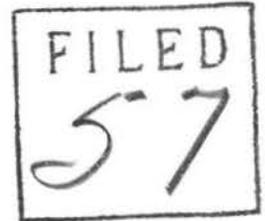


COUNTY COURT: Under Sec. 11118, R. S. Mo. 1939, until taxes on real estate have been paid and collected, whether delinquent or otherwise, county court has authority to correct errors in valuations, assessment and levy, and may order such levy changed to conform to the requirements of the law.

March 6, 1944



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your letters of January 27, 1944, and February 21, 1944, requesting an opinion from this department. Your letters of request read as follows:

"By a very careful audit, and by the use of outside evidence the office of the State Auditor in making a recent audit of the officers of Morgan County, found that in 1939, the office of Collector collected over \$600.00, which was never accounted for until the audit, and which was paid in but did not show on the books of the collector.

"The levy for interest and redemption fund for the bonded debt of Morgan County, Mo., was in excess, by the levy of May 1939, and the excess levy contrary to the constitution of Mo., was caught by the tax experts of the two railroads, and the two railroad only paid to the collector the actual amount of taxes due based on what seemed to be a more correct levy. Then the two railroad moved to have the tax records against their property corrected by making a sworn affidavit that there was an erroneous assessment and that the tax records be corrected to show what was assumed to be a more correct at least not an excessive levy. And the court did order the 'erroneous assessment' corrected, but which was

an excessive levy never paid into the county collector. This order was made in order that the collector could make a settlement and balance, because he did not collect what the railroads said was excess, and he only collected what they tendered.

"Then the books of the public railroads or public utilities and of all the public utilities was changed to show the reduced levy and all paid in full except the two railroads, and the excess of the other utilities was not paid in, until discovered by the State Auditors. And the county court reducing the tax amount, only named the two railroads that complained and tendered only the reduced amount.

"Now this is 1944, and in May 1943, under Sec. 11046 R.S. Mo. 1939 the county made a 50¢ per \$100.00 for county purpose levy, and which was in excess for the reason that the increase in levy could not exceed 10% over the previous years taxes. This time after the levy, all the public utilities figured the levy should have been .43 per \$100.00 valuation, because the valuation of the county was less than \$10,000,000.00 total assessed valuation, and all these public utilities just tendered and paid into the county collector .45 on the 100.00, and left a balance against the different public utilities uncollected. Now in Jan. 1944, all these public utilities petitioned the county court for an order to charge off these excess taxes, and make their application on the basis of an 'erroneous assessment'. It looks like this application should be for an illegal levy contrary to the Mo. Const. Herein are two sample petitions to correct erroneous assessments. The others are similar. Now, the collector wants the orders made so that he will not have to account for the excess taxes not collected, in order that his settlement will balance and will not be delinquent. The excess and illegal levy, if that be what it is, seems to not concern in the least, erroneous assessments, but erroneous taxation, or erroneous

levies. This remission is for money not paid into the county, and it looks like under Sec. 11215, R.S. Mo. 1939 only provides for levies paid in and which have been declared illegal by the Supreme Court.

"The County Court wants to know, and as their advisor, I want to know just how to handle such an application, based on the above and assumed facts. After reading Sec. 11118, R.S. Mo. 1939, it looks like maybe the county court can make some correction. The County Court being a court of record, how could it take an action on these petitions for erroneous assessments when other than land is involved and it concerns an illegal levy?"

"In your request for a more definition of the purpose of my question Jan. 27, 1944, in your letter of 2/18/44, I want to further state my request:

"The first three paragraphs in my letter of Jan. 27 deal with what happened in 1939, and which was discovered by the state auditors in auditing the books of the county collector. There the levy was excessive and evaded the constitution, because the levy exceeded the amount to be raised to pay the interest and redemption fund requirements to pay on the bonded debt of the county. In that case, only two railroads caught the excess levy, and they refused to pay only the amount of taxes necessary to pay the amount needed to pay the interest and principal that matured. And herein is attached an order that was prepared by the county collector or his deputy and which was approved by the county court to cover up what was actually done.

"All the tax books concerning the public utilities in the railroad book, were changed, to make the levy rate and the resulting taxes that the two railroads said was the correct levy and which would not be excessive. These books were changed, and the tax receipts in the office of collector was changed, by some one in the office of the

collector, and purportedly by authority of the order of the county court, said order being the one enclosed. But, the full amount of the taxes were collected for the levy originally fixed by the county court levy order, collection being made from these public utilities, and the checks paid by the public utilities and the receipts marked paid held by them showed all but the two railroads paid the original levy in full. Some one in the office of the county collector's office kept the difference between the original levy and the subsequent levy that was supposed not to be excessive for collection of taxes for the interest and redemption fund.

"Mr. W. A. Holloway can explain about this embezzlement in the office of the collector, if I have not made the plan clear.

