

TAXATION: LEVY:
UNCOLLECTED TAXES:

In fixing a levy, the county court should take into consideration amount to be realized from all uncollected taxes except those, that after a reasonable time and after reasonable efforts to collect, remain uncollected, county court has a wide discretion in fixing the levy and unless it abuses this discretion and acts arbitrarily and fraudulently, the levy will not be interfered with by the courts.

January 9, 1939

Mr. George B. Bridges
Prosecuting Attorney
Mississippi County
Charleston, Missouri

1-17



Dear Sir:

This will acknowledge receipt of your request for an opinion from this department which is as follows:

"The Mississippi County Court has requested that I receive an opinion from you on the following matter.

"The Air Line Special Road District was dissolved at an election on November 4, 1938. There is at present an outstanding indebtedness of \$10,500.00 in bonds and accrued interest. Last spring the customary levy of fifty cents was made upon the property holders in this district. However, the railroad company now refuses to pay twenty-five cents of this levy on the grounds that there are sufficient delinquent taxes due and owing to retire this indebtedness.

"The fifty cent levy, mentioned above, consisted of a twenty-five cent special road and bridge tax (a blanket levy throughout the county) and the Air Line Special Road levy of twenty-five cents. However, this has been erroneously handled and the entire sum treated as an Air Line

Special Road District levy. I don't know whether or not this pertinent to the point involved, but thought it might be wise to mention it to you."

Your request goes to the question of whether or not the county court has abused its discretionary power in fixing the levy by not taking into consideration uncollected taxes. In fixing the levy the county court should fix the amount that will raise the required amount of money. In State ex rel. and to Use of Johnson, County Treasurer, v. St. Louis & S. F. R. Company, 10 S. W. (2d) 918, 920, the court quotes Judge Ragland as follows:

"Exactions from the people, as taxes or otherwise, in advance of any needs of the government are not only condemned by sound public policy but are violative as well of fundamental rights guaranteed by our organic law. The County Court of Cass County was therefore without power to levy a tax clearly in excess of what could at the time have been reasonably anticipated as necessary to pay the interest and principal of the funding bonds. However, the authority to determine what amount would be necessary for that purpose was vested in it, and unless there was a clear abuse of this discretionary power, its action in the premises cannot be interfered with. In other words the amount levied must have been so grossly excessive as to constitute, constructively at least, a fraud upon the taxpayers. * * * Whether, however, the levy was so excessive as to be constructively fraudulent must be judged not from the fact that it subsequently developed that a larger amount was levied than was actually required, but from the entire situation which confronted the county court at the time the levy was made. The amount required for the redemption of the bonds,

principal and interest, as well as the amount that would be realized from the levy, had to some extent to be estimated in advance. In doing so it would be necessary to consider, among other things, the amount and availability of funds, already on hand, and the probable loss and the cost of collection of the tax to be levied. When a court is called upon to determine whether a given levy was so excessive as to be fraudulent, or the result of a gross abuse of discretion, not only should proof of such matters as these be received, but every existing fact and condition which the county court might have properly taken into consideration in fixing the amount is relevant and admissible in evidence."

And at l. c. 921, the court further said:

"The power to levy a tax for county purposes is a power delegated to the county court, is legislative in character, and in the exercise of that power the county court has a large discretion. * * * * *"

And at l. c. 922, the rule as stated by Cooley is quoted as follows:

"In fixing the amount or rate, the levying body has considerable discretion. The rate necessary to produce the amount required is largely within the discretion of the levying officers, since it is uncertain what the deficiencies in collection will amount to. But, while local authorities have a reasonable discretion in providing in advance for necessary taxes, the courts may interfere, if

the discretion is abused by raising taxes faster than they are needed. A levy for future needs is invalid as excessive only when so excessive as to show a fraudulent purpose in making the levy."

In the same case, the court, in discussing the ruling of the Illinois Court in the case of Edwards v. People, 88 Ill. 340, quoted said court as follows:

"In the early case of Edwards v. People, supra, it was held that in the levy of a tax by the levy board it is proper that it take into consideration the past history of the state in the matter of losses and deductions which have occurred in the collection of the revenue and in the light of that experience exercise its best business judgment as to the rate necessary to produce the net amount required to be raised, and to fix such rate. Where the evidence clearly shows that public authorities have gone beyond the limits herein mentioned they will be held to have abused the discretion vested in them, and to the extent of such abuse the levy and rate fixed by them will be held invalid. In no sense is it to be considered that actual fraud has been committed or that the showing of actual fraud is necessary."

