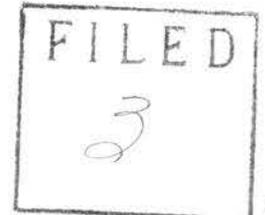


IN RE: Taxpayer voluntarily filing joint individual income tax return for the whole year 1931 for himself and wife and paying the tax thereon in absence of a statute or regulation of State Auditor's office allowing him so to do, has not the right in 1933 to file an amended return for the year 1931 of himself and wife covering income from January 1, 1931 to September 13, 1931, and from September 14, 1931 to December 31, 1931 under the Act of the Missouri General Assembly approved April 16, 1931, and by the amended return become entitled to a credit of \$68.80 on future income taxes.

April 17, 1933.

Hon. Forrest Smith,
State Auditor,
Jefferson City, Mo.



Dear Sir:

Your letter states as follows:

"Mr. T.J. Brodnax, 3526 Walnut Street, Kansas City, Missouri, filed his joint individual Missouri Income Tax Return for the year 1931, of himself and wife, on our regular return for said year and has paid a tax thereon of \$332.36.

Mr. Brodnax now submits an amended return for the year 1931, of himself and wife, on the special form as provided here in some instances where an individual could segregate his income covering from January 1, 1931 to September 13, 1931 (the old law) and from September 14, 1931 to December 31, 1931 (the new law) and said amended return discloses a tax on this special form of \$263.56.

Mr. Brodnax has filed a claim for credit of \$68.80 covering this amended return and desires to apply this against his 1932 tax, and as he is required to file his 1932 return before the first of April, he is very anxious to be advised if this is permissible under the law.

This is my first case of this kind and not feeling in a position to advise him in this matter without an opinion of your office, I am writing this letter to you and would appreciate it if you will advise me as promptly as possible if it is permissible to file amended return on this special form for the year 1931 and redetermine the tax and then make claim for credit to be applied against future year."

The Missouri General Assembly by an Act approved April 16, 1931, increased the rate of income taxes and amended Sec. 10115 R.S. of Mo., 1929, and among other things, provided as follows:

"For the portion of the year 1931 after June 30, 1931 remaining after this Act becomes effective and for the whole of each succeeding year thereafter *** a tax shall be levied *** upon net income ***"

This enactment divided the year 1931 into two tax periods with different rates for each period of time. The Legislature may provide for collection of income prescribed by existing law for part of the year and expired part of the year at time Act is effective and at different rate for remainder of year.

State ex rel Koelin v. S.W. Bell Telephone Co.,
312 Mo., p. 1008

Apparently, the amendments of 1931 to the Income Tax Law (See Session Laws of Mo., 1931, pp. 365-375) were made in form to meet the decision of our Supreme Court in

Smith v. Diercx, 283 Mo., 188

wherein it was held so much of the amendment of 1919 income tax as undertook to assess tax of one per cent on that part of net income for the year 1918 received by the tax payer prior to the time the amendment went into effect August 7, 1919 was violative of Art. II, Sec. 15, Missouri Constitution, declaring no law "retrospective in its operation" can be passed by the General Assembly.

I assume for purposes of my opinion Mr. Brodnax is claiming the benefit of two different income tax rates for year 1931 on account of the amendment of 1931, of income tax law by the General Assembly. I have examined the regulation of the Auditor's Office as published in the printed pamphlet you sent me and I fail to find therein any rule or regulation providing for filing an amended tax return and changing the form thereof; I may have overlooked such a regulation in the pamphlet. I have examined our Missouri Statutes and I fail to find any enactment authorizing the filing of an amended tax return such as Mr. Brodnax has filed. Sec. 10135 R.S. of Mo., 1929, relating to income taxation provides as follows:

"At any time within forty-five days after assessment or additional assessment of income has been certified by the assessor to the county clerk, the taxpayer shall have the right to apply for abatement or correction of same to the county court of the county in which such assessment is made except in the city of St. Louis, and to the circuit court in such city."

Other parts of said section authorizes county courts in the counties and the circuit court in the city of St. Louis to adjust any errors in the assessment of the income tax on application therefor within 45 days from assessment thereof and allows appeals to be carried to Circuit and Supreme Courts from decisions made by county courts and St. Louis City Circuit Courts.

There is nothing in your letter to indicate Mr. Brodnax paid the taxes in 1931 under duress or threats, nor that he made the return in the form in which he made same under any duress or threats from

the state or county tax officials. Therefore, I will assume that first - Mr. Brodnax voluntarily selected the form in 1932 in which he would make his income tax return for his income for the year 1931; second - that Mr. Brodnax voluntarily and without compulsion paid the tax on his income for the year 1931. Can Mr. Brodnax file an amended return in 1933 of himself and wife for the year 1931 and obtain a credit on 1933 tax?

There are no decisions on this question in Missouri in so far as I have ascertained. The statutes of Missouri do not provide specifically for filing such a return. The rules and regulations of the Auditor's office might provide for filing such an amended return and such regulation would be valid. The Federal statute does not, so far as I have been able to learn, provide for filing an amended return. The rules governing amended returns as to Federal incomes have their sources in either regulations or other departmental rulings.

The first return of Mr. Brodnax was filed or could have been filed about six months after the Act of 1931 providing for two separate tax periods in the year 1931 became operative. Mr. Brodnax selected a form of making a return and a basis therefor and voluntarily paid the tax on the basis of his own computation. I assume he claims now he had a right to make his return at the time he did make it in 1932, and divide his income for 1931 into two tax periods of time, having different rates of taxation.

The Federal Board of Tax Appeals in Butolph v. Commissioner of Internal Revenue, 7 B.T.A. 310, held where husband and wife made a joint return, they could not thereafter make separate returns on the theory that if a taxpayer has selected one of two approved bases for reporting his income, he cannot subsequently file an amended return upon another basis. I do not understand Mr. Brodnax and his wife filed separate returns in the amended return, but they changed the basis of their return.

I do not believe Mr. Brodnax is entitled to file the amended income tax return for 1931, which he has submitted in 1933, and I base my opinion on the ground Mr. Brodnax voluntarily made the original joint return for himself and wife and he had a right to make it in that manner, and he voluntarily paid the tax, and the statute nor the regulations of the Auditor's office provide a method for his filing an amended return.

I am of the opinion Mr. Brodnax could not maintain an action against the collector nor other officials to recover any over-payment he may have made because the payment was voluntary on his part. The Missouri Supreme Court in

Robins v. Latham, 134 Mo., 466

said:

"A taxpayer is not entitled to have taxes voluntarily paid by him returned and the allegation that he paid them under protest is insufficient; he must show a seizure of his property or a threat to do so and that it could only be escaped by payment."

It is true Sec. 10132 R.S. of Mo. 1929 provides at any time within three years after any return shall have been filed, the Auditor has a right to examine, during business hours, the records and books of a taxpayer, and if more tax has been paid than was due, the Auditor can issue a credit slip which shall be taken as a deduction on taxpayer's succeeding taxes, and if Auditor finds a deficiency in amount paid, he shall certify same to the assessor who shall make an additional assessment; but this section does not, in my opinion, authorize the filing of an amended return.

As I have indicated above, the provisions of Sec. 10135, R.S. of Mo. 1929 provide a method whereby Mr. Brodnax could within 45 days from the time he filed in 1932 the return for 1931 income, have had his over-payment, if any, of taxes adjusted by the county court of Jackson County, but he neglected to use the remedy the law gave him.

Yours very truly,

EDWARD C. CROW.

APPROVED:

Attorney General

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