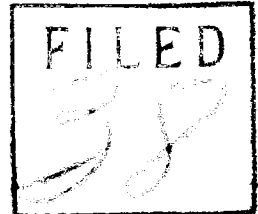


TAXATION:  
COLLECTOR OF REVENUE:  
RECOVERY OF EXCESS COMMISSIONS:  
WHO MAY BRING SUIT FOR:

The county is not authorized  
to bring suit for excess com-  
missions paid to the collector  
by taxpayers.

January 4, 1940



Honorable Charles E. Hassett  
Prosecuting Attorney  
Henry County  
Clinton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you state that the county collector of that county has apparently collected commissions on taxes in excess of that authorized by law; that he is taking the position that the act reducing his commissions was passed during his term of office and that under the Constitution his salary cannot be changed and for that reason he is entitled to collect commissions under the law which was in effect at the time he was elected. You state that this excess, if it be an excess, has been collected from a large number of taxpayers and you request the opinion from this office on the following question:

"I would like an opinion from your office informing me whether or not the county could in any manner be construed as a real party in interest or whether there is any procedure by which the county could present a class suit for the benefit of these taxpayers."

On the second part of your request pertaining to the disbursement of school moneys by the county collector and of whether or not he is entitled to commissions thereon, I find that this office, on February 26, 1937, by an opinion to Honorable Forrest Smith, State Auditor, written by Mr. Harry G. Waltner, Jr., Assistant Attorney General, has covered this question. I am enclosing a copy of that opinion for your information.

Going back to your first question on whether or not the county court would be authorized to bring the suit for the taxpayers who have apparently paid excess commissions when they paid their taxes, we find that county courts and counties are limited in their powers to the provisions of the Constitution and statutes. Section 2078, R. S. Missouri 1929, only authorizes the county court to control and manage the property belonging to the county, so it would seem from this section that the county court would not be authorized to bring this suit for the aggrieved taxpayers.

Section 36 of Article VI of the Constitution of Missouri provides as follows:

"In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Under this section we do not think through the county court it would be authorized to bring a suit in which the county was not interested.

Section 9927, R. S. Missouri 1929, requires the county collector to make a monthly statement to the county court and to pay into the treasury all moneys received belonging to the county, but it will be noted that this section provides that the collector is not required to include in his payment into the county treasury his commissions.

Section 9935, R. S. Missouri 1929, which has been amended in 1933, 1935 and 1937, provides for the commissions which the various county collectors of the state may retain for their services.

Section 9934, R. S. Missouri 1929, provides

for the proceedings against a county collector who fails to pay into the state or county treasury the amount of taxes or revenue collected by him which are due the state or county. This section does not provide for any procedure against the collector in case he collects an excess commission from a taxpayer.

On the question of a member of the public recovering excess fees collected by a public officer, we find the rule stated in Volume 46 Corpus Juris at page 1031, Section 286:

"A payment exacted by and paid to a public officer in excess of his legal fees in order to obtain the performance of his official duty, to which the payor is entitled without such payment, is compulsory, and may be recovered back; and in such a case it is not necessary that the payor should have protested against the payment. So, where fees are wrongfully exacted under an unconstitutional statute, they may be recovered as involuntarily paid. But where illegal fees are claimed as a matter of right by an officer, and are paid to him voluntarily, after his term of office has expired, and with full knowledge of the facts, they cannot be recovered."

It will be noted that the reasons given in the foregoing rule for recovery of such excess payments is that the member of the public who makes such payment is making it under compulsion and that it would not be necessary for such party to show that he had protested against paying such excess charges.

On the question of parties to a suit bringing an action by class representation, we think the rule is stated in Volume 47 Corpus Juris at page 40, Section 79 as follows:

"The code rules as to parties to an action usually contain the provision that 'where the question is one of a common or general interest of many persons or where the persons who might be made parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.'"

This rule is again stated in 61 Corpus Juris, page 1001, Section 1278:

"\* \* \* \* \*

"One of a number of taxpayers who have paid illegal taxes may sue to recover on behalf of himself and the others, under a statute providing that, where a common or general interest is involved, or the parties are numerous, and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all; but in such case plaintiff must have a substantial interest in the controversy, and he cannot assume to represent others if his own pecuniary interest is a mere trifle. Nor can one taxpayer sue in behalf of others where the interest of each one is distinct, personal, and peculiar to himself."

It will be noted that the rule stated here is that the plaintiff, in such a case where he brings a class suit, must have a substantial interest in the controversy.

Class suits are brought under the code in this

state. It will be noted that in *Castilo v. State Highway Commission*, 312 Mo. 244, 253, a class suit was brought by the plaintiffs who sued in behalf of themselves and all resident citizens and assessed taxpayers of the State similarly situated and interested in the cause. From this it will be seen that such suits may be brought in this state.

If the collector has collected excessive fees, it seems that Section 3948, R. S. Missouri 1929, might apply. This section provides as follows:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

You speak of limitations of actions in your request. Of course, the one year statute for misdemeanors would apply as to this action.

On the question of a civil action, I think Section 863 R. S. Missouri 1929, would apply. This section provides as follows:

"Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

Hon. Charles E. Hassett

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January 4, 1940

Since the collector exacts these fees in an official capacity, I am of the opinion that this section would apply to suits brought against him to recover the excess commissions.

CONCLUSION.

From the foregoing it is the opinion of this department that the county itself, or through the county court, could not present a class suit for the benefit of taxpayers who have paid excess commissions to the county collector.

Respectfully submitted,

TYNE W. BURTON  
Assistant Attorney General

APPROVED:

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W. J. BURKE  
(Acting) Attorney General

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