

TAXATION: Fees, commissions and costs for services actually performed allowed in bankruptcy.

October 30, 1935. 11-5



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention of Mr. W. A. Holloway.

Dear Sir:

Acknowledgment is made of your request for an opinion of this office on the following matter:

"We request that you furnish this Office with your official opinion as to the following points of railroad tax law.

Where a railroad is in bankruptcy in the United States District Court under the present amended bankruptcy statutes providing for reorganization, should the Federal Court allow and order the trustees in bankruptcy to pay the interest, penalties, Collectors' commissions, Attorneys' fees and costs which are provided for by Article 13, Chapter 59, R. S. Missouri, 1929, with reference to taxes on railroads. Sections 10043, 10044, 10035, 10034 and other sections of said article.

The railroad was adjudged a bankrupt June 7, 1933 and the tax bill is for taxes levied in the same year, 1933.

It is urged by the railroad that Section 57J of the Bankruptcy Act and the Federal decisions, forbid the allowance of penalties and forfeitures on taxes and that their contention is further supported by the case of State ex rel. Crutcher vs. Koeln, 61 S. W. (2nd) 750.

Section 57J (or 93J) is as follows:

'Debts owing to the United States, a state, a county, a district, or municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law.'

Are the tax penalties, interest, commissions, attorney's fees etc, debts within the meaning of the bankruptcy law?

It appears to us that the Koeln case above mentioned is not a railroad case, that it does not interpret railroad law, and that the statutes passed upon by it have mostly been repealed or have expired by their own limitation, such repeal and expiration having occurred before January 1, 1934, that being the date when the tax penalties began to accrue on the instant tax bills. And it seems to us that our Legislature made an almost entirely separate code of laws for the assessment and taxation of railroads in Missouri, providing among other things for Collector's commissions, interest, Attorney's fees and costs, on delinquent railroad taxes."

Sometime ago we had an occasion to pass upon this question and under date of March 26, 1935, this office rendered an opinion to Hon. David R. Clevenger, Prosecuting Attorney of Platte County, Missouri, wherein it is stated:

"Insofar as other charges are concerned such as collectors' commissions, clerks fees etc., it is difficult, if not impossible, to place these within the provisions of Subdivision J of Section 93, Title 11, U.S.C.A. as being penalties and forfeitures, as they are certainly compensations allowed others who are required

to perform duties by virtue of the failure of the taxpayer to pay the tax when due, and if the acts have actually been performed, the costs allowed by law should be paid by the Trustee in Bankruptcy."

The conclusion of that opinion reads as follows:

"It is therefore the opinion of this office that the Trustees of the Chicago, Rock Island and Pacific Railroad Company are liable to the State of Missouri as interest on delinquent taxes six per cent per annum on such taxes from the date of delinquency until paid."

While it is true that the statements relative to the commissions, fees and costs were not directly involved in that opinion, that opinion does conclusively dispose of your question relative to the penalty interest on taxes due from bankrupt railroads. We are enclosing a copy of that opinion for your examination.

We shall not deviate from the statements made in that opinion relative to the commissions, fees and costs, but due to the fact that the case of State ex rel. Crutcher vs. Koeln, 61 S. W. (2d) 750 has been cited in your request and might tend to confuse the issues, we herewith give to you our views concerning such case and its application to Section 57J of the Bankruptcy Act, 11 U.S.C.A. 93J. It is true that the Supreme Court of this State in the case of Crutcher vs. Koeln supra stated that the term "penalties" was generic and included within its terms commissions, fees and costs allowed the various county officials and appointees for their services rendered in connection with the collection of delinquent taxes, however, it must be remembered that that decision construed a state statute having in mind the relief of delinquent taxpayers, and the Court was called on to construe that law in view of the relief which the legislature undoubtedly intended to grant delinquent taxpayers of this state. While it is true that these commissions, fees and costs may have been construed as within the term "penalty" as used in Senate Bill 80 of the 57th General Assembly in Regular Session, that holding does not necessarily indicate that these charges are the type and character of penalties which may not be allowed under the provisions of Section 57J of the Bankruptcy Act and certainly if they are to be construed as penalty or forfeiture they must be held to be within the exception set forth in that section. For convenience we herewith quote the section:

"Debts owing to the United States, a state, a county, a district, or municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

The exception is that the amount of pecuniary loss sustained by the act out of which the penalty arose shall be allowed. Therefore, if the delinquency of the tax has required the performance of additional duties by the taxing authorities and it has been necessary to employ attorneys to effect the collection of the tax, the compensation for these acts, which have actually been performed is not to be construed as an outright penalty, it represents a pecuniary loss sustained by the action of the taxpayer in failing to pay his taxes within the time required by law.

