

**Fees — Refund — Limitations — Counties — Claims — Commissioners.**

A claim for fees illegally collected by the county need not be presented within one year and the county commissioners in their discretion need not plead the statute of limitations.

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Townsend, Montana.

March 27, 1925.

My dear Mr. Hooks:

You have requested an opinion on the following questions:

1. Can the county legally pay a claim for fees illegally collected from the Crow creek irrigation district by county officers, which claim was

filed with the county on July 5, 1924, most of the items thereon being over two years old, some less than one year and two over five years?

2. Does the mixture in one bill of separate items some of which were incurred within one year and some more than a year ago operate so as to allow the commissioners to pay the bill, or that portion thereof that is more than one year old?

3. In a bill growing out of the recent decision of the supreme court in the case of Crow Creek Irrigation District vs. Crittenden, can the district rightfully claim recovery for all fees paid to any officer prior thereto?

4. Must the county commissioners at all times invoke section 9030, or the statute of limitations, and refuse to pay any item more than five years old not founded on an instrument in writing?

In answer to your first question, I do not find any decisions covering the re-payment of fees illegally collected for the use of the county: however, the question of re-payment of taxes illegally collected has been before the courts many times and I see no difference between the collection of illegal taxes and fees as far as the liability of the county is concerned. The question whether a claim for the refund of taxes or fees illegally collected is an account or claim against the county requiring presentation, as provided by section 4605 of our code, is a doubtful one. The supreme court of California has held that such a claim must be presented to the county commissioners within the statutory time and if it is not, that it is barred. (Perrin vs. Honeycut, 77 Pac. 776.)

And where certain items of a claim accrued more than a year prior to the presentation and filing of the account they are barred, and the fact that one of the items occurred within the year does not revive the stale items. (Welch vs. Santa Cruz County, 156 Pac. 1003.)

However, section 4075 of the California code, which corresponds with section 4605 of our statute, is much more mandatory than our law.

The supreme court of Utah, in passing upon the question of a claim for refund of taxes illegally collected, held that it was not necessary to present a claim to the county auditor within the time prescribed by section 531 of their statutes for the presentation of claims and accounts against the county. The court in speaking of this in the case of Neilson vs. San Pete County, 123 Pac. 334, said:

“Referring again to the provisions contained in sections 531 and 533 to which we have already referred, we are of the opinion that a claim for a refund of taxes like the one in question here was not intended to be and is not governed by the provisions of either of those sections. Neither is the claim for such refund an account which the board of county commissioners is authorized to settle and allow under the purview of subdivision 7 of section 511, to which we have also made reference. Furthermore, we think that this court is already committed to such a doctrine. In the case of Mining Co. vs. Juab County, 22 Utah, 403, 62 Pac. 1025, in passing upon the question of whether a claim for the refund of taxes had to be presented to the board of county com-

missioners as a condition precedent to the right of bringing an action against the county where the taxes were paid under protest as provided in section 2684. *supra*, Mr. Justice Baskin said: 'Under the provisions of said section at the moment the plaintiff paid the unlawful tax, under protest, he thereupon acquired a right to institute suit against the defendant and was not required, as claimed by defendant's counsel, to first present a claim to the county court (board), or take any other steps as a condition precedent to bringing his action.'

It should be noted that the court in the Utah case was of the view that the same reasoning that makes it necessary to present a claim for taxes paid under protest applies to taxes illegally and erroneously collected.

The supreme court of this state has held that it is not necessary to file a claim with the board of county commissioners before commencing action to recover taxes paid under protest. (*Story vs. Dixon*, 208 Pac. 592.)

The supreme court of Kansas in the case of *Commissioners of Saline County vs. Young*, 18 Kan. 440, had this question under consideration in a case where the facts were very similar to the facts involved in this matter. The court in holding that it was not necessary to present the claim against the county and that it was not barred by failure to do so, said:

"The plaintiff in error also claims that claim of the plaintiff below is barred by the following statute, to-wit: 'No account against the county shall be allowed, unless presented within two years after the same accrued.' (Gen. Stat. 264, Sec. 47.) Now this statute is not applicable to this case. It applies only where it is necessary for the claimant to present his 'account' to the county board to be 'allowed' by them in order that he may obtain a county order on the county treasury for the amount of his claim. It does not apply where his claim is already liquidated and 'allowed' by law, and where the instrument upon which he draws his money is already issued. In such a case as this, all that is necessary for the claimant to do is to present his tax certificate to the county treasurer and receive his money. (Gen. Stat. 1058, Sec. 120.) The county board has nothing to do with allowing, or disallowing, his claim, or with issuing an order on the county treasurer for it. When the county clerk 'discovers' the 'error or irregularity,' and refuses to convey the land for which the tax certificate calls, then the claim of the holder of the tax certificate becomes complete, and he is at once entitled to receive his money from the county treasury. The plaintiff in error also says in its brief, 'but this action accrued more than three years next before commencement, and is therefore barred by section 18 of civil code.' Now the county clerk did not discover said 'error or irregularity' until April 1st, 1873; nor did the county treasurer refuse to refund to the plaintiff his money prior to that time; and this suit was commenced August 11th, 1875. Therefore, the

claim of the plaintiff is not barred by said statute. It is not claimed that the plaintiff's claim is barred by any other statute of limitations."

It should be observed that in that case the court held that the three-year statute of limitations did not bar the action for the reason that the "error or irregularity" was not discovered and the county had not *refused* to refund the tax more than three years before the commencement of the action. Other cases holding that a claim for the refund of taxes illegally collected is not an account or claim against the county requiring presentation are the following:

Kellogg vs. The Supervisors, 42 Wis. 97;  
Stringham vs. The Board of Supervisors, 24 Wis. 594;  
Newman vs. The Board of Supervisors, 45 N. Y. 676.

In view of the foregoing authorities this office has already held that a claim for refunding of taxes illegally collected is not required to be presented to the board of county commissioners and I see no reason for making a distinction in the case of illegal fees.

It is, therefore, my opinion that when a demand is made to a board of county commissioners for the refunding of fees illegally collected by the county such board must order the county treasurer to refund the same and that such claims or demands are not barred by section 4605, R. C. M. 1921, for failure to present the same within one year after the payment of the illegal fee. I believe that this answers the first three of your questions.

In answer to your fourth question as to whether the county commissioners must at all times invoke the statute of limitations our court has held that a contract within the statute is not void but simply voidable. (Featherman vs. Hennessy, 42 Mont. 535.)

Also that the question whether an action is barred by the statute of limitations can be raised only by answer. The defense may be waived by failure to interpose it. (State ex rel. Kolbow vs. District Court, 38 Mont. 415.)

It is, therefore, my opinion that whether or not this defense will be interposed is optional with the county commissioners.

Very truly yours,

L. A. FOOT,  
Attorney General.