

## Opinion No. 54-6000

August 5, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** J. C. Bergere, Director School Tax Division Bureau of Revenue Santa Fe, New Mexico

{\*460} In your letter dated July 23, 1954, you state that an audit has been made for the period ending June 30, 1951 for the Lembke Construction Company, a general contractor, who performed work for the Lovelace Foundation in Albuquerque. The audit shows that the Company paid school tax on the contract with the Foundation, when, in fact, services performed for the Foundation were exempt from such taxes. You further state that a credit cannot be given to the Company at this time in view of the fact that the Company is no longer in operation or existence. You are wondering whether a refund of the taxes paid can be made at this time in view of the fact that the taxes were not paid under protest.

Section 76-1444 of the 1941 Compilation sets up a suspense fund and provides for payment of refunds of moneys paid under protest where the court proceeding terminates in favor of the taxpayer. This section ends with the following sentence.

"All other refunds approved by the bureau of revenue as by this act provided shall be paid out of the emergency school suspense fund on proper voucher approved by the bureau of revenue."

Section 76-1423 of the 1941 Compilation provides as follows:

"If upon examination of any return made under this act it appears that the taxpayer has paid an amount in excess of that properly due by him under the provisions of this act, the amount of such excess shall be credited by the bureau of revenue against any tax or installment thereof thereafter due from the taxpayer under the provisions of this act."

This latter section apparently is not applicable, since the discovery of the erroneous payment of taxes was not made upon examination of the return and payment of tax, but was made some three years later upon {\*461} an audit of the books and records of the Company. It is thus apparent that there is no statutory authority authorizing you to make a refund of the taxes erroneously paid at this late date, particularly in view of the fact that no payments were made under protest and no suit was filed within the time required to recover payments made under protest.

We realize that this conclusion may seem inconsistent with Opinion No. 3003, written in 1939, but in that opinion apparently the time element was not considered.

By: C. C. McCulloh

Assist. Attorney General