

TAXATION AND
REVENUE:

When a petition for correction and abatement of an assessment of income is filed, collectors are not to certify taxes to the State Auditor.

March 15, 1939.

Mr. Wm. F. Baumann,
Collector of Revenue
St. Louis City,
St. Louis, Missouri.



Dear Sir:

This will acknowledge receipt of your request for an opinion, reading as follows:

"When a petition has been filed pursuant to Section 10135, Revised Statutes of Missouri, 1929, asking for an abatement of income taxes, but no bond has been posted in accordance with certain provisions in said section, should the Collector consider the bill for income tax, which is attacked by the petition filed as aforesaid, a delinquent bill after the expiration of thirty days from its reception in his office and should he, consequently, certify same to the State Auditor as any other delinquent income tax bill?

"In other words, this situation has been presented to us. The State Auditor set up against a certain taxpayer, on December 2nd, 1938, a tax against said taxpayer's 1935 income. Thereafter, and within forty-five days from the time this tax was assessed, the taxpayer filed, in the Circuit Court of the City of St. Louis, a petition asking for an abatement of the additional tax. However, no bond was posted, as is required by that section of the statutes governing such a petition, and although we do not believe that the posting of a bond is jurisdictional, still we are of the opinion that without the bond the tax becomes delinquent as any other tax would, and the filing of the

petition alone does not stay its delinquency. The pertinent part of the section referred to says, in effect, that the taxpayer may file a bond double the amount of the indebtedness and in that event the taxes will not be deemed to be delinquent until thirty days after final judgment on the petition. We assume, that conversely, if no bond is filed, the tax does become delinquent in accordance with Section 10134 (as amended) and that, therefore, it should be certified by the collector to the State Auditor even during the pendency of the suit for abatement."

Preliminary to the consideration of the precise question involved in your request for an opinion, we make these observations:

A review of our Income Tax Act, in detail, discloses that the State Auditor is the supervisory officer over all other officers in the administration of the Act. It is provided in Sec. 10134, R. S. Mo. 1929, that,

"* * * He shall give instructions for carrying this chapter into effect and all such instructions shall be strictly complied with by the officers in the performance of their duties, as required by this chapter.
* * *"

Whenever the State Auditor determines that any taxpayer has failed to file a return of income, or has filed an insufficient return of income, he may determine the proper income and certify the same to the assessor for assessment, and,

"* * * the assessor shall thereupon make the assessment in accordance with such certificate including all penalties provided.* * *" Sec. 10132, R.S. Mo. 1929.

It should also be observed that assessors, in assessing incomes, have all the powers granted to assessors by law in assessing real and personal property, together with the right to estimate incomes, excepting, however, when

"* * * the state auditor certifies to any assessor the amount of income of a taxpayer who has made no return or who has made an insufficient return or against whom the assessor has made an insufficient assessment, such assessor shall make an assessment against the taxpayer in accordance with the amount of income as certified by the state auditor including all penalties, and the assessor shall have no power to estimate the income of any taxpayer after the auditor has certified to the assessor the amount of income of such taxpayer."
Sec. 10142, R. S. Mo. 1929.

Under the provisions of Sec. 10128, R. S. Mo. 1929, it is provided, in effect, after an assessment against income has been made by the assessor, such assessor is to certify the result of such assessment to the county clerk to compute the tax, and, thereafter, the county clerk delivers the tax book to the collector, who collects the tax.

Thus it will be noticed that the assessor, under the statute, is required to follow the directions of the state auditor in making an assessment against income. This is equally true as affects the duties imposed by law upon the collector. In this respect we have been advised that the State Auditor has instructed all collectors of income taxes not to certify the taxes as being delinquent to him under the provisions of Sec. 10136, as amended, Laws of Missouri, 1935, at page 410, where a petition for correction and abatement of the assessment has been duly filed within forty-five days after the assessment has been certified by the assessor to the county clerk.

Prior to 1929 assessments made against incomes were subject to review by the Board of Equalization, and any assessment made against incomes, unless changed by the Board, became final. In this respect it should be noted that the Supreme

Court, in the case of State ex rel. Ford Motor Company v. Gehner, 27 S.W. 1, 3, in speaking of the assessor and Board of Equalization, said:

"* * * This body and the assessor act judicially.* * *"

It was also pointed out in the above case that these officers could not increase an assessment without notice to the taxpayer. The court said, at page 4,

"Nor may these officers increase the assessment without notice to the taxpayer."

Hence, it is to be thus observed, whenever the State Auditor certifies income to the assessor, as a basis for an additional assessment, (1) The assessor must make an assessment in accordance with the certificate of the auditor, (2) notice must be given by the assessor to the taxpayer of the assessment, and (3) the assessor acts judicially in making the assessment.

In 1929 the Legislature substituted a new procedure for the reviewing of assessments made by the assessor, thus eliminating the Board of Equalization, and providing:

"At any time within forty-five days after assessment or additional assessment of income has been certified by the assessor to the county clerk, the taxpayer shall have the right to apply for abatement or correction of same to the county court of the county in which such assessment is made except in the city of St. Louis, and to the circuit court in such city. Such application shall be made by petition, which petition shall be sworn to by the taxpayer or some one as agent who has actual knowledge of the facts, and which petition shall show the net income

of the taxpayer, showing all matters of income, deduction and exemption as defined by law. Upon the filing of such petition a copy thereof shall be served by the sheriff, upon the assessor who made the assessment or additional assessment, and a copy thereof shall be served upon the state auditor by the clerk of the court by registered mail addressed to the state auditor at Jefferson City, Missouri. * * * * At the time of filing the petition, the taxpayer may submit a bond with good and sufficient security, payable to the state of Missouri, in double the amount of the tax based on the assessment attached, conditioned that the taxpayer will pay any tax, together with all interest and penalties under the judgment in the said proceedings; if said bond shall be approved by the court, the taxpayer shall not be regarded as delinquent and no penalties shall be added until the thirty-first day after judgment in the proceeding shall become final, but the tax shall bear interest at the rate of 6 per cent per annum from its due date to date of payment; if paid on or before thirty days after such judgment becomes final; in case of non-payment within said period, interest at the rate of 6 per cent per annum shall cease thirty days after such judgment shall have become final, and penalties shall be added commencing with the thirty-first day.* * *"

Sec. 10135, R. S. Mo. 1929.

