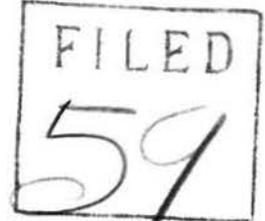


TAXATION: City collector of city of second class cannot assess a penalty of more than 1% upon delinquent real estate taxes but can assess and is entitled to 3% of the total penalty of not more than 5% on personal delinquent taxes.

December 14, 1939

Hon. F. Hiram McLaughlin
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated December 6, 1939, which reads in part as follows:

"We now have in progress in Greene County a Grand Jury, and in their instructions of a general nature was to look into officials handling public money. We have a situation here in regard to the City Collector for a city of the second class in which there is some confusion. Several different lawyers have written different opinions in regard to this matter, and the statutes are somewhat confusing. As this involves a criminal matter, it is much more serious than any civil rights might be. In brief, the City Collector now collects and has been collecting a 3% penalty on all delinquent real estate taxes when they are paid at his office, whether or not suit has been brought. This is in addition to the 1% per month interest charge which the statutes allow a city of the second class to charge and the Collector keeps this additional 3% as a part of the emoluments of the office. We are unable to find in the statutes any authorization for the city by ordinance or under the state laws to charge anything in addition to the 1% per month on delinquent real estate taxes."

You also state:

"Please pardon the long explanation of this tax matter as outlined above, but that is a fair statement of the questions we are trying to decide and would appreciate very much an opinion from your office on the legality of the penalty over and above the interest charge in a city of the second class where they have attempted to regulate this by ordinance. Also if Section 6589 means 3% of the 5% commission as the statute says or whether or not it can be construed that the Collector would get 3/5 of the commission and the city 2/5."

We are first quoting sections of the statute which apply to real estate and land tax only.

Section 6600 R. S. Missouri, 1929, reads as follows:

"No demand for the payment of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the commissioner of revenue, unless otherwise provided by ordinance, at some time between the first day of September and the thirty-first day of December in each year and pay his taxes; and if any tax be not paid before the first day of January following the levy of the tax, the same shall be delinquent and bear interest thereafter at the rate of one per centum a month, or a fractional part thereof. The commissioner of revenue shall continue to receive taxes after they become due until collected by distress or sale."

It will be noticed in the above section that the only penalty set out for the non-payment of real estate or land taxes is a penalty of 1% a month or a fractional part thereof when the land tax is not paid when due.

Section 6605 R. S. Missouri, 1929, which applies only to delinquent land taxes, does not set out any specific penalty and does provide that when the back tax book is delivered to the commissioner of revenue he shall direct the city attorney to bring suit in the name of such city to enforce the collection of such taxes, general or special, with interest, cost and penalties in any court of competent jurisdiction. It does not set out any penalty. Section 6606 R. S. Missouri, 1929, specifically states that the procedure would be the same as ordinary practice and procedure in civil cases, including the sale under executions and making deed to purchaser. All of the sections mentioned and set out apply to land or real estate delinquent taxes only and do not apply to the collection of delinquent personal taxes.

Section 6612 R. S. Missouri, 1929, specifically applies to delinquent personal and ad valorem tax due. This section partially reads as follows:

"It shall be the duty of the said commissioner of revenue in the month of January in each year to make out a full and complete list of all taxes on personal property and ad valorem taxes remaining unpaid for the previous year, which list shall state the name of each person delinquent in the payment of his personal tax, which list shall be made out alphabetically. * * * "

This section does not apply to real estate, but does apply to personal property and ad valorem tax.

Section 6597 R. S. Missouri, 1929, partially reads as follows:

" * * The term 'personal property' shall include every tangible thing which is the subject of ownership not forming a part or parcel of real property, and where used in this article in a general sense shall include all taxable property other than real

property. * * * "

Section 6614 R. S. Missouri, 1929, reads as follows:

"It is hereby made the duty of the commissioner of revenue as soon as taxes on personal property or ad valorem taxes shall be delinquent to proceed to collect the same by distress and sale, in the manner herein prescribed, and for this purpose it shall be his duty to appoint one or more deputies to aid and assist him in the speedy collection of such delinquent personal and ad valorem taxes. The said commissioner of revenue shall receive as additional compensation for his services and expenses, such sum as may be fixed, by ordinance, on the amount of all delinquent personal taxes collected, not exceeding five per cent. which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes, interests and costs, and in making such collections should it become necessary to make the delinquent personal and ad valorem taxes by distress and sale, he shall be entitled to receive the same compensation, in addition, as may be provided by ordinance, not to exceed the five per cent. provided for in this section, as constables are entitled to receive for the sale of property on execution and such other and further compensation as may be provided by ordinance of such city, which shall also be taxed as costs."