And the court further said at l. c. 923:

"In that case there was considered the evidence as to what was shown by the experience of previous years as to the average percentage of loss and cost of collection of taxes, and also ruling that back taxes unpaid, but in process of collection, and distributable to the

funds under consideration, were also to be borne in mind by the levying body.* * *

We also find that the question of considering uncollected taxes when the levy is being fixed has been treated in 79 A. L. R., page 1156, wherein the rule is stated as follows:

"It has been generally held under Constitutions requiring uniformity of taxation, that such provisions are not violated when, after the lapse of reasonable time and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy. Wayne County Savings Bank v. Supervisors, 97 Mich. 630, 56 N.W. 944; State v. Common Council, 15 Wis. 30; State v. Holt County Court, 135 Mo. 533, 37 S. W. 521; Francis v. Atchison, Topeka & Santa Fe Railway Co. 19 Kan. 303. These holdings are based on constitutional provisions similar to ours, requiring the levy and collection of the amount of money necessary to meet interest and principal bond payments. While, of course, the tax officials are required to use diligence to bring about the collection of the tax, and, as held in People v. Chicago & Northwestern Railroad Co., supra, they will not be allowed to supply such want of diligence by a further levy of taxes, there is in this bill no charge of want of diligence in attempts to recover the full levy for interest on and due installments of bonds. It is also generally held that such constitutional requirement is not

satisfied merely by the levy of a rate sufficient to pay the debt if the taxes be collected, but it requires that there be a sufficient levy and collection of taxes to actually pay and discharge the debt.
* * * * *

It will be noted by the rule as stated in A. L. R., supra, that the county court must not only make a levy sufficient to meet the demands on the funds for which the levy is being made but it must take into consideration that it will collect an amount sufficient to meet such demand when it falls due. Therefore, the court may make some allowance for uncollected taxes.

In the case of State ex rel. v. Holt, 135 Mo. 533, 546, the question of the authority of the county court to make an additional levy for drainage taxes caused by uncollected taxes, the court said:

"* * * * * Even if the assessment in the first instance was sufficient, if collected, to pay the cash in full, for said improvements, yet if after the allowance of a reasonable time for the collection from delinquents, a deficiency exists, and the legal remedies have been exhausted for the collection of taxes, or if the assessments made have been abandoned or remain uncollected, by the authorities having the matter of the collection in charge, the writ should be granted ordering an additional assessment."

The county court, in fixing the levy, should take into consideration the amount which will be realized from uncollected taxes and if it does do this and does not act arbitrarily in fixing such amounts, then the court will not interfere with the county court's action. All of the facts and circumstances and the manner in which the court arrived at the amount for the levy are to be considered, and as they are not before us we cannot say whether or not the county court acted arbitrarily and dis-

regarded the amount it will receive from uncollected taxes. However, the court, in fixing the levy, is required to keep in mind that it must not only make a levy sufficient to meet the demands, but also must collect an amount of money sufficient to meet such demands as they fall due. Therefore, it would seem that the past experience of the per cent of uncollected taxes should be taken into consideration when the levy is made and if the county court does not vary too far from that amount in considering the uncollected taxes when it fixes a levy, we do not think it could be said that the court has arbitrarily refused to consider uncollected taxes when it fixed the levy.

CONCLUSION.

From the foregoing, we are of the opinion that if the county court, when it fixed the levy to pay the indebtedness on the drainage district, failed to take into consideration uncollected taxes except those which, after a reasonable time and a reasonable effort to collect have not been collected, then the levy is void as to the amount that would be required to equal the amount of such uncollected taxes.

We are further of the opinion that if the county court, in considering the amount of uncollected taxes for the purpose of fixing the levy, takes into consideration the past experience of collecting delinquent taxes and uses that figure or some figure reasonably near to it as to the amount of taxes that will not be collected, then the county court cannot be held to have acted arbitrarily in fixing the levy and leaving out of consideration such uncollected taxes.

Respectfully submitted

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APPROVED:

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