

Opinion No. 129.

Taxation—Government land becomes subject to taxation, when—Refund of taxes erroneously collected.

Held: Government land becomes subject to taxation when right to patent is complete and equitable title fully vested in entryman. Taxes erroneously collected may be refunded, if claim therefor is made within time provided by Chapter 201, Laws of 1939.

September 22, 1943.

Mr. W. W. Mercer
County Attorney
Golden Valley County
Ryegate, Montana

Dear Mr. Mercer:

You have asked my opinion as to the legality of certain claims made for refund of taxes paid on land from the years 1922 to 1942, inclusive, it appearing the land was not privately owned, but owned by the government until issuance of a patent in June, 1942.

As you will note from the opinion appearing at page 117, Volume 2, Report and Official Opinions of the Attorney General, land comprising a part of the public domain becomes subject to state taxation when the right to a patent is complete and the equitable title fully vested in the entryman, even though patent has not yet been issued. Therefore, you should ascertain from the land office the exact date when the entryman's right to patent became complete, and any taxation levied on the land subsequent thereto would be valid.

Section 2222, Revised Codes of Montana, 1935, as amended by Chapter 201, 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 county commissioners, be refunded by the county treasurer."

The Supreme Court has heretofore passed on the section in the following cases: First National Bank v. Sanders County, 85 Mont. 450, 279 Pac. 247; First National Bank of Lima v. Beaverhead County, 88 Mont. 577, 294 Pac. 956; Williams v. Harvey, 91 Mont. 168, 6 Pac. (2nd) 418, and Christofferson v. Chouteau County, 105 Mont. 577, 74 Pac. (2nd) 427.

In the last cited case, it appears that Christofferson took an assignment of a tax sale certificate, which had no validity by reason of the fact the tax covered state land. In the course of the opinion, the Court reviewed the prior decisions, and concluded the section of the statute in question permitted the refund of taxes erroneously paid, citing a Nevada and South Dakota decision, holding in effect that an erroneous assessment occurs when the taxing officers have power to act, but err in the exercise of that power; an illegal assessment taking place when there is no power at all.

The facts submitted by you are similar to those in the Christofferson case; in your case, when some of the taxes, at least, were assessed and paid, the government owned land; in the Christofferson case, the state owned the land.

It would, therefore, appear that taxes assessed and collected on the land in question, prior to the time when the entryman became entitled to patent, were erroneously assessed and collected, and are subject to refund by the board of county commissioners, providing claim therefor was made within time.

Chapter 201, Laws of 1939, specifically 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."

The only authority for the refund of taxes erroneously paid is to be found in this chapter, but the refund may only be made in strict compliance therewith. (Opinion No. 485, Volume 19, Report and Official Opinions of the Attorney General.)

It follows that the greater part of the claim made on your county must be rejected, but that your board of county commissioners is authorized to refund any taxes erroneously collected before the entryman became entitled to patent, if claim therefor is presented within the period provided for in the above quotation from Chapter 201, Laws of 1939.

Sincerely yours,
R. V. BOTTOMLY
Attorney General