Opinion No. 62

Taxation — Indian Trust Lands — Refund of Taxes — Sale for Delinquent Taxes

HELD: (1) No refund of taxes may be made when the taxes were not paid under protest and the incorrect levy is based upon erroneous information furnished by the taxpayer.

(2) When taxes have been incorrectly assessed against a tract of land not owned by the taxpayer to whom they were assessed, and a tract of land of equal size owned by the taxpayer has not been assessed, the land actually owned by the taxpayer may not be sold for the delinquent taxes accrued on the other tract.

February 28, 1956

Mr. Dan S. Welch
County Attorney
Glacier County
Cut Bank, Montana

Dear Mr. Welch:

You have asked my opinion upon questions arising from the following facts:

> In 1922 a fee patent upon a tract of Indian Trust Lands was issued to an individual, and the land was placed upon the county tax rolls. The description of the land in the patent was erroneous, so that a twenty acre tract which was not intended to be conveyed was described in the patent, and another twenty acre tract which should have been included was left out. In 1955 a corrected patent was issued correctly describing the land; including the twenty acres which should originally have been included, and leaving out the twenty acres which was erroneously included in the 1922 patent. The taxes upon the erroneously included twenty acre tract were delinquent at the time of the issuance of the corrected patent.

This transaction has raised the following questions:

1. Should the taxes for the years 1922 to 1955 which were levied on the twenty acres erroneously included in the 1922 patent now be refunded to the taxpayer?

2. May the twenty acres first included in 1955 be sold for the delinquent taxes accrued on the

twenty acres that were erroneously included in the 1922 patent and were excluded from the 1955 patent?

There are only two ways in which taxes, once paid, may be recovered by the taxpaper under Montana law. One is by payment under protest and suit for recovery under Section 84-4502, R.C.M., 1947; the other is by claim for refund under Section 84-4176, R.C.M., 1947, which applies only to taxes paid more than once or erroneously or illegally collected.

The taxes in this case on the twenty acres erroneously included in the 1922 patent were evidently never paid under protest. Any refund would, therefore, have to be made under Section 84-4176, supra. However, Section 84-4176, supra, does not apply to errors in assessment caused by the taxpayer's own mistake. Section 84-409, R.C.M., 1947, requires that every owner of property must file a statement setting forth specifically all his real and personal property. It is from this statement that the assessor proceeds to list the property for taxation.

The source of the erroneous levy in the instant case is the incorrect information on the patent. The responsibility for the mistake does not lie with the county officials, but with the landholder who should have known of the error. In such a case, no refund may be made under Section 84-4176, supra. The Supreme Court of Montana, in the case of North Butte Mining Co. vs. Silver Bow County, 118 Mont. 618, 169 Pac. (2d) 339, said:

> " . . . To constitute a wrongful or illegal levy, assessment or collection there must have been unwarranted or illegal action on the part of the taxing officials. There is none such here. The only assessment and levy that could have been made under the facts contained in the statement furnished by plaintiff was the assessment and levy which was made and the only proper tax to be collected from the statement furnished was that which was collected.
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> . . . 'This section does not contemplate an error of judgment as to the law respecting the title to the land, committed by the taxpayer. It was not intended to protect him against errors or mistakes of law committed by himself, but against errors and illegalities committed by the officers of the law to whom is entrusted the duties of assessing, levying and collecting taxes.' "

It is therefore my opinion that no refund of taxes may be made when the taxes were not paid under protest and the incorrect levy is based upon erroneous information furnished by the taxpayer.

The twenty acres which were first included in the patent in 1955 are taxable only from the date upon which they were first assessed. Assessment is an indispensable prerequisite to the validity of a tax (84 C.J.S., Taxation, § 392, p. 753) and this requirement is very strictly construed in Montana (Perham vs. Putnam, 82 Mont. 349, 267 Pac. 305; State ex rel. Tillman vs. Dist. Ct., 101 Mont. 176, 53 Pac. (2d) 107). These twenty acres may not be sold for the delinquency upon other acreage. It has long been the rule in Montana that each piece of real property constitutes the basis for computing the measure of the tax against the owner on account of the property and is security for the discharge of the lien for unpaid taxes (Christofferson vs. Chouteau County, 105 Mont. 577, 74 Pac. (2d) 427). In Calkins vs. Smith, 106 Mont. 453, 78 Pac. (2d) 74, the court said:

> " . . . Every piece of real estate is liable for the taxes **upon it**, and the owner thereof is not personally liable therefor. . . . " (Emphasis Supplied)

It is a general rule of law that there must be a fixed relationship between the lands assessed and those sold; the tract sold should be the same as that assessed, or some definite portion or fraction thereof (McQueston vs. Swope, 12 Kan. 32).

It is therefore my opinion that the twenty acres first included in the 1955 patent may not be sold for the

delinquent taxes accrued on the other twenty acres which were erroneously included in the 1922 patent and excluded from the 1955 patent.

This opinion should not be construed as a general ruling upon the questions of tax liabilities involved, but is restricted to the facts set out in the letter of request.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.