"Now, my question is how to avoid a repetition of the above procedure. In 1943, the assessed valuation in Morgan County increased. The county was allowed to increase the levy for county purposes, from 40¢ to 50¢ per 100.00; but Section 11046 R. S. Mo. 1939, restricts the resulting increase to only 10% per year, that is, the county could not levy the full 50¢ per 100.00 valuation for county purposes, but must increase the levy gradually. See Sec., supra. But in May 1943 the county court did increase the levy to 50¢ per 100.00, from 40¢ per 100.00. The public utilities caught the excess of levy for county purposes, and said that the levy should have increased only 10% and should be about 43¢ per 100.00, instead of 50¢ per 100.00, and that the jump from 40¢ a hundred to 43¢ per hundred was the correct jump, and sent in only enough tax money to make 43¢ per hundred. This 43¢ being for county purposes.

"Now, these public utilities have filed petitions before the county court to make an order correcting the tax books, so that the tax books will show that the collector can collect only 43¢ per 100.00 valuation, instead of the 50¢ per hundred valuation,

such as his books show and which he is charged up with. I sent in copies of their petitions to correct an 'erroneous assessment.' The assessment was not erroneous. If anything, the levy was excessive. The county court wants to make an order so that if only the 43¢ is collected by the collector, then this excess of about 7¢ per hundred will be remitted, and the collector not charged, but in such a way that the original levy will not be collected against others, and then not accounted for, such as was done in 1939.

"The public utilities did not pay these excessive levies for county purposes into the hands of the collector, and these levies have not been declared illegal by the Supreme Court, such as are defined in Sec. 11215 R. S. Mo. 1939.

"Under these petitions to correct an erroneous assessment, would the county court have any legal right to make a correction of an excessive levy under Sec. 11118 R. S. Mo. 1939? Does that section cover excessive levies? And now, how should the order be written in order to make any correction?"

A brief statement of the situation set out in your letters of January 27, 1944, and February 21, 1944, is in order.

Morgan County levied taxes in excess of the amount necessary to pay the interest and redemption fund requirements on the bonded debt of the county. Morgan County has also been levying a rate for county purposes in excess of the rate provided in Section 11, Article X of the Constitution of Missouri, and Section 11046, R. S. Mo. 1939. In each instance a portion of the taxpayers have paid their tax in full, and in each instance a taxpayer has refused to pay the amount in excess of the constitutional limitations.

There can be no question but what Morgan County has the authority under the Constitution to levy taxes sufficient to pay the annual interest on funding bonds and whatever rate is

necessary to provide a sinking fund for the payment of the principal of the bonds as they become due.

Section 3282, R. S. Mo. 1939, provides as follows:

"Any county, city, village, town, township, parts of townships or school district, issuing its bonds for the purpose aforesaid, shall, at the time of issuing the same, provide in the express manner provided by law for the levy and collection of an annual tax sufficient to pay the annual interest on such funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due."

In the case of the excess taxes paid under the levy for interest and sinking fund on the bonded indebtedness of Morgan County, Section 11215, R. S. Mo. 1939, provides as follows:

"Wherever, in any county in this state, money has been collected under an illegal levy, the county court of such county or counties is hereby authorized to refund the same by issuing warrants upon the fund to which said money had been credited, in favor of the person or persons who paid the same as shown by the collector's books: Provided, that should the person in favor of whom any warrant or warrants are issued be dead or unable to appear in person, then the same shall be paid to his heirs or legal representatives: Provided further, that said county court or courts may, in their discretion, refund, in addition to the money collected, interest which may have accrued upon the same, not to exceed six per cent: Provided further, that before any levy shall be considered illegal, it shall have been so declared by the supreme court of the state of Missouri: Provided further, that the provisions of this section shall only apply to those counties in which the money collected under said illegal

levy is either in the county treasury or within the control of the county court:
Provided further, that the county court so refunding said money shall specify the time in which said money shall be refunded, and all warrants left on hand after the expiration of such time shall be by said county court canceled, and the money and interest turned into the school fund of the county."
(Emphasis ours.)

The payment of this illegal tax was a voluntary payment. Without such finding of the Supreme Court declaring the tax illegal, as provided in Section 11215, supra, the following rule applies. The rule is set out in the case of *Brewing Company v. St. Louis*, 187 Mo. 1. c. 376:

"It is a well-settled rule of law that money paid through a mistake of fact, may be recovered in an action for that purpose. (15 Am. and Eng. Ency. Law (2 Ed.), p. 1103, and cas. cit.) But this rule is subject to the qualification that the party paying must make the payment under a bona fide belief that the money is due. For if he did not believe he owned the money at the time he paid it, he can not recover it. (Idem, p. 1105.)

"This rule applies to payments to municipal corporations as well as to individuals. (20 Am. and Eng. Ency. Law (2 Ed.), p. 1158, and cas. cit.) But in all such cases the mistake must be one of fact and not of law, for all persons are deemed to have notice of the law. (Ibid.) An analysis of the cases relied upon by the plaintiff shows that they follow this rule, or else that there was an element of duress in the payment.

