

**Banks and Banking—Taxation—Refund—Protest—Illegal Taxes.**

Taxes illegally assessed and collected may not be refunded when paid without protest.

May 3, 1928.

E. M. Child, Esq.,  
County Attorney,  
Kalispell, Montana.

My dear Mr. Child:

Your letter was received regarding the recovery of taxes under section 2222 R. C. M. 1921. The question presented is whether national banks that have paid taxes without protest and which, had they been paid under protest, could have been recovered by virtue of the recent decisions of the supreme court of the United States, may be recovered by virtue of the above-cited section.

The right to recover such taxes has presented a question concerning which the courts are not in accord. In section 1276 of Cooley on Taxation, it is said:

“The right of a taxpayer to recover from the state, county, municipality, or other tax district, or from the tax collector, taxes paid where the tax is invalid, is more or less involved and the subject of some conflict in the decisions. The right may depend on (1) whether the action is against the state, subdivision of the state, or tax collector, (2) whether the tax or the levy or assessment is such a one as to be invalid, (3) whether the payment is voluntary or compulsory, (4) whether a statute regulates or affects the right to recover, etc. It must be kept in mind that the governing rules in some states differ more or less from such rules in other states, and that while the rules relating to recovery back of payments other than taxes are for the most part applicable, they do not necessarily always apply equally well to recovery of taxes paid. ‘It should be kept in mind,’ it has been said, ‘that the rules which apply to actions to recover back money paid by one person to another do not apply, to their full extent, to actions to recover back from a county, town or other municipality money in payment of taxes illegally assessed or levied.’

“If a state collects illegal taxes for its own purposes, the several persons from whom the collection is made have claims

against it for the repayment of the sums collected from them respectively. The state is trustee of the money for the use of the persons paying it; but whether they can bring suit against the state therefor must depend upon the provision of law which it may have made for the purpose. They cannot sue the state except as by law it may have provided therefor; and though this is sometimes done, it is more usual to give to some auditing board authority in the premises. If an action is given it will be governed by the same rules as apply in actions against municipal corporations, except as the statute may have otherwise provided.

"In some states provision is made by law for the refunding by the state, through the counties, of sums illegally collected as state taxes, and under such a provision the county may be sued on a presumption that the state has performed its duty in supplying the means.

"The town, village, city, or county for which a tax has been levied and collected may, under some circumstances, be liable to an action at the suit of parties from whom the tax has been exacted. The case, however, must be exceptional, and the circumstances such as to render repayment equitable. In general, an action can only be maintained when the following conditions are found to concur:

"1. The tax must have been illegal and void, and not merely irregular.

"2. It must have been paid under compulsion or the legal equivalent.

"3. It must have been paid over by the collecting officer, and have been received to the use of the municipality.

"And to these perhaps should be added:

"4. The party must not have elected to proceed in any remedy he may have had against the assessor or collector."

In the case of national banks the tax in question, in my judgment, was not wholly illegal in the sense contemplated by section 2222. The banks were taxable and taxable under the law at 40% of the value of the shares of stock, save and except that by virtue of the federal statute the banks had the right to show that they were discriminated against in favor of other moneyed capital. Until this showing had been made the tax, in my judgment, would be regular. The situation, in my opinion, would be analogous to those in which there had been an over-valuation of the property, and that has been held insufficient to justify the collection or refund of taxes erroneously assessed.

In *Clay County vs. Brown Lumber Co.*, 119 S. W. 251, the supreme court of Arkansas, in speaking of this question, said:

"It is urged by the appellee that an excessive valuation of property is an erroneous assessment thereof within the meaning

of section 7180 of Kirby's Digest, so that a remedy is here given to one, who has paid taxes under these circumstances, by having the taxes refunded; but we do not think that the term, 'erroneously assessed,' as used in said section, refers to an over-valuation of the property. The term 'erroneous assessment,' as there used, refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property. If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of Kirby's Dig. Section 7180, give the owner a remedy for a refunding of such taxes thus erroneously paid; but a remedy is not given by this section to the party aggrieved by reason only of an excessive assessment or overvaluation of his property."

Likewise, in the case of *In Re Trustees, etc. of Village of Delhi*, 124 N. Y. S. 487, the court said:

"The tax as levied was not void on its face. The town board of assessors had jurisdiction, and it was proper for them to assess all that part of the waterworks system of the village outside its corporate limits. If there was any illegality in the assessment and subsequent levy by the board of supervisors, extrinsic evidence was necessary to demonstrate it. It was only upon proof that a part of the tract of land comprising the waterworks system was within the corporate limits that any illegality could be claimed, and then confessedly it was necessary to apportion the tax between that part outside the limits, which was taxable and over which the assessors had complete jurisdiction, and that part inside the corporate limits, which was not taxable and over which the assessors had no jurisdiction. The village made no protest on grievance day that the assessors had assessed the eight acres outside the corporate limits at too high a figure. The whole waterworks system was proved to have been of the value of \$50,000. Manifestly the assessors had the power to assess the eight acres at \$14,000, and confessedly under the statute in question a tax cannot be refunded because the assessors were guilty of overvaluation."

It is therefore my opinion that taxes paid without protest by national banks may not be recovered under section 2222, R. C. M. 1921.

Very truly yours,

L. A. FOOT,  
Attorney General.