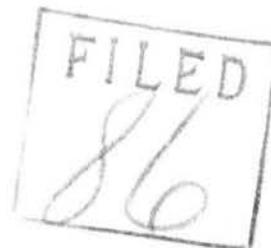


TAXATION ) Commission of County Collector cannot  
COUNTY COLLECTOR. ) under any circumstances exceed per centage  
of taxes actually paid.

4-13  
April 5, 1935.

Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri



Dear Mr. Smith:

Acknowledgment is herewith made of your request dated March 28, 1935, for an opinion of this office reading as follows:

"On February 12, 1935 you furnished this office an opinion as to the amount of commission a collector could legally retain on compromise back taxes.

In an effort to get around your opinion, the Collector of Stoddard County has prepared a form which he is now using and a copy of which I am enclosing in this letter. This form as you will note attempts to bind the taxpayer to the extent that he agrees to pay the collector his commission on the full amount of taxes collected. It is my opinion that the taxpayer can not sign any agreement fixing the amount of commission that a collector can legally retain for his services, as the commission is fixed by the statutes and not by an individual.

I would like an opinion from your office as to whether this agreement which I am enclosing will in any way effect your opinion given me on February 12, 1935."

The form which you attached to your request reads as follows:

April 6, 1935.

"In Re: Tax Receipt No. \_\_\_\_\_ Dated \_\_\_\_\_

AGREEMENT OF TAX PAYER ON  
COMPROMISE OF TAXES.

In consideration of the benefits moving to me by reason of a compromise order made by the County Court of Stoddard County, Missouri, authorizing the payment of certain delinquent taxes on a reduced valuation on certain real estate, and which I subsequently paid to the ex-officio collector of said County as is shown by tax receipts numbered \_\_\_\_\_ and dated \_\_\_\_\_, 193\_\_\_\_\_, and issued to me by said Collector, I, the undersigned tax payer, or his legal representative, do hereby agree and state as follows:

First: That said reduction was made at my request and on my application.

Second: That I was advised at the time of the making of said compromise order that said compromise order did not apply to the state taxes levied and assessed against said lands and that said state taxes would have to be paid in full.

Third: That I was advised at the time of said compromise, and I fully understood that the Collector's commission, Clerk's costs, and all other legal costs and charges, including costs incident to tax suits filed against said lands and all of which had theretofore accrued against said land by reason of its delinquency, would have to be paid in full on the original valuation of said lands.

Fourth: That with full knowledge of all the above facts I paid the taxes on said lands, on the compromise basis as fixed by the County Court, and intended to and did pay as set out in the above numbered tax receipts, the Collector's commission, Clerk's costs, attorney fees, and all other costs and charges incident thereto on the

basis of the original valuation of said lands, and that I did further intend to and did thereby forever prevent and estop myself, my heirs, executors, administrators and assigns, or anyone for me or in my or their behalf from claiming or demanding the return of my part of the sums so paid by me as shown by said numbered tax receipts.

In testimony whereof I have hereunto set my hand this \_\_\_\_\_ day of \_\_\_\_\_, 193\_\_\_\_.

\_\_\_\_\_  
Witness: \_\_\_\_\_."

Your inquiry deals particularly with the third and fourth paragraphs of the "agreement" and we therefore do not pass upon the first and second clauses.

I.

"AGREEMENT" VOID AS  
LACKING CONSIDERATION.

While not passing upon the validity or construction of Section 9946, page 424, Laws of Missouri 1933, we shall assume that the County Court acted lawfully and legally. Authority for acts must be found either in Section 9946, page 424, Laws of Missouri 1933, Section 9950, page 427, Laws of Missouri 1933, or Section 9808, R. S. Mo. 1929. Each of these sections authorize the county court to perform specific acts to insure that an owner of property pays no

more than his fair and equitable share of taxes. Two of these sections are hereinafter quoted and authorize the County Court to affirmatively act in the correction of error and the compromise of taxes.

