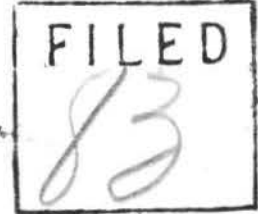


BONDS: OFFICERS: Collector who fails to certify delinquent state income taxpayers within thirty days after delinquency is liable on his official bond.

June 17, 1937.

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

Dear Mr. Smith:

We wish to acknowledge your request for an opinion under date of June 11th, wherein you state as follows:

"Under Section 10136 of the State Income Tax Law, as passed by the Fifty-eighth General Assembly, it was made compulsory on the part of the various County Collectors throughout the State of Missouri, and the City Collector of St. Louis, to certify all delinquent state income tax to the State Auditor within thirty days after it becomes delinquent.

"This office has had considerable trouble by reason of the fact that many Collectors throughout the State fail to make the above certification within the time required by law.

"Will you kindly advise whether or not a Collector who fails or refuses to certify delinquent state income taxpayers appearing on his records would be liable on his official bond for any state income tax which may be made uncollectable due to his negligence, failure or refusal to certify such delinquents in accordance with the law."

Section 10136, Laws of Missouri, 1935, page 410, makes it the duty of the collector to certify all delinquent state income tax to the State Auditor within thirty days after it becomes delinquent:

"All taxes assessed on account of incomes shall become delinquent on the second day of June, where assessments are required to be made and certified to by the assessor prior to April 30, and subsequent to March 15; in all other cases taxes assessed on account of income, shall become delinquent thirty days after the tax book is required by law to be delivered to the collector; within thirty (30) days after such delinquency the collector shall certify the names of the delinquent taxpayers to the State Auditor,
* * * ."

The Court in the case of State ex rel. Stephens v. Wurdeman, 295 Mo. 566, in referring to the word "shall", said:

"Usually, the word 'shall' indicates a mandate, and unless there are other things in the statute it indicates a mandatory statute."

We are of the opinion that the duty imposed upon the collector to certify all delinquent state income tax to the State Auditor within thirty days after it becomes delinquent is mandatory and gives no room for opinion or discretion.

Section 9885, Laws of Missouri, 1935, page 409, provides that the collector's bond is conditioned that he will in all things faithfully perform all the duties of his office according to law:

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering

upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * * *

46 C. J., Sec. 398, page 1068, in discussing the liability of officers on their bonds for negligence, states that:

"The condition of an official bond providing for the faithful discharge by the principal of his official duties is broken by the mere negligence, without corruption, of the principal in the performance of a ministerial duty, which performance does not involve the exercise of discretion."

In the case of *People v. Smith*, 55 Pac. 765, 1. c. 766, 767, 123 Cal. 70, the court in pointing out that where the bond requires the faithful exercise of all official duties, the neglect to perform a duty which is ministerial, and does not involve an exercise of discretion, is a breach of the obligation, said:

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" * * * the duty of the assessor to collect the tax is merely ministerial, and gives no room for opinion or discretion, and the neglect to discharge that duty is a breach of the obligation of the bond. In People v. Gardner, 55 Cal. 304, 307, it was said: 'It is the duty of an officer to do what the law requires to be done in his office, for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by any one in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a non-performance of duty, and a breach of the official bond of the officer, for which he and the sureties thereon are liable.'"

From the foregoing, we are of the opinion that a collector who fails or refuses to certify all delinquent state income taxpayers appearing on his records to the State Auditor within thirty days after they become delinquent is liable on his official bond for any state income tax which may be uncollectable due to his negligence, failure or refusal to certify such delinquents in accordance with the law.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

MW:HR