

Inheritance Tax—Taxation—Refunds—State Treasurer.

Amount of inheritance tax which has been received by the state treasurer and credited to the general fund and the common school equalization fund may not be refunded by the state treasurer except by virtue of an appropriation made by the legislature.

State Board of Equalization,
Helena, Montana.

August 7, 1931.

Gentlemen:

You state that at the time of the computation of the inheritance tax in connection with the estate of Frank M. Heinrich there was a claim pending which the administrator had refused to allow and was not considered as a deduction in the computation of the tax; that it was stipulated in the event the court subsequently allowed the claim against the estate the administrator would be entitled to a refund of a proportionate part of the inheritance tax paid; that the administrator paid the tax to the county treasurer who has remitted the same to the state treasurer; that the court subsequently allowed this claim against the estate and that the administrator is entitled to a refund in the sum of \$3008.11 of the inheritance tax paid; that there is no money in the hands of the county treasurer with which to pay this refund. You desire the opinion of this office on the question of the authority of the state treasurer to refund this amount to the administrator out of any inheritance tax moneys that may be in his possession.

The original inheritance tax law of 1921 provided that inheritance taxes could be paid over to the county or state treasurer (section 10381 R. C. M. 1921) and this provision is retained in our present law (section 5, chapter 65, laws of 1923). The original law provided for refunds to be paid by the county or state treasurer when debts were proved against the estate after payment of the tax and when taxes were erroneously paid, the payment of the refunds to be in the "proper proportionate shares" or "the county's and state's proportionate amount of such tax so paid." (Section 10384 R. C. M. 1921.) The above provisions are also retained in our present law (section 8, chapter 65, laws of 1923) and in

addition thereto it is provided for the payment of refunds in the case where an estimate has been made of the tax and the same is paid prior to determination by the court of the amount of the tax, the excess, if any, to be refunded by the county treasurer out of any inheritance taxes in his possession, or by the state treasurer, if the county treasurer is without such money.

In the original law it was provided that 90% of the taxes levied, less expenses of collection and deductions authorized by the act, should be paid into the state treasury and be deposited to the credit of the general fund of the state, and 10% thereof should be placed to the credit of the general school fund of the county. (Section 10399 R. C. M. 1921.) This was the method of computation evidently intended to be used in arriving at "the proper proportionate shares" and ascertaining the "county's and state's proportionate amount of such taxes so paid" when paying a refund, as provided in section 10384.

Under the original act the county treasurer was required to pass on to the state treasurer only the state's part of the taxes (section 10395 R. C. M. 1921) and the county treasurer placed the county's share to the credit of the county school fund. However, by the enactment of section 23 of said chapter 65, laws of 1923, the legislature changed the law relating to the disposition of inheritance tax moneys and provided that 50% of the taxes levied, less deductions authorized by the act should be deposited to the credit of the general fund of the state and 50% should be deposited by the state treasurer to the credit of the "inheritance tax fund" to be distributed by him to the various counties of the state for the benefit of the schools therein, and by section 19 of said act the county treasurer was required to remit all of the inheritance tax moneys received by him to the state treasurer instead of only a portion thereof as the state's share, as provided in the former law. Such is also the present law. (Section 7, chapter 50, laws of 1925.)

By section 1 of chapter 119, laws of 1927, the legislature created the state common school equalization fund and it is therein provided that said fund shall consist of certain moneys mentioned therein, among which are those of the inheritance tax fund found therein at the time of the enactment of the act, as well as those thereafter received for it so that at the present time the general fund of the state receives 50% of the inheritance taxes and the common school equalization fund the other 50%. Immediately upon receipt of the inheritance taxes it is the duty of the state treasurer to deposit the general fund's share to the credit of that fund and transfer to the common school equalization fund any moneys received for the credit of the inheritance tax fund.

Section 34 of article V of the constitution provides that no money shall be paid out of the treasury except upon appropriations made by law, and section 10 of article XII provides that all taxes levied for state purposes shall be paid into the state treasury and no money shall be drawn from the treasury except in pursuance of specific appropriations made by law. These provisions would seem to preclude the state treasurer refunding any of the inheritance taxes which by law he is required to credit and has credited to the general fund, for immediately they become

a part of that fund and before they can be paid therefrom there must be a specific appropriation therefor by the legislature.

State ex rel. Journal Publishing Co. vs. Kenney, 9 Mont. 389;
24 Pac. 96;

In re Pomeroy, 51 Mont. 119, 151 Pac. 333.

In the case presented by you there has been no appropriation from the general fund for the payment of the refund or refunds in general and therefore the treasurer would, in my opinion, be without authority to pay the refund or any part thereof from the general fund. As only 50% of the taxes was paid into the general fund it is apparent also that not more than 50% of the refund should be paid therefrom even by virtue of an appropriation.

As to the 50% paid into the state common school equalization fund this cannot be paid out except by appropriation also but the act creating this special fund contains its own appropriation of all the moneys deposited in said fund and this is for the benefit of the schools. Money may only be paid out of that fund for the purposes specified in the law and upon a warrant drawn by the auditor in pursuance of a certification of distribution made by the state board of education acting as the common school equalization board. The said board can only distribute the moneys to the schools and therefore no one has authority to draw or order drawn the moneys out of the fund for the purpose of paying a refund. The treasurer can only pay out moneys from said fund upon a warrant drawn by the auditor in pursuance of the certification by the common school equalization board and he may not pay out any moneys upon any other authority. He therefore cannot take from said fund any part of the moneys therein to pay refunds. Likewise, as only 50% of the taxes are paid into this fund it should only bear one-half of the amount of the refund when and if the legislature makes an appropriation therefor from it for the purpose of paying the refund.

It is therefore my opinion that the state treasurer does not have the authority to pay the refund mentioned in your communication but that the same must be the subject of an appropriation or appropriations by the legislature.

Very truly yours,
L. A. FOOT,
Attorney General.