TAXATION: Chapter 59, Article 17, providing for taxation of merchants, must be followed and no other method under any other chapter should be followed for this purpose.

January 11, 1940

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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated January 3, 1940, which reads in part as follows:

> "The 60th General Assembly amended Section 10094, said amended section being found in Laws of Missouri, 1939, page 854. The amended section provided that when the collector had shown to the court that due diligence had been exercised in the collection of outstanding merchant's taxes and that the same was uncollectable; the court could allow the collector credit for the amount thereof.
>
> "That amended section creates some questions upon which we would like your opinion."

I

You further inquire as follows:

> "We would like to know if the statutes present a legal construction on what the court should require from the col-

lector to indicate the exercise of due diligence in this matter."

Section 10087, R. S. Missouri, 1929, reads as follows:

"Every person, corporation or copartnership of persons, to whom a license shall have been granted to vend goods, wares and merchandise, who has filed a correct statement as herein required, and failed to pay the amount of revenue so owing to the collector of the proper county, shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

Section 10090, R. S. Missouri, 1929, 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."

Section 10094, as amended, appearing in Session

Laws of 1939, page 854, reads as follows:

> "The county court, at each regular term thereof, shall settle and adjust the accounts of the collector for licenses delivered 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 statement 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 10090, supra, specifically states the procedure that a collector should take upon the forfeiture of the bond, as provided in Chapter 59, Article 17, R. S. Missouri, 1929. It will be noticed, also, that that procedure must be followed by instituting a suit without delay.

18 C. J. 1039, reads as follows:

> "Due diligence. Appropriate, fit, proper diligence--that is, ordinary diligence; due care, such diligence as ordinarily prudent men would use; such watchful caution and foresight as the circumstances of the particular service demand; 'doing everything reasonable, not everything possible.' The term is nearly synonymous with 'reasonable diligence.'"

In the case of Chicago, etc., R. Co. v. U. S., 194 Fed. 342, 344, 114 CCA 334, the court said:

> "The measure of 'due diligence and foresight' is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the twenty-eight-hour law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances. An 'accidental or unavoidable cause' which cannot be avoided by the exercise of due diligence and foresight in the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid."

In view of the above authorities, it is the opinion of this Department that the county court should require the collector to bring an action upon a bond forfeiture without delay as set out in Section 10090, supra, and that when the county collector has followed this procedure, he has exercised due diligence to collect the outstanding merchant taxes against the merchants and upon a showing that the taxes are uncollectable the collector should be allowed credit for the amount thereof.

II

Your second inquiry reads as follows:

> "Including the amendments to the statutes concerning the collection of merchants' and manufacturers' taxes, there is still no provision for collection of a merchant's tax as a delinquent tax. Section 10090 R. S. Missouri, 1929, instructing the collector that he shall 'institute suit without delay by some attorney to be selected by him upon the bond forfeited against the principal and all sureties, * * *.' If such a suit has been instituted by a collector, but before a judgment could be obtained the merchant goes to the collector's office and tenders to pay his tax, should the collector accept the payment of the original tax or should he require the payment of additional interest, penalties, and/or attorney's fees and other costs incurred in filing the suit? If the collector should not collect these costs, who will be liable for them?"

Under Section 10090, supra, it is mandatory upon the collector to institute suit without delay upon the forfeited bond and if judgment shall be for the plaintiff the costs should be taxed and a reasonable fee in favor of the attorney prosecuting the action, the same as other costs in any other civil action. Upon the filing of a suit the only way that the suit can be released is by a satisfaction of the record as to the cost and attorney's fees. It is the duty of the collector to collect these costs and even before judgment under Section 10090, supra, the costs have accrued and he must collect the costs before the case can be satisfied of record. If the collector has failed to collect the costs in these cases, where a suit has been filed, he could still hold the taxpayer for the costs, for the reason that the case upon which the suit had been filed is not released by the payment of the tax only to the collector.