Section 9946, page 424, Laws of Missouri, 1933, reads as follows:

"In all cases where any assessor or assessors, the county court, or assessment board,\*\*\*\*\*shall have assessed and levied taxes,\* \* \*on any real estate, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon,\*\*\*\*\* the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law.\*\*\*\*\*"

Section 9950, page 427, Laws of Missouri, 1933, reads as follows:

"Whenever it shall appear to any county court,\* \* \*that any tract of land or town lot contained in said 'Back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon,\* \* \*or that the same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court\* \* \*to

compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state,\* \* \* \*"

It is generally recognized that County Courts are not the general agents of the County but only have such powers as are expressly granted to them by statute. *Kin vs. Marion County*, 349 S. W. 418. The action of the County Court authorized by the foregoing sections is based, first as to Section 9946, upon the existence of an error which may appear in the assessment and levy of taxes, and second in respect to Section 9950 upon the fact that the property is not worth the taxes levied and assessed against it. If either of these two facts exist the County Court is authorized by these Sections to make an order in the one instance correcting the errors, or in the other instance, compromising the taxes. It is the existence of these facts which authorize the County Court to act in the premises. These two Sections do not provide for any understanding or agreement with the taxpayer as to the granting of the order or the payment of any additional charges or fees of any kind or character. No promise can be exacted from the taxpayer relative to any such payments. If the facts exist, the taxpayer is entitled to the relief as a matter of right and cannot be required to promise or agree to any of the matters or things called for in the "agreement of taxpayer on compromise of taxes". It appears that the "agreement" is based upon some purported "consideration", "moving to me by reason of a compromise order made by the County Court". Such consideration is wholly and totally fictitious, does not exist in law and cannot be the basis of any such agreement or understanding.

CONCLUSION.

It is therefore the opinion of this office that there is no consideration whatsoever for the agreements contained in "agreement of taxpayer on compromise of taxes."

II.

AGREEMENT VOID AS  
AGAINST PUBLIC POLICY.

County Collector's commissions are prescribed by Section 9935, page 454, Laws of Missouri 1933, and 9969, page 429, Laws of Missouri, 1933. Section 9935 states:

"The collector\* \* \* shall receive full compensation for his services in collecting the revenue, except back taxes, the following commissions and no more:

I. \* \* \* a commission of ten per cent on the amount collected.

II\* \* \* a commission of ten per cent on the first five thousand dollars collected and six per cent on whatever amount may be collected over five thousand dollars.

XIV.\* \* \* all fees, commissions and other compensations heretofore charged, received or allowed by or to any such collector as

compensation for services whether under or by virtue of state law or not are hereby abolished; and such collector and all his deputies and employees are hereby forbidden under penalty of forfeiture of office to collect, charge or receive directly or indirectly any fees or commissions in the nature of compensation or other compensation other than those allowed and authorized by this section."

Section 9969 allows the collector on delinquent taxes:

"\* \* \*two per cent on all sums collected.  
\* \* \*"

Attorney fees may only be charged and collected by reason of suits instituted prior to the effective date of Senate Bill 94 and are provided for in Section 9952 R. S. No. 1929. This section provides that the attorney shall receive

"as fees, such sum not to exceed ten per centum of the amount of taxes actually collected and paid into the treasury."

The Collector's fees and attorney fees are therefore only permitted to be computed on the amount of money actually collected. No justification or authorization is to be found for any further additional charges. In fact, Subdivision 14 of Section 9945 heretofore referred to declares a forfeiture of office on the part of any collector who shall receive any fees as compensation in excess of such amount. These provisions were passed on at an early date by the Courts of this State. In the case of State ex rel. Kemper vs. Smith, 13 Mo. Appeals 421, the Court, referring to the Attorney fees allowable under a section practically identical with Section 9952 R. S. No. 1929, stated, l. c. 423:

"It is thus perceived that the attorneys of the collector are not entitled to any fees in proceedings under this statute except such as may accrue as commissions upon 'taxes actually collected and paid into the treasury.' It is also perceived that the law in direct terms prohibits

them from receiving any fee or compensation for services except such as may accrue by way of commissions upon taxes actually collected and paid into the public revenue. It is also perceived that the collector is not entitled to any fees in proceedings under this statute, except a per centum on 'sums collected.'

Similar holdings may be found respecting the collectors commissions. There is another section equally applicable to this situation. Section 3948 R. S. Mo. 1929 provides:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

The law specifically states that the fees are to be computed on the amount which is actually collected and not upon some fictitious amount which might at some time or other have been entered on the tax book. It is unlawful for the Collector to receive any fee for any official act done for more than is due, and no provision of law can be found authorizing the collecting or receiving of the fees and charges attempted to be collected under the guise of an "agreement."

Nor can it be maintained that the agreement of the taxpayer can in any way effect the law as provided by the foregoing sections. It has long been established in this State that the County Court does not allow the fees of the County Collector but that the law itself allows such fees and is the rule by which all compensation must be measured. In the case of *Hethcock vs. Crawford County*, 200 Mo. 170, 175, it is stated:

"The County Court does not allow his (collector's) commission; it has no lot or part in that; the law allows them on settlements and statements made by him-- the Court being merely the representative or fiscal agent of the County, charged with the duty to see to it that the public is protected."