It will be noticed under the above section that the word "ordinance" appears and that said section specifically states "on all delinquent personal taxes." This section applies only to personal taxes, and no ordinance is required for the 1% set out as a penalty for the non-payment of real estate taxes under section 6600, supra.

We can find no place in the statute, under the col-

lection of delinquent taxes applying to land or real estate, where the city collector or commissioner of revenue in a city of the second class is entitled to any penalty or can collect any penalty other than the 1% as set out in section 6600, supra.

You also state in your request that it is the theory of some lawyers that under section 6605, supra, where the statute uses the word "with interest, cost and penalties" that this would be sufficient to authorize the city to pass an ordinance collecting a penalty on delinquent real estate. This is not the law, and all tax statutes are to be construed against the taxing authority and in favor of the person paying the tax. It was so held in the case of *State v. Hallenberg-Wagner Motor Co.*, 108 (2d) 398, par. 2, where the court said:

"Like general rules govern the construction of revenue laws, which, when 'ambiguous or doubtful, will be construed strictly in favor of the taxpayer and against the taxing power,' 59 C. J. p. 1131, sec. 670, nn. 84-86; *State ex rel. v. Gehner* (Banc) 325 Mo. 24, 29, 27 S. W. (2d) 1,3 (3), citing authority; but, of course, the rule of strict construction may not serve to defeat the intention of the lawmaker. In *re Clark's Estate*, 270 Mo. 351, 362, 194 S. W. 54, 57 (2); *State ex rel. v. Baker* (Banc) 316 Mo. 853, 858, 859, 293 S. W. 399, 401 (2,4,5)."

Also, in the case of *State v. Markway*, 110 S. W. (2d) 1118, par. 1, where the court said:

"The power to levy and collect taxes is purely statutory, and has been confided to the Legislature and not the courts.' *State ex rel. Parish v. Young*, 327 Mo. 909, loc. cit. 915, 38 S. W. 2d 1021, 1023. 'It is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and that all such laws are

to be construed strictly against such taxing authority.' State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, loc. cit. 29, 27 S. W. 2d 1,3."

Section 6589 R. S. Missouri, 1929, partially reads as follows:

"* * Provided, that the commissioner of revenue shall in addition to said sum of three thousand dollars be entitled to retain three per cent of the five per cent penalty provided by section 6614, article 3, chapter 38, R. S. 1929, upon delinquent taxes collected, and that the remainder of such penalty shall be paid into the city treasury; * * * "

You ask in your request if that section should be construed 3% of the 5% commission, or whether it should be construed that the collector would get 3/5 of the commission and the city 2/5 of the commission. If the collector was only to receive 3% of the 5% commission on a ten dollar delinquent tax payment, he would only receive one and one-half mill for his services, but, if he received 3% of the ten dollar payment on back personal tax, he would receive thirty cents. Surely it was not the intention of the legislature to only allow one mill for the collection of a delinquent personal tax of ten dollars. In construing statutes of this nature, one must take into consideration the reason and the purpose of its enactment. The legislature in stating that the commissioner in addition should receive three per cent of the 5% penalty, surely must have intended that the collector should receive three per cent of the penalty and the city receive the balance of 2% of the penalty.

In the case of O'Malley v. Continental Life Ins. Co. 75 S. W. 2d 837, pars. 7,8, the court said:

"The conclusion just reached may find additional support in the proviso itself when it is considered apart from the con-

text. In the consideration of this clause we apply the rule that 'where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words and the meaning of a term may be enlarged or restrained by reference to the whole clause in which it is used.' 25 R. C. L., sec. 239, p. 995."

Under the above holding, in view of the fact that the legislature intended to pay an additional commission to the collector for the collection of delinquent personal taxes it could not be said that the legislature only intended that the collector should receive three per cent of the penalty.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the city collector of a city of the second class cannot be authorized by an ordinance of the city allowing him to collect a penalty of not more than five per cent upon delinquent real estate taxes, as set out in Section 6614 R. S. Mo., 1929, which section only applies to delinquent personal tax and ad valorem tax.

It is further the opinion of this department that the city collector of a city of the second class is entitled by ordinance to levy and collect not more than five per cent of the amount of the taxes which are delinquent as a penalty and the city collector may

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retain by ordinance three per cent of the penalty if permitted by ordinance and the balance of two per cent of the penalty should be paid into the city treasurer's office. This only applies to the case of personal taxes and ad valorem taxes.

Respectfully submitted,

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APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW