TAXATION: BOARD OF EQUALIZATION: PENALTIES AND INTEREST: RAILROADS:

Taxes on account of 5% increase ordered by Board of Equalization December 17,1934, not delinquent until levied by county courts and reasonable time given to pay.

January 21, 1935

FILED 98

Honorable Andy W. Wilcox
Chairman State Tax Commission
Jefferson City
Missouri

Dear Sir:

This Department acknowledges receipt of your inquiry dated January 18, 1935, as follows:

> "This Department is desirous of an opinion in the following matter:
>
> 'In the settlement of the railroad companies' injunction as of December 20,1934, some of the County Clerks and County Collectors insist that they should add the usual penalties. Should this be done? ' "

1.

In order to have a complete grasp of the question presented by you we state, in a general way, the facts leading up and giving rise to your inquiry.

On September 2, 1932, the then State Board of Equalization made a horizontal raise of ten per cent in the equalizing of the valuation of railroad properties in this state (not including locally assessed properties) above the valuation of such railroad properties theretofore fixed by the State Tax Commission. Thereafter,

twenty-four railroad corporations, affected by the order of the board of equalization, filed their separate suits in the United States District Court for the Western District of Missouri, seeking to set aside the order of the board of equalization on two grounds.

(a) That the action of the board of equalization amounted to an assessment of valuations against the railroad properties which was beyond the power of the board of equalization to make, it being claimed that that power was then vested in the State Tax Commission.

(b) That the action of the state board of equalization was arbitrary and discriminatory as against the railroads and their properties, as compared with the assessment valuations of other properties in the state.

After the bringing of the suits, and under the order of the District Judge, the railroad companies paid to the various taxing bodies of the state their taxes as based on the assessment valuations fixed by the State Tax Commission.

On appeal to the United States Circuit Court of Appeals, Eighth Circuit, 70 Fed. (2nd) 670, that court held the board of equalization of this state to have the power to make the ten per cent increase in valuations of railroad properties by way of equalizing values of properties among the counties of the state. On December 17, 1934 the then board of equalization modified the order of the board of equalization theretofore made on September 2,1932 and equalized the values of railroad properties with other property in the state by increasing the valuation of railroad properties five per cent. The purport of the order of the board of equalization made December 17, 1934 was embodied in a decree entered by the United States District Court for the Western District of Missouri December 20, 1934, and disposing of the above cases, it being provided in the decree that the respective defendant railroad companies should pay the taxes lawfully levied on account of such five per cent increase, within thirty days after the entry of the decree, to-wit, December 20, 1934. The order of the board of equalization made December 17, 1934 further provided for the certification out by the

Secretary of the State Board of Equalization and the Secretary of the State Tax Commission of the five per cent increase in valuations to the various county clerks and taxing bodies in the state. These certificates did not go forward from said secretary until some time after the first day of January, 1935.

2.

(a). Discussing subdivision 6 of Section 9854 Revised Statutes Missouri 1929, the court in Park v. Kansas City Southern Railway Company 70 Fed. (2nd) 670, 672, said:

> "It cannot be doubted that the clear and explicit language of subdivision 6 did divest the state board of equalization of the power of original assessment of railroads then possessed and exercised by it, and conferred those powers upon the state tax commission. But there is nothing in the language of the first sentence to indicate any intention to divest the state board of equalization of the power which it had had since 1879 to equalize by raising and lowering valuations of railroad property. The power there conferred on the tax commission is the power of original assessment; a power which is distinct and different from the power of equalization after original assessment and not to be confused therewith. They are dissimilar functions."

And further on page 673,

> "The conferring of the exclusive power of original assessment upon the state tax commission, where, at the same time, the statute confers the power of equalizing upon the state board of equalization, indicates that the two functions have been divided; the function of assessing now resting with the state tax commission and the different function of equalization remaining with the state board of equalization."

Section 9848 Revised Statutes Missouri 1929, provides for the employment of a secretary for the State Tax Commission. Section 9849, referring to such secretary, further provides that:

> "He shall also be the secretary of the state board of equalization, shall keep the records of said board and shall discharge such duties as the board may bequire."

Article 13, Chapter 59, Revised Statutes Missouri 1929, treats of the taxation of railroads. While the duty of the original assessment of railroad companies now devolves on the state tax commission, yet, such sections of said Article 13 as do not conflict with the duties of the state tax commission in making original assessments or railroads, may be treated as effective and controlling in the details of levying and collecting such railroad taxes.

Section 10013 requires the president or other chief officer of every railroad company in this state to furnish to the clerk of the county court of each and every county in the state in which said railroads are located, a statement of its property in such county, which statement shall be furnished on or before the first day of January in each and every year.

Section 10028 provides that,

> "The county court, upon the receipt * * * * of the certificate of the action of said board of assessment and equalization, the returns of the county assessor and the certificate of cities, towns and villages, made under the preceding section, shall, * * * * ascertain and levy the taxed for state, county, municipal township, city, incorporated town and village and school purposes, and for the erection of public buildings, and

for other purposes on the railroad and the property thereof,* * * * at the same rate as may be levied on other property * * * *."

Section 10030 provides that,

"Within ten days after the county court shall have levied the taxes on railroad property, as prescribed in the two preceding sections,the county clerk of such county shall extend the same on a separate tax book, to be known as the railroad tax book * * * as equalized and apportioned to such county by the state board of assessment and equalization* * *."

Section 10031 provides,

"It shall be the duty of the county clerk, as soon as said tax book is completed, to make out and certify to the secretary or chief managing officer in this state, of the proper railroad company, a statement of taxes levied on the property of such railroad company in his county* * * *."

Section 10032 provides,

"The county clerk shall, as soon as may be after the railroad tax book shall have been made out and adjusted as above provided, deliver the same to the proper collector of such county* * * * *."

Section 10033 provides,

"All taxes of whatever description,charged against any railroad company,according to the provisions of this article,due to any county, and all taxes due the state

> and collectible in said county,and all taxes due cities,incorporated towns, villages, municipal townships and school districts in such county, shall be due and payable to the county collector of such county on the first day of September of the year for which the same may be levied and charged as herein provided."

Section 10035, with reference to delinquent railroad taxes, is as follows:

> "If any railroad company shall fail to pay to the county collector of the proper county any taxes levied for state, county,city,town,village,school,or for the erection of public buildings,and for other purposes,on the property of such railroad company in said county, on or before the first day of January next after the same shall have been assessed and levied, the same shall then be,on and after that date, known and treated as delinquent railroad taxes;and the said company shall forfeit and pay, in addition to the taxes with which said company may stand charged on the tax books of such county, such penalty as is provided by law for the nonpayment of other delinquent taxes, which penalty shall be apportioned to the various funds respectively; and it shall be the duty of the collector to collect and account for, as other taxes, in addition to all taxes so charged against said company, the penalty aforesaid, on all such taxes after the first day of January, till the same shall be paid."

(b). At this point it is proper to state the limits of the duties of the taxing bodies, as well as the rules for the construction of taxation

> the counties are charged with whatever is done by the state affecting the rights of the taxpayer."

In State ex rel Union Electric Light & Power Company v. Baker 316 Mo. 853, discussing the question of revenue laws, the court at page 859 of the opinion said:

> "As a general rule revenue laws are to be strictly construed, but the doctrine of strict construction should be applied with due regard to the intention of the Legislature as expressed in the statute, and with a view to promoting the object of the statute. (36 Cyc.1189-1190.) It is the duty of the courts to endeavor by every rule of construction to ascertain the meaning of and give full force and effect to every legislative enactment not obnoxious to constitutional provisions, but the legislative intent must be intelligibly expressed. (State ex inf. v. Street Ry. Co., 146 Mo. l. c. 168.)."

