

Refund Taxes—Deduction of State's Portion of Taxes Refunded — County Treasurer — Statutes Construed, Sec. 2720, Rev. Codes 1907—Taxes.

Construction of Sec. 2720, Rev. Codes of 1907 with reference to statement of facts submitted.

March 8th, 1918.

Hon. H. L. Hart,
State Treasurer,
Helena, Montana.

Dear Sir:

You have submitted to me a letter from Mr. C. Wilson, County Treasurer of Chouteau County, regarding deductions, which may be made by a county treasurer of the state's portion of taxes refunded by county commissioners, from the amount of money in the hands of such county treasurer and due to the state as its portion of taxes collected, and have requested my opinion regarding the construction to be placed on Sec. 2720, Revised Codes.

Chapter IX, Title XII, Part III, Political Code, being Sections 2683 to 2691 inclusive, Revised Codes 1907, has reference to and provides for the collection of taxes on personal property when such taxes are not a lien on real estate.

Section 2687 has application only to excess taxes collected on such personal property, such excess being caused by reason of such taxes being collected under the rate for the preceding year when such rate is higher than the rate for the current year, when such current year rate is fixed by the board of county commissioners.

Chapter XI, Title XII, Part III, Political Code, being Sections 2715 to 2727 inclusive, Revised Codes 1907, is in relation to settlements between county treasurers and the state auditor and the payment by county treasurers to the state treasurer of moneys in their possession belonging to the state. Sections 2715 and 2720 are as follows:

"Section 2715. The treasurers of the respective counties must at any time upon the order of the state auditor and state treasurer, settle with the state auditor, and pay over to the state treasurer, all moneys in their possession belonging to the state, and must, without such order settle and pay over the moneys on the first Mondays of January and July in each year."

"Section 2720. In the settlement the state auditor must deduct the expenses allowed to the county treasurer for his travelling, the state's portion of repayments made under Sec. 2687 (3944), and any other amounts due the county or officers thereof."

Section 2669 Revised Codes 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, etc. The word "may" in this section has been construed to mean "must". (Hayes vs. Los Angeles, 33 Pac. 766), and it, therefore, becomes the duty of such board to refund any taxes paid

more than once or erroneously or illegally collected. (4 Op. Atty. Gen. 467). The provisions of this section apply to all taxes, whether on real or personal property, which have been either paid more than once or erroneously or illegally collected.

Taxes on personal property which are not a lien on real estate, and which are collected under the provisions of Sections 2683 to 2691, inclusive, are not erroneously or illegally collected even though the amount collected is in excess of the amount due for the year in which the same are collected, but they are legally collected, and therefore, cannot be refunded under Sec. 2669. Consequently the legislature by Sec. 2687 has provided that such excess of taxes shall not be apportioned to the state, but shall remain in the county treasury and repaid by the county treasurer to the persons from whom the same was collected.

Section 2720 provides that the auditor must deduct, not only the expenses allowed the county treasurer for his traveling expenses, and the state's portion of repayments made under Sec. 2687, but also any other amounts due the county or the officers thereof. This section is not found with those sections which have reference only to the collection of taxes on personal property which are not a lien on real estate, but is found with those sections which have reference to settlements between the county treasurer and state auditor and payment of the state's moneys by the county treasurer to the state treasurer. These several sections, 2715 to 2727 provide for such settlement and payment in connection with all moneys collected by the county treasurer for the state. I am, therefore, of the opinion that Sec. 2720 has reference not only to moneys in the hands of a county treasurer received by him from the collection of taxes on personal property under Sections 2683 to 2691, inclusive, but also to all moneys collected by a county treasurer for the state, whether such moneys have been received from the collection of taxes on personal property which are a lien on real estate, or from the collection of taxes on real estate, or from the collection of licenses, or from any other source, and that a county treasurer has the right, on a settlement with the state auditor, and on payment to the state treasurer, to deduct and withhold the amount allowed him for traveling expenses, the state's portion of repayments under Sec. 2687, and the state's portion of taxes paid more than once or erroneously or illegally collected which have been refunded by order of the board of county commissioners, provided the state's portion of such tax paid more than once or erroneously or illegally collected, has not theretofore been paid over to the state treasurer.

