

**Taxes, Illegally or Erroneously Collected, Refunding of Same by County. County Commissioners, Power of to Refund Erroneously Collected Taxes. Schools, Free County High, Claims Against, How Presented. Claims Against County Free High Schools, How Presented.**

Taxes erroneously collected should be refunded by the board of county commissioners upon application made therefor.

Claims against county free high schools for services rendered or material furnished should be itemized and verified the same as other claims against the county funds.

Helena, Montana, May 13, 1908.

Hon. Thomas Nelson Marlowe,  
County Attorney,  
Missoula, Montana.

Dear Sir:—

I have your letter of May 7th requesting an opinion of this office as to whether or not the board of county commissioners of Missoula county have the right to refund to E. Donlan certain taxes, amounting to the sum of \$266.19, which were erroneously paid on lands not subject to taxation. Also as to whether claims filed with the board of trustees of a county free high school for services rendered and material furnished should be verified as are other claims against the county.

I take up these questions in the order presented. You will notice Section 3913 of the Political Code provides that:

“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, per centage and costs, must be refunded to the county, and the state auditor must draw his warrant therefor in favor of the county.”

While this is direct authority under which the board of county commissioners may refund the taxes erroneously collected, it is undoubtedly true that the state's share of such taxes collected for the years 1903, '04, '05 and '06, have been returned to the state treasurer and been included in the various funds for which the taxes were collected. The section above quoted provides that the state auditor shall issue his warrants in favor of the county so as to reimburse the county for the amount refunded. However, before the auditor is permitted under constitutional provisions to draw such warrant there must be an appropriation made by law upon which to draw the same, and there being none such at this time the county must wait refund by the state until the legislature makes an appropriation. It is the experience of this office that the legislature refuses to pass such appropriation acts, and there is now outstanding in favor of the various counties some thousands of dollars in claims of this character. The law is pretty well settled

in most jurisdictions that taxes paid not under protest and not under compulsion cannot be refunded.

See Am. & Eng. Ency. of Law, 2nd Ed. Vol. 27, page 567, and Supplement, Vol. 4, p. 1033 and cases cited therein.

Also Current Law, Vol. 2, p. 1786; Vol. 4, p. 1605; Vol. 6, p. 1602 and cases therein cited.

See also Ency. Plead. and Prac., Vol. 21, p. 361.

However, the statute above quoted takes this transaction out of the general rule, and the only reason why the reimbursement should not be made is that the county might itself suffer loss by reason of not being reimbursed by the state. This reason, however, it appears to me, is not sufficient to warrant the refusal on the part of the commissioners to refund the amount. The question presented to them is, in the first place, were the taxes erroneously or illegally collected? Having determined that in the affirmative, the only concern of the commissioners is then to look at the law and its direction with regard to refunding same. The section of the statute above quoted seems to be clear, explicit and mandatory. The only limitation placed upon that section is the constitutional provisions which refer only to the auditor and which do not effect the actions of the board of county commissioners. I therefore advise you that the commissioners may make the refund as asked in the petition of Mr. Donlan.

As to the second question propounded, you are advised that the various acts creating county free high schools have not included the requirement that the board of trustees should require claims for services rendered and material furnished to be itemized and verified as other claims against the county are required to be under the provisions of Section 4286, Political Code.

However, the funds entrusted to the board of trustees are county funds; the county treasurer is made the treasurer of the board; the funds are distributed by the county treasurer upon warrants authorized by the board and signed by the president and secretary thereof; the body of the county is the source of this revenue, and the funds are as much county funds as any other held by the county treasurer. While the law does not specifically state that the claims should be itemized and verified, it would nevertheless be a reasonable regulation that might be made and enforced by the board, and I advise you as a protection to the board that such regulation should be made.

Very truly yours,

ALBERT J. GALEN,  
Attorney General.