

Liquor License, Return of Unearned Portion. License, Unearned Portion Thereof When Returned. Board of County Commissioners. Authority to Return Unearned Portion of Liquor License. Taxes, License, When May Be Refunded.

The question as to the right and power of the Board of County Commissioners to return to the holder of a liquor license the unearned or unused portion thereof, examined and construed.

December 2, 1915.

Hon. Herbert H. Hoar,
County Attorney,
Sidney, Montana.

Dear Sir:

I am in receipt of your letter of the 18th ultimo, submitting the question:

"Has the Board of County Commissioners authority to return to the licensee the unearned portion of a liquor license suspended by operation of law, and without fault on the part of the licensee?"

There is not any statute in this state authorizing the recovery of money paid under such circumstances, or the recovery of the unearned portion of the liquor license tax, except in the specific case provided for in Chapter 87, Laws of 1915, wherein the legislature, apparently recognizing that no provision of law existed for the return of an unearned portion of a license, provided in Section 2 of that Act that the county treasurer should refund the unexpired portion of the license in the particular cases there referred to. This statute, however can have no application to the above question, nor are we able to say that the provisions of 2669, Revised Codes, providing that "erroneously or illegally collected" taxes, per centum and costs may be refunded, can have direct application, for such license tax was not erroneously or illegally collected. The regulation of the liquor traffic is a matter within the police power of the state, and the control of the same is vested in the legislature.

State ex rel Bray v. Settles, 34 Mont., 448, 87 Pac. 445. The authorities appear to be in hopeless conflict as to the legal right of the licensee to demand a return of the unearned portion of his license. The cases cited by you in your letter present a very thorough discussion of the question. I think it may be regarded as settled law that where the license ceases to be operative by reason of any fault or act on the part of the licensee, that he cannot recover in law, and that no equity attaches to his claim. As stated by you, McQuillin lays down the rule that:

"Where a liquor license granted by the municipality, becomes inoperative by the act of the municipality or operation of law, the licensee may recover the unearned portion of his license."

3 McQuillin Munic. Corp. No. 1009, note.

It is laid down by the same authority in the paragraph referred to, that:

"A license tax voluntarily paid can not be recovered back unless there is a statute which expressly authorizes such recovery."

This latter rule seems to be supported by the general line of authority.

1 Wollen & Thornton on Intox. Liquors, No. 447;

Joyce Intox. Liquors No. 330, and cases hereinafter referred to.

The rule mentioned in the foot note cited in McQuillin, supra, finds support in the following cases:

Pierson v. City of Seattle, 14 Wash. 438, 44 Pac. 884;
 Bart v. Pierce Co., 60 Wash. 507, 111 Pac. 582, 31 L. R. A. (N. S.) 1151;
 Hirn v. Ohio, 1 Ohio St. 15;
 City of Marshall v. Snediker, 25 Tex. 460, 78 Am. Dec. 534;
 Myrtel v. East St. Louis, 91 Ill. 67;
 Allsman v. Oklahoma City, 95 Pac. 468; 16 L. R. A. (N. S.) 511;
 State ex rel Maddaugh v. Ritter, 134 Pac. 492 (Wash.).

These cases are found collected in Roberts et al v. City of Boise, 132 Pac. 306, which case is cited and referred to by you in your letter.

See also Thayer Co. v. Thompson, 51 Nebraska, 857, 71 N. W. 728.

Many authorities, however, are collected in the Oklahoma City case, and the City of Boise case, supra, to the effect that there can be no recovery of an unearned portion of a liquor license. Annotations to Section 4040, of the Montana Codes Annotated of 1885, contains a list of many authorities to the same effect. The liquor license law being a police regulation, may be changed at the will of the legislature, and such change does not operate as an invasion of the licensee's constitutional rights, for no contractual relation exists between the licensing power and the licensee.

Cooley, Constitutional Limitations, 7 Ed. p. 849 et seq., and while as stated in the City of Boise case, supra, at first blush, it seems that the equity is entirely on the side of the licensee in such a case, the discussion given the question by the Idaho court, discloses the fact that there may be equities on the other side of the case. The party obtaining a license to retail intoxicating liquors is bound to take notice of the state of the law as then existing, and of the reserve power in the legislature to enact laws which would render his license nugatory. The licensee in the instant case also had notice of the existence of the law of this state relating to local option, and that the expressed will of the people of his county might at any time render his license of no avail. Hence when he applied for the license, he was seeking a privilege rather than a natural right, and he did so with full knowledge of the conditions of the statute governing that business, and as stated by the Supreme Court of Idaho,

"it is one of the risks and chances of the business which he assumes when he procures his license."

The claim for refund of unearned licenses is not enumerated as one of the county charges (Sec. 3199), and there being no statutory provisions directly relating to it, and no decision of the Supreme Court of this state establishing the right as a matter of law to such recovery, I am of the opinion that recovery cannot be had as a strict legal right, and that if had at all, it must be under the peculiar facts and equities of the particular case, and a manner similar to the method pursued in State ex rel Maddaugh v. Ritter (Wash.) 134 Pac. 492.

Yours very truly,

J. B. POINDEXTER,

Attorney General.