

Bachelor Tax—Refund.

The bachelor tax must, upon proper application, be refunded under the provisions of Section 2222 of the Revised Codes of 1921.

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My dear Mr. Bullock:

You have inquired whether, in view of the recent Supreme Court decision holding invalid the so-called bachelor tax, persons making proper application for a refund of this tax paid by them are entitled to such refund.

Section 2222 of the Revised Codes of 1921 reads as follows:

“Any taxes, per centum, and costs paid more than once or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer, and the state’s portion of such tax, percentage, and costs must be refunded to the county, and the state auditor must draw his warrant therefor in favor of the county.”

It has often been held that “an unconstitutional law is in reality no law, but is wholly void, and in legal contemplation is inoperative as if it had never been passed. Since an unconstitutional law is void, it imposes no duties and confers no power or authority on anyone.”

6 R. C. L. p. 117;
Cooley Constitutional Limitations (7th ed.), 259;
Felix v. Board of Commissioners, 62 Pac. 667.

The law under which the tax in question was collected being from the beginning a nullity, the taxes were illegal within the meaning of Section 2222, supra.

Section 2222 of the Codes of 1921, supra, gives authority to the County Treasurer, when ordered by the County Commissioners, to refund taxes "erroneously or illegally collected," and it is my opinion that this section is applicable to the tax in question, although such taxes were, in most cases, not paid under protest.

The rule in regard to refunding such taxes is stated in 37 Cyc. 1172, as follows:

"To take advantage of a statute authorizing the refund of taxes illegally or wrongfully assessed, it must be shown that the tax was illegal, that the assessors acted without jurisdiction, that the property should not have been assessed at all, or that the taxes claimed were not justly due; it is not sufficient to show mere irregularities or errors of judgment in the assessment or in the mode of making it, or that the valuation of the property was excessive or was increased without authority. But where an assessment is made on property which has no existence in fact, the error is one which may justify a refund of the taxes paid."

A provision of the California law very similar to Section 2222 (Sec. 3804, Codes of California) was construed, by the Supreme Court of that State, in *Brenner v. City of Los Angeles*, 116 Pac. 397, as mandatory upon the Treasurer and Board of Supervisors.

It has been held in a number of cases, under provisions similar to Section 2222, that a tax collected under a law subsequently declared unconstitutional must be refunded.

Commercial Nat'l Bank of Council Bluffs v. Board of Supervisors, 150 N. W. 704;
Spaulding v. Board of Com'rs, 168 Pac. 34;
Brenner v. Los Angeles, 116 Pac. 397.

In cases where taxes illegally collected have been disbursed, the authorities are divided as to the right of recovery in the taxpayer, but those holding that no such right exists were usually based upon some special reason, as in *Hawkins v. Nicholas County*, 89 S. W. 484, where the court, having declared illegal a bond issue the proceeds of which had been spent, held that the tax collected on account of such bond issue could not be recovered by a taxpayer, for the reason that, the money having been spent, if this tax was to be refunded it would be necessary to levy a new one to provide funds with which to refund it, which would be futile, the result being that the taxpayer would merely be taking from one pocket to put into the other, with costs added.

The better view seems to be that stated in *Montgomery v. Col-litz County*, 14 Wash. 230, 44 Pac. 259, in which the court said:

"We are unable to perceive from what principle the appellant (the taxpayer) should be held responsible for the acts of the respondent's (the county's) officers, who were neither controlled by him nor acting under his directions; and, if the respondent has paid out any of the money which it wrongfully obtained from the appellant, that affords no sufficient answer in the present case."

See, also:

DuBois v. Lake County, 37 N. E. 1056;

Lauman v. Des Moines Co., 29 Ia. 310.

It is, therefore, my opinion that upon proper application for refund of the poll tax of \$3, known as the "bachelor tax," collected under Chapter 261 of the Laws of 1921, the same must be refunded under the provisions of Section 2222 of the Revised Codes of 1921.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.