

Opinion No. 55-6140

April 18, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. L. Forsling, Chief Tax Commissioner, State Tax Commission, Santa Fe, New Mexico

In your letter dated March 31, 1955, you inquire concerning the procedure for issuance and service of distraint warrants for the purpose of collecting delinquent personal property taxes.

The present law on this subject is somewhat confused but we shall make an effort to arrive at some logical procedure for the benefit of the Tax Commission and the various county treasurers in connection with this matter.

In 1921, § 72-7-11, 1953 Compilation, was passed authorizing county treasurers to prepare a personal property delinquent tax list on the first day of June of each year and issue a distraint warrant to the sheriff for seizure and sale of property of the taxpayer in an amount sufficient to pay the delinquent taxes with interest, penalties and costs of seizure and sale. As a part of the same 1921 law, § 72-7-18, 1953 Compilation, was passed setting up the procedure for serving the distraint warrant, seizing the property and sale of the same by the sheriff. This section, however, was amended in 1925 to authorize the assessor or treasurer to seize and take possession of the personal property of the delinquent taxpayer and to sell the same. By the 1925 amendment, the sheriff was no longer required to serve the warrant, seize and sell the property. The procedure set forth in this section may still be followed by the treasurer as to delinquent personal property taxes up until the delinquency of the second half for any year is more than six months delinquent, at which time the jurisdiction of the State Tax Commission accrues.

In 1929, § 72-7-1, 1953 Compilation, was passed in the following language:

"Collection by tax commission after last installment is delinquent for six months. -- The power, jurisdiction and authority to collect all delinquent taxes is hereby vested in the state tax commission. and hereafter whenever any tax has not been paid within six (6) months after the date on which the second half of property taxes become delinquent as provided by law, the power, jurisdiction and authority to collect the same shall become vested in the state tax commission."

As a part of the original law of 1921, being Chapter 133, § 72-7-2 of the 1953 Compilation was enacted and was subsequently amended in 1927 to read as follows:

"Powers and duties of other agencies vested in tax commission -- Mandamus to compel performance of duties requisite for collecting delinquencies. -- For the purpose of

collecting the said delinquent taxes the state tax commission is hereby granted all powers and duties heretofore granted to the district attorneys of the several judicial districts within the state and to all special tax collectors or attorneys under existing laws. And the said commission shall also have and is hereby vested with the power to enforce by mandamus or other appropriate remedy in the courts the performance of all statutory, ministerial and executive duties of all state and county officers, the performance of which is necessary and requisite for the collection of delinquent taxes."

As a part of Chapter 114, Laws of 1929, § 72-7-17 of the 1953 Compilation was passed authorizing the State Tax Commission, at the time of issuing certificates of lien on real estate through it several delinquent tax collectors, to issue distraint warrants against persons appearing on the tax rolls to be delinquent in the payment of taxes levied on personal property. In connection with the powers of the Tax Commission in *State ex rel. Gibson v. Fernandez*, 40 N.M. 288, 58 P. 2d 1197, the Supreme Court held that the sovereign power affecting collection of delinquent taxes more than six months delinquent is vested in the Tax Commission rather than in the special tax attorney who was declared to be merely an employee of the Commission.

In 1934, the tax structure and the procedure for collecting taxes on real estate was changed substantially to the present system whereby the county treasurers are directed to sell real estate in January of the year following delinquency of the second half of such taxes and the county treasurers are authorized to accept payment of delinquent taxes on real estate by way of redemption from the tax sales. To that extent the power of the Tax Commission over the collection of delinquent taxes on real estate contained in the 1929 law has been limited.

The power of the Tax Commission over the collection of delinquent personal property taxes under the 1929 law has also been limited by virtue of authority given to the county treasurers to collect delinquent taxes contained in § 72-7-3, 1953 Compilation, which was a part of Chapter 27, Special Session Laws of 1934. It is thus apparent that the county treasurers have full power to collect, receive and issue receipts for delinquent taxes upon both real and personal property.

The jurisdiction, however, remains in the Tax Commission to govern and control the collection of delinquent taxes upon which the second half is delinquent for more than six months insofar as litigation or other proceedings may be deemed necessary or desirable in order to collect such taxes. The procedure for issuance and service of distraint warrants and the seizure and sale of personal property is a summary method which may be used in lieu of litigation, judgment and execution for the collection of personal property taxes.

From a review of the various statutes, it is our conclusion that after the second half of personal property taxes is delinquent for more than six months, the Tax Commission has authority to do any one of three things in order to force collection of such delinquent taxes. First, it may file suit in behalf of the State and county, recover judgment and levy execution upon any property of the taxpayer; second, it may obtain a delinquent

personal property list from the county treasurer and issue distraint warrants against the persons appearing therein and require the sheriff to seize and sell sufficient personal property to pay the taxes, interests and costs of seizure and sale substantially pursuant to authority given in § 72-7-17; third, it may by resolution designate the county treasurers as ex-officio tax collectors and as agents of the Tax Commission to issue distraint warrants and require the sheriff to serve the same, seize and take possession of the personal property of the delinquent taxpayers and sell the same for the payment of the delinquent taxes, interests and costs of the distraint proceeding and sale.

It should be noted that under § 72-7-17 of the 1953 Compilation the Tax Commission is authorized to issue distraint warrants "at the time of issuing certificates of tax lien on real estate by its several delinquent tax collectors". The 1934 law abolished certificates of lien on real estate and substituted tax sale certificates for the same, and chapter 185, Laws of 1939, repealed the statute authorizing the appointment of delinquent tax collectors. Regardless of this change in the statute, we feel that the power of the Tax Commission to issue or direct county treasurers to issue distraint warrants still exists as above outlined.