

No. 467

TAXES—LICENSES—REFUND—COUNTY COMMISSIONERS—LIQUOR BOARD

Held: Where license taxes have been erroneously levied and collected, the authority levying and collecting the same is authorized to, under Section 2222, Revised Codes of Montana, 1935, as amended, refund the taxes, or the portion thereof erroneously collected, where claim is filed within a reasonable time after the discovery of the error.

August 18, 1942.

Mr. J. Miller Smith
County Attorney
Lewis & Clark County
Helena, Montana

Dear Mr. Smith:

You have requested my opinion on the following state of facts:

During the years 1937, 1938, 1939 and 1940, one purchased a liquor license for the sale at retail liquor in Lewis and Clark County, and in each case the amount of the license was based upon 50% of the sum charged by the state. During these years the state charged \$600.00 per year for each of said years, with the result that Lewis and Clark County charged \$300.00. Later, by an opinion rendered from your office, it was decided that it had been illegal or erroneous for the State of Montana to charge \$600.00 per year, due to the fact that's place of business was so situated as to properly come under that section of the statute providing for the payment of \$200.00 per year for a state license. I am informed that the State of Montana made refund to and to other similarly situated. Now is applying to Lewis and Clark County and has filed his verified claim asking for a refund of the taxes which he claims were illegally collected and erroneous and excessive.

Chapter 84, Laws of 1937, was an act to regulate, license and authorize the sale of liquor at retail. This act provided the amount of license tax to be collected, dependent upon where the premises of the licensee were

located as regards incorporated and unincorporated cities and towns, and villages with specified populations. The act authorized the city councils of incorporated cities and towns, and the county commissioners outside incorporated cities and towns, to charge a license tax for city or county purposes on premises licensed by the liquor control board in an amount not to exceed fifty per cent of that charged such premises by the liquor board.

It appears that, under the provisions of this statute, the liquor board determined the premises in question came within the classification for which the state license was six hundred dollars. In pursuance to the authority granted the county commissioners of Lewis and Clark County, that county charged the maximum license of three hundred dollars. In the case at hand this amount was paid for the years 1937, 1938, 1939 and 1940.

It appears further that as a result of an opinion of the attorney general rendered in November, 1939, the liquor board reduced the license on these premises from six hundred dollars to two hundred dollars and refunded the excess. The county commissioners of Lewis and Clark County did not make refund of the excess license charged by them. A claim was filed demanding such refund.

The question presented for determination is as to the authority of the board of county commissioners of Lewis and Clark County to refund such excess license tax for the years mentioned.

If authority for such refund exists it must be by virtue of some statute. A board of county commissioners is an executive body of limited powers and must in every instance justify its actions by reference to the provisions of law defining and limiting its powers. (*Morse v. Granite County*, 119 Pac. 286, 44 Mont. 78; *Judith Basin County v. Livingston*, 89 Mont. 438, 298 Pac. 356.) Such board may exercise only such powers expressly conferred upon it, or necessarily implied from those expressed. (*Lewis v. Petroleum County*, 92 Mont. 563, 17 Pac. (2nd) 60.)

It is therefore necessary to look at some statute granting the board the power to make the refund under the facts here presented.

Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201, Laws of 1939, 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."

Sections 2268 and 2269, Revised Codes of Montana, 1935, provide the procedure for the collection of taxes which are deemed to be "unlawful" or "illegal," by the taxpayer. These sections provide for payment under written protest and the commencement of an action for recovery within sixty days.

Our Supreme Court gave consideration to these sections and discussed at length their application in the cases of *First National Bank v. Sanders County*, 85 Mont. 450, 279 Pac. 247, *First National Bank v. Beaverhead County*, 88 Mont. 577, 294 Pac. 956, *Christofferson v. Chouteau County*, 105 Mont. 577, 74 Pac. (2nd) 427, and *Williams v. Harvey*, 91 Mont. 168, 6 Pac. (2nd) 418.

In the first case cited, Chief Justice Callaway, writing the opinion for the court, gave an exhaustive history of these sections, and the court there said, with reference to the remedy for the recovery of taxes paid which are deemed to be illegal or unlawful:

"The legislative history of these sections, supplemented by the interpretations given them by this court, demonstrate beyond a reasonable doubt that section 2269, with which we read 2272, provides an exclusive remedy (except as the equitable remedy may also be

available) for the recovery of taxes collected as the result of an unlawful levy. To this extent we reiterate that sections 4024 and 4026 repealed section 2913, now 2222."

This holding was followed in the later case of First National Bank v. Beaverhead County, *supra*. However, in the later and somewhat recent case of Christofferson v. Chouteau County, 105 Mont. 577, 74 Pac. (2nd) 427, decided in 1937, the court reviewing the decisions in the First National Bank v. Sanders County and First National Bank v. Beaverhead County cases, *supra*, said:

"A careful reading of those two previous decisions reveals that the court nowhere discussed or referred to taxes erroneously collected as distinguished from taxes illegally collected, unless we assume that the two terms in the statute are entirely synonymous. Therefore this court in the Williams case, in summarizing the holding in the previous cases that it was there decided that the statute (Section 2222) was repealed as to taxes erroneously collected, made this statement inadvertently."

