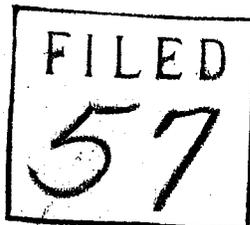


TAXATION, County not liable for Federal Withholding Tax if
COUNTIES: withheld tax is not paid to county.



June 14, 1954

Mr. Frank M. May
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

You have requested an opinion in regard to the payment of federal withholding tax on the salary of deputy recorders. The pertinent part of your request is as follows:

"The local representative of the Director of Internal Revenue has presented a bill to the County Court for payment of Withholding Tax for employees of the late Mr. Robinson for the calendar quarters ending September 30, 1953 and December 31, 1953. Withholding Tax has always been paid in the past by the Recorder personally, and it would appear that the clerks in that office were employees of the Recorder rather than of St. Francois County.

"However, since any surplus over the statutory fees of the Recorder, and his office help, is supposed to be turned over to the County, perhaps the County can be held responsible for this Withholding Tax.

"The County Court of St. Francois County will not hesitate to pay this Withholding Tax to the Federal Government, provided it is proper for them to do so under the circumstances outlined above.

"The question to be determined then is this: Are the Clerks in the office of the Recorder

Mr. Frank M. May

of Deeds employees of the office-holder, in which case the office-holder or his estate is liable for payment of Withholding Tax, or are there clerks employees of St. Francois County, in which case it is proper for the County Court to pay Withholding tax on the wages earned by said clerks?"

In addition to the above we refer also to your supplemental letter dated May 22, 1954 which is as follows:

"No funds were ever turned back into St. Francois County as a surplus over the allowed amount by the late Forrest Robinson during any quarter of the year 1953.

"No money was ever withheld from the pay of Mr. Robinson's deputies for Federal Income Tax, or for any other purpose.

"I hope this information will clear up any misunderstanding that might exist in this matter."

It is provided in RSMo 1949, Section 59.250 as follows:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of four thousand dollars except those set out in section 59.490, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

It must be noted here that this above-quoted Section has been re-enacted by Missouri Revised Statutes, Cumulative Supp. 1953, A. L. 1953, S. B. 42, which reads as follows:

Mr. Frank M. May

"1. The recorder of deeds in counties of the third class, wherein there is a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received. He shall make a report thereof each year to the county court.

"2. All other fees over and above the sum of four thousand seven hundred fifty dollars, for each year of his official term, seven hundred fifty dollars of which shall be compensation for the performance of duties imposed by section 59.365 and four thousand dollars for other duties imposed by law, shall be paid into the county treasury after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary."

Both of the above sections are cited inasmuch as the 1953 section became effective during the time encompassed by the withholding periods stated.

In regard to whether the employer is to be considered the recorder or the county, it is believed that the language of our Supreme Court decides the question. In the matter of State ex rel. Vernon County v. King, 136 Mo. 309 l.c. 318, Judge McFarlane stated as follows:

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court."

and at l.c. 319-320:

"We are of the opinion, therefore, that

Mr. Frank M. May

the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amount so paid; and, if such credit had been given, there would be, at most, but a small amount, if anything, due the county."

The Federal statute law in regard to the responsibility for the withholding and for the payment of income taxes is to be found in Title 26, USCA and it is believed that the applicable law as to political subdivisions is contained in Title 26, USCA, Section 1624 which is as follows:

"If the employer is the United States, or a State, Territory, or political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, the return of the amount deducted and withheld upon any wages may be made by any officer or employee of the United States, or of such State, Territory, or political subdivision, or of the District of Columbia, or of such agency or instrumentality, as the case may be, having control of the payment of such wages, or appropriately designated for that purpose."

In regard to the collection of income taxes at source the liability of the "employer" is stated in Title 26, Section 1623 as follows:

"The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment."

Mr. Frank M. May

From the foregoing it may be noted that the control of the payment of the wages is a condition on which the Federal law fixes the duty to collect Federal taxes.

In regard to the liability of such a collector the Circuit Court of Appeals in the matter of USF and G Company v. United States, 201 Federal 2d 118 at l.c. 120, states as follows:

"Thereafter there remains only his liability for the tax which he has collected. That is the tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

And in Merrick v. Hoffman, 205 Federal 2d 365, l.c. 368 it is stated:

"But withholding taxes are income taxes which the employer must deduct from the wages of employees and for the payment of which the employer is liable to the government."

The last two above quotations serve to indicate the responsibility for payments of withholding taxes to the collector of revenue and establish that the taxes are the liability of the employer, the employer who pays the salaries.

Since the foregoing authorities seem to establish the responsibility upon the recorder as an employer and as the person charged by law with the withholding of taxes from the wages which he pays, the responsibility it is believed cannot be considered to shift to the county in the event the withholding was not made, or as said in the supplemental letter, no settlement was made with the county into which if it had been withheld the withheld portion could have been intermingled.

In further consideration of the question of the liability of the county for withholding tax of deputy recorders it is thought that one further Federal statute is involved here. Title 26, Section 3661 provides as follows:

"Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over

Mr. Frank M. May

to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose."

The county, in accordance with the supplemental letter received no funds whatsoever from the recorder. There could have been no such special fund in trust for the United States. No such funds were ever withheld.

CONCLUSION

It is therefore the opinion of this office that in accordance with the Federal Statutes, Federal Withholding Tax is required to be withheld by a recorder of deeds of a third class county from the salaries, fees and emoluments paid to deputy recorders. The county is not liable for the tax in the event he fails to withhold from the salaries of his deputies when he has paid no funds into the county from his office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James W. Faris.

Yours very truly

JOHN M. DALTON
ATTORNEY GENERAL

JWF:A