

No. 11

**COUNTY COMMISSIONERS—COUNTRY TREASURER—
TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED—
REFUND**

Held: Where county treasurer arbitrarily adds to or raises amount of tax levy as set by authorized board, and collects the same, such increase is erroneously and illegally collected and may be recovered by the person who has paid such tax, or his guardian or administrator, by filing the claim therefor as provided by law.

January 29, 1941.

Mr. D. W. Doyle
County Attorney
Pondera County
Conrad, Montana

Dear Mr. Doyle:

You have submitted the following questions and asked my opinion thereon:

"For some years heretofore the County Treasurer of this County in determining the tax of personal property, which is not a lien upon real estate, and before the levy for the current year has been made, used the levy made during the previous year as provided in Section 2239 of the Code of 1935, but has also arbitrarily added to the amount of the levy for the previous year from 5 to 10 mills and after the present law for the taxing of motor vehicles was passed in determining the tax to be assessed the County Treasurer has used the same methods.

"1. Is the amount of the taxes arbitrarily added by the Treasurer in excess of the previous year's levy within Section 2222 and its amendment, and reclaimable at any time within the two-year period?

"Section 2247 of the same code provides that in the event that the rate fixed for the year in which the collection is made shall be less than the levy for the preceding year then the person from whom such excess tax was collected may file with the Board of County Commissioners a duly verified claim for a refund of such excess tax at any time before the 1st day of November of the year in which such an excess was collected, and such claim shall be allowed and ordered paid by the Board of County Commissioners to the amount of such excess.

"2. May the Board of County Commissioners consider a claim filed under Section 2247 of the Code of 1935 where the claim has not been filed with the Board on or before November 1st of the year in which the taxes are paid?"

In answering your queries I will answer your second question first. Examining Section 2239, Revised Codes of Montana, 1935, as amended by Chapter 107 of the Laws of 1939, we find the pertinent part declaring:

" . . . For the purpose of determining the taxes due, on such personal property, the treasurer **must** use the levy made during the previous year, if the levy for the current year has not been made . . . "

And Section 2247, Revised Codes of Montana, 1935, directs the Board of County Commissioners as follows:

"Provided further, that if the rate of taxation fixed for the year in which the collection is made is an increase over the preceding year's

levy, then the said Board of County Commissioners may direct the county treasurer to collect the amount of such increased levy, but shall not be obliged to do so in cases where, in the opinion of the board, the cost of collection would exceed the amount of such increase, and provided further that if the rate fixed for the year in which the collection is made shall be less than the levy for the preceding year, then the person from whom such excess tax was collected may file with the board of county commissioners a duly verified claim for a refund of such excess tax, at any time before the first day of November of the year in which such an excess was collected, and such claim shall be allowed and ordered paid by the board of county commissioners to the amount of such excess."

Thus it will be noted that provision has been made for the revision and adjustment of the tax to conform to the same rate on all property of the same class where the treasurer has used the levy made during the previous year, and where the levy in the current year is less; and also provides for the collection of the additional levy in the event the current levy is more than the previous year, if so determined by the board of county commissioners.

"Section 2247 relates, among other things, to the permanent rate of taxation of property which is assessed and taxes paid on a rate other than the current year; and further provides for the making of adjustments so that the tax finally paid shall conform to the rate for the current year. Chapter 72 is silent on these subjects. Section 2247 is a general statute applicable to all personal property on which the tax has been paid at the rate for the previous year. Chapter 72 contains a general repealing clause, repealing all Acts in conflict therewith, but does not expressly repeal or qualify the provisions of Section 2247. We think Section 2247 applies to property of this character unless it is repealed by the provisions of Chapter 72. Any repeal which may result must of necessity be by implication. Repeals by implication are not favored by the courts. . . . Hence, the two Acts are not repugnant nor in conflict with one another. Both may stand without one impinging on the other. Therefore, there can be no implied repeal here. The provisions of Section 2247 must apply to motor vehicles on which taxes have been paid at the old rate, and hence they are subject to revision and adjustment to conform to the same rate on all property of the same class, thereby establishing complete uniformity in so far as the contentions of counsel are concerned."

