

TAXATION: Penalty and interest on delinquent
SOLDIERS AND SAILORS: taxes of persons in military service
DELINQUENT TAXES: forgiven.

June 16, 1943



M. R. E. Gruner
Mr. R. E. Gruner, Collector
City of St. Louis
110 City Hall
St. Louis, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date in which you request the opinion of this department. Your letter is as follows:

"I have been informally advised that under provisions of Article V of the Soldiers and Sailors Civil Relief Act, soldiers, sailors and others coming within the provisions of this Act cannot be required to pay any penalties on delinquent taxes, but that same would be discharged upon payment of the face amount of the tax bill, with six per cent interest per annum, figured to the date of payment.

"Will you be good enough to let us have your opinion as to whether or not under the provisions of this Act, we are, (1) permitted to add to the bill the usual two per cent for collection commission in addition to the above six per cent, (2) if we are not permitted to add the two per cent, are we then permitted to retain two per cent commission out of six per cent interest.

"The above will be a matter of interest to all Collectors in the State of Missouri, as our offices are maintained solely on commissions."

Since you refer to Article V of the Soldiers' and Sailors' Civil Relief Act as found at page 98, Title 50, App., we set forth Subdivisions 1, 2, 3 and 4 of Section 151 thereof, relating to taxes and public lands, as follows:

"(1) The provisions of this section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the war.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in mil-

itary service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the termination of the war; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest until paid at the rate of six per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon."

You desire to know whether you are (1) permitted to add to the bill the usual two per cent for collection commission in addition to the six per cent interest per annum, (2) if not permitted to add the two per cent are you then permitted to retain two per cent collection commission out of the six per cent interest above referred to.

Under the provisions of Sections 11182 and 11196, R. S. Mo. 1939, the collector is entitled as his fee for collecting delinquent taxes two per cent on all sums collected, and this is the two per cent commission which you refer to in your letter of request.

Section 11235, R. S. Mo. 1939, provides that the collector of the city of St. Louis shall collect the state taxes in the same manner and to the same extent and do and perform all other things appertaining thereto, as fully to all intents and purposes as now required, or as may be required, of the county collectors.

For the purposes of this opinion it is unnecessary for us to set forth the above statutes.

It will be observed, by the provisions of Subdivision (4) of the Soldiers' and Sailors' Civil Relief Act, quoted above, that the Federal statute has placed on the delinquent taxes a limitation of six per cent interest per annum, and provides that no other penalty or interest shall be incurred by reason of such nonpayment of taxes by one who comes within the provisions of the Soldiers' and Sailors' Civil Relief Act in respect to all real property owned and occupied for dwelling or business purposes by a person in military service, or by his dependents at the commencement of his period of military service and so occupied by his dependents or employees.

We think that the Federal legislation excusing the payment of penalties or interest by the Federal government is paramount to the state in that respect and that the limitation of six per cent interest applies all over the United States, but if the Legislature of any state desires to adopt a more generous attitude to those in the military service it may do so.

Section 11085, R. S. No. 1939, provides in part as follows:

"If any taxpayer shall fail or neglect to pay such collector his taxes at the time and place required by such notices, then it shall be the duty of the collector after the first day of January then next ensuing, to collect and account for, as other taxes, an additional tax, as penalty, the amount provided for in section 11124. Collectors shall, on the day of their annual settlement with the county court, file with said court a statement, under oath, of the amount so received, and from whom received, and settle with the court therefor: Provided, however, that said interest shall not be chargeable against persons who are absent from their homes, and engaged in the military service of this state or of the United States, or against any taxpayer who shall pay his taxes to the collector at any time before the first day of January in each year:

Provided, that the provisions of this section shall apply to the city of St. Louis, so far as the same relates to addition of said interest, which, in said city, shall be collected and accounted for by the collector as other taxes, for which he shall receive no compensation. * * *

The first proviso in the above section has been on the statute books of the State of Missouri since 1872, and our Legislature, in its wisdom and generosity, has seen fit to waive the payment of the "additional tax, as penalty" provided for in Section 11124, R. S. Mo. 1939, as we hereinafter will show.

While the first proviso uses the term "interest" the courts have construed that word, under analogous circumstances, to include the term "penalty." In other words, any additional costs that may be placed on the taxpayer because he has permitted his taxes to go delinquent, whether it be classified as fees, commissions, penalty or interest, is held to be a penalty. We quote extensively from the case of State v. Koeln, 61 S. W. (2d) 750, 1. c. 753, as sustaining this statement, the following:

"* * * We will now consider the several imposts as laid by statute upon the property of the delinquent, in their relation to the delinquent. Unquestionably they impose a duty, moral and legal, upon him in the interest of the public welfare. He is required to pay them, whatever the names they bear; they are imposed upon his property as a punishment to him as well as for the purpose of general deterrence of delinquency. They are essentially of a penal nature, since they imply punishment. They are, one and

all and indiscriminately, 'costs' to the delinquent. Also by statutory classification the respondent's 'commission' of 2 per cent. on delinquent taxes collected is 'penalty' as against the relator, required to be added to the tax bill and collected from the party paying such tax 'as a penalty in the same manner as other penalties are collected and enforced.' Thus the penalty exacted of the relator is by the statute (section 9935) required to be accounted for by the respondent along with the interest penalty of 1 per cent. per month imposed by section 9914, supra. These observations apply also to the city comptroller's fee of 25 cents per tract provided for and required 'to be taxed as costs and collected from the party redeeming such tract.' Not only is the fee an incident and part of the penalty exacted from the delinquent, but considered as costs eo nomine it is essentially penal. It is said in 15 Corpus Juris at page 19, right column: 'In their origin costs were known as a punishment of the defeated person * * * rather than as a recompense to the successful party. * * * The latter theory obtains * * * in the legislation in regard to it.' In volume 7 of Ruling Case Law, page 780, it is stated that 'the terms "fees" and "costs" are sometimes used interchangeably as having the same application.' 'Strictly speaking the two terms are not synonymous. The term "costs" includes fees and reimbursements consisting of fixed and unalterable amounts previously specified by laws, regulations or tariffs,' etc. 15 C. J. p. 21, top 1 col. It follows that as used in the chapter on taxation in the Revised Statutes the expressions 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty.'

"With regard to what may be called the interest penalty, this court in banc, in Seaboard National Bank v. Wooston, 176 Mo. 49, loc. cit. 62, 75 S. W. 464, held, that the statute (now section 9914) does not change the character of the imposition; that it is not an 'additional tax' at all, for regarded as a tax it would or possibly might be illegal, as the amount of the taxes that the Constitution permitted had already been levied; and that it is not 'interest' in any proper sense, because it is a penalty imposed for a failure to discharge a duty that can be lawfully demanded. See, also, St. Francis Levee District v. Dorroh, 316 Mo. 398, loc. cit. 410-413, 289 S. W. 925; 4 Cooley on Taxation (4th Ed.) Sec. 1821, p. 3573; State ex rel. Gold Mines v. Superior Court, 93 Wash. 433, 161 P. 77; Jones v. Williams (Tex. Sup.) 45 S. W. (2d) 130, 136, 79 A. L. R. 983, and cases there cited. And the same rule applies to other burdens imposed by statute for the nonpayment of delinquent taxes, which being in the nature of penalties (State ex rel. v. Coos County, 115 Or. 300, 237 P. 678, 679; Colby v. Medford, 85 Or. 485, 487, 167 P. 487; Jones v. Williams, supra) clearly come within the broad scope of the word 'penalties,' which is defined as 'an exaction in the nature of a punishment for the non-performance of an act, or for the performance of an unlawful act, and involving the idea of punishment, whether enforced by a civil or criminal action or proceeding.' Law Dictionary, Ballentine, p. 948; Hall v. Norfolk & W. R. Co., 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757."

The courts have held that a liberal construction must be placed on statutes for relief of soldiers and sailors,

and we quote from 130 A. L. R., page 776, as follows:

"It has been held that it was not the legislative intent that the remedial purpose of the Soldiers' and Sailors' Civil Relief Act should be defeated by a narrow or technical construction of the language used. Thus, in *Clark v. Mechanics' American Nat. Bank* (1922; CCA 8th) 282 F. 589, it was held that a statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed by the exacting duties required of him, and unable to give attention to matters of private business. * * * *"

In your letter of request you have referred to the Federal Soldiers' and Sailors' Civil Relief Act and also you have enclosed a copy of the opinion of the City Counsellor's office of the city of St. Louis, which refers only to the Federal Act. We think that the state law, namely, the first proviso in Section 11085, supra, must be considered on this question. This state has seen fit to forego the collection of interest from those "who are absent from their homes, and engaged in the military service of this state, or, of the United States"; that is, those who come within the first proviso of said Section 11085, supra.

Since the court in the above opinion has classified the collector's commission of two per cent on delinquent taxes collected as "penalty" as against the taxpayer and, further, states that "in the chapter on taxation in the Revised Statutes the expressions 'commissions,' 'interest,' 'fees,' and 'costs' are included in the generic term 'penalty,'" we are constrained to hold that the collector is not entitled to charge the persons who are absent from their homes, and engaged in the military service of this state, or of the United States, the two per cent commission for collecting delinquent taxes, and is not permitted to add said commission to the tax

bill. And, since he is not permitted to charge the two per cent commission on delinquent real estate taxes, we do not think he is entitled to deduct it from any other portion of the taxes paid by those who are entitled to be excused from paying interest by reason of military service. It will be noted that Subdivision 4 of Section 151 of the Federal Act, quoted above, provides that "no other penalty or interest shall be incurred by reason of such nonpayment" and, since a commission, as used in our tax statutes of Missouri, is a penalty, we do not think the collector could charge a person in the military service such commission.

CONCLUSION

It is, therefore, our opinion that the collector is not permitted to add two per cent commission for collecting delinquent taxes from those engaged in the military service, that is, those who come within the provisions of Subdivision 1 of Section 151 of Article V of the Soldiers' and Sailors' Civil Relief Act as set out above.

It is further our opinion that the collector is not entitled to deduct a two per cent commission from any other portion of the taxes that may be collected from those who come within the provisions of the foregoing subdivision.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

CRH:CP