"The rule stated has been uniformly followed in this State in reference to all kinds of payments, including taxes, licenses, and claims, and the doctrine is firmly established that payments made with a full knowledge of all the

facts constitute voluntary payments and can not be recovered, and that mistake or ignorance of law gives no right to recover. (Walker v. St. Louis, 15 Mo. l.c. 575; Christy's Admr. v. St. Louis, 20 Mo. 143; Claflin v. McDonough, 33 Mo. 412; Couch v. Kansas City, 127 Mo. 436; Teasdale v. Stoller, 133 Mo. 645; Douglas v. Kansas City, 147 Mo. l.c. 437; see, also, 22 Am. and Eng. Ency. Law (2 Ed.), pp. 609 and 613.)"

This section will also apply to any payment of taxes in excess of the constitutional limits when the tax is for county purposes. The net result, therefore, is that before a refund can be made to a taxpayer, the tax must have been declared illegal by the Supreme Court of Missouri and the taxes must be in the possession or under the control of the county court.

A taxpayer of Morgan County, who refuses to pay taxes in excess of the legal rate, has filed a petition in the county court to correct an "erroneous assessment." This tax was a tax for county purposes. We agree with you that the question is not one of erroneous assessment but rather one of illegal levy. An erroneous assessment would involve an assessment, for example, on property exempt from taxation or property assessed at a higher or lower figure than is reasonable. That is not involved in this case. The assessment here was correct but the rate of levy was in excess of the constitutional limitation. Clearly the petition filed with the county court of Morgan County to correct an "erroneous assessment" should be denied. So the question is how and by what authority may the county court correct this situation.

The records of the collector will show a levy of 50¢ per \$100.00 valuation was made, and he has no authority to accept anything less than that. State of Missouri ex rel. Brewer, County Revenue Collector v. Federal Lead Co., 265 Fed. l. c. 309:

"There seems to be no Missouri statute conferring power on the collector to take a less sum in payment of the taxes charged to him on the tax books than the amount of such taxes as shown by such tax books."

Section 11214, R. S. Mo. 1939, authorizes the county court to correct erroneous assessments only. The only other authority that might be found in the statutes delegating power to the county court to correct errors in the levy of taxes is Section 11118, R. S. Mo. 1939. Said section reads as follows:

"In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon, the city council of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list or books, or otherwise, and to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

It will be noted that this section applies to taxes, whether they are delinquent or otherwise, and "until the same are paid and collected." While it is true that in the first portion of this section the word "levy" is used in connection with the word "assessed", the use of the word is entirely different as it next appears in this section. In fact, the county court is therein given power and authority to correct any errors which may appear in connection with any general or special taxes and "to make such valuations, assessment and levy conform in all respects to the facts and requirements of the law."

Provision has been made under the statutes for refund of taxes paid under an excessive and illegal levy, and it would seem logical that provision should be made in those cases, as here, where there is an excessive levy and the tax has not been paid. That seems to be the purpose of Section 11118, supra.

This construction is further strengthened by a statement by Judge Ellison in State ex rel. Merritt v. Gardner, 148 S. W. (2d) 1. c. 784:

"There is another statute, Sec. 11118, R.S. 1939, Sec. 9946, R. S. 1929, Mo. Stat. Ann. Sec. 9946, p. 7989, Laws Mo. 1933, p. 424, which appellant seems to have overlooked. It authorizes the county court (not the county board of equalization) in its discretion to correct any errors which may appear in connection with the assessment and levy of taxes, including those of valuation, whether the taxes be delinquent or not, until they are paid or collected, with all costs. We are not called upon here to construe this statute; but suggest that appellant may possibly obtain relief from the county court thereunder if the assessment complained of is as oppressive as his petition alleges. See State ex rel. Brewer v. Federal Lead Co., D. C. 265 F. 305; State ex rel. Teare v. Dungan, 265 Mo. 353, 373, 177 S. W. 604, 610 (5)."

It is true that the above statement is dictum and it seems to be in direct conflict with the decision rendered by Judge Shain of the Kansas City Court of Appeals in School District No. 46 v. Stewartville School District, 110 S. W. (2d) 399, 232 Mo. App. 631. However, it seems more reasonable to believe that the statutes would make provision for both situations, that is, where the tax has been paid under an excessive levy and where the tax has not been paid under an excessive levy, than to interpret the statutes as providing for only one of the above mentioned situations. For that reason we are inclined to adopt the suggestion made by Judge Ellison in the

Gardner case, in preference to the opinion in the School District case, and consider that Section 11118, supra, authorizes the county court to make an order changing the rate of levy on real estate to correspond with the law.

We find no statute authorizing the county court to make any correction of a levy in cases where personal property is involved.

We do not have under consideration the legality of a levy of 43¢ per \$100.00 valuation for county purposes in Morgan County, nor do we have any suggestions concerning a method to compel the county court in the future to levy a legal rate.

The above and foregoing constitutes the opinion of this department.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General

RCL:HR