

TAXATION: Penalty for delinquent state and county property taxes should not be assessed on property owned as tenants by the entirety, where such delinquency occurs during period that husband is absent from his home and engaged in the military service of this state or of the United States.

JOHN M. DALTON
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July 7, 1953

John C. Johnsen
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Honorable Harold W. Barrick
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Barrick:

This is in response to your request for opinion dated June 9, 1953, which reads, in part, as follows:

"At the request of Miss Hazel Palmer, County Collector of Pettis County, I hereby request an official opinion from your office on the following question:

Can a penalty be waived by the county collector on property taxes assessed against property held by the entirety by a service man and his wife where the service man was on involuntary active duty and has just returned?"

The question submitted involves the interpretation of Section 139.100, RSMo 1949, the pertinent portion of which reads as follows:

"1. 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 140.100.

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"2. 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; * * *"

The comparable section under the 1939 revision (Sec. 11085, R.S. Mo. 1939) was construed in an opinion of this office dated October 18, 1945, and directed to the Honorable Forrest Smith, State Auditor, Jefferson City, Missouri, a copy of which we enclose. Section 11085, R.S. Mo. 1939, was amended, following the rendition of the above-mentioned opinion, in the Laws of 1947, Vol. II, page 425, but the amendment does not alter the conclusion reached therein.

The conclusion of the 1945 opinion was that the collector of state and county taxes should not charge any penalty, as provided in Section 11124, R.S. Mo. 1939 (Sec. 140.100, RSMo 1949), against any taxpayer during the period that the taxpayer is absent from his home and engaged in the military service of this state or of the United States. Since the pertinent statutory provisions are the same now as they were at the time of the rendition of that opinion, we hereby reaffirm the conclusion reached therein.

As we understand the question submitted by you, the only difference that exists between the situation that you have presented to you and the general problem that was analyzed in the 1945 opinion is that under your set of facts the serviceman in question owned the property against which the tax was assessed as a tenant by the entirety with his wife. In our opinion that fact would not alter the conclusion reached in the 1945 opinion.

The nature of the tenancy under a tenancy by the entirety is such that neither the husband nor the wife have any separate interest in the property so owned. In *Brewing Co. v. Saxy*, 273 Mo. 159, l.c. 163, the court so construed the tenancy:

"In *Garner v. Jones*, 52 Mo. 68, it was said:

"At Common law a conveyance in fee to husband and wife, of real estate, created a tenancy

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by the entirety. But being one person in law, they took the estate as one person. Each being the owner of the entire estate; neither of whom had any separate or joint interest, but a unity or entirety of the whole. * * *

Again, Mo. l.c. 170, the court said:

" * * * we conclude that where a judgment and execution thereon are against a husband alone, not including the wife, such judgment and execution cannot affect in any way property held by them by the entirety, nor can it affect any supposed separate interest of the husband therein, for he has no separate interest."

It necessarily follows that if the husband has no separate interest in the property held as tenants by the entirety neither does the wife. Therefore, any assessment of a penalty for delinquency in the payment of taxes on property held as tenants by the entirety would necessarily be an assessment against both the husband and the wife. In view of the proviso contained in Section 139.100, supra, it is our conclusion that such an assessment of a penalty for delinquent taxes cannot be made.

We do not believe that this can properly be referred to as a waiver of the penalty by the county collector. The word "waive" is defined in Black's Law Dictionary, Second Edition, as follows:

"In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong."

In the situation presented, and under the conclusion reached, the county collector did not have the opportunity to assess the penalty otherwise provided for delinquency of property taxes because Section 139.100, supra, says 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." (Emphasis ours.)

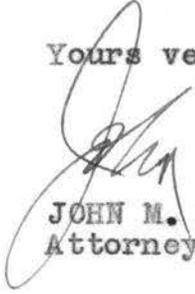
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CONCLUSION

It is the opinion of this office that the penalty for delinquent property taxes provided for in Section 140.100, referred to in Section 139.100, RSMo 1949, should not be assessed on property owned as tenants by the entirety, where such delinquency occurs during the period that the husband is absent from his home and engaged in the military service of this state or of the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John W. English.

Yours very truly,



JOHN M. DALTON
Attorney General

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