COLLECTOR: County Collectors not authorized to
TAXATION: compromise penalties for nonpayment
of merchant's tax; penalty collected
should be turned in to the county.

February 16, 1949

Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

This is in reply to your request for an opinion from this office, which reads as follows:

> "The County Collector of this county, a Third Class County, has a few delinquent merchant taxes, which have not been paid at this date.
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> "He has Bond signed by the merchants with sufficient sureties to insure payment of these taxes by December 31, 1948.
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> "Under Section 11315 and the provisions of these Bonds, they are now forfeited and double the amount could be sought.
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> "If the merchants at this date, wish to come in and pay the Collector the amount of the tax, plus interest, should the Collector demand double the amount of the bond as a penalty?
>
> "If he demands and collects double the amount of the bond as penalty is he authorized to retain the excess penalty?"

Section 11315, Mo. R. S. A., reads as follows:

> "Every person, corporation or copartnership of persons, to whom a license shall

> have been granted to vend goods, wares and merchandise, who has filed a correct statement as herein required, and failed to pay the amount of revenue so owing to the collector of the proper county, shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

In 51 Am. Jur., Section 998, page 871, the rule is stated as follows:

> "The tax collector's duties in the collection and enforcement of taxes are ministerial in character and are to be discharged with promptness and fidelity. * * *"

The collection of taxes is a ministerial act. (Louisville Water Company V. Commonwealth, 89 Ky. 244, 12 S. W. 300). In the case of State v. Welsch, 124 S. W. (2d) 636, the St. Louis Court of Appeals, in defining a ministerial act, stated, l.c. 639:

> " * * * A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of legal authority upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. State ex rel. Jones et al. v. Cook, 174 Mo. 100, 118,119, 120, 73 S. W. 489."

The statutes requiring bond for merchant's license tax, prescribing form of bond and providing double, triple and quadruple penalties as well as provisions for suit to collect them, first appearing in Revised Statutes, 1855, Chapter 110, pages 1072-1078, have been contained to this time in almost identical language.

In your opinion request you state that some of the merchants did not pay a merchant's tax due for 1948 on or before the 31st day of December. Section 11315, supra, declares in clear and unequivocal language that such person "shall be deemed to have forfeited the bond given by him or them in virtue hereof, and judgment shall be rendered for the plaintiff in damages, for double the amount of such revenue and costs."

In the case of American Surety Co. v. Hamrick Mills, 191 S.C. 362, 4 S. E. (2d) 308, 124 A. L. R. 1147, the court said, l.c. 1153:

> "The Statute fixes the amount of the penalty (the indebtedness), and to this extent is self executing, and the mere fact that some officer has not performed his ministerial duty thereabout cannot affect the existance of the debt. The passage of time, when the tax has not been paid, automatically attaches and increases the debt in the amount or to the extent of the penalty provided by the pertinent statute. * * *"

In the case of State v. Central Pacific R. R. Co., 9 Nev. 79, the court considered the question of the powers of the Board of County Commissioners to compromise and settle suits instituted by the state for the collection of taxes. Concerning this, the court said, l.c. 88:

> "2. Did the board of county commissioners have any authority to make the compromise with defendant? It is not claimed that there is any law expressly giving to the commissioners power to compromise and settle suits instituted by the State for the collection of delinquent taxes. But it is argued by defendant's counsel that section 8, subdivision 12, of the Statutes of 1864-5, p. 259, giving to the commissioners power to 'control the prosecution or defense of all suits to which the county is a party;' and sec. 29 of the Statutes of 1871, p. 94, providing that 'no suit

> for the collection of delinquent taxes shall be commenced except by the direction of said board, 'imply that it was the intention of the legislature to invest the commissioners with full power to control the collection of taxes, and 'that when the process of collection has taken the form * * * of an action at law, the county commissioners have control of such action.' This position is wholly untenable.
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> "The board of county commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law and void. State v. Commissioners of Washoe County, 5 Nev. 319; Swift v. Commissioners of Ormsby County, 6 Nev. 97; Hess v. Commissioners of Washoe County, 6Nev. 108; White v. Conover, 5 Blackford, 463; Rosenthal v. M. & I. Plankroad Company, 10 Ind. 361; City of Lowell v. Commissioners of Middlesex, 3 Allen, 550; Finch v. Tehama County, 29 Cal. 455."

