Taxation—Refund — Reclamation Projects — Counties— Claims—Limitations.

Taxes collected upon land situated within Reclamation Projects and which was not subject to taxation, should be refunded.

The claim for such refund is not such an account as is required to be presented to the Board of County Commissioners within one year under Section 4605, Revised Codes of 1921.

F. A. Ewald, Esq.,
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My dear Mr. Ewald:

Your office has requested an opinion of this office as to whether taxes paid on lands within the Sun River and other reclamation projects (and which lands were held not subject to taxation by the Supreme Court of the United States in the case of Irwin v. Webb, 238 U. S. 219), should be refunded.

We have two statutes with reference to the repayment of taxes, namely, Sections 2222 and 2269, Revised Codes of 1921. Section 2222 provides that taxes paid more than once, or erroneously or illegally collected, may, by order of the Board of County Commissioners, be refunded by the County Treasurer, while Section 2269 provides that any tax deemed unlawful may be paid under protest and an action commenced, within sixty days after date of payment, to recover the same.

The taxes paid on the lands within these reclamation projects were not paid under protest, so that no action can be instituted under Section 2269 to recover the same, and the only question to be determined is whether such taxes can be refunded under Section 2222.

An examination of the California Codes discloses the fact that these two sections of our code were undoubtedly adopted from California, Section 2222 being similar to Section 3804 of the California code, while Section 2269 is similar to Section 3819 of the California code.

Construing these two sections the Supreme Court of California has held that the two sections are entirely independent of each other, Section 3804 being intended to give relief through the Board of Supervisors without the necessity of resorting to the courts, while Section 3819 was intended to furnish a remedy in certain cases through the courts alone. (Stewart L. & C. Co. v. Alameda County, 76 Pac. 481; Pacific Coast Co. v. Wells, 66 Pac. 657; Brenner v. City of Los Angeles, 116 Pac. 397.) In the course of the opinion in the case of Stewart L. & C. Co. v. Alameda County, supra, the Court said:

> "Section 3819 furnishes a remedy entirely independent of that afforded by Section 3804 and cannot be regarded as exclusive. The owner of any property assessed in the county 'may pay the same to the tax collector under protest,' etc., and have his action in the court as by the Act provided. But there is nothing in the Act from which an intention of the Legislature may be derived that the Board of Supervisors may not, under the provisions of Section 3804, proceed to hear and determine a claim presented under that section. Cases may arise under this latter section which could not be reached by Section 3819. Other cases may arise where the taxpayer might, at his option, proceed under whichever section he thought most likely to give him speedy relief. Respondent's contention, in effect, would make Section 3819 work a repeal of Section 3804. But to do this it should appear from the last Act (and Section 3819 was passed subsequently to Section 3804) that it was intended to take the place of or repeal the former, or that the two Acts are so inconsistent that effect cannot be given to both. * * * This cannot be said of the Act in question."

To the same effect is the case of Neilson v. San Pete County (Utah), 123 Pac. 334, where the Supreme Court of Utah placed the same interpretation upon two sections of the statutes of that state that are practically identical with Sections 2222 and 2269 of our statutes.

In the two cases of Hayes v. Los Angeles County, 33 Pac. 766, and Brenner v. City of Los Angeles, 116 Pac. 397, the California Supreme Court held that the word "may" as used in Section 3804 of the California code, means "must," and that when a claim is presented to the Board of Supervisors under such section and it appears to the Board that the taxes, for which refund is claimed, were paid more than once, or erroneously or illegally collected, such Board must order the same refunded by the County Treasurer.

This office in an opinion addressed to W. L. Bullock, County Attorney, Pondera county, held that the so-called bachelor tax, which was declared unconstitutional by our Supreme Court, must be refunded under the provisions of Section 2222, and I believe that the reasoning in that opinion applies equally to taxes illegally collected on land within reclamation projects.

The decisions are in conflict as to whether a claim for a refund of taxes illegally collected must be presented against the county within the time prescribed by statute.

Section 4605, Revised Codes of 1921, requires all claims against a county to be presented within one year.

The Supreme Court of California has held that such a claim must be presented to the county and that, if it is not, it is barred.

Perrin v. Honeycutt, 77 Pac. 776;
Murphy v. Bondshu, 83 Pac. 278.

However, Section 3804 of the California codes, which corresponds with Section 2222 of our statute, differs from Section 2222, in that it specifically requires that a duly verified claim be presented to the County Commissioners, while our statute is silent in this respect.

