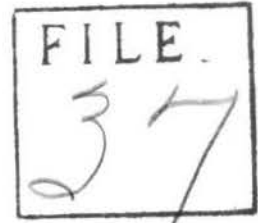


TAXATION:
COLLECTING MERCHANTS
AND MANUFACTURING
TAX:

Collector must bring suit on merchants
and manufacturing bond before he can
obtain credit for tax.

February 10, 1942

Hon. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Mr. Harned:

This is in reply to your letter of recent date
wherein you request an opinion from this department upon
the following statement of facts and questions:

"I am writing you to request your opinion on
Section 11322 R. S. Mo., 1939

"Is it necessary that the Collector of Revenue file suit and take judgment against
the defendant before he has exercised due diligence?

"In other words, how far does the collector
have to proceed to exercise due diligence?

Section 11322 R. S. Mo., 1939 is as follows:

"The County Court, at each regular term
thereof, shall settle and adjust the ac-
counts of the collector for licenses de-
livered to him, giving him credit for all
blank licenses returned, and charging him
for all licenses not returned, according
to the statement required to be filed by
the person having license, and the state-
ment of the bonds required to be returned:
Provided however, that when the collector
shows that he has exercised due diligence
to collect outstanding merchants taxes

against the merchant and upon his bond or bondsmen and that the same is uncollectible, the county court, upon a showing of said facts may allow the collector credit for the amount thereof."

Section 11306 R. S. Mo. 1939 requires each merchant to execute a bond for the payment of his merchant's tax before such person may receive a license to do business.

Under section 11315 if such merchant fails to pay to the collector the amount of his merchant's tax due, then such bond is deemed forfeited and judgment shall be rendered for the collector in double the amount of the tax and costs.

If the merchant fails to file a statement of his goods as is required by Sec. 11309 then the bond is deemed to be forfeited and judgment shall be rendered for triple the amount of such revenue and costs.

If such merchant files a false statement then under Section 11317, his bond is forfeited and judgment shall be rendered for four times the amount of revenue due.

Section 11318 R.S. Mo., 1939 reads as follows:

"Upon the forfeiture of any bond as provided, it shall be the duty of the collector of the proper county to institute suit without delay, by some attorney to be selected by him, upon the bond forfeited, against the principal and all sureties, jointly or severally, as may be deemed advisable; and the court in which the judgment shall be rendered shall, if judgment shall be for the plaintiff, tax as costs in the case to be collected and paid as other costs, a reasonable fee in favor of the attorney prosecuting the action."

This section requires the collector to proceed without delay to institute suit on the merchant's bond which has been forfeited for any of the reasons hereinabove set out.

Said section 11322 R.S. Mo., 1939, authorizes the county court to give the collector credit for merchant's taxes

which he has been unable to collect, provided he can show that he has exercised due diligence in trying to collect such tax.

Just what is "due diligence", is the question here.

"Due diligence" in collecting a note has been defined in Words and Phrases, Permanent Edition Volume 13, as follows:

"'Due diligence,' within the principle that the blank indorsement of a note implies that the same shall be collectible by due diligence, imports not only a demand, but an attempt to collect by legal process."

"'Due diligence' by assignee of note in attempting to collect from original maker does not consist in merely constituting suit against maker and prosecuting it to judgment, but execution must be obtained and regularly returned."

"Under a statute providing that the assignee of a note, having used due diligence, shall have an action against his immediate indorser, it is held that the phrase "due diligence" must be taken to mean prompt employment of the means which the law affords for the enforcement and collection of debts due and payable."

Since the law contemplates that every person shall bear his share of the tax burden, and since our lawmakers have set up a system for the collector, to follow in collecting merchant's taxes, and since it requires the officer to proceed without delay to obtain a judgment of forfeiture of the bond, then it would seem that "due diligence" would require the collector to proceed by suit in accordance with the foregoing statutes, before the county court would be authorized to give him credit for a merchant's tax, which he reports uncollectible.

CONCLUSION

It is therefore the opinion of this department that

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the collector, in order that he may show that he has exercised due diligence to collect outstanding merchant's taxes, for the purpose of being allowed credit for such taxes that he has been unable to collect, he must show that he has filed suit for the forfeiture of such merchant's bond, obtained judgment thereon, requested execution be issued thereon and that execution has been returned nulla bona.

Respectfully submitted

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APPROVED:

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