So, in the instant case, the law allows the fees to the Collector and to the delinquent tax attorney and the contract of the parties can have no bearing upon the fees which the law allows. Section 3948 R. S. M6. 1929 supra, has recently been before the Appellate Courts of this State in the case of Bennett vs. Gerk, Chief of Police, 61 S. W. (2d) 241. In this case the Court had for consideration the issue as to whether or not deputy sheriff might receive a portion or all of a reward offered for the arrest of criminals. The Court held that to permit public officials to participate in such rewards would be contrary to public policy in this state. In reaching this conclusion the Court quoted with approval from the case of Hatch vs. Mann, 15 Wend. (N.Y.) 49-50, (61 S. W. (2d) 246.):

" 'That a public officer, whose fees are prescribed by law, may maintain an action to recover an additional sum promised him by a party for doing his official duty, is a monstrous proposition, fraught with every kind of mischief. The pretence that it is for extra services would cover any conceivable corruption or extortion. What are extra services in the performance of a defined official duty? The Supreme Court seems to define them as being 'extraordinary efforts, beyond what an officer is strictly bound to make.' But 'Nil agit exemplum, litem quod lite resolvit.'--What are the 'extraordinary efforts' which an officer can make to discharge his official duty, which he is not strictly bound to make? When he takes upon himself the office, he solemnly swears to discharge the duties of it 'according to the best of his ability.' Has he then an extraordinary ability beyond his best ability, for the exertion of which he may legally demand extra pay? If it be so in regard to a constable, it is equally so in regard to every other officer, judicial or ministerial. They all take the same oath, and all are embraced together in the same prohibition. The language of 2 R. S. 650, Sec. 5, is 'No judge, justice, sheriff, or other officer whatsoever, or other person to whom any fees or compensation shall be allowed by law for any service, shall take or receive any other or greater fee, or reward for such

service, but such as is or shall be allowed by the laws of this state.'

'If a constable, for making 'extraordinary efforts' to perform an ordinary official act, may not only receive, but may also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might and soon would put their 'extraordinary efforts' in the market, to be had by the highest bidder. This is a sickening and revolting view of the subject, I admit, but it is one forced on my mind by the case. It carries back my thoughts to scenes which I trust are never to be witnessed in this country, when chancellors and judges made a business transaction of receiving gratuities from parties for expediting, i. e., making 'extraordinary efforts' to dispose of their suits. These gratuities were not deemed bribes for perverting justice, but merely compensations for 'extraordinary efforts' to administer it 'beyond what an officer was strictly bound to make.' The great Lord Bacon by the workings of whose mighty mind

'Darkness fled,  
'Light shone, and order from disorder  
sprung'--

secured his eternal epitaph, of 'wisest, brightest, meanest of mankind;' not by contaminating his fingers with bribes to do injustice, for it is recorded of his judicial decisions that never one of them was reversed or even the fairness of it questioned--but by receiving gratuities for making 'extraordinary efforts' to discharge his official duty. It was because he had an itching palm and sold his offices for gold, that he was impeached, fined, imprisoned, degraded and disgraced, and that genius which like a meridian sun should have illumined a world,

April 6, 1935.

for this reasonable practice of taking extra pay for 'extraordinary efforts', was shorn of its beams, and will forever 'in dim eclipse, disastrous twilight shed.'

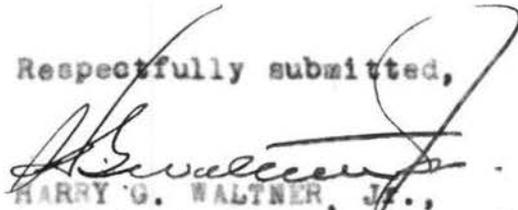
'I have scarcely patients to look for authorities to support a principle which of itself is paramount to all authority.'"

There can be no valid distinction drawn between these two classes of public servants. The law on the subject in this state is clear and conclusive. The "agreement" is void as against the policy of the law of the State of Missouri.

CONCLUSION.

It is therefore the opinion of this office that the "agreement of taxpayer on compromise of taxes", is void as contrary to public policy of this state, and that the officials receiving or retaining fees in excess of the respective percentages of the taxes actually paid, by virtue of the agreement or otherwise, are subject to the penalties prescribed by Section 3948 R. S. Mo. 1929 and Section 9935, page 454, Laws of Missouri 1933.

Respectfully submitted,

  
HARRY G. WALTNER, JR.,  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK,  
Attorney General.

HGW:MM