

1976 WL 30924 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 9, 1976

\*1 The penalty provided by Section 65-1636 is mandatorily imposed for the failure to list or return personal property for ad valorem tax purposes unless excluded by other statutory provisions such as Section 65-1640.

Mr. Cecil L. Stevens  
Auditor  
Lee County

### QUESTION

Is the penalty provided by Section 65-1636, as amended, mandatorily imposed?

### STATUTE INVOLVED

Section 65-1636.

### DISCUSSION

Section 65-1636 now provides:

'If any person shall fail to list the personal property he is required by law to list in any one year, the value thereof may be charged against him for taxation with a ten percent penalty added thereto, and the taxes and penalty collected as in other cases.'

Prior to the 1973 amendment, the section imposed the penalty when the property 'escaped taxation for that year' and there was no statutorily imposed penalty for the failure to file the return. See Opinion 3529, 1972-1973 OAG, page 152, May 23, 1973. The section was amended subsequent to that opinion and now provides the penalty for failure to return the personalty. Whether the term 'may' is permissible or mandatory is however the subject of some doubt and because of such we set forth a history of the penalty.

The General Assembly, in Act 677, Acts of 1881, adopted legislation providing for the taxation of real and personal property. Section 229 of the Act provided a penalty equal to 50% of the value of personal property for the failure to return or certify under oath the return of personal property. The section was amended in 1925 by Act 671 to include real and personal property and the penalty was reduced to 10%. The provision was carried forward in the 1932 and 1942 Codes as Section 2723, however, the phrase 'and personal' was deleted in the 1952 Code and because of such now applies only to real property. (Section 65-1635). The 1881 Act, Section 230, however, separately imposed a penalty for the failure to return real property and this section is now codified in the 1962 Code as Section 65-1633.

It is thus apparent that the statutory penalty imposed for the failure to return personal property was not repealed by an Act of the General Assembly other than the Act adopting the 1952 Code as the only statute law of the State.

The penalty was not imposed however when the failure to file was occasioned by illness or absence. (Section 231 of the 1881 Act, now Section 65-1640).

We now treat the question of whether the penalty is mandatorily imposed or whether discretion is granted to your office to impose or not impose the same. There certainly is no discretion granted your office to impose the penalty upon one property owner in your County and not another when the facts are substantially the same and the question is whether therefore there is discretion in imposing a county-wide penalty. We find no case in point, however, the General Assembly cannot delegate police powers to one county and withhold the same from others.

\*2 'We have heretofore endeavored to point out that rational differences exist in the various counties with reference to their fiscal affairs, but no good reason appears why the police power should be exercised by the corporate authorities of one county and not by others, particularly when comparable in size and population. \* \* \*.' [Gaud v. Walker](#), 241 S. C. 451, 53 S. E. 2d 316.

We know of 'no good reason' why the property owner in one county should be penalized when a property owner in another or adjoining county escapes the penalty.

A statute levying a delinquent penalty in Orangeburg County was declared unconstitutional as special legislation in the case of [Webster v. Williams](#), 183 S. C. 368, 191 S. E. 51. Likewise, a statute giving Chesterfield County special advantages over other counties in the collection of taxes and in the collection of delinquent taxes in installments, etc., was also declared unconstitutional as special legislation in the case of [Douglas v. Watson](#), 186 S. C. 34, 195 S. E. 116.

The word 'may' has been held to mean 'must' in a statute providing authority to a court to allow interest on damages. 'The word 'may,' as used in Rev. St. c. 96, Section 20, providing that the court may allow interest on the damages given in the action from the time the verdict was returned to the time of rendering judgment thereon, means 'must,' as it could not have been the intention of the Legislature to grant a power to the court merely discretionary to allow interest on a verdict in one case and disallow it in another, according as it might seem to the court to be equitable. [Forbes v. Inhabitants of Bethel](#), 28 Me. (15 Shep.) 204, 209.' 26A Words and Phrases, page 447.

The general rule is that the word 'may' will be construed to mean 'shall' whenever it is used in a statute to delegate a power that is for the public's interest.

'The words 'may' and 'shall,' when used in a statute, will sometimes be read interchangeably, as will best express the legislative intent. The word 'may' will be construed to mean 'shall' when the public or third persons have a claim that the power ought to be exercised \* \* \*.' [People ex rel. Chipfield v. Sanitary Dist. of Chicago \(Canal Com'r v. Sanitary District\)](#), 184 Ill. 597, 56 N. E. 953, 956. 'The general rule is that the word 'may' will be construed as 'shall', or as imposing an imperative duty whenever it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests. \* \* \*.' [Puckett v. Sellers](#), 235 N. C. 264, 69 S. E. 2d 497. See also 26A Words and Phrases, [May](#), page 469, et seq.

It is thus clear that under the above authorities the term 'may' as used in Section 65-1636 means 'shall' and the penalty is therefore imposed without discretion.

### CONCLUSION

The penalty provided by Section 65-1636 is mandatorily imposed for the failure to list or return personal property for ad valorem tax purposes unless excluded by other statutory provisions such as Section 65-1640.

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