

TAXATION:

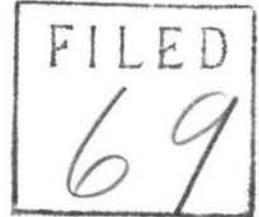
Penalties and interest on taxes may not be charged in cases where the taxpayer was unable to pay the taxes before they became delinquent on account of the death of the collector. Check is not legal tender for payment of taxes.

PENALTIES AND INTEREST:

-----

January 7, 1943

Miss Hazel Palmer  
County Collector  
Pettis County  
Sedalia, Missouri



Dear Miss Palmer:

This is in reply to yours of recent date wherein you submit the questions concerning:

1. The authority to charge and impose interest and penalties on delinquent taxes which were not paid before delinquent date on account of the death of the collector;
2. The authority of a person to receive taxes before he has qualified to act as collector; and
3. The payment of taxes by check.

From your statement of facts it appears that the Collector of that County died during the month of December, 1942, and that no person qualified to collect taxes in that County until after January, 1943, at which time taxes became delinquent.

Section 11075, R. S. Mo. 1939, which relates to a vacancy in the office of County Collector on account of the death of such collector, is as follows:

"In case of the death, resignation, removal or other disability of any county collector, during the time the tax books are in his hands, and before the time specified in this chapter for making settlements, the county clerk shall demand and take charge of the tax books. Said clerk shall appoint one competent person, the legal representatives of the collector may choose a second, and the sureties of the collector may choose a third, and the persons so appointed and chosen shall examine said tax books, and it shall be their duty to ascertain the amount remaining uncollected, and make out a correct abstract of the same. If the representatives or sureties of such collector shall fail or refuse to choose persons to make such examination, then the person appointed by the county clerk shall proceed to make the same and report the same to the county clerk: Provided, that should there be but a small portion of the taxes collected at the time of the death of the collector, then the amount actually collected shall be ascertained and the same books used in completing the collections."

Section 11076, R. S. Mo., 1939, which relates to the same subject matter, provides as follows:

"Whenever any collector shall die after he has received the tax book for any year, his legal representatives shall hand over at once to the county clerk the tax book, and shall also pay over to his successor in office, at once, out of the estate, all moneys which have been collected by the deceased collector and then in his hands."

Under Section 11076, supra, the books of the county collector are, upon the death of such collector, at once turned over to the county clerk. No duties are imposed upon, or authority granted to, the county clerk to collect any taxes upon these books.

Under Section 11075, supra, it is the duty of the county clerk, together with other persons named in that section, when he receives these books to ascertain the amount remaining uncollected and to make an abstract thereof.

Since no statutory provisions are made for any person to pay his taxes during the time from the date of the death of the collector until his successor is appointed, or elected, and qualified, then it would be impossible for the taxpayer to pay the taxes before they become delinquent if the delinquent date occurs during the interim in which there is no collector in office.

Under Section 11085, R. S. Mo. 1939, a penalty is imposed if the tax is not paid by January first after the taxes become due. This section reads as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer

who shall pay his taxes to the collector at any time before the first day of January in each year: Provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation. Whenever any collector of the revenue in the state fails or refuses to collect the penalty provided for in this section on state and county taxes, it shall be the duty of the state auditor and county clerk to charge such collectors with the amount of interest due thereon, as shown by the returns of the county clerk, and such collector shall be liable to the penalties as provided for in section 11099."

It will be noted that under this section the collector is liable for these penalties in cases where he fails to collect same.

In the case of State ex rel. Western Union Tel. Co. v. Markway, 341 Mo. 976, 981, the Supreme Court of this state recognized the rule that "equity follows the law" in tax matters. The court also said in that case, l. c. 979:

"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, l. c. 915, 38 S. W. (2d) 1021.) "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.

The rule of construction of statutes imposing penalties and interest is that such statutes shall receive a strict construction and nothing taken by intendment.

While Section 11085, supra, does impose a penalty in case taxes are not paid on January first, yet no provisions are made for a penalty in a case where the taxpayer fails to pay the taxes before delinquent date because there is no one to whom he can make payment. Applying the rule announced in the Markway case, supra, it might be held that the taxing authorities would not be authorized to impose a penalty where the state has no one to whom taxes could be paid to avoid penalties.

We think the rule announced in 61 C. J. page 1489, sec. 2134, would be applicable here. Said rule reads as follows:

"A penalty for nonpayment cannot be imposed until the taxpayer has had an opportunity to pay it and fails to do so within the full time allowed by law in which to make a voluntary payment; \* \* \* \* \*

Cooley on Taxation, Fourth Edition, Vol. 3, at page 2538, announces a rule which would be applicable in this case, we think, and which reads as follows:

"\* \* \* Interest or penalties cannot be imposed where the taxpayer could not pay the taxes because the collector refused to accept payment unless payment was also made of taxes erroneously assessed, or where, for other reasons, the state could not accept the tax. \* \* \* \* "

(Underscoring ours.)

In this case we have a condition in which it is impossible for the taxpayer to pay the taxes before delinquency because the state did not have any agency that could accept the tax.

On the question of the authority of the taxpayers to mail checks to you, as the newly appointed collector, before January first, to avoid penalties, will say that we do not find where that would relieve such taxpayers of penalties if they are liable for penalties. You would not be the duly appointed, qualified and acting collector and would not be authorized to accept monies in payment of taxes.

Section 11077, R. S. Mo. 1939, provides as follows:

"The new collector shall execute receipts in triplicate, to be attested by the clerk of the county court, for the tax book so delivered, and showing the amount already collected upon the same; also, receipts in triplicate for the amount of taxes collected by the deceased collector, from all sources, and paid over to him by the administrator or executor; one of each of which receipts shall be certified by the clerk to the state auditor, who shall thereupon charge the new collector with the balance of the state taxes due on the tax book, and the amount paid over to him by the executor or administrator of the deceased; another shall be filed in the office of the clerk of the county court, upon which to charge the new collector with the county revenue; and the third shall be given to the executor or administrator of the deceased collector."

In addition to this, you are required to execute a bond in compliance with the statute before you can qualify as collector and be authorized under the statute to perform the duties of the office.

On the question of what shall be received in payment of taxes we refer you to Section 11082, R. S. Mo. 1939, which is as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue for the year in which the warrant was issued over and above the expenses of the county or city for that year.

#### CONCLUSION

From the foregoing, it is the opinion of this department that:

1. Penalties and interest may not be imposed and inflicted for non-payment of taxes on January first, where the collector has died on or before December 31st, and no successor has been appointed and qualified.

Penalties and interest may not be imposed until the successor is duly appointed and qualified and then only at the next penalty date after such appointment and qualification.

2. A person, before being qualified to act as collector, is not authorized to accept checks for taxes and the tender of payment of taxes by check, or otherwise, would not relieve the taxpayer of the penalty, if any.

3. Checks tendered in payment of taxes do not constitute tender under the statutes.

Respectfully submitted,

TYRE W. BURTON  
Assistant Attorney-General

APPROVED:

---

ROY MCKITTRICK  
Attorney-General

TWB:CP