Whier et al. v. Dye et al., 105 Mont. 347; 73 Pac. (2nd) 209.

It will be noted, however, that Section 2247, Revised Codes of Montana, 1935, is specific in regard to the refund therein provided, as there must be a duly verified claim for refund of such excess tax filed by the taxpayer with the board of county commissioners at any time before the first day of November of the year in which such excess was collected; and in my opinion a claim filed subsequent to the first day of November of the year in which such excess was collected would not be a valid claim as being other than specified by the statute.

Now as to the question of an arbitrary raising of the levy by the county treasurer, I find no warrant in law for such a practice. County commissioners set the levy for the county taxes. (Sections 4465.12, 2148.1 and 2150, Revised Codes of Montana, 1935.)

"At the conclusion of its sitting the board must fix the rate of taxation for the year."

State ex rel. Fadness v. Eie et al., 53 Mont. 138, 147, 162 Pac. 164.

Where a levy has been arbitrarily raised by a county treasurer, it is an unlawful and illegal levy in so far as it differs from the levy set by the

duly authorized board. Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201 of the Laws of 1939, provides:

"Any taxes, percentum and costs, heretofore or hereafter, paid more than once or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer. . . .

"No order for the refund of any taxes, percentum or costs under this Section shall be made except upon a claim therefor, verified by the person who has paid such tax, penalty or costs, or his guardian, or in case of his death by his executor or administrator, which claim must be filed within two years after the date when the second half of such taxes would have become delinquent if the same had not been paid . . ."

"The language employed in the statute appears to be plain and without any ambiguity; therefore it must be construed in accordance with its apparent meaning. It speaks for itself, and by it the board of county commissioners of a county is permitted to refund only such taxes as have been 'paid more than once, or erroneously or illegally collected.'"

Yellowstone Packing Co. v. Hays, 83 Mont. 1, 10, 268 Pac. 555. The State of California has a statute similar to our own Section 2222, supra, and the California court in the cases of

Pacific Coast Company v. Wells, 134 Cal. 471, 66 Pac. 657;

Hayes v. County of Los Angeles, 99 Cal. 74, 33 Pac. 766,

passed upon the meaning of said section. Our Supreme Court in commenting on these California decisions had this to say:

"In *Pacific Coast v. Wells*, 134 Cal. 471, 66 Pac. 657, 659, the taxpayer made his return to the assessor, who in transcribing the total valuation of the taxpayer's property inadvertently added \$100,000 more to certain classes of property. The taxpayer voluntarily paid the taxes, including those levied on this 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. The court there reviewed and adhered to what it had said in a previous decision. In the course of its opinion it said: 'In *Hayes v. County of Los Angeles*, 99 Cal. 74, 33 Pac. 766, it appeared that by some mistake real estate had been twice assessed. The owner had been assessed with the property, and had paid the taxes. It had also been assessed to a third party, and the taxes so assessed to such third party were not paid. It was accordingly advertised and sold for delinquent taxes. The purchaser at the tax sale paid the delinquent taxes and costs, and afterwards sold and assigned the certificate of purchase. Upon the assignee discovering that the sale was on a double assessment and void, he applied to the board of supervisors for an order refunding the money. The board refused the order, and this court held that the order should have been made, and that the word "may" meant the same as "shall." In the opinion this language is used: "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 a recovery was scarcely worth pursuing. That the object of the statute was to obviate these difficulties, and provide a means for the recovery of money 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.”””

And then our Supreme Court went on to say:

“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.”

Christofferson v. Chouteau County, 105 Mont. 577, 74 Pac. (2nd) 427.

It is therefore my opinion that any arbitrary increase by a county treasurer of a levy once set by the authorized board is unlawful and illegal, and where such tax has been so erroneously and illegally collected by the county treasurer, such illegal increase shall be refunded by order of the board of county commisisoners upon proper verified claim, filed within two years after the date when the second half of such taxes would have become delinquent if the same had not been paid, as provided in Section 2222, Revised Codes of Montana 1935, as amended by Chapter 201 of the Laws of 1939.

Very truly yours,

JOHN W. BONNER
Attorney General