Section 2687 makes it the duty of the county treasurer to hold the excess tax collected on personal property which is not a lien on real estate. It is, therefore, the duty of the county treasurer, when he collects any tax on such personal property to hold the same until the levy for the current year is fixed by the board of county commissioners, and then, if the amount collected is in excess of the amount due, it is his duty to repay such excess to the person paying such tax. In other words after the levy has been made, if it is found that an amount in excess of the due amount has been collected, the excess should be paid over to the state treasurer but should be retained by

the county treasurer and repaid to the person paying the same.

Section 2742, Revised Code, as amended by Sec. 1, Chap. 135, Session Laws 1909, authorizes the payment of taxes under protest, and requires that any tax so paid shall be held by the county treasurer, without the payment of any portion thereof to the state treasurer, until the determination of an action instituted to recover the same, or until the time has expired in which such an action may be commenced. Under the provisions of this section when a tax is paid under protest the county treasurer holds the same until the determination of an action to recover such tax or until the time has expired in which suit may be instituted. If no suit is instituted within the time therein provided, or if such suit be instituted and be decided adversely to the person paying such tax, then the county treasurer must pay over to the state treasurer the state's portion of said tax but if suit be instituted and decided in favor of the person paying the tax then the county treasurer does not pay over to the state its portion of such tax but refunds all of said tax, including the state's portion, to the person paying the same.

When moneys have once been paid into the state treasury, they cannot be withdrawn except upon appropriations made by law, and on warrants drawn by the proper officer in pursuance thereof. Const. Sec. 34, Art. V.) If, therefore, the state's portion of any tax, which has been paid more than once, or erroneously or illegally collected, has been paid to the state treasurer, on a settlement with the state auditor, then, while the board of county commissioners must refund the whole of such tax, including the state's portion thereof, the county treasurer cannot deduct from any other money belonging to the state and then in his hands, the state's portion of the tax so refunded, but the county must look to the legislature for an appropriation to reimburse the county for the state's portion of such tax so refunded by the county. (4 Op. Atty. Gen. 467; 6 Op. Atty. Gen. 321). If, however, the state's portion of such tax has not been paid over to the state treasurer, on a settlement with the state auditor, but still remains in the hands of the county treasurer, then, upon the refunding of such tax on the order of the board of county commissioners, the county treasurer may deduct from the money belonging to the state then in his hands the state's portion of the tax so ordered refunded.

A summary of this whole subject, then, is as follows. First, excess personal property taxes collected under the provisions of Sections 2683 to 2691, inclusive, are never to be paid over to the state treasurer but are to be at all times retained by the county treasurer and repaid to the persons paying the same. Second, taxes paid under protest, as authorized by Section 2742 as amended, are not to be paid over to the state treasurer until after the time for instituting action to recover the same has expired, or until after such action, if instituted, is decided adversely to the person paying the same. Third, if the county treasurer, inadvertently or thru mistake, accounts to the state auditor and pays over to the state treasurer any portion of the excess personal property taxes collected under Sections 2683 to 2691, inclusive, or any portion of any tax paid under protest, under Section 2742 as amended, while such

county treasurer must refund such personal property taxes, and also such protested taxes if judgment be rendered against him therefore, he cannot deduct the state's portion of such taxes from any other moneys in his hands belonging to the state, but the county must look to the legislature for an appropriation to reimburse such county therefor. Fourth, taxes which have been paid more than once, or erroneously or illegally collected, including the state's portion of the particular tax so paid or collected, has not been paid over to the state treasurer on an accounting with the state auditor, but still remains in the hands of the county treasurer, then the state's portion of such tax so refunded may be by the county treasurer deducted from the moneys of the state then in his hands; but if the state's portion of the particular tax so paid or collected, has been paid over to the state treasurer on an accounting with the state auditor, then, while the county must refund such tax, including the state's portion thereof, the county treasurer cannot deduct the state's portion of such tax so refunded from any other money belonging to the state then in his hands, but the county must look to the legislature for an appropriation to reimburse such county therefor.

Very truly yours,
S. C. FORD,
Attorney General.