In Brown v. Kirby, 4 Ky. Law Rep. 446, the rule was stated by the court as follows:

> "Sheriff is the agent of the State and county in the collection of revenues. His duty is to collect money for taxes, and he can not make any commutation so as to affect the State or county."

In the case of City of Louisville v. Louisville Ry. Co., 63 S. W. 14, the court, while considering the question of the authority of a city attorney to compromise claims for taxes, stated,, l.c. 19:

> " * * * Likewise, we are of opinion that the city attorney could not effect a compromise and take less than is shown to be

> due from the taxpayer, neither before nor after suit brought. City of Louisville v. Bank of Kentucky, 174 U. S. 412, 19 Sup. Ct. 881, 43L. Ed. 1027. His powers and duties are fixed by the charter provision, and when the delinquent taxes come to him for collection the matter must be adjusted by a judgment, unless the full amount be paid."

In view of the above authorities, we believe that the collector is without the authority to accept payment of the merchant's tax which was due on or before December 31, 1948, without also exacting double the amount in damages. The passage of time automatically attaches and increases the debt in the amount or to the extent of the penalty provided by the pertinent statute, and it becomes the duty of the collector, under the provisions of Section 11318, Mo. R. S. A., to institute suit without delay upon the bond forfeited, against the principal and all sureties, jointly or severally, as may be deemed advisable. The sections providing for forfeiture of the bond given by merchants to insure payment of the tax may seem to be harsh, but as stated in the case of Western Union Tel. Co. v. State, 44 N. E. 793, l.c. 796:

> "Appellant makes particular complaint of the 50 per cent. penalty provided for in suits under the statute. What we have said as to the nature of appellant's property, and the difficulty in coercing payment of delinquest taxes due thereon, will fully answer this objection. In the sale and redemption of other forms of property in case of delinquency there is often quite as heavy a penalty imposed before the property is finally relieved from the paramount tax lien. By section 56 of the general tax law (section 8466, Rev. St. 1894), the county auditor is required to add 50 percent. to the valuation in case the property owner has refused to list his property or subscribe to the oaths required. The validity of a similar penalty was upheld in Boyer v. Jones, 14 Ind. 354. Other like penalties and heavy charges are imposed in different sections of the tax law, where the property holder

> has been neglectful or otherwise at fault in matters relating to the assessment or payment of his taxes. See numerous provisions of the tax law as to penalties, costs of redemption, etc., resulting from failure to pay taxes when due. Sections 150-225 of the general tax law of 1891 (sections 8568-8643, Rev. St. 1894). In the event that one is called upon to pay a tax which he believes to be illegal, he has two courses open to him: He may resist payment at the hazard of all penalties in case the decision shall be against him, or he may pay the tax under protest, and then, in case the decision is in his favor, demand the return of his money. See Chemical Works v. Ray (R. I.) 34 Atl. 814, No one need pay any penalty except through his own wrongful act. The government is in need of its revenues, and these revenues will be paid promptly by all good citizens. In case of failure to comply with such duty, such penalties will be imposed as will, in the judgment of the lawmaking power, best compel compliance with the law in each case, to the end that all the property owners of the state may bear their equal share of the public burden. Such penalties, as we have seen, are never imposed upon those that pay their taxes when due; the imposition of the penalty being an effort on the part of the lawmakers to compel good citizenship on the part of all taxpayers, that none may shirk the common duty. The validity of the penalty here complained of has, besides, been already affirmed by this court in the case of State v. Adams Exp. Co., 144 Ind. --, 42 N. E. 483."

In answer to the second question, that is, is a collector authorized to retain the excess penalty, we refer you to the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, which states the general rule concerning compensation of public officers for official duties as follows, l.c.860:

> "The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation

> therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. State ex rel. Evans v. Gordon, 245 Mo. 12, 28, 149 S. W. 638; King v. Riverland Levee Dist., 218 Mo. App. 490, 493, 279 S.W. 195, 196; State ex rel. Wedeking v. McCracken, 60 Mo. App. 650, 656.
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> "It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

We are unable to find any statute which provides that the collector may retain the amount of the penalty provided by Section 11315, supra, and following the rule in the Kidder case, supra, the penalty money must be accounted for by the collector.

Conclusion

It is the opinion of this department that collectors do not have the authority to compromise the penalty which accrues by virtue of the nonpayment of merchant's taxes on or before December 31, but must demand double the amount of the bond as a penalty. The collector is not authorized to retain the penalty which becomes due by virtue of such nonpayment.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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