

License, Ten Per Cent Penalty, Liability of Treasurer for Failure to Collect Penalty.

Under Section 4084, Political Code, the penalty imposed for commencing or carrying on business without a license is in the nature of a fine. It can only be enforced when an action is instituted to collect such license. The treasurer would not be liable for failing to collect the ten per cent penalty where the person liable for the license came in and paid for the license before suit was instituted to collect the same.

April 14, 1905.

F. H. Ray, Esq., Assistant State Examiner, Helena, Montana.

Dear Sir:—In your favor of the 25th ult., you present the following question to this office for an opinion, to-wit:

Section 4084, of the Political Code, as amended by the Laws of 1897, p. 200, provides that, where a person commences or carries on a business for which license is required without taking out or procuring a license, a penalty of ten per cent shall be added to the amount of said license and must be collected by the county treasurer at the time of collecting

the license. Is the county treasurer liable if he fails to collect this penalty?

Section 4084, reads as follows:

"Every person who commences or carries on a business, trade or profession, or calling for the transaction or carrying on of which a license is required by the provisions of this Act without taking out or procuring a license as herein prescribed, or who violates any of the provisions of this Act, shall be punished as provided in Section 780 of the Penal Code and in addition thereto shall be liable to a penalty of ten per cent of the amount of said license, which said penalty must be added to the amount of said license and collected by the county treasurer at the time of the collection of the license, but the payment of said penalty shall in no event relieve any person from the prosecution provided for in Section 780 of the Penal Code."

The penalty imposed by said section is in the nature of a fine for the carrying on of such business without a license. The treasurer may institute a civil action for the collection of such license, in which event he must also collect the ten per cent Penalty. In addition to such civil action, the treasurer may also prosecute such a person under said Section 780. If the term "penalty" is to be construed as a fine, it would seem that the additional ten per cent could only be collected by a suit in some form.

Black's Law Dictionary defines the word "penalty" as follows:

"A punishment; a punishment imposed by statute as a consequence of the commission of a certain specified offense."

In *Gossilink v. Campbell*, 4 Iowa 300, the court used the following language in defining the word "penalty," "The terms 'fine', 'forfeiture' and 'penalty' are often used loosely, and even confusedly; but, when a discrimination is made, the word 'penalty' is found to be generic in its character, including both fine and forfeiture. A 'fine' is a pecuniary penalty and is commonly (perhaps always) to be collected by suit in some form."

Raplje & Lawrence's Law Dictionary defines the word "penalty" as follows: "Statutory. Some penalties are imposed by law; thus many statutes creating duties of a public nature contain provisions for the recovery of penalties against persons neglecting those duties. Some of these may be enforced by information, others by an ordinary action."

From the above definitions of the word "penalty" it would appear that where a person comes in voluntarily and pays his license before the treasurer has instituted action against him, or where upon demand, without suit, the person who had been carrying on business without a license, came in and voluntarily paid for and procured a license for such business, dating back to the time when he commenced to so carry on business without a license, the treasurer, upon issuing the same, would not be liable for the ten per cent penalty if he did not also collect it.

The ten per cent penalty mentioned in said Section 4084 is to be distinguished from the ten per cent added to delinquent taxes. The word "penalty" is not used in Section 3866, Political Code, as amended by the laws of 1899, p. 97, or in Section 3871, 3874 and 3879, Political Code, or

elsewhere, in referring to delinquent taxes. In such sections the words "ten per cent", "percentage", and "ten per centum" are used, but nowhere are the same called a "penalty.

Therefore, we must hold, under the construction given to the word "penalty," that the treasurer would not be liable for failing to collect the ten per cent penalty imposed for carrying on business without a license, where the license was paid before suit was instituted for the collection of the same.

Respectfully yours,

ALBERT J. GALEN,

Attorney General.