Opinion No. 102.

Taxation—Delinquent Taxes—Penalty and Interest, Refund of—Refunds —County Commissioners.

HELD: 1. Section 2269, R. C. M. 1921, providing for payment of taxes under protest, provides the exclusive remedy where the levy of taxes is unlawful but permits Section 2222 to operate outside of this exclusive field.

2. Under Section 2222, R. C. M. 1921, the county commissioners may order the county treasurer to refund penalty and interest collected contrary to the provisions of Chapter 88, Laws of 1935.

May 15, 1935.

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You have requested my opinion as to whether the county treasurer, upon order of the county commissioners, should refund interest and penalty paid by taxpayers after Senate Bill 55, or Chapter 88, Laws of 1935, became effective. No facts are stated but I assume that in the case you have in mind the property owner sought to redeem real property after the above law became effective, by paying the original tax without interest and penalty, and that the county treasurer refused to accept the same on account of an opinion from this

office, which in turn was based upon two prior decisions of our Supreme Court, holding the law unconstitutional. Thereafter our Supreme Court reversed itself and held the law constitutional. We assume that since the county treasurer refused to permit redemption upon payment of the original tax, the property owner paid the interest and penalty thereon upon the promise of the county treasurer, in some instances at least, to refund such interest and penalty in case the Supreme Court held the law valid.

It has been held that where part of the tax is illegal but the legal part will not be received without payment of the illegal part, a payment of the illegal part to avoid the penalty is made under compulsion and is not voluntary. (61 C. J. 990, and cases cited in note 66.)

The property owner should have been permitted to redeem his real estate sold for taxes without being required to pay interest and penalty. The collection of the interest and penalty was therefore illegal. No blame, of course, can attach to the county treasurer as he relied upon the legal advice given to him as hereinbefore stated. The collection of the penalty and interest was nevertheless illegal as the law was in force when the payment was made.

Section 2269, R. C. M. 1921, as amended by Chapter 142, Laws of 1925, provides that where the "**levy** of taxes * * * are (**is**) deemed **unlawful** by the party whose property is thus taxed * * * such party may before such tax * * * becomes delinquent pay under written protest such tax * * * or any part thereof, deemed unlawful, * * * and thereupon * * * may bring an action * * * to recover such tax * * * within sixty days after the date of payment of the same * * *."

Section 2222, R. C. M. 1921, provides, "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 * * *." Since the taxes were delinquent at the time of payment, the remedy provided by Section 2269, R. C. M. 1921, as amended, was not available. The question now is, is the taxpayer entitled to a refund under the provisions of Section 2222, or is he without remedy?

Of these two sections, Section 2269 is the later act. It does not expressly repeal Section 2222. Whether it does so by implication, depends upon whether the two are so inconsistent with, or repugnant to each other that effect cannot be given to both of them. It will be noted that Section 2269 authorizes recovery by action "in all cases of **levy** of taxes * * * which are deemed **unlawful** by the party whose property is thus taxed * * *," while Section 2222 provides for refundiug by the county treasurer upon order of the county commissioners of "any tax, per centum and costs paid more than once or erroneously or illegally collected." Where the **levy** of taxes **is unlawful,** aside from the equitable remedy provided in Section 2268, Section 2269 provides an exclusive remedy to recover such taxes. Where there is a lawful levy, however, and the tax is for some other reason illegal, we believe that a taxpayer is entitled to the remedy provided by Section 2222. Each, therefore, has a separate field in which to operate and they are not inconsistent with, or repugnant to each other excepting where the tax is illegal because based upon an unlawful levy. Besides, there is good reason why the remedy given by Section 2269 should be exclusive only in cases of unlawful levy. An unlawful levy may be so far reaching and affect so many taxpayers and the functioning of the county. if not the state, may be so seriously disturbed by it that there is good reason for the policy declared in Section 2269, as amended. The same reason does not apply to the occasional error resulting in paying a tax twice or paying a tax erroneously or illegally where there is no underlying unlawful levy.

The decisions of our Supreme Court are not inconsistent with this view. In First National Bank v. Sanders County, 85 Mont. 450, 279 Pac. 247, where taxes on shares of stock of a national bank were unlawfully computed on the basis of 40% as provided by the classification law, instead of 7%, the same not having been paid under protest, it was held that Section 2222 was inapplicable since the

tax was based on an unlawful levy. The court in that case said:

"It is unreasonable to believe that it ever was in the thought of the legislature that Section 2222 had reference to **unlawful levies or moneys collected upon unlawful levies.** It must have been the thought of the legislature, as it was of this court, as we shall see, that the equitable remedy provided by Section 4023 and the legal remedy provided by Section 4024 of the Political Code **were exclusively in respect to an unlawful or void, levy of taxes.** Otherwise would it be reasonable to suppose that the legislature would not also have amended 2222? (p. 460.)

