

No. 441

MOVING PICTURE THEATERS—THEATERS—TAXATION—LICENSE TAXES—THEATERS ANNUAL TAX—REFUND OF TAXES ILLEGALLY COLLECTED—ILLEGALLY COLLECTED TAXES, refund of

- Held: 1. Inasmuch as Chapter 91, Laws of 1937, repealed Section 2439, Revised Codes of Montana, 1935, said Chapter 91, Laws of 1937, provides the only and exclusive method of licensing and taxing moving picture theaters.
2. A moving picture theater from which a license tax has been collected under Section 2439, Revised Codes of Montana, 1935, after the effective date of Chapter 91, Laws of 1937, and after the effective date of Chapter 201, Laws of 1939, may file a verified claim with the county commissioners within two years after the date when such tax would have become delinquent, if the same had not been paid.
3. A theater, as defined in Section 2434, Revised Codes of Montana, 1935, and under the facts you have submitted, is subject to the license tax of one hundred dollars per annum.

July 6, 1942.

Mr. Edward T. Dussault
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Dussault:

You have submitted the following questions for my opinion:

1. Did the enactment of Chapter 91, Laws of 1937, repeal Section 2439, Revised Codes of Montana, 1935?
2. If Section 2439, Revised Codes of Montana, 1935, was repealed by Chapter 91, Laws of 1937, is a moving picture theater entitled to a refund of the annual license fee of \$25.00 for the years 1938, 1939, 1940 and 1941 it has paid the county treasurer under the terms of Section 2439, Revised Codes of Montana, 1935?
3. Did Chapter 91, Laws of 1937, repeal or amend Section 2434, Revised Codes of Montana, 1935, insofar as the theater license is concerned?

In answering your first question, it is to be noted Chapter 91, Laws of 1937, did not expressly repeal Section 2439, Revised Codes of Montana, 1935. Therefore, if Section 2439, Revised Codes of Montana, 1935, was repealed by Chapter 91, Laws of 1937, it was by implication. Our Supreme Court has often held "repeals by implication are not favored."

State v. Board of County Commissioners, 89 Mont. 37, 296 Pac. 1.

Yet here we have two statutes, each dealing with the same subject matter, each act in direct conflict with the other, so that they may not be harmonized in any particular. In such a situation the court has repeatedly held:

"Where two legislative enactments are so much in conflict as to render it impossible for both to stand, the courts should not hesitate to declare a repeal by implication."

In re Naegele, 70 Mont. 129, 224 Pac. 269.

"Prior statute cannot stand if provisions of later act are irreconcilably repugnant, or Legislature clearly intended later act should be only law on subject."

Nichols v. School District No. 3, 87 Mont. 181, 287 Pac. 624.

"For earlier statute to be repealed by later one, they must be plainly and irreconcilably repugnant to, or in conflict with, each other, must relate to same subject, and must have same object in view."

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

I, therefore, answer your first question in the affirmative. Section 2439, Revised Codes of Montana, 1935, was repealed by Chapter 91, Laws of 1937.

Answering your second question, it appears that, by the repeal of Section 2439, Revised Codes of Montana, 1935, there was no longer a license tax to be paid by moving picture shows thereunder and any such license tax so illegally collected may be refunded upon verified claim if said claim is filed within two years after the date when such tax would have become delinquent, if the same had not been paid, as provided by Chapter 201, Laws of 1939.

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

See Attorney General's Official Opinion No. 219, Volume 19.

Answering your third question, it appears conclusively Chapter 91, Laws of 1937, did not repeal or amend Section 2434, Revised Codes of Montana, 1935. Said section deals with theaters other than moving picture theaters; at the time Section 2434, Revised Codes of Montana, 1935, was enacted in 1903, there were no moving pictures theaters, and the word theater had a well defined meaning.

62 C. J. 841, '842.

As Section 2434, Revised Codes of Montana, 1935, is still in full force and effect, it is my opinion, under the facts as you have presented them to me, the theater would be subject to the annual license tax of one hundred dollars.

It is therefore my opinion:

1. Inasmuch as Chapter 91, Laws of 1937, repealed Section 2439, Revised Codes of Montana, 1935, said Chapter 91, Laws of 1937, provides the only and exclusive method of licensing and taxing moving picture theaters.
2. A moving picture theater from which a license tax has been collected under Section 2439, Revised Codes of Montana, 1935, after the effective date of Chapter 91, Laws of 1937, and after the effective date of Chapter 201, Laws of 1939, may file a verified claim with the county commissioners within two years after the date when such tax would have become delinquent, if the same had not been paid.
3. A theater as defined in Section 2434, Revised Codes of Montana, 1935, and under the facts you have submitted, is subject to the license tax of one hundred dollars per annum.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General