quoted, and consequently are not to be allowed against the estate of a debtor in a proceeding under the Bankruptcy Act.

Under Section 77 of the Bankruptcy Act, relating to the re-organization of railroads, to the terms of which the Chicago, Rock Island and Pacific Railway Company proceeding here involved, is subject, the district court in which the proceedings are pending has "exclusive jurisdiction of the debtor and its property wherever located." (Act of July 1, 1898, c.541, Sec. 77 (b), as added March 3, 1933, c.204, Sec. 1, 47 Stat. 1474). To that court any person seeking to establish a claim against the debtor railroad must go, and that court has decided, on the authority of the Koala case referred to above, that such a debtor can only pay the principal amount of the delinquent taxes due to certain Missouri county collectors. That decision should be adequate protection to any Missouri county collector against personal liability arising out of the failure to collect anything except the principal amount of delinquent taxes due by that railroad to his county, even though an appeal could be taken from the decision which has been made by that court.

In conclusion it is our opinion that the Collector of Henry County would not be personally liable for a failure properly to discharge the duties of his office for accepting from the trustees of the Chicago, Rock Island & Pacific Railway Company a sum of money equal to the principal only of delinquent taxes owed by that company to such collector, and in making no further attempt to collect the penalties, interest of 1% per month, commissions and attorneys fees on such delinquent taxes, authority to pay which has been denied by the United States District Court in which the affairs of the railway company are being administered with respect to substantially identical claims by collectors of other counties of this State.

Very truly yours,

EDWARD H. MILLER
ASSISTANT ATTORNEY GENERAL

APPROVED:

ROY McKITTRICK
ATTORNEY GENERAL