

INCOME TAX: Section 10144, R.S. Mo. 1929 prohibits State Auditor from divulging information contained in an income tax return to persons other than the taxpayer.

11-9

November 3, 1934.



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

Dear Sir:

This department is in receipt of your request for an opinion as to the following state of facts:

"This office has been requested by an income tax payer to disclose in a court proceeding his income tax return for the year 1933, for the purpose of showing that in that return he claimed to be a resident of the State of Missouri, the question of his residence apparently being material in the litigation.

Sec. 10144, Revised Statutes 1929 provides that it shall be unlawful for any persons, including officers, to divulge any information relative to, or the contents of, any income tax return filed under that article.

I would like to have your opinion as to whether, at the request of the taxpayer himself, it is permissible under the law to disclose in a court proceeding the fact that the taxpayer made a return and to disclose, if he requests it, the contents of the return itself."

Section 10144, R.S. Mo. 1929 provides in part as follows:

"It shall be unlawful for any person, persons, or officers to divulge, give out or impart to any other person, or persons, any information relative to or the contents of any income tax return

filed under this article, or to permit any other person, or persons not connected with his office to see, inspect or examine the same;

* * *

It shall be unlawful for any board of equalization, or any member thereof, or any officer to in any way permit the inspection of any such return or to use the same in any way in making assessments other than the assessment of the tax provided for in this article, and any person violating the provisions of this section shall be deemed guilty of a felony and upon conviction thereof shall be fined a sum of not less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000) or by imprisonment in the penitentiary for a term of not less than two years and not more than five years, or both such fine and imprisonment as the court may deem proper; *****

It is clear that this statute absolutely prohibits the use of an income tax return made to the State of Missouri for any purpose whatsoever even though evidence contained in said return might be very material in a trial before a court of justice.

These statutes are not uncommon, but in fact are to be found in practically every income tax law in the United States; however, in many of the statutes of the different states exceptions are made allowing the use of the income tax return for certain purposes. There is a deep public policy underlying the enactment of this type of statute, and that policy is that where the government needs information for the conduct of its functions and the persons possessing the information need the encouragement of privacy in order to be induced to make full disclosures, the protection of the privilege should be accorded.

Isadore Loeb, in an article entitled "Tax Administration in Missouri", proceedings of the National Tax Association in 1924, page 44, said:

"Many taxpayers are apprehensive regarding publicity of matters if included in their income tax returns. While the law provides penalties, it is notorious that such provisions are not taken seriously in many localities and persons naturally tend to omit information, which if published, might prove prejudicial to their interests."

Wigmore, in his work on "Evidence, (V), Sec. 2377, has this to say anent this policy:

"In that well settled common-law application of this policy, the privilege concerned information relating to the conduct of third persons. But many situations exist where the information can best be obtained only from the person himself whose affairs are desired to be known by the government. And where the ultimate purpose to be served is administrative, and not penal, it may well be that the government can afford to promise secrecy in respect to purposes, penal or litigious, as the price of readily achieving its administrative purpose when it demands a report of the truth. It is some such principle that justifies the modern creation of a number of privileges, all statutory in origin, covering sundry matters required by law to be reported to some administrative official."

Jones, in his work "Commentaries on Evidence", Sec. 2201, says:

"It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential and respecting which it will not allow the confidence to be violated."

As we have seen, the public policy behind the enactment of a statute of this description is for the purpose of affording full protection to the taxpayer in order that the taxpayer may feel free to disclose his business affairs to the state government without fear that such disclosure might later prove prejudicial to him. The statute, however, as enacted by the Legislature has attempted to treat income tax returns in the same manner as other governmental secrets and to forbid disclosure for any reason whatsoever, even though the taxpayer himself might request such disclosure.

In other words, the law in its application has gone far beyond the intendment of the public policy underlying its enactment. It has become a law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial, and it

would seem to substantially deprive a taxpayer of due process of law. 10 R.C.L. 864.

