

Taxes—Taxpayer—Payment—Protest—Recovery.

Section 2269 R. C. M. 1921 is not affected by chapter 96 of session laws of 1923.

A taxpayer, to avail himself of the semi-annual taxpaying plan provided by chapter 96, laws of 1923, must pay unconditionally one-half of his taxes, which he deems lawful, on or before November 30th of each year.

A taxpayer, to proceed under section 2269 R. C. M. 1921, must pay under protest such part of his total tax as he deems unlawful, on or before November 30th of each year and within sixty days from such date begin an action to recover the same.

Norman M. Moody, Esq.,
Clerk and Recorder,
Roundup, Montana.

December 11, 1924.

My dear Mr. Moody:

You have requested an opinion of this office upon the question whether a taxpayer may pay half of his taxes under protest in November and the other half under protest the following May, and, if so, when must he bring action to recover the taxes paid?

Section 2269, R. C. M. 1921, provides that in all cases of levy of taxes which are deemed unlawful the party taxed may pay under protest such tax, or any part thereof deemed unlawful, and may then bring an action to recover the tax, "provided, that any action instituted to recover any tax paid under protest shall be commenced within sixty days after the thirtieth day of November of the year in which such tax was paid."

By section 1 of chapter 96, laws of 1923, the legislature provided that all taxes shall be payable as follows:

"One-half of the amount of such taxes shall be payable on or before 6 o'clock p. m. on the 30th day of November of each year and one-half on or before 6 o'clock p. m. on the 31st day of May of each year."

The purpose of this act, as indicated by its title, was "to fix the time and method of collecting taxes and interest thereon." It makes no reference whatever to section 2269, supra, and there is no evidence in the body of the act that would indicate a legislative intent to deal with the subject of payment of taxes under protest.

At the time section 2269 was enacted all general taxes became delinquent on November 30th of the year in which the tax was levied, and it was unquestionably the legislative intent that all protested taxes must be paid on or before that date, and an action to recover the same be brought within sixty days after said date.

As observed by our supreme court in the case of *Dolenty v. Broadwater county*, 45 Mont. 261, section 2269 is not only a statute of limitations but is a statute creating a right which did not exist at common law and the limitation of time stated therein is of the essence of the right itself.

Nothing in chapter 96, supra, indicates any legislative intent to enlarge or add to the right created by section 2269.

Another reason for concluding that section 2269 is not affected by chapter 96, supra, is the fact that no apparent reason exists for extending the time, provided for in section 2269, in which to pay a part of a tax under protest.

Under the law a taxpayer is required to make written application to the county board of equalization and in case of an adverse ruling to appeal from its decision to the state board of equalization for a reduction of any tax claimed to be excessive, and the complaint in an action to recover taxes paid under protest must show a compliance with these requirements. (See *Bozdeck v. Montana Ranches Co.*, 67 Mont. 366.) Each of these bodies acts upon the application made to it long prior to the 30th of November and no good reason seems to exist why a taxpayer should be required to pay and bring action to recover part of an alleged illegal tax within sixty days after November 30th, but should have six months or more in which to pay and bring a similar action to recover the other one-half.

It is my opinion that the enactment of chapter 96, laws of 1923, has not affected section 2269 in so far as the requirement is concerned that the entire tax which a party deems unlawful must be paid on or before November 30th and an action to recover the same be brought within sixty days after said date. It should also be noted in this connection that the payment of a tax under protest is not payment thereof within the meaning of chapter 96, laws of 1923. Taxes paid under protest are not unconditionally paid, the state and county deriving no benefit therefrom pending the outcome of the suit, but the money is required to be held until the determination of the action.

It is, therefore, my opinion that if a person desires to avail himself of the semi-annual tax payment plan provided by chapter 96, laws of 1923, he must, on or before November 30th, pay unconditionally one-half of his taxes that he deems proper, and in addition, if he desires to proceed under section 2269 he must pay under protest any part of the tax which he deems unlawful, and within sixty days after said date must bring an action to recover the same.

Very truly yours,

L. A. FOOT,
Attorney General.