

No. 485

**TAXATION—REFUND OF TAXES ERRONEOUSLY
PAID—TIME TO FILE CLAIM FOR REFUND**

Held: Refund of taxes as to land not included in mortgage cannot be made under Section 2222, Revised Codes of Montana, 1935, where mortgagee voluntarily pays delinquent and current taxes on tract of land, which includes some land not under the mortgage.

Claim for refund of taxes under Section 2222, Revised Codes of Montana, 1935, must be filed within two years after date when second half of such taxes would have become delinquent if same had not been paid.

September 19, 1942.

Mr. T. W. Carolan
County Attorney
Rosebud County
Forsyth, Montana

Dear Mr. Carolan:

You have submitted the following facts:

"A taxpayer was the owner of a certain tract of land, a part of which was mortgaged. Taxes were levied against the larger tract and became delinquent for the year 1938. The tract in its entirety, was sold for delinquent taxes. On April 28, 1942, the mortgagee redeemed from said tax sale and paid 1939 and 1940 taxes, said redemption and payment of taxes being on the land covered by the mortgage and also on the land not included with the mortgage. The mortgagee has filed its claim against the county for the amount of taxes paid on the land not included within its mortgage."

With reference to these facts, you request the opinion of this office whether the county is legally obligated to refund the taxes paid by the mortgagee on the land not included within its mortgage.

The only authority of the board of county commissioners to refund taxes is to be found in Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201, Laws of 1939.

In *First National Bank v. Sanders*, 85 Mont. 450, 279 Pac. 247, it was held this statute could not be used to refund taxes which had been computed upon an illegal assessment and recovery could not be had thereunder.

In the case of *Williams v. Harvey*, 91 Mont. 168, 6 Pac. (2nd) 418, it was held relief could be afforded thereunder where taxes had been paid more than once.

In *Christofferson v. Choteau County*, 105 Mont. 577, 74 Pac. (2nd) 427, it was held that refund of taxes erroneously paid could be made under this statute. You will note the error was based upon the fact that an assignment of a tax sale certificate was made which did not convey any right, as the land was state land upon which the certificate of purchase had been cancelled, and which cancellation carried with it a cancellation of all taxes. The result was that the tax sale certificate did not create any right in the land.

In order to be entitled to a refund under this statute, the claimant must show an absolute right thereto, a showing which does not appear in the matter under examination. As you state, the property in question was not assessed more than once, the assessment was regular in all respects, and the taxes were correctly imposed. In addition, the payment by the mortgagee was voluntary as it had reference to the land not included with its mortgage. It is not a case where taxes were "erroneously collected" insofar as the taxing authorities of your county are concerned.

A similar situation appears in *Calkins v. Smith*, 106 Mont. 453, 78 Pac. (2nd) 74. Calkins and his intermediate predecessor in interest, after acquiring title to one-half of a parcel of land on which parcel taxes had been permitted to go delinquent, paid them, including those on that part retained by the former owner. In the action they sought to recover the portion of the taxes paid and properly chargeable to the part retained by the former owner. The following significant statement appears in the opinion, which is particularly appropriate to the question under examination.

"Plaintiff was not without remedy. At the time of the payment of the delinquent taxes she or her predecessor could have taken advantage of the provisions of section 2211, Revised Codes, which provide for piecemeal redemption and apportionment of the tax accordingly; or she could have taken advantage of section 2207, Revised Codes, which provides for the payment of taxes by anyone and the assignment of the tax certificate. It is true in this instance that she proceeded under the misapprehension and mistaken belief that the tax she paid was really against the property she owned, rather than against the half retained by Smith. However, this does not alter the force of the legal principles involved."

It is, therefore, the opinion of this office there is no authority in the board of county commissioners to order a refund of the taxes in question under the facts of this particular case.

In addition, there is another insurmountable barrier to the refunding of the part of the payment covering 1938 taxes, as you will note the amendment to Section 2222, appearing as Chapter 201, Laws of 1939, provides:

"No order for the refund of any taxes . . . shall be made except upon a claim therefor . . . which claim must be filed within two years after the date when the second half of such taxes would have become delinquent if same had not been paid."

Sincerely yours,

R. V. BOTTOMLY
Attorney General