On the question of the construction of penal statutes, the rule is stated in 61 C. J. page 1483, Section 2106, as follows:

> "Following the general rule, statutes imposing penalties for delinquencies in complying with the tax laws are subject to strict construction, and will not be extended by implication to any taxes or to any persons, not clearly within their terms; and where there is such an ambiguity in the statute as to leave reasonable doubt of its meaning, or it is doubtful whether the legislature intended that a tax should be paid on the property, it is the duty of the court not to inflict a penalty."

So that in determining whether or not there has been delinquency on the part of the railroad companies in paying

the taxes resulting from the order of the Board of Equalization made December 17, 1934, the statutes in that connection must be strictly construed and against the imposition of penalties and forfeitures, unless such was the manifest intention of the Legislature.

3.

(a). The situation in reference to the statutes of this state, as to the question presented, was and is as follows:

The Secretary of the Board of Equalization was required to certify out to each county clerk the equalized values as fixed by the State Board of Equalization on December 17, 1934. Section 9856. A railroad company is required, on or before the first day of January in each and every year, to furnish the clerk of the county court of each county a statement of its property in such county. Section 10013. On receipt of the certificate of the secretary of the board of equalization, the returns of the county assessor and the certificate of cities, towns and villages, the respective county courts in each county shall ascertain and levy taxes on account of such equalized value - in this case the five per cent increase. Section 10028. Within ten days after the levy of such railroad taxes by each county court, the clerk of such county court shall extend the same on a railroad tax book. Section 10030. The county clerk is required, as soon as said tax book is completed, to certify to the proper officer of the railroads a statement of the taxes so levied on such railroad property in his county. Section 10031. As soon as the county clerk shall have made out the railroad tax book the clerk shall deliver the same to the proper collector of such county. Section 10032. All taxes charged against any railroad company shall be due and payable on the first day of September of the year for which the same may be levied and charged as in the foregoing sections provided. Section 10033. If any railroad company fails to pay any taxes levied on the property of such railroad on or before the first day of January next after the same shall have been assessed and levied the same shall then be, on and after that date, known and treated as delinquent railroad taxes. Section 10035.

State ex rel. Hammer, Collector v. Vogelsang 183 Mo. 17, was a suit by a collector to collect taxes on certain

real estate for the years 1885 to 1890, both inclusive, which had been omitted from the current assessments of those years, and the omission discovered in 1896 and the assessments then made, pursuant to Section 7562 of the Revised Statutes of 1889. It was claimed that the collection of the taxes was barred by the statute of limitations. At page 24 of the opinion the court said:

> "The suit is not barred by the statute of limitations. No right of action accrued until the taxes were assessed and had become delinquent."

State ex rel. Blades, Collector v. Wabash Railroad 251 Mo. 134, is in point. That was an action to collect railroad taxes. In the year 1908 the county court of Montgomery County levied taxes, for county purposes, to the amount of fifty cents on the one hundred dollars valuation on the right-of-way and other taxable property of defendant in that county. Defendant contended that the county court was only authorized to levy forty cents on the one hundred dollars valuation because the total assessed valuation of all taxable property in the county for the year 1908 exceeded six million dollars. When the county court of Montgomery County held its regular May term in 1908, the general assessment books of the county were complete and had been corrected in conformity with the action of the county and the prior action of the state board of equalization, but the state board of equalization had not at that time assessed, equalized and fixed the final valuation of such railroad property in the county as it had the power to do. The assessments and returns of the railroad company, which were before the county court at its May term, indicated that all the taxable property in the county was less than six million dollars but on July 31, 1908 the State Board of Equalization having raised the valuation of railroad property assessable in that county, certified the result of its labors to the county court. After adding said increase in the valuation of railroad property as fixed by the State Board of Equalization to the then existing assessment of other property, the aggregate valuation of all property in Montgomery County for 1908 exceeded six million dollars. The county court met again in the month of September, 1908, and, notwithstanding the return or certificate as to increase in railroad assessments, it proceeded to levy upon defendant's property a tax of fifty cents on the one hundred dollars, instead of forty cents as required where the valuation was over six million dollars. The

decision is illuminating on the question at hand and we quote at length therefrom beginning on page 141:

