

No. 219

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

Held: County commissioners may refund taxes erroneously or illegally collected only for the two-year period as specified in Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201, Laws of 1939.

August 23, 1941.

Mr. Edison W. Kent
County Attorney
Granite County
Philipsburg, Montana

Dear Mr. Kent:

You have submitted the following question:

Where the State entered into a long term contract to sell certain lands to individuals and after many years discovered that it did not own the lands contracted to be conveyed, the fee of said lands being at all times in the United States, during all such time the grantees having paid the taxes upon said lands, may the Board of County Commissioners of the county wherein said land is located and said taxes have been paid refund said taxes under Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201, Laws of 1939?

In answering your inquiry it will be necessary to examine Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201 of the Laws of 1939, which is as follows:

"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. Whenever any payment shall have been made to the state treasurer, as provided in Section 2255 of this code, and it shall afterwards appear to the satisfaction of the board of county commissioners that a portion of the money so paid should be refunded as herein provided, said board of county commissioners may refund such portion of said taxes, penalties and costs so paid to the state treasurer, and upon the rendering of the report required by Section 2257 of this code, the county clerk shall certify to the state auditor, in such form as the state auditor may prescribe, all amounts so refunded, and in

the next settlement of the county treasurer with the state, the state auditor shall give the county treasurer credit for the state's portion of the amounts so refunded.

"When any part of the taxes, penalties or costs hereinbefore referred to were levied in behalf of any school district or municipal or other public corporation, and collected by the county treasurer, the same may be refunded upon the order of the board of county commissioners.

"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.

"All refunds ordered to be paid by the board of county commissioners shall be paid by the county treasurer out of the general fund of the county and the county treasurer shall then make such transfers from other county funds and from state, school district, and other public corporation funds in his possession as may be necessary to reimburse the county general fund for payments made therefrom on account of such other funds."

There is no question these taxes were erroneously collected by the county treasurer. The state was in error in assuming it owned the fee in said lands. It was in error in contracting to sell the said lands. The county was in error in assessing and collecting the taxes.

Before said Section 2222 was amended, our Supreme Court in *Christoferson v. Chouteau County*, 105 Mont. 577, 585, 586, 74 Pac. (2nd) 427, stated as follows:

"In *Pacific Coast Co. 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 moneys collected by mistake, and to which the county and the 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."

"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 commonlaw rule recognized by the courts in proper case prohibiting the recovery of a tax where voluntarily paid."

Also see Opinion No. 11, Volume 19, Report and Official Opinions of the Attorney General.

Section 1805.92, Revised Codes of Montana, 1935, provides the interest of the purchaser in state lands is subject to taxation. Here, however, there was never any interest in the lands to be taxed.

Section 39 of Article V of our Constitution prohibits the releasing and remitting of any taxes held or owned by the state or any municipal corporation.

Under the facts before us, as we have seen, there was no interest in the land which could be taxed, and only by the erroneous representation by the state were these taxes collected. There was no tax or obligation owing to or held or owned by the state. Therefore, there is no constitutional provision standing in the way of refunding these taxes.

However meritorious this claim for refund may be, the Board of County Commissioners before granting it must be able to point to the expressed authority in the statute:

"The power to act without authority does not exist."

State ex rel. Bean v. Lyons, et al., 37 Mont. 354, 364, 96 Pac. 922.

The question is what relief, if any, under the facts, has the legislature provided.

The pertinent part of Chapter 201 of the Laws of 1939 is as follows:

"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 above law is plain, explicit and mandatory, although harsh. The verified 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.

This is a statute of limitation, limiting the authority of the Board of County Commissioners to refunding only on verified claims filed within two years after the date when the second half of such taxes would have become delinquent if said taxes had not been paid.

Therefore it is my opinion the statute above quoted limits the Board of County Commissioners to ordering refund of taxes erroneously or illegally collected only as provided therein for the two-year period. In some instances, as in this case, this law will operate harshly, but we must take the law as we find it.

Sincerely yours,

JOHN W. BONNER
Attorney General