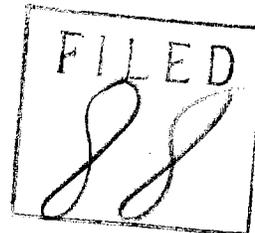


TAXATION:—Under Section 9868, R. S. Mo. 1929, upon petition by County Court, Circuit Judge may issue order directing increased levy and may, under same section, revoke its prior order.

September 11, 1934.



Mr. R. P. Stone,  
Prosecuting Attorney,  
Eldon, Missouri.

Dear Sir:

We are acknowledging receipt of your letter in which you inquire as follows:

"I herewith hand you a number of Exhibits which are orders of the County Court of Miller County, Missouri, and orders of the Circuit Court of Miller County in vacation, together with my petition to the Circuit Judge as Prosecuting Attorney of Miller County, Missouri, based on the order of the County Court, (all of which are presumed to be based on Section 9868, R. S. 1929, and ask your opinion on the same:

"FIRST: Did the County Court have authority to make the order and request in Exhibit 'A' herewith filed?

"SECOND: If the County Court had the authority to make the order and request in Exhibit 'A' did I, as prosecuting attorney have any choice as to filing the petition to the Circuit Judge, said petition being marked Exhibit 'B' and filed herewith?

"THIRD: Did the Circuit Judge in vacation have authority to make the order marked Exhibit 'C' and filed herewith, upon the petition filed by me as Prosecuting Attorney of Miller County?

"FOURTH: If the county court had the authority to make the order and request in Exhibit 'A' dated February 8th, 1934, and the Circuit Judge in vacation had authority to make the order in Exhibit 'C', did the county court, after receiving the order from the Circuit Judge, and after making the levy of six cents

on the One Hundred Dollars valuation (the same being within the Constitutional limits) and after the Six Cents had been extended on the Tax Books by the County Clerk, have authority to ask the Circuit Judge to rescind the order, as shown in Exhibit 'D', and did the Circuit Judge in vacation have the authority to make the order, dated August 20th, 1934, and marked Exhibit 'E' setting aside the levy made by the county court, and if the Circuit Judge had authority to set aside the levy so made by the county court, after the levy was made and extended on the Tax Books, and delivered to the Collector, then whose duty would it be to deduct the Six Cents from the Tax Rolls, or Book, and how would the County Collector account for the same, after it had been charged to him?"

Section 9868, R. S. Mo. 1929, provides as follows:

"No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes shall be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes,

and shall enforce such order by mandamus or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside and annulled by the circuit court or judge thereof granting the same: Provided, that no such order shall be modified, set aside or annulled, unless it shall appear to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied and collected are not authorized by the Constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists."

It appears from your inquiry that the County Court requested the authority to levy an additional tax under the foregoing section. You, as prosecuting attorney, prepared the request and filed it with the circuit judge and the circuit judge, under the foregoing section, found that there was a necessity for the tax and made the order authorizing the additional levy. Thereafter, for various reasons, the county court requested that the order be rescinded and upon application made by you the circuit judge entered his order revoking the original order. In the meantime, however, the assessments had been made and they now appear on the tax books.

In answer to your first inquiry we are of the opinion that the county court had the authority, under the foregoing section, to make the request which it did.

In answer to your second inquiry, under the foregoing section, it was your duty, upon a request being made by the county court, to file the petition which you did with the circuit court.

In answer to your third inquiry we are of the opinion that the circuit judge in vacation had authority to make the order giving to the county court the right to make the additional levy. The above section specifically provides that the court may make the order in vacation.

In answer to your fourth inquiry, we believe that the court had a right to modify or set aside its original order. The foregoing section specifically provides

that the court may modify or set aside the order whenever it appears to the court or the judge thereof that the taxes which were assessed were not authorized by the Constitution or laws of the State, or that the necessity no longer existed. The order of the Circuit Court found that the taxes were not authorized by the Constitution or laws of the State and the judgment of that court, standing unappealed from, became final and is not subject to collateral attack. So far as the county is concerned, the situation is the same as if the county had not made the original request to increase the levy, because the court, in revoking its prior order, destroyed the power previously given to the county court to make the levy.

Since the Circuit Judge has revoked the order levying the assessment, which he had a right to do, then the assessment cannot be enforced. Since the levy is not legal the County Collector cannot be held responsible for his failure to collect those taxes. Since he is charged with them on his books, the county court would have a right to give him credit for that portion of the taxes when he makes his usual settlement. As a matter of fact, the order of the county court and of the circuit court already provides that the county collector shall take credit for this levy which is now found upon his books.

Very truly yours,

FRANK W. HAYES,  
Assistant Attorney General.

APPROVED:

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(Acting)  
Attorney General.

FWH:MS