III AND IV

Your third inquiry reads as follows:

> "Chapter 59, Article 17, R. S. Missouri, 1929, prescribes the full procedure in the taxation of merchants. This procedure requires a sworn statement to be made by the merchant, which statement shall set forth the value of the greatest amount of goods 'on hand at any one time between the first Monday in March and the first Monday in June.' If the merchants' tax book is certified to the collector containing tax extensions against merchants which carry the notation that the valuation upon those taxes as extended are based upon an estimate made by the Assessor, what is the status of such tax items; and what is the liability of the collector on such items?"

And your fourth inquiry reads as follows:

> "If a collector refuses to issue a license to a merchant because that merchant refuses to give him a good and sufficient bond and yet the merchant makes a statement to the Assessor for taxation purposes, what is the status of the tax extended upon that statement and what is the liability upon the collector?"

Section 10088 R. S. Missouri, 1929, reads as follows:

> "Every such person, corporation or copartnership of persons, who shall fail to file such statement, and at the time and in the manner required, shall be deemed to have forfeited the bond given by him or them, in virtue of this article, and judgment shall be rendered for the plaintiff in damages for three times the amount of revenue which shall be found to be due for the year, and costs."

Section 10098, R. S. Missouri, 1929, reads as follows:

> "It shall be the duty of the several collectors to call at least as often as once in every three months on all merchants who are required by law to take out license, and to offer to furnish such as have not a license, with a license; and the said collector shall report to each grand jury of his county the names and localities of all persons who refuse to take out or renew their license at the proper time as required by law."

Under Section 10088, supra, if the taxpayer should fail to file a statement in the manner required, he shall be deemed to have forfeited the bond given and immediate action should be taken under Section 10090, supra.

Under Section 10098, supra, it is the duty of the county collector, at least every three months, to call upon all merchants who are required by law to take out license.

Chapter 59, Article 17, R. S. Missouri, 1929, specifically prescribes the method of taxing merchants and should not be confused with other taxation chapters. This is a special statute as to the taxation of merchants

and unless the merchant follows specifically the method of filing bonds and making returns, he may also be prosecuted under Section 10076, R. S. Missouri, 1929, which reads as follows:

> "No person, corporation or copartnership of persons shall deal as a merchant without a license first obtained according to law; and every person so offending shall forfeit to the state not less than fifty nor more than five thousand dollars for every such offense, to be recovered by indictment or information."

In the case of Collins v. Twellman, 126 S. W. (2d) 231, l.c. 233, the court said:

> "* * Appellant concedes that when one of two conflicting statutes must prevail then all else being equal a special statute must take precedence over the general law; also that all else being equal later statutes take precedence over earlier statutes."

In the case of State ex rel v. Horton Land and Lumber Company, 161 Mo. 664, l.c. 671, the court said:

> "This, as well as other points made for reversal, are founded upon a misconception of the nature of the action. This is not an action for the recovery of the taxes of 1896, nor for the recovery of damages under section 6904, for failure to pay the amount of the taxes for that year, levied in accordance with a correct statement filed by the lumber company as required by law, but for damages under section 6905, for the failure of the lumber company to file

> the statement required by law, whereby such taxes might have been assessed, levied and collected in the manner provided by law. The character of the action is determined by the facts stated in the petition and not by the prayer for relief. The bond covered not only damages under section 6904, for failure to pay such taxes, when so assessed and levied, but also damages under section 6905, for failure to file the proper statement whereby they might have been so assessed , levied and collected. Hence, the court committed no error in overruling defendant's objection to the introduction of evidence in support of the petition, and committed no error in admitting evidence tending to prove the value of raw material and finished products on hand on any one day between the first Monday in March and the first Monday in June, 1896, and of the tools, machinery and appliances used in conducting their business or owned by them on the first day of June, 1896."

Section 6904, set out in the above quotation is now Section 10087, R. S. Missouri, 1929.

Section 6905, as set out above is now Section 10088, R. S. Missouri, 1929.