The situation presented is somewhat analogous to that considered by the Supreme Court of the United States in the case of United States vs. Childs, 266 U.S. 304, 69 L.Ed. 299. In this case the Federal Government presented a claim for taxes accompanied by a claim for penalties of five per cent and interest of one per cent per month. The trustee took the position that the taxes alone should be ordered paid with simple interest and that the penalty of five per cent should be disallowed and interest in excess of six per cent per annum likewise disallowed because of the provisions of Section 57J hereinbefore referred to. The Supreme Court ordered interest paid at the statutory rate of one per cent per month, arriving at its conclusion partly by means of the following statement, 1. c. L.Ed. 300:

"At the outset we are confronted with the difference between penalty and interest. A penalty is a means of punishment; interest a means of compensation."

The opinion concludes with this statement, 1. c. 301:

"The tax in this case is one on income; a burden imposed for the support of the government. Interest is put upon it and so denominated, distinguished from the 5 per cent as penalty, clearly intended to compensate the delay in payment of the tax, the detriment of its nonpayment, to be continued during the time of its nonpayment--compensation, not punishment."

So in the instant case the commissions, fees and costs are not assessed as a pure matter of punishment to the delinquent taxpayer but are charges made to compensate those obligated to perform services made necessary by the acts of the delinquent taxpayer.

It has been the uniform ruling in this state that tax collectors are to receive additional compensation for services performed in the collection of the delinquent taxes. This principle was announced in the case of State ex rel. Shannon County vs. Hawkins, 169 Mo. 615, construing what is now Section 9869, page 429, Laws of Missouri 1933, the section which allows collectors two per cent commission for the collection of delinquent taxes, other than railroad taxes. The Court at page 620 stated:

"Section 9309 deals with the costs allowed him for his extra services in addition to his commissions, and these are to be paid by the delinquent, and the collector is allowed only four per cent. Otherwise we would have the result in Shannon county that the State freely allows the collector five per cent for merely receiving and paying over taxes which the taxpayer tenders, but allowing him nothing by the State or county for collecting delinquent taxes at the end of a lawsuit, and after making out various delinquent lists and performing other duties, in enforcing payment."

The extra services referred to in the foregoing quotation are those which are made necessary by the failure of the taxpayer to pay his taxes within the time required by law.

You ask if taxes, penalties, interest, commissions, attorneys fees, etc., are debts within the meaning of the bankruptcy law. Taxes have always been construed and treated as debts within the meaning of the Bankruptcy Act. *Kaw Boiler Works vs. Shaw*, 230 Fed. 587; *United States vs. Childs supra*. It appears that the term "debts" as used in Section 57J of the Bankruptcy Act is used in its broad sense and is synonymous with existing dues of all types and descriptions. This is evidenced by the fact that to give a law any significance a penalty is a debt within its meaning, while according to the weight of authority a penalty is not a debt within the ordinary or restricted use of that term. As stated in 17 *Corpus Juris* 1376, Section 1:

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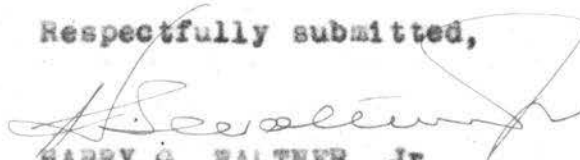
"Ordinarily the term imports a duty or obligation to pay, the enforcement for which an action will lie."

The term "debt" as used in the Bankruptcy Act has been construed to include attorneys fees. *Oldham vs. Parker*, 5 Federal (2d) 682. As far as Section 57J of the Bankruptcy Act is concerned the term "debt" includes commissions and costs as well as attorneys fees.

CONCLUSION.

It is therefore the opinion of this office that the provisions of Subdivision J of Section 57 of the Bankruptcy Act, 11 U.S.C.A. 93J, do not forbid the allowance of such commissions, fees and costs as the statutes of Missouri grant to officials and appointees for the performance of duties required to be done because of the failure of the taxpayer to pay the tax when due, if such duties have actually been performed.

Respectfully submitted,



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Enclosure.