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OFFICIAL OPINION NO. 8

April 4, 1967

**TAXATION—COUNTY SHERIFFS—Entitlement of Fees  
Arising from Execution of Alias Tax Warrants  
Issued by Department of Revenue.**

Opinion Requested by Mr. William L. Fortune, Commissioner  
of State Revenue.

This is in answer to your request for an opinion concerning delinquent tax and “damages” collected on warrants pursuant to § 13 (a) of the Gross Income Tax Act of 1933, Acts 1933, ch. 50, as last amended by Acts 1963, ch. 382, § 1, Burns § 64-2613, which has been further amended since the date of your letter by Acts 1967, (House Enrolled Act No. 1273), ch. 222, § 1, and § 603 of the Adjusted Gross Income Tax Act of 1963, Acts 1963 (Spec. Sess.), ch. 32, Burns § 64-3237. As you point out, these sections contain similar, but not identical, provisions concerning the issuance, amount and collection of tax warrants. Your questions specifically refer to alias warrants issued by the Department pursuant to those sections, and are:

1. Must your department’s employees channel collections made by them on such alias warrants through the office of a sheriff of a county, or should they remit the collections directly to the Department of Revenue?
2. “If collections are made on alias warrants by the representatives of the Department of Revenue, is the sheriff entitled to receive and retain the amount of damages set forth in the warrant?”

For convenience in answering your questions, each statute will be considered separately.

(a) *Indiana Gross Income Tax Act*. Your second question was answered in part by 1954 O.A.G., p. 270, under § 13 (a) of the Indiana Gross Income Tax Act as it read at that time, Acts 1951, ch. 279, § 2:

“(a) If any tax, penalties, or interest, or any proportion thereof, imposed by this Act and demanded by the Department be not paid within thirty (30) days after the same is found to be due and within the ten (10) days after the demand provided for in Section 12(a) of this Act, *the Department shall issue a warrant under its official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person owing said tax, found within his county, for the payment of the amount thereof, with damages to the amount of ten per cent of the tax, in addition to the penalties imposed for failure to make a return, and in addition to the penalties imposed under Section 11 of this act, and interest, and costs of executing the warrant, and to return such warrant to the department and pay to it the money collected by virtue thereof, by a time to be therein specified, not more than sixty days from the date of the warrant. . . .* Such officers shall be entitled to the same fees, to be collected in the same manner, as is now provided by law for like services. *The sheriff shall also be entitled to retain for his services the amount of damages set forth in the warrant and as prescribed herein, but only when the full amount of tax and penalties set forth in the warrant has been collected by him and transmitted to the department. . . .* The warrant provided for herein shall be the sheriff’s instrument of execution on the judgment and in case the execution and levy is not made within the sixty days provided, the Department may issue an alias warrant in the same amounts which shall be served with like effect as the original warrant.” (Emphasis added.)

Under that statute, the Attorney General concluded that when a warrant was returned unsatisfied by a sheriff and the Department later received payment for the warrant, the dam-

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ages portion should be retained by the Department of Revenue, and not paid to the sheriff, because the sheriff had not personally collected and transmitted the proceeds, as required by the statute as a condition precedent to his retention of the damages. However, the Attorney General also concluded that any alias warrant issued would be issued to a sheriff, that he might hold it indefinitely under the statute, and that the Department should never accept directly the proceeds of a warrant held by a sheriff. Since there was no provision in the statute requiring the return of an unsatisfied alias warrant, the practical effect of this opinion was that, in any case in which an alias warrant was issued, only a sheriff could collect the amount due, and he could retain the damages specified in the statute.

In Acts 1963, ch. 382, § 1, the Legislature eliminated from the last line of § 13 (a) quoted above the words "with like effect as the original warrant," and added other provisions, so that that portion of the statute read as follows:

*"The warrant provided for herein shall be the sheriff's instrument of execution on the judgment and in case the execution and levy is not made within the sixty (60) days provided, the Department may issue an alias warrant in the same amounts which shall be served and executed either by the sheriff or by the Department. For the purpose of levying and executing such alias warrants against the real or personal property of the person owing said tax, the Indiana Department of State Revenue is hereby given the same jurisdictions and powers which are prescribed by law and exercised by sheriffs in respect to executions issued against property upon judgments or attachment proceedings of a court of record."* (Amendment emphasized.)

The Legislature thus specifically empowered the Department, as well as a sheriff, to execute an alias warrant. The conclusion in the 1954 Attorney General's Opinion that a sheriff may retain any damages collected "only when the full amount of tax and penalties set forth in the warrant has been collected *by him* and transmitted to the department," § 13 (a), remains valid under this last amendment prior to 1967. How-

ever, under the 1963 amendment to § 13 (a), the second conclusion that a sheriff is entitled to receive the damages when an alias warrant has been issued, because he is the only proper person to execute the warrant, can no longer be reached. The General Assembly gave the Department powers equal to those of a sheriff in serving, executing and levying the warrant, and authorized either, in the alternative, to execute a warrant under this section. It cannot be implied that the General Assembly thereby intended to require the Department to exercise such powers only through a sheriff.