"* * * Section 2269, with which we read 2272, **provides an exclusive remedy** (except as the equitable remedy may also be available) for the recovery of taxes **collected as the result of an unlawful levy.** To this extent we reiterate that Sections 4024 and 4026 repealed Section 3913, now 2222. (Pol. Code 1895, Sec. 5185; Western Ranches v. Custer County, 28 Mont. 278, 72 Pac. 659.)" (pp. 463-464.)

In its opinion the court repeatedly referred to the fact that the tax in this case was based upon an "unlawful levy" in holding 2222 inapplicable. The court concluded: "We need not pursue the inquiry further. Clearly, this case is one wherein is involved an **'unlawful levy and collection of public revenue.'** The remedy provided by Section 2269 is applicable, and Section 2222 is not." (p. 465.)

First National Bank v. Beaverhead County, 88 Mont. 577, 294 Pac. 956 was a similar case based upon a similar record and the court followed the Sanders County case.

In Williams v. Harvey, 91 Mont. 168, 6 Pac. (2) 418, the court held that where the owner of sheep was properly assessed in Wheatland County, and later in Judith Basin County, that he could recover under Section 2222 on the theory that the tax was paid twice. The broad statement of the court, in referring to Section 2222, found on page 171, "we have held that this section has been repealed in so far as it relates to the recovery of taxes erroneously or illegally collected" (citing the Sanders County and the Beaverhead County cases), was not necessary to the decision, was dictum, and is not supported by the cases cited for in both of those cases the tax was illegal because of the underlying unlawful levy, as we have shown by the quotations above.

We do not find that our court has held that the provisions of Section 2222 have been repealed except as to taxes where there is an underlying unlawful levy. We do not find that our Supreme Court has refused relief under Section 2222 in cases like this where the tax paid was illegally collected and where there is no question in regard to the legality of the levy or assessment.

It is the general rule that there is a repeal of an earlier statute only to the extent of the conflict, repugnancy, or inconsistency (59 C. J. 916) and that where it is possible to do so, by any fair and reasonable construction, two seemingly repugnant acts should be harmonized or reconciled, so as to permit both to stand and be operative and effective, and thereby avoid a repeal of the earlier act by implication. (59 C. J. 917-918). The court will, if possible, give effect to all statutes covering, in whole or in part, the same subject matter where they are not absolutely irreconcilible and no purpose of repeal is clearly shown or indicated. (59 C. J. 918.)

The construction we have given to the two sections is in harmony with the opinions of the Attorney General found in Volume 1, Opinions of Attorney General, p. 337 (Galen); Volume 2, Opinions of Attorney General p. 276 (Galen); Volume 4, Opinions of Attorney General, p. 467 (Galen); Volume 5, Opinions of Attorney General, p. 70 (Kelly); Volume 6, Opinions of Attorney General, p. 243 (Poindexter); Volume 7, Opinions of Attorney General, p. 88, 201 (Ford); Volume 9, Opinions of Attorney General, pp. 26, 258, 376 (authorizing refunding of illegal bachelor tax held unconstitutional) (Rankin); Volume 10, Opinions of Attorney General, p. 17 (Rankin); and Volume 12, Opinions of Attorney General, pp. 197, 294 (Foot).

The construction we have given is also in harmony with the decisions of other states having similar statutes.

(See Stewart Law & C. Agency v. Alameda County, 142 Cal. 660, 76 Pac. 481; Neilson v. San Pete County, 40 Utah, 560, 123 Pac. 334; Casey v. Butte County, 52 S. D. 334, 217 N. W. 508.) The above sections provide separate and distinct remedies. (See Neilson and Stewart cases, supra; Brenner v. City of Los Angeles, 160 Cal. 72, 116 Pac. 397; Casey v. Butte County, supra; Birch v. Orange County, 186 Cal. 736, 200 Pac. 647.)

The construction we have placed upon these two sections, we believe is sound. It is supported by the Supreme Court in First National Bank v. Sanders County (supra), and other authorities. It leaves the field of the collection of illegal taxes based upon "unlawful levies" exclusively to Section 2269, for which there is good reason. Outside of this exclusive field, it permits Section 2222 to operate for which there is also good reason. This construction and reconciliation permits both sections to stand and to be operative and effective. It harmonizes with the contemporaneous construction of these statutes by all the attorneys general of the state. It permits justice to be done to taxpayers, who, not having the remedy provided by Section 2269 available to them by reason of the taxes being delinquent, were compelled to pay such interest and penalty in order to make redemption of their real estate from tax sales. In most instances, if not all, promises were made by county treasurers to refund them, if the law was held constitutional. Unless these taxpayers can now recover the amounts erroneously or illegally collected from them, they are without remedy and have lost their right to redeem without payment of interest and penalty, which the statute gives them.

It is my opinion, therefore, that such interest and penalty may be refunded by the county treasurer upon the order of the county commissioners. If any portion of such payment has been paid to the state, the state auditor may not draw a warrant therefor in favor of the county as the latter part of Section 2222 has been held inoperative. (In re Pomeroy, 51 Mont. 119, 151 Pac. 333; First National Bank v. Sanders County, 85 Mont. 450, 460, 461.)