

Opinion No. 188.

Taxation—Recovery of Taxes Unlawfully Levied—Recovery of Per Capita County Road Taxes—Section 2269 Provides Exclusive Remedy.

HELD: Per capita county road taxes were unlawfully levied under the provisions of Section 1617 and if paid, Section 2269 provides the exclusive remedy for their recovery.

January 11, 1940.

State Board of Equalization
The Capitol

Gentlemen:

Recently this office gave an opinion to you to the effect that Section 1617, R. C. M., 1935, in so far as it attempted to levy a county per capita road tax of \$2.00, is unconstitutional. You have now requested our opinion on the question whether such tax, if collected, may be refunded.

The county per capita road tax, if collected, was based upon an **unlawful levy** by the legislature, under said Section 1617, in Violation of Section 4, Article XII of the Montana Constitution, which prohibits the legislative assembly from levying taxes upon the inhabitants or property in any county for county purposes. Section

2269 Id., which has to do with the recovery of taxes unlawfully levied, reads:

"In all cases of (1) **levy** of taxes, licenses or other demands for public revenue which are deemed **unlawful** by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may (2) before such tax or license becomes delinquent pay under (3) written protest such tax or license, or any part thereof, deemed unlawful, to the officers designated and authorized to collect the same; and thereupon the party so paying, or his legal representatives, may bring an action in any court of competent jurisdiction against the officer to whom said license or tax was paid, or against the county or municipality in whose behalf the same was collected, to recover such tax or license, or any portion thereof paid under protest; provided, that any action instituted to recover any license or tax paid under protest shall be commenced within sixty days after the date of payment of the same; * * *." (Figures and emphasis ours.)

It will be observed from this section that where taxes based on an unlawful levy are paid, several conditions precedent are necessary to recover, namely, (1) payment before the tax becomes delinquent; (2) written protest; (3) the action to recover such taxes must be commenced within sixty days after the date of payment. If all these conditions required by the statute have been observed by the taxpayer, recovery may be had.

The Attorney General, in an opinion (Vol. 16, Opinions of the Attorney General, 101), compared the provisions of Sections 2269 and 2222, reviewed the decisions of our Supreme Court and the former opinions of the Attorney General and we think correctly distinguished between taxes "unlawfully levied" and "taxes erroneously and illegally collected." We agree with that opinion. Since that opinion was rendered, our Supreme Court (Dec. 7, 1937), in an opinion by Mr. Justice Anderson, unanimously concurred in by the other Justices, likewise had occasion to analyze these sections and after reviewing the previous decisions of the Court, came to the same conclusion. See *Christofferson v. Chou-*

teau County, 105 Mont. 577, 77 Pac. (2) 427. In *First National Bank v. Sanders County*, 85 Mont. 450, 279 Pac. 247, Chief Justice Callaway, speaking for the Court, said (p. 460):

"* * * it is unreasonable to believe that it ever was in the thought of the legislature that Section 2222 had reference to unlawful levies or moneys collected upon unlawful levies."

In the *Christofferson* case, *supra*, the Court, in referring to this case, said (p. 581):

"* * * The court held the action to be one wherein an **unlawful levy** and collection of public revenues were involved. It decided that Sections 2268, 2269, and 2272 provided **exclusive** remedies as to all cases falling within their purview, and that, as to all such cases falling within the purview of these sections, Section 2222 had been repealed. It was clear from the holding of the court in this case that, wherever an **illegal tax** was involved, the **only** remedy open to the taxpayer was the equitable remedy of injunction, or the legal remedy by paying the taxes under protest and bringing suit to recover in accordance with these statutory provisions." (Emphasis ours.)

Effective March 17, 1939, the Twenty-sixth Legislative Assembly amended Section 2222 (Chapter 201, Laws of 1939), but it did not change the wording or the scope of this section. It merely added the words "heretofore or hereafter" and provided for the settlement of accounts between the county treasurer and the state treasurer and the payment by the county treasurer when any part of the tax is levied in behalf of any school district. It also limited the time of filing of claim to a period "within two years after the date when the second half of such taxes would have become delinquent, if the same had not been paid," thus limiting the scope of the section to that extent. Section 2 of said Chapter 201 reads:

"All acts and parts of acts in conflict herewith are hereby repealed, but none of the provisions of this act shall be deemed or construed to

be in conflict with the provisions of Sections 2268 and 2272, inclusive, of this code, but this act and the provisions of such sections shall provide and afford concurrent remedies."

In other words, the legislature expressly said that Section 2222, as amended, should not conflict with Section 2269, which it did not wish to repeal and that Section 2222 and the other sections should afford "concurrent remedies." As was pointed out by the Attorney General in the opinion above referred to, these sections do not necessarily conflict but each stands and operates in its own separate field, Section 2269 in the field of taxes unlawfully levied and Section 2222 in the field where taxes are "paid more than once or erroneously or illegally collected." The fact that the wording of Section 2222 was unchanged, that the legislature expressly provided that it should not conflict with Section 2269, shows that the legislature did not intend that Section 2222 should be co-extensive with Section 2269, or cover the same field. This conclusion is strengthened by the fact that the amendment was made after the opinion of the Attorney General above referred to, and after the opinion of the Supreme Court in the Christofferson case. See "concurrent," as defined in 15 C. J. S., note 73, and 12 C. J. 393. If the legislature had intended that Section 2222 should cover the same field as Section 2269, it would have repealed the latter section as there would be no further need of it. Certainly there would be no need to pay taxes under protest as a basis for recovery, if Section 2222 covered the entire field of recovery of taxes paid.

Aside from the wording of these sections and the history, as well as the decisions of our Court and the opinions of the Attorney General based thereon, there is good reason why taxes unlawfully levied should be paid under protest and the procedure of Section 2269 followed before such taxes can be recovered. In order that the finances of the state, county or school district might not be too seriously disturbed such tax money is placed in a special fund, the "protest fund" and is not distributed or used until the final determination of the suit, which must be commenced within sixty days. As was said by the Attorney General, *supra*:

"Besides, there is good reason why the remedy given by Section 2269 should be exclusive only in cases of unlawful levy. An unlawful levy may be so far reaching and affect so many taxpayers and the functioning of the county, if not the state, may be so seriously disturbed by it that there is good reason for the policy declared in Section 2269, as amended. The same reason does not apply to the occasional error resulting in paying a tax twice or paying a tax erroneously or illegally where there is no underlying unlawful levy."

If the per capita road tax collected because of the unlawful levy may now be refunded under Section 2222, and Section 2269 disregarded, then large and powerful taxpayers who desire to contest the right to levy certain taxes need never pay such taxes under protest as a basis for recovery, or commence action for their recovery within sixty days, as provided by Section 2269, as they have been required to do heretofore. We do not think that the Twenty-sixth Legislative Assembly, by anything they said in the amendment of Section 2222, intended such far-reaching consequences, or to abandon the wise, economic policy established by Section 2269.

Since per capita county road taxes were unlawfully levied, we are of the opinion that if they are paid they are governed exclusively by the provisions of Section 2269, and that compliance with all the conditions therein is necessary to their recovery.