Therefore, under the Indiana Gross Income Tax Act, § 13 (a), the answer to your first question is that it is not necessary that your Department's employees channel collections made by them on alias warrants through the office of the sheriff of a county, and such employees should, in fact, remit the money collected directly to the Department of Revenue.

Further, in answer to your second question, since the Department is authorized to make collections of alias warrants directly and not through the office of a sheriff, and when it does, a sheriff does not personally collect the full amount of tax and penalties, a sheriff is not entitled to any damages collected by the Department's representatives.

As previously stated, the 1967 General Assembly amended § 13 of the Act, effective April 1, 1967. The amendment adds the following sentence to the paragraph last quoted above as added in part by the 1963 amendment to the same section:

"No sheriff shall be entitled to receive the amount of damages set forth in an alias warrant levied and executed by the department."

Thus the General Assembly has acted to clarify the language of the section, the meaning of which was apparently in dispute, to provide specifically that which, in my opinion, the present law implies, but does not state in so many words. Therefore, there will be no problem of interpretation concerning any damages collected beginning April 1, 1967.

(b) *Adjusted Gross Income Tax Act.* This Act was passed by the Special Session of the 1963 General Assembly, which enacted in regular session the amendment to the Indiana

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Gross Income Tax Act authorizing the Department to execute alias warrants under § 13 (a) of that Act. Section 603 of the Adjusted Gross Income Tax Act, Burns § 64-3237, reads in part as follows:

“(a) If any tax, penalties, or interest, or any portion thereof, imposed by this act and demanded by the Department be not paid within thirty (30) days after the same is found to be due and within ten (10) days after the demand provided for in section 602 of this act, *the Department shall issue a warrant under its official seal, directed to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the person owing said tax, found within this county, for the payment of the amount thereof, with interest at the rate of six per cent per annum from the date of the demand to the date of sale and costs of executing the warrant, and to return such warrant to the department and pay to it the money collected by virtue thereof, by a time to be therein specified, not more than sixty days from the date of the warrant. . . .*

“The warrant provided for herein shall be the sheriff’s instrument of execution on the judgment and, in case the execution and levy is not made within the sixty days provided, the Department may issue an alias warrant in the same amounts which shall be served and executed either by the sheriff or by the Department. For the purpose of levying and executing such alias warrants against the real or personal property of the person owing said tax, the Indiana Department of State Revenue is hereby given the same jurisdictions and powers which are prescribed by law and exercised by sheriffs in respect to executions issued against property upon judgments or attachment proceedings of a court of record.” (Emphasis added.)

In the first portion of this Act, quoted above, it is provided that the amount to be collected is the tax, penalties or interest owing, plus six per cent interest from date of demand to date of sale, plus costs. No damages for the sheriff

are provided. The sheriff is directed to return the money collected on the warrant to the department. The other language quoted above is identical to the comparable provisions of § 13 (a) of the Indiana Gross Income Tax Act, as last amended prior to 1967. Therefore, it would appear that the General Assembly was aware of and considered the provisions of § 13 (a) of the latter Act while enacting the Adjusted Gross Income Tax Act, and rejected for the 1963 Act the provisions in the earlier statute granting damages to the sheriff who collects a warrant. This position is consistent with legislation, adopted after the Gross Income Tax Act and prior to the 1963 Act, which placed the compensation of sheriffs and other county officers on a salary, rather than a fee, basis, Acts 1957, ch. 319, as amended and supplemented, Burns § 49-1053. That a sheriff is not intended to retain any of the tax or interest collected by him on a warrant issued under this section is also indicated by Acts 1965, ch. 407, Burns §§ 49-1311, 49-1312, which provides for fees and charges, designated "sheriff's costs," to be collected by a sheriff but to belong to the county he serves. The "sheriff's costs" are in lieu of all other penalties or costs theretofore taxed and charged by sheriffs "other than those received for collections for delinquencies under section 13, as amended, of the gross income tax act. . . ." No such exception is made for any collections under the Adjusted Gross Income Tax Act.

In answer to your first question, it is my opinion that the Department is not required to make collections of alias warrants issued under § 603 of the Adjusted Gross Income Tax Act through a sheriff of a county, but that the Department's employees may execute alias warrants and must remit the amount collected to the Department. In answer to your second question, in no instance in which collection of an alias warrant is made pursuant to § 603, whether made by a sheriff or by the Department, is a sheriff entitled to receive and retain any amount of "damages."