The Supreme Court of Utah, in construing Section 2642 of the Utah statutes, which is almost identical with Section 2222 of our statutes, held that it was not necessary to present a claim to the County Auditor within the time prescribed by Section 531 of their statutes for the presentation of claims and accounts against the county. In the case of Neilson v. San Pete County, 123 Pac. 334, the Court, in speaking of this, said:

> "Referring again to the provisions contained in Sections 531 and 533 to which we have already referred, we are of the opinion that a claim for a refund of taxes like the one in question here was not intended to be and is not governed by the provisions of either of those sections. Neither is the claim for such refund an account which the Board of County Commissioners is authorized to settle and allow under the

purview of Subdivision 7 of Section 511, to which we have also made reference. Furthermore, we think that this court is already committed to such a doctrine. In the case of Mining Co. v. Juab County, 22 Utah, 403, 62 Pac. 1025, in passing upon the question of whether a claim for the refund of taxes had to be presented to the Board of County Commissioners as a condition precedent to the right of bringing an action against the county where the taxes were paid under protest as provided in Section 2684, supra, Mr. Justice Baskin said: 'Under the provisions of said section at the moment the plaintiff paid the unlawful tax, under protest, he thereupon acquired a right to institute suit against the defendant and was not required, as claimed by defendant's counsel, to first present a claim to the county court (board), or take any other steps as a condition precedent to bringing his action.'

"With regard to whether the action was barred because not commenced within the time specified in Section 533, supra, it is also held in that case that the action was not barred by that section."

It should be noted that the Court in the Utah case was of the view that the same reasoning that makes it unnecessary to present a claim for taxes paid under protest applies to taxes illegally and erroneously collected.

The Supreme Court of this state has held that it is not necessary to file a claim with the Board of County Commissioners before commencing action to recover taxes paid under protest.

Story v. Dixson, 208 Pac. 592.

The Supreme Court of Utah did not decide when such a claim would be barred, because the question was not before it, the Court saying:

"We are also of the opinion that in case the Board of County Commissioners, upon demand therefor, refuses to order a refund, the taxpayer may bring an action to recover the tax, and may recover legal interest from the date of the demand. Whether under Section 2642 the action must be commenced within four years from the date the tax is paid or within four years from the date of the demand we do not decide, because this question is not raised nor necessary to the decision of this case."

The Supreme Court of Kansas in the case of Com'rs of Saline County v. Young, 18 Kan. 440, had this question under consideration in a case where the facts were very similar to the facts involved in this matter. In that case, it appeared that land, the legal title to which was in the United States, had been taxed. The statute permitted the refund of taxes paid through "error or irregularity." The

Court, in holding that it was not necessary to present the claim against the county and that it was not barred by failure to do so, said:

> "The plaintiff in error also claims that claim of the plaintiff below is barred by the following statute to-wit: 'No account against the county shall be allowed, unless presented within two years after the same accrued.' (Gen. Stat. 264, Sec. 47.) Now this statute is not applicable to this case. It applies only where it is necessary for the claimant to present his 'account' to the county board to be 'allowed' by them in order that he may obtain a county order on the county treasury for the amount of his claim. It does not apply where his claim is already liquidated and 'allowed' by law, and where the instrument upon which he draws his money is already issued. In such a case as this, all that is necessary for the claimant to do is to present his tax certificate to the County Treasurer and receive his money; (Gen. Stat. 1058, Sec. 120.) The county board has nothing to do with allowing, or disallowing, his claim, or with issuing an order on the County Treasurer for it. When the County Clerk 'discovers' the 'error or irregularity,' and refuses to convey the land for which the tax certificate calls, then the claim of the holder of the tax certificate becomes complete, and he is at once entitled to receive his money from the county treasury. The plaintiff in error also says in its brief, 'but this action accrued more than three years next before commencement, and is therefore barred by Section 18 of civil code.' Now the County Clerk did not discover said 'error or irregularity' until April 1st, 1873; nor did the County Treasurer refuse to refund to the plaintiff his money prior to that time; and this suit was commenced August 11th, 1875. Therefore, the claim of the plaintiff is not barred by said statute. It is not claimed that the plaintiff's claim is barred by any other statute of limitation."

It should be observed that in that case the Court held that the three-year Statute of Limitations did not bar the action for the reason that the "error or irregularity" was not discovered and the county had not **refused** to refund the tax more than three years before the commencement of the action. Other cases holding that a claim for the refund of taxes illegally collected is not an account or claim against the county requiring presentation are the following:

> Kellogg v. The Supervisors, 42 Wis. 97;
> Stringham v. The Board of Supervisors, 24 Wis. 594;
> Newman v. The Board of Supervisors, 45 N. Y. 676.

See also Penney v. Hennepin County (Minn.), 165 N. W. 965.

It is, therefore, my opinion that when any demand is made to a Board of County Commissioners for the refunding of any taxes paid on lands situated within a reclamation project and which lands were

not subject to taxation, such board must order the County Treasurer to refund the same and that such claims or demands are not barred by Section 4605 of the Revised Codes of 1921 for failure to present the same within one year after the payment of the illegal tax.

No opinion is expressed as to when the causes of action accrue.

Very truly yours,

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Attorney General.