TAXES: Legislature has a right to remit penalties accruing under Section 9914, Revised Statutes 1929, and similar sections.

February 1, 1933

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Senator M. E. Casey
Missouri Senate
Jefferson City, Missouri

Dear Senator:

As we understand the question submitted by you to this office for answer is:

"Can the additional tax penalty or interest as the same are interchangeably used in Section 9914, Revised Statutes Missouri, 1929, be legally forgiven and the same ordered cancelled and stricken from the tax books by the legislature."

In the case of Morgan's Railroad and Steamship Company v. Louisiana, 118 U. S. 455, 30 L. Ed. 237, the Supreme Court of the United States said:

"A tax is defined to be a contribution imposed by Government on individuals for the service of the state".

Article 10 of the Constitution of the State of Missouri, authorizes the taxing power to be exercised by the General Assembly, counties and other municipal corporations, such taxes to be levied within the limits fixed by Article 10 of the Constitution and the amendments thereto.

Article 6, of Chapter 5, of the Revised Statutes of Missouri, 1929, provides for the levy, assessment and collection of taxes in the State of Missouri by the various authorities or bodies authorized to levy, assess and collect same. Subsequent sections provide when taxes shall be paid, and Section 9914 Revised Statutes Missouri, 1929, 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, of one per cent. per month upon all taxes collected by him after the first day of January, as aforesaid; and in computing said additional tax or penalty, a fractional part of a month shall be counted as a whole month. 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 9938".

The Supreme Court of this state in Bank v. Wooston, 176 Mo. 49, 62, discussing Section 9235 Revised Statutes 1899, now being Section 9914 under consideration, held:

"The laws of this State (Sec.9235 R.S.1899) prescribe that if any one fails to pay his general taxes before the end of the year,"an additional tax, as penalty, of one per cent per month" shall be added. The section then says that "said additional tax or penalty" shall apply to a fraction of a month, and then adds: "Provided,however, that said interest shall not be chargeable against persons who are absent from their homes," etc."

"It will be observed that the one per cent a month, is first called "an additional tax as penalty" and then it is called "said additional tax or penalty", and finally it is called "said interest," thus showing the looseness of expression that may be employed in the same section of the same statute when referring to the same matter. But the term employed does not change the character of the imposition. It is not an "additional tax" at all, for regarded as a tax it would or possibly might be illegal, because the full amount of taxes that the Constitution permitted had already been levied. It is not "interest" in any proper sense, because it is a penalty imposed for a failure to discharge a duty that can be lawfully demanded."

The Supreme Court in the last mentioned case makes a clear distinction between the tax that has been levied under the constitution and by a body authorized to do so, and a penalty fixed for failure to pay such taxes when and at the time the laws of the state provide that they shall be paid.

That interest on a tax or penalty for failure to pay same is not any part of the tax, it is held in Henry v. McKay, 3 Pacific (2nd) 145, 151, the Supreme Court of the State of Washington holding:

> "The general principle of the law on the subject is entirely clear. The repeal of a penal statute puts an end to all prosecutions under it. Sedg.on Stat. Const.Law 129 *** In view of this rule, I have not been able to perceive any ground on which to sustain this demand for the penal interest. It has always been held that interest does not inhere in a tax as a legal incident. City of Camden v.Allen, 2 Dutcher (26 N.J.Law) 399. This twelve per cent. has no existence, then, except by virtue of the act of 1862, and when that act was repealed, it fell with it. If that statute, instead of directing its collection by force of the tax warrant, had authorized a suit to be brought, such suit, by the repeal of the act, according to the cases referred to, would have fallen in any of its stages anterior to final judgment. The reason for this, given in the books is, that at the time of judgment a right to the penalty must exist, which cannot be the case unless the statute is alive which created it. It is not to be denied that this same objection applies with full force at the present time when this court is asked to compel the payment of this penalty, which, under existing circumstances, has no statutory basis whatever. My first impression was, that this interest might be regarded as a mere incident to the tax, and that in this mode its existence might be continued. But the defects of this theory are two-fold: first, the twelve per cent.is a penalty, and not a mere incidental part of the sum to be paid; and, in the next place, even if it should be regarded as an incident, it is altogether a statutory incident, and consequently would expire with the law from which it proceeded."