> "The county court no doubt acted in good faith in levying upon the railroad property the same rate of taxes for county purposes which it had theretofore levied upon other property in the county. In fact, by section 9363, Revised Statutes 1899 (now section 11582, Revised Statutes 1909) it was required to levy the same rate of taxes upon railroads as other property. It is, therefore, apparent that this litigation grows out of the fact that the law does not require the assessment of railroad property to be completed at the same time as the assessment of other property; and if the county court violated the Constitution by levying upon defendant's property a tax for county purposes in excess of forty cents on the one hundred dollars valuation, it did so in an effort to obey section 11582, supra.
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> Plaintiff's learned counsel assert that it was the duty of the county court to fix the rate of tax levies for county purposes at its May term, 1908; and while he does not call our attention to any mandatory statute prescribing that such taxes must be levied by county courts at their May terms, we think it was probably the legislative intent that the rate of tax levies should be fixed in May. (See Sec.9283, R.S.1899,now Sec.11423,R.S. 1909.)
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> Plaintiff's counsel also assert that as the statute required tax levies to be made in May the county court possessed the right to rely upon the assessments of 1908 as they existed in said month of May, and was not required to await the action

of the State Board of Equalization to ascertain what the final assessed valuation of property in the county might be.

This contention seeks a construction of that part of section 11, article 10, of our Constitution which prescribes the method for ascertaining the assessed valuation of counties, and reads as follows:

'The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes.'

We are not aware that this particular clause of our Constitution has ever been before the appellate courts of this State. We are, therefore, justified in consulting the precedents announced by the appellate courts of other jurisdictions.

The Supreme Court of Illinois (Culbertson v. City of Fulton, 127 Ill.30), in construing a constitution which used the word 'last assessment,' held that said words meant the last completed assessment as corrected and approved by the State Board of Equalization, and not the assessment by the local assessor, whose work had not yet received the approval of said State Board of Equalization.

In the case of Wilkinson v. Van Orman, 70 Iowa, 230, a constitutional provision prohibiting school districts from becoming indebted in excess of five per cent of the taxable property therein 'to be ascertained by the last State and county tax lists' was construed to apply only to the completed tax lists, and not to the original assessment lists as prepared by the assessor before the taxes were equalized and levied.

In the case of Chicago,Burlington & Quincy Railroad Co.v.Village of Wilber, 63 Neb.624, the Supreme Court of Nebraska construed the words 'last preceeding assessment' to mean an assessment which had been completed by receiving the approval of all the agencies through which it was required to pass.

We find the reasoning of the foregoing cases is sound, and that the county court of Montgomery county could not base its tax levies upon returns made by the officers of railroad companies,which returns had not been passed upon by the State Board of Equalization.

It is not contended by respondent that the tax levies in controversy were based upon the assessment of property in that county made during the year 1907 (which were doubtless completed), but they are admittedly based upon assessment books and returns of railroad officials made in 1908. There was no attempt in this case to show what the assessment of the county amounted to as made in 1907.

It is, however, admitted that in the month of September, 1908, when most of the taxes sued for were levied upon defendant's roadbed, etc.,the county court had before it the result of the work of the State Board of Equalization, which showed conclusively that the aggregate and final assessment of all property in the county exceeded six million dollars for the year 1908.

At its September meeting the county court found itself in a very unfortunate position. It was required by section 11582, Revised Statutes 1909, to levy upon the railroad property of defendant as assessed by the State Board of Equalization the same rate of taxes for county purposes that it had theretofore levied upon other property of the county,which in this case was fifty cents on the one

hundred dollars valuation, and at the same time it was prohibited by the Constitution from levying upon said property more than forty cents on the one hundred dollars valuation for county purposes.

