

Opinion No. 576**Road Tax—Poor Poll Tax—Poll Tax
—Volunteer Fire Department
—Refund—County
Commissioners.**

HELD: Where an employee is by law exempt (in this case a volunteer fireman) from payment of road and poor poll taxes but his employer nevertheless pays such taxes to the county treasurer and deducts the same from the wages of such employee, the county commissioners may, under Section 2222, R. C. M., 1921, order a refund of such taxes.

July 13, 1934.

You have requested our opinion upon the right of the members of the East Side Volunteer Fire Department to obtain refunds from Silver Bow County of road and poor poll taxes paid by them, presumably through their employers.

The sections of the Revised Codes of 1921 which apply to the organization of volunteer fire companies are as follows:

"5143. Fire companies in incorporated cities and towns are formed and organized under special laws, or under authority conferred upon the city or town government. Those in unincorporated towns and villages are organized by filing, with the county

clerk of the county in which they are located, a certificate in writing, signed by the foreman or presiding officer and secretary, setting forth the date of the organization, name, officers, and roll of active and honorary members, which certificate and filing must be renewed every three months. There must not be allowed to any such towns or villages more than one company for each one thousand inhabitants, but one company must be allowed in any city, town, or village where the population is less than one thousand. There must not be allowed to any fire company more than twenty-eight certificate members.

"5144. Every such fire company must choose or elect a foreman, who is the presiding officer, and a secretary and treasurer, and may establish and adopt by-laws and regulations and impose penalties, not exceeding five dollars, or expulsion for each offense. The officers and members of unpaid fire companies regularly organized and exempt firemen are entitled to the following privileges and exemptions, viz: Exemption from payment of poll-tax, road-tax, and head-tax of every description; exemption from jury duty; exemption from military duty, except in case of war, invasion, or insurrection. Every fireman who has served five years in an organized company in this state is an 'exempt fireman,' and must receive from the chief engineer of the department to which he belonged a certificate to that effect. Every active fireman must have a certificate of that fact, signed by the chief of the fire department or the foreman of the company to which he belongs; such certificates must be countersigned by the secretary, and over the seal of the company, if one is provided. Each certificate entitles the holder to exemption from military and jury duty."

It appears that the East Side Volunteer Fire Company was organized on November 8, 1933, and has complied with the provisions of these sections so far as it was possible for it to do so.

There is nothing in the board's letter or in the copy of the county attorney's opinion which accompanies it from which it can be determined that the district sought to be protected against fire is a town or village within the meaning of section 5143. We may safe-

ly assume, however, that if it be one or the other it is unincorporated.

The word "town," as used in section 5143, means an aggregation of houses so near to one another that the inhabitants may fairly be said to dwell together. (*Davis v. Stewart*, 54 Mont. 429; *Marx & Co. v. Bankers' Credit Life Ins. Co.*, 139 South. 421; *People v. Van Nuys Lighting Dist.*, 162 Pac. 97; *County Court of Garfield County v. Schwarz*, 22 Pac. 783; *Murphy v. State*, 5 South. 626.)

The word "village", as used in section 5143, means any small aggregation of houses in the country, generally less in number than in a town or city and more than in a hamlet. (*People v. Van Nuys Lighting Dist.*, *supra*; *Mahood v. State*, 133 South. 90; *State v. Village of Gilbert*, 120 N. W. 528; *State v. Lammers*, 89 N. W. 501.)

Our investigation has disclosed that the district in question is somewhat extensive in area and rather dense in population. Therefore, it easily rises to the dignity of a village, if not a town, according to the definitions given above.

The power of the board of county commissioners to refund taxes is found in section 2222, Revised Codes of Montana 1921, which reads as follows: "Any taxes, per centum, and costs paid more than once or erroneously or illegally collected may, by order of the board of county commissioners, be refunded by the county treasurer, and the state's portion of such tax, percentage, and costs must be refunded to the county, and the state auditor must draw his warrant therefor in favor of the county."

Our supreme court has held that capitation or poll taxes are taxes in the real sense of the term and not mere exactions under the police power of the state. (*State v. Gowdy*, 62 Mont. 119.)

Our supreme court has also held that section 2222 has been repealed by section 2269, Revised Codes of Montana, 1921, in so far as it relates to the right to recover property taxes illegally collected. (*First Nat. Bank v. Beaverhead County*, 88 Mont. 577; *Williams v. Harvey*, 91 Mont. 168.)

We think, however, that section 2222 is still effective in a case where an employee is by law exempt from pay-

ment of road and poor poll taxes but his employer nevertheless pays such taxes to the county treasurer and deducts the same from the wages of such employee. A refund may be ordered under those conditions. This is but following a practice which has prevailed in Montana for forty years or more.