Our Supreme Court in the Christofferson case, *supra*, adopted the distinction between the terms "erroneously" collected, and "illegally" collected made by the Supreme Court of Nevada on this question and said:

"In the case of Ford v. McGregor, 20 Nev. 446, 23 Pac. 508, the court found it necessary to determine whether there was a distinction between an erroneous assessment and an illegal assessment. It there said that an erroneous assessment occurs when the taxing officers have power to act but err in the exercise of that power, and that an illegal assessment takes place when they have no power to act at all."

And the court—concluding its opinion on this question—said:

"We conclude that, when the legislature used the words 'erroneously collected' and 'illegally collected,' that body recognized a distinction between them, and what this court has said in previous decisions, with reference to the repeal of the section with relation to taxes illegally paid, cannot be held to have declared the repeal of the section relating to taxes erroneously paid."

It would appear clear, therefore, that recovery of taxes "erroneously" paid may be had under Section 2222, Revised Codes of Montana, 1935, as amended, whereas recovery of taxes paid under an unlawful levy or illegally paid must be had under Sections 2268 and 2269, Revised Codes of Montana, 1935. It is necessary, therefore, to determine under which classification the license tax in question here falls.

Under the provisions of Section 28 of Chapter 84, Laws of 1937, the board of county commissioners have the authority to set the license tax at a sum not to exceed fifty per cent of what the liquor board has set. This board did in the case here considered. However, it appears that under the opinion of the attorney general, the liquor board erred in the amount fixed, and likewise the board of county commissioners erred. It therefore follows that the license taxes collected in these instances were "erroneously" collected, as distinguished from "illegally" or "unlawfully" collected, and recovery may be had under the provisions of Section 2222, Revised Codes of Montana, 1935.

It will be noted that Section 2222, *supra*, provides:

"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." (Emphasis mine.)

Obviously, the portion of this provision relative to the time within which claim must be filed cannot have reference to a claim for the license tax here in question for the simple reason that such taxes are not payable installments. The Liquor Control Act, under which these license taxes are levied, does not provide any procedure for refund. The legislature evidently considered the existing statutes on the subject sufficient.

The policy of the law, where provision is made for the refund of taxes, is to limit the time within which claim is made or suit brought. The reason for this is to afford the board an opportunity to investigate the merits of the claim, while evidence is available from which their merits may be inquired into, and to liquidate all claims within a reasonable time for the convenience, efficiency and dispatch of governmental business. The question would then arise as to the time in which claim for refund of license taxes erroneously paid should be made. In the absence of any statutory limit, as appears in this case, it would seem such claim should be presented within a reasonable time after the error is discovered. That part of the reason for the rule, as to giving the board opportunity to investigate the merits, does not exist here. There is nothing to investigate. The records show the amount actually paid.

The attorney general's opinion upon which the liquor board refunded the excess was rendered on November 29, 1939; however, the question was not judicially determined by the Supreme Court until the case of *Vantura v. Montana Liquor Control Board*, decided April 4, 1942, which decision upheld the opinion the attorney general rendered. This particular claim was filed, we are informed, on April 15, 1942. We think, under the circumstances, the claim was filed within a reasonable time.

Is the claim here in question barred by the provisions of Section 4605, Revised Codes of Montana, 1935? This section required all accounts against the county must be itemized and verified and must be presented within a year after the last item accrued.

This section of our code was before the Supreme Court for interpretation and application in the case of *Weir v. Silver Bow County*, decided April 4, 1942, 124 Pac. (2nd) 1003. In this action the plaintiff sued for the difference in mileage due him because of an alleged error in computing the rate allowed by law. Some of the items claimed were for services performed more than a year prior to the filing of the claim. In speaking of this section, the court said:

"Section 4605, requiring all claims to be presented within a year after the last item accrued, is a provision enacted for the benefit of the county commissioners to enable them to investigate the merits of claims while evidence is available from which their merits may be inquired into. . . ."

"We agree with the statement of law made by the supreme court of Idaho in *Drainage District No. 2 of Ada County v. Ada County*, 38 Idaho, 778, 226 Pac. 290, where it said: 'The phrase "claim against the county," as used in the above statute, applies only where there is something for the commissioners to pass upon, involving the exercise of discretion on their part; that is to say where, under certain circumstances, they might be justified in rejecting the claim. It does not apply to a case where the liability and its extent are so clearly fixed by positive statutory law that the question becomes purely one of law, leaving nothing for the commissioners to pass upon and no room for the exercise of discretion.' . . ."

Under the facts here considered it appears the liquor control board has levied for the years in question on the premises a license fee of \$200. It must be taken, from this fact, that the liquor board has determined the premises come within that classification of the statute requiring but a \$200 license. Therefore, it follows the board of county commissioners was only authorized to levy a license tax on these premises in the sum

of not to exceed \$100. The excess was erroneously levied, and should in equity and justice and on the authority of Section 2222, Revised Codes of Montana, 1935, be refunded.

It is therefore my opinion that, where license taxes have been erroneously levied and collected, the authority levying and collecting the same is authorized under Section 2222, Revised Codes of Montana, 1935, to refund the taxes, or the portion thereof erroneously collected, where claim is filed within a reasonable time after the discovery of the error.

Sincerely yours,

R. V. BOTTOMLY
Attorney General