

COUNTY COLLECTORS--STATE AUDITOR: The State Auditor's power to audit, adjust and settle with County Collectors carries with it the right to discreetly credit County Collectors with outlawed taxes where his refusal to so credit would be arbitrary under all the facts.

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

Your request for an opinion dated April 10, 1935 is as follows:

"Section 9961, Laws of Missouri, Extra Session, 1933-34 relating to delinquent and back taxes reads as follows:

"**Sec. 9961. Limitation of action.--**
No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, provided that proceedings for the sale of lands and lots on which taxes are delinquent for the year 1928 may be commenced at any time prior to December 31, 1934. Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after de-

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linquency, otherwise no suit or action therefor shall be commenced, had or maintained.'

"In checking the annual settlements of the various collectors, we find that some of them have taken as a credit item, 1928 and 1929 real estate tax as outlawed.

"We would appreciate an opinion from your office advising us as to whether or not the collectors should be allowed credit for 1928 and 1929 delinquent real estate on their annual settlements as an outlawed tax, and if this would not be a credit that would be allowable, how should we proceed to issue a Quietus to one of these collectors that had taken credit for the 1928 and 1929 delinquent real estate as above set out.

"It is our understanding that the above land was not advertised or offered for sale in the fall of 1934."

The Session Acts of 1933-1934 at page 154, quoted in your request, provide for a statute of limitations upon the time in which the County Collector can bring an action enforcing the State's tax lien against real estate. Said law, by its very terms indicates that 1928 and 1929 delinquent State tax liens which were not foreclosed upon prior to December 31, 1934, ceased to be a tax lien against the land.

The State Auditor is an executive officer charged under the Constitution with performing those duties which the Legislature prescribes. Article V, Section 1, Missouri Constitution provides:

"The executive department shall consist of a Governor, Lieutenant-Governor, Secretary of State, State Auditor, State Treasurer, Attorney-General and Superintendent of Public Schools, all of whom, except the Lieutenant-Governor, shall reside at the seat of government during

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their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law."

Auditing, settling and adjusting of County Collector's accounts by the State Auditor is provided for by Statutes. Section 11404, R. S. Mo. 1929, reads in part as follows:

"He shall:* * * *fourth, audit, settle and adjust the accounts of the collectors of the revenue, and other holders of public money who are required by law to pay the same into the treasury;* * * *."

Again in Section 11407 R. S. Mo. 1929, the Legislature followed in the wake of Section 11404, supra, and again provided for the auditing, settling and adjusting of County Collector's accounts by the State Auditor. Said section reads as follows:

"All officers and others bound by law to pay money directly into the state treasury shall exhibit their accounts and vouchers to the State Auditor on or before the thirty-first day of December, to be audited, adjusted and settled, except the collectors of the revenue, who shall, immediately after their settlement with the county court on the first Monday in March in each year, exhibit their accounts and vouchers to the State Auditor to be audited, adjusted and settled; and the State Auditor shall proceed, without unnecessary delay, to audit, adjust and settle the same, and report to the treasurer the balance found due."

In the case of State ex rel. Gehner v. Thompson, 293 S. W. 391; 316 Mo. 1169, l. c. 1185, the Supreme Court said:

"It appears to us, from the precise language of the statute and the duties and obligations imposed upon respondent thereby, that respondent's acts and decisions thereunder, in the allowance or disallowance of claims made against the State, necessarily, and as a general rule, involve the exercise of discretion upon his part and invest him with quasi-judicial functions and duties. That being true, this court cannot control or direct respondent's action, or quasi-judicial discretion, unless it be clearly shown that respondent is acting arbitrarily and without legal reason, or unless it clearly appear that respondent has abused his discretion. For us to control or direct respondent's quasi-judicial discretion (absent an arbitrary and clearly unlawful, or unjustifiable, action on his part) would mean for this court to impose our own judgment and discretion for that imposed upon respondent by the legislative department of this State, the assumption and arrogation of which power on our part would be to render abortive and ineffectual the statute prescribing the powers and duties of the State Auditor."

The above case holds that the State Auditor, and he alone, is charged with auditing, settling and adjusting accounts. Said case even goes so far as to say that the State Auditor's quasi-judicial discretion (absent an arbitrary and clearly unlawful, or unjustifiable, action on his part) cannot be controlled by the courts.

Section 11408 R. S. Mo. 1929, provides the statutory liability of a County Collector who shall fail to pay the amounts which the State Auditor finds due the State and reads:

"If any of the persons mentioned in the preceding section shall fail to

pay the amounts so found due into the treasury within thirty days after the settlement above required, the delinquent shall forfeit to the state the amount of the commission allowed him by law, and also two and a half per cent. a month on the amount wrongfully withheld, to be computed from the time the same ought to have been paid until actual payment; and the auditor shall charge such delinquent accordingly."

