

**Taxes, Refund of. Refund of Taxes, Procedure to Recover.**

The Board of County Commissioners is authorized to refund taxes in proper cases without suit having first been instituted, under the provisions of Section 2742, Revised Codes of 1907. Sections 2669 and 2742, Revised Codes of Montana, give current remedies for the recovery of taxes erroneously collected.

Helena, Montana, Sept. 29, 1915.

Hon. H. S. Magraw,  
State Examiner,  
Helena, Montana.

Dear Sir:

Under date the 25th instant, you submitted for my consideration the two following questions:

1. "Has the Board of County Commissioners the power to make a refund of taxes subsequent to the adjournment of the County Board of Equalization in view of the fact that Sections 2574 and 2575 exists?"
2. "Must the aggrieved person proceed as stated in Section 2742 in order to receive a refund of tax?"

The sections involved in these questions are Sections 2574, 2575, 2742, et seq., and 2669. Sections 2574 and 2575, relate to the equalization of taxes, and provide the methods by which property owners may present evidence of over-taxation or over-assessment by the assessor to the Board of Equalization. Section 2742 et seq., relate to the collection of taxes, and permits them to be paid under protest, and provides a remedy for the recovery of any such taxes which are illegal. Section 2669 provides that the county commissioners may refund taxes erroneously or illegally collected. Your first question it seems to me, misconstrues the real purpose of Sections 2574 and 2575. These sections have wholly to do with the County Board of Equalization and its powers, and nowhere in the Article in which they appear is any power given to the Board of Equalization to refund any taxes, and they have no such power. Their whole duty as a Board of Equalization is set forth in Section 2573, and is summed up by the words "and make the assessment conform to the true value of such property and money." The refunding of taxes illegally or erroneously collected is done by the Board of County Commissioners, and is not in any way dependent upon their powers as a Board of Equalization. In other words, one body has to go with the assessment of property for taxation, and the other to

the fiscal management of the county after the taxes have been collected.

The authority for the recovery of taxes illegally or erroneously collected, is found in two different provisions of our code. Section 2669 reading as follows:

"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, percentage and costs, must be refunded to the county, and the state auditor must draw his warrant therefor in favor of the county,"

is the first, and Section 2742 et seq. the second. Seemingly the only question to be decided then, is whether the provisions of Section 2742, et seq., has superseded the provisions of Section 2669, and afford the only and exclusive remedy for the recovery of taxes erroneously or illegally collected.

It does not appear that Sections 2742, et seq. were intended to be the only and exclusive methods of obtaining a refund in such cases. To do so it would be necessary to construe them as impliedly repealing Section 2669, in as much as there is no express repeal mentioned therein. Section 2669 clearly and directly authorizes the county commissioners to refund illegal, or erroneously collected, taxes. Our Supreme Court apparently has never passed upon these two sections, or upon the question here raised. Numerous other state courts, under very similar statutes, have rendered opinions touching the question, and almost universally they hold that the two remedies are concurrent. In the case of *Stewart Law & Collection Co. v. Alameda Co.*, 76 Pac. 481, it was urged that a person could not recover taxes erroneously or illegally collected, because he had not proceeded under Section 3819 of the Political Code of California, which corresponds to Section 2742 of our law. The court refused to consider this contention, saying:

"We think Section 3804 (corresponding to Sec. 2669 R. C., of Montana, 1907), was 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. \* \* \* Section 3819 furnishes a remedy entirely independent of that afforded by Section 3804, and cannot be regarded as exclusive."

In another case the same court even went so far as to hold that the word "may," as used in their statute, corresponding to our Section 2669, meant "shall." After quoting from an opinion, U. S. Supreme Court *Supervisors vs. U. S.*, 4 Wallace, 435, the court concluded:

"Where the public interest or private right requires that the thing should be done, then the word 'may' is generally construed to mean the same as 'Shall.' Applying the rule enunciated in the foregoing section, it is apparent that a sound and just rule of construction requires that the permissive word 'may' used in Section 3804 be construed as 'shall.'"

*Hays v. Los Angeles Co.*, 33 Pac. 766.

It is to be noted that in this last case the plaintiff had brought an action under the section of the California law corresponding to Section

2669 of our Code, and the court upheld his right to do so.

I am of the opinion, therefore, that upon this phase of the question that the Board of County Commissioners is authorized to refund taxes in proper cases without suit having first been instituted, under the provisions of Section 2742, et seq. As to the time within which this may be done, each case would have to be decided largely upon its merits. I may say, however, that the provisions of Section 2669 are founded upon the doctrines of equity, and any person seeking to avail himself thereof would be required to be diligent in bringing his claim before the Board of County Commissioners for their action. The provisions of Section 2742 apply only to cases where the person has brought himself squarely within the provisions thereof by making timely protest at the time of paying his taxes, and bringing his action within the time limit, that is, within sixty days from the 30th day of November of the year in which the taxes have been paid. It is doubtful whether this limitation at the time could be read into Section 2769, in as much as the two statutes are intended to cover somewhat different cases, and the most that we can say is that the ordinary doctrines of equity must be applied in construing Section 2669.

Yours very truly,

J. B. POINDEXTER,

Attorney General.