

Opinion No. 62

Taxes—Penalty and Interest—Notice
—County Treasurer.

Held: The provisions of Section 2169, Revised Codes of Montana, 1935, as it applies to the county treasurer giving the notices therein mentioned, are directory and not mandatory. The failure of the county treasurer in giving the notices as therein provided will not affect the legality of the tax, nor the lawful interest and penalty accruing thereon, as provided by law.

September 5, 1947

Mr. J. M. Watts
County Attorney
Musselshell County
Roundup, Montana

Dear Mr. Watts:

You have submitted the question, "as to whether or not a taxpayer is liable for penalty and interest upon delinquent taxes where the county treasurer has failed to send him notice that said taxes are due and delinquent, as provided in Section 2169, Revised Codes of Montana, 1935."

Section 2169, Revised Codes of Montana, 1935, is as follows:

"Within ten (10) days after receipt of the assessment book, the county treasurer must publish a notice specifying:

"1. That one-half ($\frac{1}{2}$) of all taxes levied and assessed will be due and payable before five o'clock p. m. on the 30th day of November next thereafter, and that unless paid prior thereto the amount then due will be delinquent and will draw interest at the rate of two-thirds ($\frac{2}{3}$) of one per centum (1%) per month from and after such delinquency, and two per centum (2%) will be added to the amount thereof as a penalty and that one-half ($\frac{1}{2}$) of all taxes levied and assessed will be due and payable on or before five o'clock p.m. on the 31st day of May, next thereafter, and that unless paid prior to said date said taxes

will be delinquent and will draw interest at the rate of two-thirds ($\frac{2}{3}$) of one per centum (1%) per month from and after such delinquency, and two per centum (2%) will be added to the amount as a penalty.

"2. The time and place at which payment of taxes may be made: And he must send to the last known address of each taxpayer a postcard or other written notice, postage prepaid, showing the amount of taxes due the current year, and the amount due and delinquent for other years; but any failure to give either notice will not affect the legality of the tax." (Emphasis mine).

It is to be noted that, the underlined portion of the above section specifically provides, "but any failure to give either notice will not affect the legality of the tax."

It should also be pointed out that Section 2170, Revised Codes of Montana, 1935, provides in part:

"The failure to publish or post notices does not relieve the taxpayer from any of his liabilities."

In reading our tax laws it is observed the word "shall" or "must" is used many times and it is apparent that one or the other of the words is employed indiscriminately in both the imperative and the permissive sense. In a somewhat similar case, and treating with Section 2169, our Supreme Court stated:

"It is true that section 2169, above, directs the county treasurer to give notice by mail to each taxpayer of the amount of taxes due 'and delinquent for the other years,' but that direction ceases with the provision: 'But any failure to give either notice will not affect the legality of the tax.'" (Emphasis mine).

Smith v. Blaine County, et al,
102 Mont. 116, 119; 56 Pac. (2d)
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From the foregoing it will be seen that our Supreme Court has interpreted the provisions of section 2169, supra, as being directory and not

mandatory insofar as it applies to the county treasurer in giving the notice.

It is presumed by our law that every owner of property is put on notice that his property will be assessed and taxed for the proportionate costs of government. The burden is upon the taxpayer to see that the taxes on his property are paid or suffer the penalty which the law provides.

Of course, the county treasurer should make every reasonable effort, based upon the records and information in his office, to notify the taxpayers at the last known address, but he is not required to act at his peril, nor is the county and state to be deprived of its taxes, including interest and penalty thereon, merely because such notice had not been sent when the statute expressly provides any failure to give either notice will not affect the legality thereof.

The legislature has on occasion passed legislation waiving the payment of penalties and interest on delinquent taxes for limited periods only, and such Acts have been held valid by our Supreme Court. The waiving of penalty and interest on delinquent taxes is wholly statutory, the legislature may constitutionally enact the same, but no such legislation is now in effect.

The state of Texas has in its tax law a similar provision in regard to tax notices; it provides that the tax collector in each county shall each year mail to the address of each owner of any land or lots a notice showing the amount of current tax, all delinquent taxes unpaid, etc., and then provides, "but failure to send or receive such notice shall be no defense to a suit brought for taxes." The Texas court held that the failure of the tax collector to send the notice was no defense for the collection of the tax, penalty and interest.

Garner v. Heisig, 20 S. W.
(2d) 332

The state of Washington has a law similar to ours relative to the sending of notices of tax and delinquencies by the county treasurer, and in an exhaustive opinion by their Supreme Court, the Court held that, the statute

was directory and not mandatory on the treasurer.

Spokane County ex rel. Sullivan,
et al v. Glover, County Treasurer, 97 Pac. (2d) 628.

From the law as given to us by the legislature and the decisions of our courts, it is my opinion that the provisions of Section 2169, Revised Codes of Montana, 1935, as it applies to the county treasurer giving the notices therein mentioned, are directory and not mandatory. The failure of the county treasurer in giving the notices as therein provided will not affect the legality of the tax, nor the lawful interest and penalty accruing thereon, as provided by law.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General