Along the same line and with particular application to Section 51 of Article 4, of the Constitution of the State of Missouri, with reference to the release or extinguishment of indebtedness, liability or obligation to the State of Missouri, the court of civil appeals of Texas in Pioneer Oil and Refining Company, et al, v. State, 273 S.W.615,618,said :

"The rule is well settled in this state "that a tax due by a citizen to a city is not technically a debt, nor is his obligation to the city to pay it, a contract, though the weight of authority is to the effect that the liability is a personal one and an action of debt can be maintained for its collection". City of Henrietta v. Eustis, 87 Tex. 14, 26 S. W. 619, and authorities there cited.
This rule, of course, applies alike to an occupation tax due the state as it does to a municipal ad valorem tax due a municipality. We cite the rule here, and the fact that appellants had not reported the taxes in question for the purpose of showing that they had not by their acts become in any way obligated to pay the taxes other than as the provisions of the law authorizing the tax imposed liability. We also cite it for the purpose of showing that our courts have not considered the mere statutory right to collect a tax in the nature of a vested right, the repeal of which is inhibited by the constitutional provision in question. The court in the case of Ollivier v. City of Houston, supra, quoted this rule with approval, but held it inapplicable to the facts in that particular case.
To hold, as contended for by the state, that this provision of the Constitution inhibits the Legislature from ever forgiving a tax, or extinguishing the right of the state to collect a tax authorized and accrued under a repealed law, would be nothing less than rendering nugatory and void the rule expressly adopted by our Supreme Court in at least three cases in which it is expressly held that the repeal of a tax measure, without a saving clause, terminates the right to collect taxes thereunder".

Since the provisions of Section 9914, supra, are in the nature of a punishment to the taxpayer for failing to observe the mandates of the statutes with reference to the time when taxes should be paid, and it being in the nature of a penalty only and being no part of the body of the levied and assessed tax, and the Legislature having the right to enact the penalizing section in the first instance, has the same right to repeal it provided that the bill seeking to do so is otherwise constitutional.

The general rule applicable to the question submitted is stated in 6 R. C. L. Page 317, Section 306:

> "Where a penalty has been imposed by law the legislature has the general power to repeal it entirely, or to limit the cases in which it is recoverable, although at the time there is an action pending which has been brought for its recovery".

And again on the same page:

> "Such a case presents simply a question of the power of the sovereign by whom the penalty was imposed to remit it, or to repeal the law imposing it, at discretion, and does not involve the impairment of any obligations of the contracts of individuals or the divestiture of individual rights of property".

Neither would the suggested legislation violate sub-sections 22 and 32 of Section 53 of Article 4 of the Constitution of Missouri, with reference to the prohibition against the enactment of special or local laws remitting penalties, if the proposed legislation applies alike over the entire state to the class affected. In City of Springfield v. Smith, 19 S. W. (2) 1, the Supreme Court of this state said:

> "It is well established in this state that a law is not a special law if applied to all alike of a given class, provided the classification thus made is not arbitrary or without reasonable basis".

If the inquiry made has reference to House Bill Number 33 now pending before the Missouri Legislature, your attention is drawn to the case of Bank v. Roesten, 176 Mo. 49, 62, supra, in connection with the wording of House Bill Number 33.

Again we suggest that if the inquiry has reference to House Bill Number 33, that the bill should likewise cover penalties accruing by virtue of Section 10152 Revised Statutes Missouri, 1929, so as not to violate Section 53 of Article 4 of the Constitution of the State of Missouri.

We are of the opinion that the legislature has the authority to remit and order cancelled and stricken accrued penalties under Section 9014, when such legislation applies uniformly over the state to the class affected and if a judgment has not been

rendered for such penalties.

Very truly yours,

GILBERT L[illegible]
Assistant Attorney General.

APPROVED:

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Attorney General.

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