In the case of State v. Brown, 33 S. W. (2d) 104, par. 2-6, page 107, the court said:

> "'A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding.

> Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R. C. L. sec. 14, pp. 766, 767."

Section 10087, supra, and Section 10090, supra, and Section 10094, 1939, page 854, supra, are mandatory provisions and under the holding in the above case. This being a mandatory provision the taxpayer can only release himself by following the procedure set out in Chapter 59, Article 17, R. S. Missouri, 1929. The taxpayer cannot release himself of this liability by following any other taxation chapter.

In the case of Morris v. Karr, 114 S. W. (2d) 962, l.c. 964, the court said:

> "* * 'Generally speaking, those provisions which do not relate to the essence of the thing to be done

> and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.'"

Under the holding in the above case Section 10087, Section 10090 and Section 10094, as it appears in 1939 Session Laws, page 854, are mandatory and must be followed.

In the case of State v. Smith, 111 S. W. (2d) 513, par. 5, the court said:

> "'It is a generally accepted rule that taxing statutes should be strictly construed in favor of the taxpayer, and such is the rule in this state.' State ex rel National Life Insurance Co. v. Hyde, 292 Mo. 342, loc. cit. 352, 241 S. W. 396, 399. See, also, State ex rel. Compton v. Buder, 308 Mo. 253, 271 S. W. 770, and State ex rel. Koeln v. Lesser, supra."

Under the holding in the above case taxing statutes should be strictly construed in favor of the taxpayer, and in case a suit is brought upon an estimate made by the assessor it would not be successful, for the reason that the assessor is following the general law and not the special statute, in regard to taxation of merchants.

In the case of Kroger Grocery & Baking Company v. City of St. Louis, 106 S. W. 2d 435, par. 5-7, the court said:

> "Summarizing the reasons underlying Kansas City v. J. I. Case T. M. Co., supra, on the instant issue, they are to the effect, in so far as material here, that said act of 1879 conferred a permissive, not mandatory,

> power upon certain municipalities to impose a graduated license upon merchants; but (considering the word 'may' in said clause authorizing a graduated license as equivalent to 'must' or 'shall' (Id., 337 Mo. 913, loc. cit. 931 (8), 87 S. W. (2d) 195, loc. cit. 205 (15-17))), any attempt to exercise the authority there conferred to exact graduated license fees must be exercised in conformity with the authority delegated and graduated in proportion to the annual sales (Id., 337 Mo. 913, loc. cit. 930 (7), 87 S. W. (2d) 195 loc. cit. 205 (13,14), and authorities cited; Keane v. Strodtman (Banc) 323 Mo. 161, 167 (11), 18 S. W. (2d) 896, 898 (11) (quoting Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S. W. 112, 113, to the effect that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unious est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out'); State ex rel. v. Clifford, 228 Mo. 194, 207, 128 S. W. 755, 758, 21 Ann. Cas. 1218."

Under the holding in the above case the court held that when a special method is prescribed for taxation for any purpose it forbids the taxing under any other method and if taxed under any other method it forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out. Chapter 59, Article 17, R. S. Missouri, 1929, specifically sets out the method of taxation of merchants and under the holding in the above case any other method will be null and void.

CONCLUSION

In view of the above authorities, it is the opinion of this Department that if a merchant's tax book is certified to the collector, containing tax extensions against merchants which carry the notation that the valuation upon these taxes as extended are based upon an estimate made by the assessor, this extension of taxes is absolutely void, for the reason that it does not follow the method and procedure as set out in Chapter 59, Article 17, R. S. Missouri, 1929.

It is further the opinion of this Department that the collector is not liable upon such items as extended by the assessor.

It is further the opinion of this Department that if a collector refuses to issue a license to a merchant because that merchant refuses to give him a good and sufficient bond and yet the merchant makes a statement to the assessor for taxation purposes, extension of such a tax under those circumstances is absolutely void and creates no liability upon the collector.

Respectfully submitted,

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APPROVED:

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