Section 11409 provides how the State Auditor shall proceed against those collectors which he finds delinquent and reads:

"The auditor shall, immediately after such delinquency shall occur, issue a warrant of distress against such delinquent and his sureties, directed to the sheriff of the proper county, or if he shall be disqualified to act, then to the sheriff of some adjoining county, who is authorized and required to execute the same, and who, together with his sureties, shall be liable on his official bond in the same manner and to the same extent as if the writ were to be executed in his own county, stating therein the amount due and the penalties and forfeitures thereon accrued; and upon any failure by the auditor to issue the distress warrant herein provided for within thirty days, he and his sureties shall become liable on his official bond for all losses which the state may sustain through such failures."

Section 11415 provides that unsettled accounts of County Collectors be reported to the General Assembly and reads:

"The auditor shall report to the general assembly, during the first week of each regular session, a list of all

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collectors of the revenue and other holders of public money whose accounts have remained unsettled for the space of six months after they ought to have been settled, according to law, and the reason therefor, if known."

CONCLUSION.

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Your request resolves itself to the problem as to the duty of the State Auditor who is charged by the statutes to audit, settle and adjust the accounts of County Collectors in allowing credit to collectors for 1928-29 real estate taxes which they have returned on their annual settlement as being outlawed. From the foregoing citations the auditor cannot exercise arbitrary, unlawful or unreasonable discretion. So long as the Auditor acts reasonably, justifiably and lawfully he may not be controlled by the Courts. In determining the legal problem presented by the request, we are not concerned with the policy which the State Auditor adopts. Such policy is for his own determination. Our only concern is to present what the auditor can do, under the law, in adjusting the annual settlement filed by the county collector. What he ought to do in the exercise of his quasi-judicial discretion is for the State Auditor to determine.

We are of the opinion that the State Auditor of Missouri, under the provisions of Sections 11404 and 11407, supra, is charged with the mandatory duty of auditing, adjusting and settling County Collectors' accounts. The word "shall" as used in these sections is used in its positive sense, making it the State Auditor's duty, under the Constitution and Statutes pursuant thereto, to audit, settle and adjust these accounts. The statutory terms, "audit, settle and adjust," as used in these Statutes, are not narrow terms. These terms are given no statutory definition and so their common meaning is to be applied when deciding the power of the State Auditor in performing his duty. These words, we believe, are conjunctive in the power which they give the State Auditor, not modifying each other. It is not only the

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State Auditor's mandatory duty to audit the Collectors' accounts, but he also has a mandatory duty to settle and adjust these accounts. Taken together these three words give to the State Auditor wide latitude in the quasi-judicial discretion he is empowered to use when passing upon the annual settlement of the County Collector. The powers to audit, adjust and settle is the power to give credit where credit is due.

The mandatory duty of the office to "audit, settle and adjust" the accounts of county collectors even though the State Auditor has wide latitude in the exercise of his power does not empower the State Auditor to exercise arbitrary authority and refuse to allow a lawful and just credit. In making these annual settlements with county collectors the State Auditor should make reasonable effort to discover all the pertinent facts relative to the efficiency of the county collector in the collection of the revenue and after taking the facts within his knowledge and which have come to his attention, he must use sound discretion in allowing credits under his power to "audit, adjust and settle." The County Collector's right to a credit depends on the facts in each particular case. Any sound discretionary credit allowance is properly made by the Auditor.

We call your attention to the opinion of this office written by Honorable Gilbert Lamb, addressed to you on July 27, 1933, in which we said:

"If such examination develops a situation that warrants you, in your judgment, in making an examination of additional books or records kept by any of the county officers named in the above section, then we think you would have a right to and should extend your examination and audit to such an extent as the facts developed by you would justify,"

Finally we are of the opinion that the provisions of Section 11408, supra, providing liability for delinquent County Collectors, Section 11409, supra, providing

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that the Auditor issue distress warrant against delinquent County Collectors, and Section 11415, supra, providing for the State Auditor's report to the General Assembly on all County Collector's accounts not legally settled, by their very terms become operative and refer only to delinquencies found by the Auditor in auditing, adjusting and settling the accounts. Where, after the affirmative mandatory action of the State Auditor, acting in a quasi-judicial capacity, he finds a delinquency, it is his duty to proceed against the delinquent under the provisions of law herein set out relating to delinquent County Collectors.

Respectfully submitted

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Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

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