

bent and who may thus be held directly responsible for the legal custody and safe keeping of the securities under consideration.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2364.

CIGARETTE TAX—NO PENALTY PROVIDED FOR NONPAYMENT OF SAID TAX.

The penalty provided for the non-payment of the general taxes upon real estate and personal property does not apply to unpaid cigarette taxes.

COLUMBUS, OHIO, August 24, 1921.

HON. J. T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads:

“We are in receipt of the following letter from the auditor of Trumbull county, which is self-explanatory, and we desire your opinion upon the question submitted in same:

‘Please refer the following inquiry to the proper department. What penalty should be figured on cigarette taxes unpaid at the close of the June collection of taxes?’

We are making our cigarette settlement this year, with \$1,600.00 unpaid. Please tell me what penalty, if any, should be added. The new form book has no column for penalty; however, I am anxious to follow the law.’”

In considering your inquiry we may start with the proposition that under the existing laws of this state and the judicial interpretations thereof, a tax may not be levied except in pursuance of clear authority of law. Analogically it will follow that the collection must be in pursuance to express authority of law. It may further be considered as established that fees cannot be collected by public officers in Ohio unless there is clear statutory authority for the same.

There may be some question as to whether the so-called “cigarette tax” is a “tax” as the later term is generally understood in legal contemplation. However, it of course is clear that the cigarette tax is a special tax and should not be confused with reference to the general taxes, that is, taxes upon real estate and personal property. However, regardless of what may be the true status of such a tax as the one under consideration, the rule in reference to its levy and collection is the same, that is, it cannot be collected except in pursuance of clear authority of law, as heretofore indicated. This rule has been so frequently enunciated by the courts of this state in various decisions and opinions of the Attorney-General that no specific citation seems necessary.

In view of the foregoing discussion, it is evident that the only question requiring consideration is whether or not there are any statutes expressly creating a penalty upon such delinquent taxes.

Section 5894 et seq., which relate to the collection of the cigarette tax, provide certain penalties for failure to make proper returns, etc. (See section 5898). However, in examination of those sections there is no specific authority found authorizing a penalty for the nonpayment of the tax as described in your letter, unless it be found in the references in section 5902, which incorporates a number of the sections relating to the collection of liquor assessments, and provides as follows:

"Sec. 5902. The provisions of sections sixty hundred and seventy-seven, sixty hundred and seventy-eight, sixty hundred and seventy-nine, sixty hundred and eighty, sixty hundred and eighty-five, sixty hundred and eighty-six and sixty hundred and ninety-two, sixty-one hundred and sixty-one hundred and one are hereby extended to this chapter so far as they can be made to apply."

Sections 6077 and 6078 G. C., mentioned in the above quoted section, provide that the county treasurer shall forthwith collect the amount of the tax upon failure to pay the same when due by distress and sale as on execution, adding four per cent collection fees and costs from any goods and chattels of such person, and further authorize the treasurer to make a levy upon the goods and chattels of such person wherever found in such county, or upon the fixtures, leasehold, etc., used in carrying on the business.

If the collection is not realized upon the action taken as above pointed out, then it becomes the duty of the county auditor to place the amount due and unpaid on the tax duplicate against the real estate in which such traffic is carried on, and it shall be collected as other taxes and assessments on such premises.

A penalty for the nonpayment of taxes is an extraordinary method provided, it is generally understood, to relate only to the general taxes on personal property and real estate. The method adopted for the enforcement of the collection of the cigarette tax, which is the same as that of the liquor tax, is an extraordinary and unusual method, and there seems to be nothing in the above mentioned sections to indicate that it was the intention of the legislature that any further penalties should be provided, excepting the penalties therein specifically set forth. While said statutes do mention that in case the treasurer fails to collect the tax when due and in the manner provided for the levy as upon execution, that it shall be placed on the tax duplicate and collected as other taxes and assessments on such premises, it is believed that this reference is to the manner of collecting the amounts previously determined to be due, and that by the use of the language the legislature did not intend to indicate that further penalties should be attached.

In specific answer to your inquiry, you are advised that it is the opinion of this department, upon the state of facts submitted, that no penalty should be figured upon said cigarette tax.

Respectfully,
JOHN G. PRICE,
Attorney-General.