

TAXATION--COSTS: Taxes more than five years delinquent may be deducted from criminal cost fees.

October 2, 1937.

10-12



Honorable Henry Cain
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Sir:

This department is in receipt of your request for an opinion which reads as follows:

"At the request of the Collector of Stoddard County, I am writing you for an opinion upon the following questions, to-wit:

"(1) Where real estate was offered for sale for the third time under the Jones-Munger Law in November, 1936 and there was no purchaser of the tax certificate offered at that third sale, shall the property be re-offered again at the 1937 sale or what should be done.

"(2) Under the provisions of the law at is now stands for the offering of tax certificates, the collector understands or believes that, for publication purposes, all fees including publication fees should be figured on a one hundred per cent basis, but in event the tax payer elects to pay his taxes before the tax sale in November he should be permitted to pay his taxes in accordance with House Bill 70, commonly known as the remission of tax penalty bill. In other words the tax certificate bill says that these certificates must be offered in November and that all fees, penalties, etc., shall be figured in full up to that time and that amount

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inserted in the notice of sale of tax certificates, but the remission bill seems to have the collector bothered and he desires to know just how the notices should be figured.

"(3) A party owes taxes for 1930 and 1932. The same party has criminal cost fees due him, and the money for the payment of these fees is now in the hands of the Treasurer. The party to whom the fees are due is willing that the fees should be applied on the payment of the 1932 taxes but as there will be a surplus over and above the 1932 taxes he is unwilling that the balance should be paid on the 1930 taxes which he claims are outlawed under the five year statute of limitations for bringing suits on delinquent taxes. I have advised the Collector that in my opinion Section 3854 R. S. Mo. 1929 does not mean that the taxes must be within the five year period but that the tax payer must have paid all his taxes, whether they are within the five year period or beyond. I would appreciate your opinion in this matter which will be communicated to the collector."

In answer to your first question you will find enclosed a copy of an opinion rendered by this department to Honorable Wm. C. Kerckhoff, Collector of Revenue, Jefferson County, Hillsboro, Missouri, on November 25, 1936, the conclusion of which reads as follows:

"It is, therefore, the opinion of this office that at the next sale of lands and lots for delinquent taxes, following a sale at which the tract or lot of land has been offered for the third time without any bid, you should offer the certi-

ificate of purchase on such lot or tract of land for all taxes which are not outlawed, to-wit, which did not become delinquent more than five years prior to the date of such proposed sale."

In answer to your second question, this department on September 17, 1937, in an opinion to the Honorable Andy W. Wilcox, State Tax Commissioner, sets forth the procedure to be followed in the sale of land for delinquent taxes, under the Jones-Munger law, in view of the Remission Statute, Laws of 1937, p. 572. A copy of this opinion is also enclosed.

Your third question is whether a person who owes taxes, which are more than five years delinquent, is subject to have these taxes deducted from criminal cost fees due him.

Section 3854 R. S. Mo. 1929, provides in part as follows:

"The county treasurers shall pay out all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: * * *."

Section 9940 R. S. Mo. 1929, states the limitations on the collection of personal taxes and provides in part as follows:

"* * * * and suits thereon may be instituted after the expiration of said first day of January, and within five years from said day. * * * *"

Laws of Missouri, 1935, p. 405, Section 9961, provides the limitations for instituting initial proceedings for the sale of land for delinquent taxes, and reads as follows:

"No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefore shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

The application of statutes of limitation in regard to the state is given in *United States v. Whited and Wheless*, 62 L. ed. 879, 246 U. S. 552, where the Court through Mr. Justice Clark said:

"Fundamental to the interpretation of the statute which the answering of this question renders necessary lies the rule of law settled 'as a great principle of public policy' that the 'United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound' (*United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 120, 125, 30 L. ed. 81, 83, 6 Sup. Ct. Rep. 1006), and also the fact that this principle has been accepted by this court as requiring not a liberal, but a restrictive, a strict, construction of such statutes when it has been urged to apply them to bar the rights of the government."

To the same effect is *State ex rel Wyatt v. Cantley*, 26 S. W. (2d) 976, 325 Mo. 67.

It will be noted that the statute of limitations in regard to the sale of land provides that "no proceeding shall be valid unless commenced within five years", and the statute dealing with personal taxes provides that suits may be instituted within five years.

Both statutes quoted only bar the right to institute proceedings to collect such taxes, but do not in any way extinguish the taxes. This fact is recognized in 37 C. J. p. 698, Section 18, which reads in part as follows:

"* * * *Except where the statute by its terms absolutely extinguishes the debt or demand itself, the general rule with respect to debts or mere

money demands is that statutes of limitation are regarded as barring the remedy, and not as extinguishing the cause of action. * * * * *"

The delinquent taxpayer owes the tax, but it can not be collected by the State in an affirmative action. However, it is a well settled rule that the statute "can only be used as a shield and not as a sword," *Byrne v. Byrne* 289 Mo. 109. Therefore, while the statute could be pleaded as a defense to any action by the State to recover delinquent taxes, still the taxpayer cannot affirmatively invoke such statute in a demand on the State for cost fees. The strict construction of the application of the statute required by the fact that it is in derogation of sovereignty does not allow this.

CONCLUSION

It is, therefore, the opinion of this department that taxes which are more than five years delinquent may be deducted from criminal cost fees due such delinquent taxpayer.

Respectfully submitted,

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APPROVED:

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