

Opinion No. 241.**Montana Liquor Control Board—Li-
cense Fees—Refund of Excess
Fees Paid.**

HELD: The Montana Liquor Control Board has authority to refund excess license fees paid by applicants for liquor license.

June 27, 1940.

Hon. L. M. A. Wass
Administrator, Montana Liquor
Control Board
Helena, Montana

Dear Mr. Wass:

You submit the following facts:

On January 1, 1940, the Montana Liquor Control Board issued a retail liquor license to certain parties who paid a license fee of \$600.00 voluntarily and without protest. On

June 18, 1940, these parties made application to the Board for a refund of \$400.00 for the reason that their place of business is in a village and the license fee for a village is \$200.00.

You request my opinion on the question whether the board may legally refund the excess, amounting to \$400.00.

On these facts, since the state received money to which it was not entitled it should refund the same unless there is some legal obstacle. Section 2409, R. C. M., 1935, provides:

"Whenever any license fee is demanded of any person for the use and benefit of the State of Montana, and the same is deemed unlawful by the person from whom the same is demanded, such person may pay the same, or so much thereof as may be deemed unlawful, under protest to the state treasurer, who shall deposit the same in a special fund to be designated 'Protest License Fund;' and thereupon the person paying, or his legal representatives, may bring an action in a court of competent jurisdiction against the state treasurer to recover the same, without interest; provided, that any action instituted to recover any license paid under protest shall be commenced within sixty days after the date of payment thereof to the state treasurer. If no action be commenced within such sixty days, or if any action be so commenced and shall be finally decided in favor of the state treasurer the amount of the license fee shall be by the state treasurer taken from such 'protest license fund' and deposited to the credit of the fund to which the same belongs, but if such action be finally decided adversely to the state treasurer, he shall, upon receiving a copy of the final judgment in said action, refund such license fee to the person in whose favor such judgment is rendered."

This section was enacted in 1921 (Section 1, Chapter 188, Laws of 1921). The State Liquor Control Act of Montana was enacted in 1933 (Chapter 105, Laws of 1933, as amended by Chapter 84, Laws of 1937, and Chapter 221, Laws of 1939). While Section 2409 may have a prospective construction (59 C. J. 1105, Sec. 655) it should be given that interpretation only if it

appears therefrom (Crerar Clinch Coal Co. v. City of Chicago, 173 N. E. 484, 341 Ill. 471). Section 2409 expressly applies to license fees collected by the state treasurer, of which there are a considerable number. There is good reason why such fees, when unlawful, should be paid under protest and that action to recover same should be brought within a specified time. Section 2269, R. C. M., 1935, covering the payment of taxes under protest is a counterpart. Such statutes are intended to prevent the indefinite earmarking of public funds and public inconvenience resulting from refunding thereof.

Liquor license fees are not paid to the state treasurer but directly to the liquor board and are therefore not expressly within the provisions of Section 2409, nor do we think they can be regarded within the scope of this section by necessary implication because there is not the same reason for it. Under the provision of the state liquor control act the State of Montana is in the liquor business and there is no reason why the state, through the liquor board, should not refund fees erroneously or unlawfully collected. There is no provision in the liquor act for the payment of license fees under protest or any assurance that an applicant would be granted a license if he paid the license fee under protest. He is in a position different from that of persons who pay the license fees collected by the county treasurer. Section 2815.154, R. C. M., 1935, as amended by Chapter 54, Laws of 1939, provides:

"All moneys received from the sale of liquor at the state liquor stores or from license fees or taxes or otherwise, arising in the administration of this act, shall be paid to the board, and the board is hereby authorized to make **such expenditures as from time to time becomes necessary in the administration of this act**, including in such expenditures all salaries, expenses of officers, agents and employees, and all proper expenditures incurred in acquiring property and merchandise in connection with the administration of this act, * * *." (Emphasis ours.)

We think the refunding of fees erroneously or unlawfully collected is an "expenditure necessary in the administration of this act" within the mean-

ing of this section and that in the practical operation of such liquor business as is conducted by the state such refunds can be made without serious inconvenience to the state.

While we do not feel any doubt regarding the interpretation of the law, should there be any, we think it should be resolved in favor of the licensee who has paid out money to which the state was not entitled.

We are therefore of the opinion that the liquor board may legally refund excess license fees paid.