In this dilemma said county court elected to obey said section 11582,supra,and let the Constitution shift for itself.

In thus ignoring the Constitution the county court committed an error fatal to plaintiff's cause of action in this case. Whenever there is an irreconcilable conflict between the Constitution and the statutes, the latter must yield.

In the case of Kansas City, Fort Scott & Memphis Railroad Co. v. Thornton, 152 Mo. l.c.575, this rule was stated by Marshall, J.,in the following language:

'It is the duty of the courts to enforce the organic law and to brush aside any statute which conflicts with it,whether it was passed before or after the Constitution was adopted.'

It is doubtless the purpose of our revenue laws to have tax levies based upon the assessment books made and returned during the years when such taxes were levied. County courts must necessarily take into consideration the current assessments in order to ascertain how large or how small the levies should be. The rate for county levies is not arbitrarily fixed by the law. They may equal the amount limited by the Constitution, or they may be lower if the county court believes that a lower rate of levy will supply the county with all the funds it needs.

We see no escape from the defendant's

contention that in levying the taxes of 1908 the county court acted upon the assessment of that year, and having disregarded the plain mandate of the Constitution the county taxes levied on defendant's property in excess of forty cents on the one hundred dollars valuation are illegal.

We are not unmindful of the hardships which this rule will entail in this case, and possibly in others. The spirit, possibly the letter, of the law, requires county courts to make their tax levies at the annual May terms thereof, at which time they cannot know what the action of the State Board of Equalization will be in assessing railroad property. Consequently, it is impossible for them to determine with certainty what the aggregate assessed valuation of the county will be in the month of May.

Section 11, article 10, of our Constitution divides counties into four classes for purposes of taxation; such classes to be ascertained by their total assessed valuation. In two of those classes county courts are permitted to levy fifty cents on the one hundred dollars valuation for county purposes; in one class forty cents on the one hundred dollars valuation, and in the remaining class thirty-five cents on the one hundred dollars valuation.

It follows that when the assessed valuation of a county is such that it is likely to pass from one class to another through the final action of the State Board of Equalization in raising or lowering values, county courts cannot safely make their levies until the State Board of Equalization has completed its work and certified the result thereof to the county clerks.

> If this rule works an inconvenience or loss in specific cases, the evil must be borne until the General Assembly in its wisdom shall see fit to enact laws requiring all assessments to be made at the same time, and that taxes be levied only after all assessments are completed and finally corrected and approved by the State Board of Equalization.
>
> Much as we dislike to announce a rule which may cause loss or inconvenience to the citizens of the State, and possibly nullify some of our statutes relating to the assessment and collection of public revenues, it is our paramount duty to uphold and support the Constitution; and we cannot warp or twist its words or place a strained construction upon its provision, however great may be the demand that we do so. (State ex rel. Burns v. Gibson, 195 Mo. 251.) It follows that we must deny recovery to plaintiff for the county taxes sued for in this case."

The case last quoted from, in connection with the sections of the statute above referred to, clearly show, in the present situation, there was no liability on the part of the railroad companies to pay the tax, growing out of the five per cent increase in equalized values, until after the equalized values had been certified to the various county clerks, and certainly not until the increased valuations had been levied against by the respective county courts for taxes for the year 1932.

The case of Railroad Company v. People 9 N.W. 249, was a suit for railroad taxes. On the question of the right to recover interest the court at page 251 of the opinion said:

> "The court below permitted the state to recover interest and this I think was erroneous. Whether the reports made by the company were correct or not, until an assessment or charge

> was made by the auditor general and notice thereof given the company, it was not in fault for not paying. Some act by the auditor general was necessary before the tax became due and payable."

Section 10031 requires notice to railroads of the taxes levied.

