

Opinion No. 213.

**Taxation—County Per Capita Road
Taxes—Payment By Another By Mis-
take—Refund—Section 2222—Stat-
utes—Constitutional Law, Effect
of Partial Invalidity.**

HELD: Where the county per capita road taxes are not paid by employees, and the employing com-

pany, at the instance of the county treasurer, without their knowledge or consent, deducts them from their wages and pays them to the county treasurer, relying upon 1620, which is unconstitutional, they may be refunded under Section 2222.

Where a section of an act authorizing the collection of a county per capita road tax is unconstitutional, a companion section which specifies the method of collection, is likewise unconstitutional.

March 13, 1940.

Mr. Claude A. Johnson
County Attorney
Red Lodge, Montana

Dear Mr. Johnson:

Upon receipt of additional facts we have given further consideration to your letter of February 6, 1940. The facts, as we understand them, are as follows:

Certain employees of the Montana Coal and Iron Company of Washoe, Montana, did not pay the county per capita road tax as provided for in Section 1617, R. C. M., 1935, which this office, in an opinion given to the Board of Equalization, declared unconstitutional because the legislature thereby attempted to levy a tax for county purposes, contrary to Section 4, Article XII of the Montana Constitution, which forbids the legislature from levying taxes upon the inhabitants in any county for county purposes. Our opinion was supported by the decision of the Montana Supreme Court in *State v. Gowdy*, 62 Mont. 119, 203 Pac. 1115. These taxes being unpaid, the county treasurer of Carbon County delivered to the Montana Coal and Iron Company the written notice provided by Section 1620, which reads as follows:

"If any person required to pay the special road tax mentioned in this act does not pay the same and has no property subject to taxation, and the person owing the same is in the employment of any other person, the county treasurer must deliver to the employer a written notice, stating the amount of tax due for such employee, and from the time of receiving said notice the employer is liable to pay said tax, and the tax

so paid may be deducted by such employer from the amount then due or to become due to such employee."

We do not know the date of the notice but we regard this as immaterial. The employing company thereupon in the month of December, 1940, made deductions for such taxes from the wages of their employees and paid them to the county treasurer of Carbon county. This was done without the knowledge or consent of the employees who were not informed thereof until December 29, 1939, when they got their statements from their employer. On the same date, they filed their written protest with their employer. We are advised that these taxes were not checked off the pay of the employees until pay day, December 31, 1939, and that thereafter and after the written protest was given, the employer paid the county treasurer, but we regard this as immaterial since the taxes were deducted and paid to the county treasurer without the consent and knowledge of the employees.

Section 1617, being unconstitutional, is as inoperative as if it had never been passed and was invalid from the date of enactment. (16 C. J. S. 287, Sec. 101.) A per capita road tax levied thereunder, consequently was levied without lawful authority and was void when levied. No one was required to pay it. The employees in question have never paid it. Deduction thereof from their wages was not authorized by them since it was without their knowledge or consent, in fact it was against their will, as shown by their written protest. Since Section 1617 is unconstitutional, Section 1620 is likewise unconstitutional because there could be no reason or purpose for its existence, except the collection of the illegal tax. The administrative machinery for the collection of such illegal tax is also unconstitutional. The rule is stated in 59 C. J. 646:

"Where a statute has a specified purpose, coupled with minor details and administrative features, and the purpose is unconstitutional, the minor details and administrative features must also be declared unconstitutional. * * *"

See also page 644 *Id.*, where it is stated:

“On the other hand, the whole statute will be declared invalid where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning, and purpose as to preclude the presumption that the legislature would have passed the one without the other, but, on the contrary, justify the conclusion that the legislature intended them as a whole and would not have enacted a part only. In other words, the whole act will be declared invalid where the unconstitutional part is so connected with the remainder or with the general scheme, that it cannot be stricken out without making the legislative intent ineffective, or is of such import that, without it, the other parts would cause results not contemplated or desired by the legislature, or is the consideration and inducement of the whole act, * * *.”

Section 1620 has no purpose, consideration or inducement except the collection of the illegal tax. It must fall with its companion section. Therefore, Section 1620 was no valid authority for the employing company to deduct the illegal tax from the wages of its employees, at the instance of the county treasurer, without the consent of the employees.

Since these per capita county road taxes were not voluntarily paid by the persons taxed but were paid by another without their consent and against their will, Section 2269, which provides for payment of taxes under protest before delinquency before they can be recovered has no application. While there was a written protest by the employees as soon as they discovered that their wages were being docked, such protest was not necessary in order to preserve their right to a refund. Their right to a refund is fully protected by Section 2222, which provides:

“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 therefore in favor of the county.”

These taxes were paid by the employer through mistake or error. That being the case it is only right and just that they should be refunded. It is therefore my opinion that the county commissioners are authorized by Section 2222 to refund these taxes to the employing company who, in turn, should distribute the funds to the persons whose wages were docked.