

COUNTY COLLECTORS: Monthly reports required; liability for failure to make.

July 13, 1943

Hon. J. R. Gideon
Prosecuting Attorney
Forsyth, Missouri



Dear Sir:

We are in receipt of your letter of July 5, 1943, requesting an opinion, which letter is as follows:

"The Collector of the Revenue of Taney County, failed to file his verified statement for collections made during the month of February, 1943, until the 25th day of June last and failed to pay the taxes collected during said month into the County Treasury until the said 25th day of June. That on said last mentioned date he paid the taxes collected for said February, into the County Treasury taking a receipt from the County Treasurer therefor and also filed his verified statement with the County Clerk.

"Since the Collector failed to comply with Section 11098 R. S. Mo. 1939, by failing to file his verified statement of collections made and by failing to pay over to the County Treasurer said collections on or before March 15th, 1943, would said Collector be subject to the forfeiture and penalty provided for in Sections 11099 and 11104 R. S. Mo. 1939, since the money has been paid and receipt taken?

"The county court of this county wants to know if they would be justified in ordering a suit filed to recover such forfeiture and penalty as provided in the two sections of the statute last above mentioned."

Section 11098, R. S. Mo. 1939, requiring the making of monthly statements and payments, is as follows:

"Every county collector and ex officio county collector, except in the city of St. Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector."

The Supreme Court in the case of State ex rel. Stephens v. Wurdeman, 295 Mo. 566, in referring to the word "shall," said:

"Usually, the word 'shall' indicates a mandate, and unless there are other things in the statute it indicates a mandatory statute."

In the case of State ex rel. Douglas County v. Alsup, 91 Mo. 172, 4 S. W. 31, the court held that a collector of county taxes, who is not a defaulter, is entitled to commissions upon his collections and thereby inferentially held that he would not be entitled to these commissions if he were a defaulter.

Section 11099, R. S. Mo. 1939, provides penalty for failure to make monthly statements and payments, and is as follows:

"If any county collector, or ex officio county collector, shall fail or refuse to pay the taxes and licenses into the state and county treasuries, as provided in the preceding section, he shall forfeit his commissions thereon, and in addition thereto shall pay a penalty of ten per cent on the amount thereof, and it shall be the duty of the state auditor to issue a distress warrant for such state taxes and penalties within thirty days, as provided by law. It shall be the duty of the prosecuting attorney to proceed, within thirty days, to collect such county, school, road and municipal taxes by suit on the official bond of such defaulting collector."

In the case of State of Missouri, ex rel. Brewer v. Federal Lead Company (D. C.) 265 Fed. 305, the court held that where the collector fails to make statement with the county court on the last day of his term, or fails to make payments on the settlement to the county treasurer, both he and his bondsman become liable. This section (Section 11099, supra) is a penal statute and, therefore, must be strictly construed.

In the case of Judson v. Smith, 104 Mo. 61, l. c. 73, the court said:

"There is no canon of construction more rigidly and universally followed than that which requires statutes prescribing summary remedies, remedies in derogation of common law and common rights, to be strictly or literally construed. Touching this point an eminent law-writer says: 'A summary distress warrant against the collector and his sureties can only be awarded where the bond is in accordance with the statute, and where all the statutory conditions exist. The process being extraordinary and in derogation of the common law, the steps leading to it must all

have been taken; and, if it is issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser. The liability is strictissimi juris, and cannot be extended a single step beyond the statutory permission. The same remark may be made of the case of application for judgment on motion. The statute must be strictly pursued, as the ordinary legal intendments do not apply in aid of the proceedings in such a case. But, where the statute has been strictly pursued, the summary remedies have been sustained by the courts without hesitation.' Cooley on Taxation (2 Ed.) 719, and cases cited. To the same effect, see 2 Desty on Taxation, 762, 763, 1034, 1043.

"It only requires a very cursory examination of the warrant issued herein, and the statutory provisions already set forth, to see, at once, that those provisions have not been complied with, either strictly or substantially.

"The governing idea of the statute under discussion is the enforcement of prompt payments of the public revenues. Instead, however, of this being done, there was no exaction of monthly payments as required by the statute, nor was the warrant in question issued by the auditor until some eighteen months after Reddick, the collector, went out of office. More than that, the warrant itself does not comply with, nor conform to, the form given by section 7569; because that section is framed for the collection of the revenue but for a single year, and not for former years, as is the case with the present warrant."

The above case, however, referred to distress proceedings by the State Auditor, which are in the nature of ex parte pro-

ceedings and, therefore, would be more strictly construed than a suit on bond as authorized under Section 11105, R. S. Mo. 1939, which will be hereafter referred to.

Section 11104, R. S. Mo. 1939, provides for a penalty for failure to make payment of taxes in the time and manner prescribed by law. It seems as if the collector can be proceeded against under either one of these penalty sections.

Section 11102, R. S. Mo. 1939, provides further penalty against the collector for failing to deposit the revenue as required by law, which section is as follows:

"For every failure of the collector to deposit the revenue, as required by this chapter, he shall forfeit to the state the sum of five hundred dollars, to be recovered of him or his sureties by suit on his official bond, and the auditor shall direct the prosecution of such suit immediately on the occurrence of such failure."

Section 11105, R. S. Mo. 1939, provides the manner of procedure against a defaulting collector, which section is as follows:

"If any collector shall fail to pay into the county or state treasury the amount of taxes or revenue by him collected, due the state or county, respectively, at the times and in the manner by this chapter required, he and his sureties shall be liable to pay ten per cent per month upon the amount which he shall so fail to pay, as a penalty; and in case of such refusal, notice may be served upon such collector in default and his sureties, informing them that at the next term of the circuit court of the county a motion will be made to said court for a judgment against such collector and his sureties, for all sums of money due from him to the state or county, as the case may be, at time of

making such motion, together with the penalty aforesaid. The circuit courts of this state are hereby vested with power and jurisdiction to hear and determine all such motions and proceedings at the first term at which such motions may be made. The judgments rendered by the court under the provisions of this section shall have the same force and effect, and be enforced in the same manner, that other judgments in the circuit courts of this state are enforced. Proceedings under this section shall be in the name of the state or county, as the case may be. Such notice may be served by any constable, coroner, or other person who would be a competent witness, and shall be served at least five days before the motion is made. The court shall have power to compel the production of all books, papers, records and other documents in the possession of the collector or others, to be used as evidence in the cause."

It will be particularly noticed that this section provides the procedure when the taxes collected are not paid over "at the times and in the manner by this chapter required."

In the case of Wimpey v. Evans, 84 Mo. 144, the court held that proceedings under this section for failure to pay moneys collected as required by law is not ex parte and may be resorted to after the expiration of the collector's term as well as during his term.

We note that Section 11099, supra, provides that "it shall be the duty of the prosecuting attorney to proceed, within thirty days, to collect." However, it does not appear that this provision is a limitation on the right of the county to sue on the collector's bond.

CONCLUSION

It is our opinion, therefore, that under the plain language of Section 11098, supra, the collector has defaulted

July 13, 1943

and, therefore, forfeited his right to his commissions on the money on which he defaulted as provided in Section 11099, R. S. Mo. 1939, and has become liable for the additional penalty therein provided.

It seems also that the penalty provided in Section 11102, R. S. Mo. 1939, is cumulative and may also be recovered if the action is brought in the name of the State instead of the county.

In addition to the common law right to sue the collector on his bond the statutes provide two other statutory proceedings. One is by distress warrant, provided for in Section 11099, supra, and the other is the procedure provided in Section 11105, supra.

Respectfully submitted,

LEO A. POLITTE
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

LAP:CP