State v. Hughes Bros. Timber Co. 203 N. W. 436, was an action by the State of Minnesota to recover certain taxes assessed against logs floated from the State of Minnesota into another state. The defendant disputed the right of the state to impose the tax on the ground that the assessment and levying of the tax was an interference with or burden on interstate commerce. The Supreme Court of Minnesota upheld the tax. On the question of interest and penalties, at page 438 of the opinion the court said:

> "The original assessment was on 10,000 cords, but in fact there were only 8,367 cords. The tax was reduced accordingly by the decision below, but, notwithstanding, the statutory interest and penalties were sustained as to the reduced amount. In that we think there was error. Under the principle of County of Redwood v. Winona & St. Peter Land Co., 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, neither interest nor penalties can be imposed upon the taxpayer until he defaults in payment. Defendants had no opportunity to pay the correct amount of the tax until it was determined. Until then they were not in default, so all they can be held for is interest on the tax from the time it was so determined."

The latter case was reversed by the Supreme Court of the United States on the ground that the tax was a burden on interstate commerce, but the holding set out above as to penalties and interest is not affected and is authority for the position that the railroad companies in the present case are not required to pay the tax represented by the five per cent increase in the valuations, until the tax rate in the respective counties has been applied thereto and

levied thereon. Until such time the railroad companies would not know what sum of money was due from them on account of such increase, and they could not be guilty of delinquency until they knew what they were to pay and until required by the statute to pay the same.

The case of Louisville & Nashville Railroad Co. v. Commonwealth 94 S. W. 655, is applicable. The board of valuation in Kentucky fixed a certain value on the railroad franchises of the plaintiff. The railroad company disputed the justness of the value so fixed and procured an injunction in Federal Court which was afterwards dismissed by the United States Supreme Court, and the railroad companies were held to pay on the entire valuation so fixed, which was done. The suit was instituted to collect penalty and interest for failure to pay the taxes at the time required by law. The finding in that regard was for the railroad Company. In the course of the opinion it is said:

> "* * * * it was not contemplated that the taxpayer was guilty of the act of refusing to pay taxes, until there was a legal liability fixed by the assessment, and a notice of the amount of taxes had been given."

In the present case the railroad companies paid, under order of the United States District Court, the amount of tax based on the assessment of the state tax commission. As shown by the statutes above quoted from and referred to, there were many things to be done by the taxing officials before the railroad companies were required to pay the taxes accruing because of the five per cent increase in equalized value. None of such acts could be done or completed by the taxing officials or taxing bodies until the final action of the state board of equalization and certified out by the secretary of the board, which was not done until after January 1, 1935.

(b). There are certain cases cited in the footnotes to 61 C. J. pp. 1490 and 1518, which may be contended are in conflict with the foregoing views, but those are

cases from foreign jurisdictions not controlled by the statutes of this state and in most instances there are peculiar statutory provisions in effect in the states where the decisions were rendered so as to render the decisions in those cases not persuasive here.

(c). We might say in this connection that, in the litigation herein referred to, the five per cent increase in valuations did not involve and does not include locally assessed property belonging to railroad companies.

While we do not think it necessary to a conclusion in this matter, yet, we may mention that the United States District Court in its decree directed the railroad companies to pay the taxes within thirty days after the rendition of the decree. Nothing was said about penalties and interest in the decree, and, ordinarily, penalties and interest are not considered as a part of a tax.

State ex rel. McKittrick v. Bair 63 S.W.(2nd) 64.

The respective railroad companies involved are entitled to a reasonable time, after the taxes on account of such five per cent increase in equalized valuations are levied by the respective taxing bodies, in which to pay the tax so levied.

CONCLUSION.

It is the opinion of this department that the respective railroad companies in this state, liable to pay taxes on account of the five per cent increase in valuations made by the State Board of Equalization December 17, 1934, will not be delinquent in the payment of such taxes until such respective valuations have been certified to the county clerks of the respective counties of the state where taxable railroad property is located and taxes have been legally levied thereon by the taxing bodies and, at least, until the respective railroad companies have

a reasonable time thereafter in which to pay such taxes.

Yours very truly,

GILBERT LAMB
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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