

**Opinion No. 131****Taxation—Recovery of License Tax on Slot Machines.**

**Held:** A license tax on slot machines provided for by statute and voluntarily paid without protest cannot be recovered back from the State after such slot machines have been declared illegal.

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October 31st, 1950.

Mr. Robert F. Swanberg  
County Attorney  
Missoula County  
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion on the following question:

Can a license tax on slot machines, provided for by statute, be recovered back from the State after such slot machines have been declared illegal?

It is a fundamental proposition of law that a legal tax, voluntarily paid, cannot be recovered back from the taxing authority. Nor is a tax recoverable because its payment was involuntarily made; the payment must not only be involuntary but the tax must for some reason be invalid.

There is a great deal of authority that the legality of a license tax does not depend on the legality of the business for which the tax is required. This position is recognized by the Montana Supreme Court in *State vs. Milton Israel and The Diversion Club*, Case No. 8957, 4 St. Rep. 1, 14, 220 Pac. (2d) 1003, in which case the following language of *Thompson vs. Hall*, 104 W. Va. 76, 138 S.E. 579, is quoted with approval. "There is considerable authority holding that the State may levy a license tax on an unlawful business. This is permitted on the theory that the tax is intended as a penalty in addition to that prescribed by the criminal law and will therefore tend to discourage the business." A like position is taken in *U. S. vs. Constantine*, 296 U. S. 287, 293, 56 S. Ct. 223, 226, 80 L. Ed. 233, 238, and *Benson vs. City of Long Beach, et al.*, 61 Cal. App. 2d 189, 142 Pac. (2d) 440.

In view of this language by the State Supreme Court it would appear that the license taxes paid on the illegal slot machines cannot be recovered.

Assuming, however, that the license tax was unlawful, it is also a basic proposition of law that if license taxes are voluntarily paid without coercion or mistake of fact, they cannot be recovered back on the ground of the illegality of the tax. 33 Am. Jur. 396. In the absence of statute, the payment of an illegal tax with full knowledge of the facts, and without any fraud, duress, or extortion is ordinarily considered to be a voluntary payment, although made under protest.

Section 84-4502, Revised Codes of Montana, 1947, provides for the manner of recovering illegally collected taxes and provides that a taxpayer who deems a particular tax unlawful must make such payment under protest. It provides further that any action to recover such license or tax must be commenced within sixty days after the date of payment. Since statutory authority is necessary to recover illegally collected taxes it follows that if a remedy is provided it is exclusive. This position was taken by the Montana Supreme Court in *First National Bank vs. Sanders County*, 85 Mont. 450, 279 Pac. 247. In that case the Court held that the legal remedy provided by Section 84-4502, when read in connection with Section 84-4504, is exclusive. The decision in that case was reaffirmed in *First National Bank of Lima vs. Beaverhead County*, 88 Mont. 577, 294 Pac. 956.

The taxpayers who paid the license fees on the slot machines for the period beginning July 1, 1950 through June 30, 1951, were on notice that the legality of such machines was under attack and already before the Supreme Court of this State. Yet they voluntarily paid the taxes on such machines and made no protest as provided

by statute. Therefore, it follows, that even if such license tax was illegal, the taxpayers have not complied with the statutory requirements for recovery of illegally collected taxes and are therefore without remedy.

In view of these considerations it is my opinion that a license tax on slot machines provided for by statute, and voluntarily paid without protest, cannot be recovered back from the State after such slot machines have been declared illegal.

Very truly yours,  
ARNOLD H. OLSEN,  
Attorney General.