

Opinion No. 326.**Taxation—Refund, Taxes Erroneously Paid.**

HELD: The remedy for refund of taxes erroneously paid is under provisions of 2222, R. C. M. 1935.

2. The County must refund the entire amount of taxes erroneously paid and look to legislative action to appropriate the amount distributed to the state.

August 24, 1938.

Mr. Harold K. Anderson
County Attorney
Helena, Montana.

Dear Mr. Anderson:

You request our opinion upon the following: Land has been erroneously assessed by the officials of Lewis and Clark County for a period of eight years, and taxes have been paid. The mistake was just discovered. You ask whether or not it is a case in which a portion of the tax should be refunded, and, if so, what would be the procedure.

Section 2222, R. C. M. 1935, provides for a refund, by the county treasurer upon the order of the board of county commissioners, of taxes paid more than once. The said section also provides that the state's portion of such tax, interest and costs may be refunded to the county, and the state auditor must draw his warrant therefor in favor of the county. This particular section is adopted from Section 3804 of the California Political Code. It has been passed upon in the case of *First National Bank v. Sanders County*, 85 Mont. 450, wherein our supreme court held that portion of Section 2222 aforesaid, as far as it provides that the state auditor must draw his warrant for the state's portion of said taxes, is in-

operative for the reason that the auditor was prohibited by law from drawing a warrant in the absence of legislative appropriation.

In the recent case of *Christofferson v. Choteau County*, 105 Mont. 577, 585, practically the same question came before our supreme court, in which decision the court refers to *Pacific Coast Co. v. Wells*, 134 Cal. 471, 66 Pac. 657, 658, as being a case largely in point in that a taxpayer voluntarily paid the taxes, including taxes levied on an erroneous assessment. Application was made to the board of supervisors, who directed the refund of the amount of the tax erroneously paid. The auditor refused to make payment, and the action was to compel him to make it. The statute then obtaining in California was not unlike our own. In the California case, as in the case of *Christofferson v. Choteau County*, the court reviewed and adhered to the decision of a previous case, that of *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, in which case the owner had been assessed with the property and had paid the taxes. The same property was assessed to a third party through error, and taxes allowed to go delinquent. The property was sold for delinquent taxes and certificate of purchase assigned. The assignee discovered that the sale had been on a double assessment and void, and he applied to the board of supervisors for an order refunding the money. The board refused the order, and the court held that the order should have been made, and that the word "may" meant the same as "shall." The following language is used in the opinion:

"It had often occurred, prior to the amendment to the Code above quoted, that by accident or oversight, property was twice assessed, and the taxes twice collected. Yet the obstacles in the way of a recovery of the taxes thus improperly collected were so numerous and perplexing, that the remedy for the recovery was scarcely worth pursuing. That the object of the statute was to obviate these difficulties, and provide a means for the recovery of moneys collected by mistake, and to which the county and state have neither a moral nor legal right, is apparent. * * * Section 3804 was enacted to do justice in a class

of cases where, but for its provisions, the application of the doctrine of **caveat emptor** would work a hardship to citizens who had paid money which it was inequitable for the county to retain."

Our court then goes on in *Christofferson v. Choteau County*, supra, as follows:

"We are in accord with the rule above announced. The effect of this statute, in so far as it remains in force, is to avoid, where properly applicable, the harsh common-law rule recognized by the courts in proper cases prohibiting the recovery of a tax where voluntarily paid."

Our court goes on in its opinion, calling our attention to the fact that in reversing the judgment and ordering the board of county commissioners to allow the claim, that it had not overlooked the decision of this court declaring that portion of the section unconstitutional with reference to refunds by the state auditor to the county treasurer under Section 2222, as decided in *Yellowstone Packing & P. Co. v. Hays*, 83 Mont. 1.

In short, our court, in the aforesaid case, has told us that Section 2222 is the proper procedure and that the county treasurer must pay. As to the recourse of the county treasurer against the state treasurer for moneys already distributed, that would have to be governed by legislative act.