

Opinion No. 549

Taxation—Income Tax—Refunds—Appropriations—Legislative Assembly.

HELD: As a general rule, in order to secure a refund of taxes once they have found their way into the state

treasury and are subject to allocation, two things must coincide, namely, legislation permitting it and an appropriation by the legislature to meet the same.

But the regulation adopted by the Board of Equalization may be all right in so far as it contemplates refunds of income taxes out of the suspense account, if in fact it does, in the cases covered by sections 22 and 25 of Chapter 181, Laws of 1933.

June 7, 1934.

We have before us your request for opinion, and the regulation of the state board of equalization accompanying the same. In regular order they are as follows:

"We are enclosing herewith a regulation adopted by the State Board of Equalization in regard to refunds and credits to taxpayers for any overpayment of tax, or for any tax erroneously or illegally collected. It is our opinion that this regulation is based on the authority granted to the Board in Section 29, Chapter 181, 1933 Regular Session Laws, which provides: 'The Board is hereby authorized to make such rules and regulations and to require such facts and information to be reported as it may deem necessary to enforce the provisions of this Act.' The regulation enclosed herein was adopted to properly enforce the provisions of Section 22 and also the provisions of Sub-Section 4 of Section 25.

"We are desirous of securing an opinion as to whether or not this regulation is in sufficient compliance with the requirements of the law, or whether it is in conflict thereto."

**"IN THE MATTER OF ADOPTION
OF OFFICIAL RULINGS PER-
TAINING TO THE PROPER AD-
MINISTRATION OF THE MON-
TANA INCOME TAX LAW"**

Income Tax Ruling
Number—

"Pursuant to Section 22 and Section 25 (4) of the Montana Income Tax Law, with reference to refunds and credits, the State Board of Equalization, after due consideration, hereby adopts the following

**OFFICIAL RULING
(REFUNDS AND CREDITS FOR
OVERPAYMENTS) Where there has**

been an overpayment of any tax imposed by this Act, or where any tax imposed by this Act has been erroneously or illegally collected, the amount of such overpayment or the amount of tax erroneously or illegally collected shall be credited against any income tax, or installment thereof, then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

Claims by the taxpayer for the refunding of any amount in overpayment of this tax, or for any amount of this tax erroneously or illegally collected, shall be made on the prescribed forms and should be filed with the State Board of Equalization. A separate claim on such forms shall be made for each taxable year or period. No such credit or refund shall be allowed or made after two years from the time the tax was paid unless, before the expiration of such period, claim therefore is filed by the taxpayer. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to appraise the Board of the exact basis thereof. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund.

Upon the approval of any such claim for refund the State Board of Equalization shall so certify to the State Treasurer and order the immediate payment of any amount due to the taxpayer because of overpayment or because of any tax erroneously or illegally collected, to be paid out of any moneys remaining in the suspense account from funds collected under the provisions of the Montana Personal Income Tax Law.

STATE BOARD OF EQUALIZATION

C. J. Muri,

John J. Greene

Adopted May 18, 1934"

Section 34, Article V, of the Constitution, provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt," and section 10, Article XII, of the Constitution, provides that "all taxes levied for state purposes shall be paid into the State Treasury, and no money shall be drawn

from the treasury but in the pursuance of specific appropriations made by law."

In giving effect to these provisions of the Constitution the supreme court in the case of *First National Bank v. Sanders County*, 85 Mont. 450, used this language: "That portion of section 2222, Revised Codes 1921, which assumes to provide for a refunding to the county of the state's share of taxes returned to the taxpayer is inoperative." The Court further said that the state auditor could not lawfully follow the statutory direction in the absence of legislative appropriation.

As a general rule, therefore, in order to secure a refund of taxes once they have found their way into the state treasury and are subject to allocation two things must coincide, namely, legislation permitting it and an appropriation by the legislature to meet the same. (In *re Baer's Will*, 266 N. Y. S. 733; 61 C. J. 975).

Section 22 of Chapter 181, Laws of 1933, provides:

"If an application for revision be filed with the Board by a taxpayer within two years from the time of the filing of the return or if the tax of such taxpayer has been recomputed, then from the time of such recomputation, the Board shall grant a hearing thereon, and if it is made to appear upon any such hearing by evidence submitted to it or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the Board shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of its determination thereon to the taxpayer."

Section 25 of the same Act provides that as soon as practicable after the return of the taxpayer is filed with the state board of equalization it shall be examined and the tax computed, and if the amount of the tax as computed is less than the amount theretofore paid, the taxpayer is entitled to a refund of the excess.

Section 192, Revised Codes of 1921, as amended by Section 1 of Chapter 157, Laws of 1931, is in part as follows:

"The State Treasurer is hereby designated the treasurer of each and every state board, commission, bureau, department and state institution, now existing or hereafter to be created or established. All departments of the state government located at the capitol shall deposit with the State Treasurer daily all moneys, credits, evidences of indebtedness and securities received, and the State Treasurer shall give such departments credit on their suspense accounts, which the State Treasurer is hereby directed to set up, and such deposits shall be subject to the final payment of all items, and the State Treasurer is directed to charge back against such suspense accounts all items unpaid for any reason. * * *

"On the fifteenth and the last day of each calendar month, every department, state board, commission, bureau, state institution, and every other employee or agent of the State of Montana shall make report and settlement with the State Treasurer, and the State Treasurer shall issue his official receipts to all departments, state boards, commissions, bureaus, state institutions and other employee or agent, reserving the right to hold in his possession such receipts subject to cancellation until all items covered in same shall have been finally paid; * * *."

Our understanding is that the state treasurer has set up a suspense account as between himself and the state board of equalization, in accordance with the provisions of sections 192, and that the board proposes to make refunds of income taxes out of said account whenever it deems it necessary or proper.

The regulation adopted by the board may be all right, then, in so far as it contemplates refunds of income taxes out of the suspense account, if in fact it does, in the cases covered by sections 22 and 25, notwithstanding the general rule above stated.

It goes without saying that in the absence of statute no executive or administrative officer has power to refund taxes, and if the power is given to him by law it must be substantially followed. (*State v. State Board of Equalization*, 67 Mont. 340; 61 C. J. 975).