

Opinion No. 45

Taxation—Levy—Unlawful—Collection, Illegal—Remedy.

Held: Taxes deemed to have been paid under an unlawful levy must be paid under protest and suit for recovery commenced within sixty days, as provided by Section 2269, Revised Codes of Montana, 1935, or no refund or recovery may be made. Taxes paid more than once or illegally

collected may be refunded by the county commissioners as provided by Section 2222, Revised Codes of Montana, 1935.

June 9, 1945.

Mr. Frank J. Roe
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Roe:

You have submitted to me your opinion rendered to the county clerk and recorder concerning the question of refund of taxes.

It appears from the facts stated the North Butte Mining Company filed with the State Board of Equalization its statement of yield for the years 1942 and 1943 in compliance with Section 2089, Revised Codes of Montana, 1935. The board computed the net proceeds in accordance with Section 2090, Revised Codes of Montana, 1935, and transmitted its valuation to the county clerk and the same were entered upon the assessment roll and tax levied thereon. In due course and within the time prescribed by statute, the North Butte Mining Company paid the full amount so assessed voluntarily and without protest. Included in the amount of yield reported by the North Butte Company to the State Board of Equalization and upon which the valuation was set and the assessment levied was the amount which the North Butte Company had received from the United States government as a premium or bonus under the provisions of the Emergency Price Control Act.

Subsequent to the payment of the tax above mentioned, our Supreme Court, in the case of *Klies et al v. Linnane*, County Treasurer of Cascade County, decided February 26, 1945, and reported in 156 Pac. (2d) 183, held this premium or bonus was not subject to taxation. Evidently because of this opinion, the North Butte Company has filed a claim with the county and requested the refund of the taxes paid. I assume the North Butte Company claims the refund under the provisions of Section 2222, Revised Codes of Montana, 1935, while the county contends the provisions of Section 2269, Revised Codes of Montana, 1935, apply and is the exclusive remedy.

Therefore the determinative question under the facts considered is whether

Section 2222, Revised Codes of Montana, 1935, or Section 2269, Revised Codes of Montana, 1935, applies.

After a careful study of the applicable statutes and decisions, I must agree with the conclusions reached in your opinion to the county clerk.

Section 2222, Revised Codes of Montana, 1935, applies in cases where taxes have been "paid more than once or erroneously or illegally collected." The provisions of Section 2269, Revised Codes of Montana, 1935, apply to taxes the levy of which is "deemed unlawful by the party whose property is thus taxed, or from whom such tax . . . is demanded or enforced . . ." In such case, the remedy provided by Section 2269, supra, is exclusive and if not complied with by the taxpayer, no refund or recovery may be made. (*First National Bank v. Sanders County*, 85 Mont. 450, 279 Pac. 247, and cases therein cited.)

Our Supreme Court in the *Klies* case, supra, held money received as a premium or bonus under the Emergency Relief Control Act is not "net proceeds" as that term is used in our statute authorizing taxation of net proceeds, and therefore not subject to such tax. It would seem, therefore, the levy of the tax on this money was unlawful, and the remedy for its refund or recovery is as provided by Section 2269, Revised Codes of Montana, 1935. Inasmuch as the tax was not paid under protest and suit commenced within sixty days thereafter, thus no refund or recovery may be made. (*First National Bank v. Sanders County*, supra.)

Sincerely yours,
R. V. BOTTOMLY,
Attorney General

Editor's Note: See *North Butte Mining Co. v. Silver Bow County*, (1946) 169 Pac. (2nd) 339, wherein the Montana Supreme Court upheld the above opinion.