

Prosecuting Attorneys:) Prosecuting attorney, under Sales Tax Act,
Sales Tax Laws:) not entitled to fee for instituting and
prosecuting suits for collection of
delinquent sales tax.

December 22, 1938.



Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This Department is in receipt of your letter of some time ago, wherein you make the following inquiry:

"Some months ago I brought a suit in the Justice Court against one Floyd McCord on the petition furnished by the Attorney General's department for Sales Tax and obtained a judgment for \$80.00 and within ten days after obtaining the judgment a notice and affidavit was filed with the Justice and with the Constable notifying them that two parties claimed priority for wages during the last six months and set up claim under Statutes to support their claims.

"In order to protect the Constable and also protect the judgment for the state I filed an interpleader in the Circuit Court for the Constable and after some delays the matter was taken up before the Court and argued. The Court found that the priority claim by the claimant was proper and sustained the cross-bill of one of the claimants, the other was not sustained for the reason that he did not secure a judgment in the Justice Court for his claim.

"Following the usual custom I asked the Court if I would be allowed a small fee for filing which he readily allowed. There is still a small balance over and above after paying the judgment of Mrs. Shultz, claimant for wages as cook and servant in the restaurant operated by McCord, and since if I should take that fee it would reduce the balance coming to the State that much, the question with me is whether the taking such fee would be in good conscience and lawful, and I would appreciate your opinion on that phase."

In answering your precise question, we will disregard the question as to whether or not the claims mentioned in your letter were in reality prior claims and should receive priority over the sales tax. We assume that the suit in question was instituted in the nature of an attachment.

With reference to the fee allowed you by the court, you do not state that the action was brought to collect delinquent sales taxes under the Act of 1935, Laws of Missouri, 1935, page 411 et seq., or the Act of 1937, Laws of Missouri, 1937, page 552 et seq. However, we are of the opinion that it does not make any material difference, as duties with reference to the attorney-general and prosecuting attorney under both acts are very similar.

Section 32, page 565, Laws of Missouri, 1937, is as follows:

"Except as in this Act otherwise provided, all suits for taxes herein required to be filed shall be filed in the County wherein the person resides or has a place of business or agent for the transaction of business in this State or where he or it may be found. If such suit be by attachment it shall be brought in the County

wherein the property attached is located, and when the amount of tax involved does not exceed the jurisdiction of Justice Courts within such County, the attachment suit may be filed in the Court of some Justice of the Peace therein; where the amount of tax involved exceeds the jurisdiction of Justice Courts, said suit shall be filed in the Circuit Court of such county. In every such suit there shall be assessed, taxed and collected as other costs, a fee of ten (\$10) dollars for the services of the Attorney-General in instituting and prosecuting said suit, which shall be paid into the State Treasury to the credit of the ordinary revenue fund."

The duty of the prosecuting attorney, upon the request to file suits for sales tax is contained in Section 40, page 567, Laws of Missouri, 1937, which is as follows:

"It shall be the duty of the Auditor to certify under seal to the Attorney General on the last day of each calendar month, following the due date of the returns herein, the names and addresses of all persons required to remit any tax, interest and penalties under the provisions of this Act for the preceding calendar month, who are delinquent in the payment of said tax, interest and penalties, together with the amount due from each delinquent, and it shall be the duty of the Attorney-General, and, upon his request, the duty of each prosecuting and circuit attorney to forthwith institute and prosecute suits for the collection thereof as herein provided."

Section 30 of the Laws of 1933, page 423, is almost identical with Section 32, quoted supra, of the Laws of 1937.

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Under Section 11318, R. S. Mo. 1929, it is the duty of the Prosecuting Attorney to institute and prosecute all suits for or against the State, within his jurisdiction. There is no provision in said section for paying fees or other emoluments for the services of the prosecuting attorney in any suit. Likewise, there is no provision in the Sales Tax Act for the payment of a fee to the prosecuting attorney for prosecuting sales tax suits. While Section 32, supra, provides for a fee of \$10.00 for the services of the Attorney-General, it is silent as to prosecuting attorney. With respect to that fact the section also provides that the \$10.00 fee shall be paid into the State Treasury and not retained by the Attorney-General.

It is a well recognized principle of law that an officer in order to receive any fee must be authorized by some statute to receive the same. As Prosecuting Attorney you receive annually a certain salary which is supposed to compensate you for all duties performed by you as Prosecuting Attorney, and finding no provision in the sales tax acts which would entitle you to any fee, we are of the opinion that you are not in a position to ask or receive from the court a fee in the case which you mentioned in your letter.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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