

OFFICERS: Not liable for tax illegally collected if done in good faith and paid over into the County Treasury.

August 21, 1939

Honorable Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

We wish to acknowledge your request for an opinion under date of August 18, 1939, as follows:

"I have an opinion from your office under date of July 15, 1939, prepared by Max Wasserman, holding that Henry County has no power to levy a tax upon skating rinks on the theory that they are public exhibitions.

In 1938 the Henry County Court levied a tax in the amount of 75¢ per day upon skating rinks, and continued to assert the right to collect such a tax up to the time of receipt of the opinion.

One of the operators through his attorney, Maurice J. O'Sullivan, has made demand upon our Constable, County Clerk and County Treasurer for the return of the amount of \$117.75, being the amounts paid for such license fees, and threatening action upon the bonds of these officers unless the same is repaid.

Enclosed herewith is a copy of the letter sent each of the above officers.

At the request of these officers I am writing you for an opinion with respect to any liability they might have on their official bonds. It is my impression of the law that a voluntary payment

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of tax or license fee cannot be recovered. This letter asserts some compulsion on the part of the officers. However, the County Court entered an order of record setting the amount of such license fees and the same were collected pursuant to this order of court. It is my impression also that the officers are protected by the court ordering it made.

I would appreciate an opinion from your office with respect to this matter at your early convenience."

With respect to the recovery of taxes illegally collected by officers, 26 R. C. L. declares that:

"This action may be maintained against the collector as long as the money remains in his hands, or if he has notice of the claim while the money is still in his hands, but after he has in good faith paid it over to the treasurer of the body politic for which he is acting he is no longer liable, and the action is more commonly brought against the county, city or town into the treasury of which the tax has been paid."

See also Seaboard Air Line Railway Co. v. Allen, 82 Fla. 191, 89 So. 555, 1. c. 558; and 60 C. J. Sect. 1279, p. 1001.

If the taxes were paid voluntarily, the owner of the skating rink would not be entitled to a refund of same. Robins v. Latham, 134 Mo. 466, 1. c. 473. However, irrespective of whether same was paid voluntary or involuntary, if it can be shown that the county officers acted in good faith in the collection of the tax and paid it over into the county treasury, they would not be liable.

In the case of State ex rel. v. Reynolds, 270 Mo. 589, 1. c. 601, 602, the Supreme Court of Missouri en banc, in an action to recover taxes illegally collected, stated the liability of the officers as follows:

"In this kind of a situation, we think the rule announced in *Lewis County v. Tate*, 10 Mo. 651, is applicable. It is there said:

'The money thus collected was paid over into the county treasury. Whatever may be the liability of the county, and of this we are not authorized to give any opinion, it is clear that the collector is not liable. Where money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back.'

In *Mechem's Public Offices and Officers*, sec. 694, it is said:

'Where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it, but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, although it appears that he acted under an authority which was void.'

In *Cooley on Taxation* (3 Ed.), p. 1482, it is further said:

'But in general, if the money, though actually collected by compulsion, is paid over to the proper receiving officer before suit brought, the collector is protected, and this principle has been applied to cases in which the officer's authority was void for unconstitutionality or other reason.'

This rule is supported by many cases found cited under the text, and we think it the safe rule."

From the foregoing, we are of the opinion that the constable, the county clerk and the county treasurer of Henry County, and their sureties, are not liable for a

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tax illegally collected from skating rinks if same was collected in good faith and has been paid over into the county treasury.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
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MW:VC