Section 10, Article II, Constitution of Missouri provides as follows:

"The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

In the recent case of *In Re French*, decided by the Supreme Court of Missouri *En Banc*, 315 Mo. 75, the court had before it a statute similar to the one under consideration. That statute, Section 11679, R.S. Mo. 1919, as amended by the Laws of 1925, required the State Bank Commissioner to keep secret all information obtained by him in the examination of banks except when called as a witness in a criminal proceeding or trial, and subjected him to a fine for misdemeanor and forfeiture of office for giving such information. The Court said:

"It is also argued that the statute is in conflict with Section 10, Article II, of the Constitution of Missouri, which is as follows: 'The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay.'

We may say that the provision of the act which prevents the court in a civil case from procuring evidence, in the conduct of the trial, is an unwarranted interference with the functions of the court. A leading case on this subject is *Brown v. Circuit Judge of Kalamazoo County*, 5 L.R.A. (Mich.) 226, 1.c. 230, where it is said: 'It is within the power of a Legislature to change the formalities of local procedure, but it is not competent to make such changes as to impair the enforcement of rights.'

If a litigant in a civil case is forbidden by statute to obtain evidence, otherwise available, then the power of the court to enforce his rights is impaired, and a 'certain remedy' is not 'afforded'.

This is not an attempt by the Legislature to enact a rule of evidence, nor to define the effect of a certain character of evidence in making out a prima-facie case. It is an attempt to say the courts shall not have or use certain evidence, however pertinent or necessary for the proper determination of a case. It is an unconstitutional encroachment upon the proper functions of the courts."

* * *

"The only theory upon which the commissioner can be restrained from divulging what he learns in his examination of banks, and from producing in court the records in his custody, is on the ground of public policy; that some public interest may be adversely affected by the revelations which would ensue. We are unable to conceive of any reason why general knowledge of the affairs of a defunct bank discovered in a trial in court, would injuriously affect the public morals, public health or public safety."

In the case of State v. Sevier, decided by the Supreme Court of Missouri, 69 S.W. (2d) 662, the court held that the trial court could, by proper order, compel the Commissioner of Securities to permit inspection and the making of copies of documents and papers on file in his office relating to the cause, notwithstanding such papers were placed in a separate file and marked "confidential". The court in its opinion referred to the case of In Re French, supra, and said:

***While the constitutionality of section 7739 is not questioned in this proceeding, if we should hold that it expresses a legislative intent to empower the commissioner to place whatever official information he might deem confidential beyond the reach of a court order authorized by section 928, which statute has superseded the old method by bills of discovery (State ex rel. Railroad Co. v. Hall, et al., 325 Mo. 102, 106, 27 S.W. (2d) 1027), such construction would render the section vulnerable to such attack when properly raised.

* * * *

CONCLUSION

While we do not conceive it to be the duty of the Attorney General as a general policy to declare laws of the State of Missouri to be unconstitutional, nevertheless, when a law so infringes upon the rights of citizens of the State of Missouri as to become violative of our state Constitution, we cannot do otherwise than to declare said act to be, in our opinion, unconstitutional.

The principle of law as declared by the Supreme Court of Missouri in the case of *In Re French*, supra, is, in our opinion, the correct principle underlying the problem here under consideration and it would seem that the only theory upon which the State Auditor can be restrained from divulging information furnished by a taxpayer in an income tax return and from producing in court the returns in his custody is on the ground of public policy--that some public interest may be adversely affected by the revelations which would ensue. Absent this public policy, the statute violates Section 10, Article II of the Constitution of Missouri.

Therefore, in view of the foregoing, it is the opinion of this department that insofar as Section 10144, R.S. Mo. 1929 prohibits a taxpayer from requiring the State Auditor to divulge information furnished by said taxpayer in his income tax return to the State of Missouri, the said statute is violative of Section 10, Article II of the Constitution of Missouri; however, as to the prohibition with reference to persons other than the taxpayer, the public policy underlying the enactment of the law excepts said section in this respect from the operation of Section 10, Art. II of the Constitution of Missouri, and the State Auditor is prohibited thereby from divulging this information to persons other than the taxpayer.

Respectfully submitted,

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APPROVED:

ROY MCKITTRICK,
Attorney General

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