The situation presented by your request for an opinion was occasioned by a certificate received from the assessor by the State Auditor. We are not unaware of the fact since this assessment was made on December 2, 1938, that you

have numerous persons on your tax book that have not been certified to the State Auditor, in accordance with the provisions of Sec. 10136, supra.

Clearly Sec. 10135, supra, affords to the taxpayer an opportunity to be heard whenever he is aggrieved by reason of any assessment against his income. Therefore, the purpose of this section of the statute is to attack the judgment of the assessor who is the only officer authorized to make an assessment against incomes.

A review of the Income Tax Law reveals that this procedure is exclusive to correct or abate an assessment. Since the purpose of the statute is to correct or abate an assessment, then it follows, what effect, if any, does the filing of a petition, as provided have upon the officers charged with the collection of a tax when no bond has been filed? We think the answer to this inquiry is solved by analogy from the expressions in 61 C.J., 776, 1004, reading,

"* * * the effect of an application thus to review or correct an assessment is to suspend the power of the assessing and collecting officers to act upon the particular assessment until the board shall have decided the case; * * * The assessing and collecting officers are subservient to the boards established for review and correction of assessments, and any change the boards see fit to make in assessments supersedes the determination of the assessing officers and, so far as they are concerned, are final.* * *"

Your attention is respectfully directed to the case of State ex rel. Vance v. Dixie Portland Cement Company, 267 S.W. 595. This was a case involving an action that was instituted by the State of Tennessee to recover delinquent taxes. The facts in this case disclose, under the statutes considered, that as soon as the county assessor assessed the taxes, the

taxpayer had the right to appeal to the Board of Equalization to review the assessment. The statute provided that the action of the State Board of Equalization was final and conclusive as to all matters passed upon by them, and that the taxes shall be collected upon the valuation as was fixed by the board. It was provided that, after the board had completed the equalization of property, it was their duty to certify the assessment not later than October 1st to the county clerk. Thereafter, it was the duty of the county clerk, upon receipt of the assessment, to make out and deliver a tax book to the county trustee the first Monday of October.

In this case, the State Board of Equalization certified the result of their action upon the assessment to the county clerk. The county clerk received the order of the State Board and entered the assessment upon the tax books. Thereafter, a petition was filed in the circuit court to review the action of the State Board in fixing the assessment. Among other things, it was alleged, in the petition that was filed, that the assessment was illegal, excessive and unjust. The State Board of Equalization and the County Clerk were made parties to the suit, and were duly served.

In ruling the case, as to whether or not the application to review the assessment would bar a recovery of the taxes while such application for review was pending, the court said at page 596:

"Upon allegation that its property was assessed in violation of law, and that it was guilty of no laches in presenting the petition, which was done before the tax was due December 1st, it lay within the sound discretion of the circuit judge to grant the writ of certiorari. The writs arrested the proceedings before the board of equalization, and removed the inquiry to the circuit. The assessment was incomplete when the tax bill was filed. There could be no recovery of the taxes pending the action in the circuit court of Davidson county to review the assessment."

We believe that the ruling in the above case is here applicable in support of our conclusion.

It is further believed that, since a petition has been filed by a taxpayer to correct or abate an assessment under Sec. 10135, supra, such assessment is immediately challenged, whether or not any bond is filed, and any tax which has been computed thereon is subject to the final judgment of the court. In the event the taxpayer is successful, it obviously follows that the assessment will have to be changed and a new tax computed, and a new tax bill rendered.

It is also to be gleaned from this section of the statute that no assessment made against income becomes final until forty-five days after the assessor has certified the taxes to the county clerk for the computation of the tax.

The only advantage to be obtained by the taxpayer, by the filing of the bond, is to prohibit the tax from being regarded delinquent, from the standpoint of the accruing of interest. In the event no bond is filed, it is to be implied from the statute that a taxpayer is to be regarded delinquent and shall pay the rate of interest that all other delinquent taxpayers are required by statute to pay. This, of course, is conditioned upon the fact that the taxpayer is unsuccessful in the prosecution of his suit for correction and abatement. But, the fact the taxpayer is to be regarded as delinquent does not mean that the assessing and collecting officers shall, as is contemplated by Sec. 10136, supra, where no petition for correction and abatement has been filed under the provisions of Sec. 10135, certify the delinquent tax to the State Auditor, and subsequently the State Auditor to the Attorney-General.

Section 10136, supra, is to be regarded as a procedural statute for the purpose of effecting collection of delinquent income taxes which have not been paid, as provided. Therefore, Sec. 10135, supra, limits the application of Sec. 10136, supra, with respect to the certification of delinquent income taxes.

CONCLUSION.

In view of the above, it is the opinion of this department that, when a petition to correct and abate income taxes is filed, and no bond has been filed with the petition, such taxes, when regarded as delinquent, shall not be certified by the collector to the State Auditor, as is required under the provisions of Sec. 10136, supra.

Respectfully submitted,

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APPROVED:

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