

## **Opinion No. 57-226**

September 10, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,  
Assistant Attorney General

**TO:** Mr. Charles B. Barker, Attorney, Bureau of Revenue, Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. Under the provisions of § 72-16-23, N.M.S.A., 1953 Compilation, may a credit against future taxes be approved by the Bureau of Revenue in a case where sales taxes (Emergency School Taxes) were paid in addition to compensating taxes?
2. May the Bureau of Revenue approve an assignment of a tax credit contemplated in § 72-16-23, N.M.S.A., 1953 Compilation?

#### CONCLUSIONS

1. No.
2. --

### **OPINION**

#### ANALYSIS

The situation which has brought the above stated questions to this office for consideration exists by reason of a payment of two separate tax determinations in a field calling for the payment of only one. The discovery of this double payment was made by an audit covering the period of a number of years. Specifically, an out of state retail concern shipped certain merchandise into New Mexico for sale to consumers through its local retail store. Compensating or use tax was paid on this merchandise in accordance with the provisions of § 72-17-3, N.M.S.A., 1953 Compilation. Subsequently, based upon the privilege of selling at retail in New Mexico, an additional tax was paid as provided for in § 72-16-3, N.M.S.A., 1953 Compilation.

Considering, first, the provisions of the privilege (sales) tax law, we find § 72-16-22 requires, in part, that:

"As soon as practicable after the receipt of any return by the tax commission (Bureau of Revenue), it shall be examined."

and following, § 72-16-23 provides:

"If upon examination of any return made under this act (72-16-1 to 72-16-5, 72-16-7 to 72-16-46) 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 tax commission (Bureau of Revenue) against any tax or installment thereof thereafter due from the taxpayer under the provisions of this act."

Attorney General's Opinion No. 6000, 1954, wherein the last above quoted statute was considered, stated in part as follows:

"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 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."

Considering the equitable presentment of the instant case, we find, as a matter of fact, that a double tax was paid, when as a matter of law, the payment of a tax on the storage, use or other consumption was specifically exempt. In stating the purpose of the Compensating Tax Act, the Legislature provided, by § 72-17-1, as follows:

"This act (72-17-1 to 72-17-30) may be cited as the Compensating Tax Act of 1939. The primary purpose of this act is declared to be to protect, so far as is practicable, the merchants, dealers and manufacturers of New Mexico who operate under the excise tax laws of this state, and who meet the requirements of such laws, against the unfair competitions of importations into New Mexico, without the payment of a sales tax, of goods, wares and merchandise."

By § 72-17-4 there is provided that:

"The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act (72-17-1 to 72-17-30).

(a) Property sold in this state, the receipts from the sale of which are required to be included in the measure of the tax imposed by paragraphs A, B, D, E, I of section 201 of chapter 73, Laws of 1935, as heretofore or hereafter amended (72-16-4, A, B, D, E, I)." (School Tax Act)

It thus becomes apparent that taxes, as paid in accordance with the question first above put, were paid erroneously and by mistake of law.

In treating the subject of refunds and recovery of taxes, 51 Am. Jur. 1012 states as follows:

"The recovery of illegally exacted taxes is solely a matter of governmental grace. In the absence of an authoritative statute, taxes voluntarily, **although erroneously, paid** cannot be voluntarily refunded, although there may be justice in the claim. A statute may authorize a refund even though the tax payment was voluntary or was made without protest. Statutes authorizing voluntary tax refunds are frequently found; such statutes proceed on the same equitable principles that underlie an action in assumpsit for money had and received.

"Sometimes conditions are annexed to the right to a refund which must be complied with, such as the making of the claim within a specified time." (Emphasis supplied)

While the questions specifically stated above seek an interpretation of the credit statute and not of the refund section (72-16-28), as generally discussed supra, it is our opinion that § 72-16-23 is limited to discoveries of mistakes of fact and to errors based upon mistakes of law. In the instant situation no evidence was presented in the tax returns upon which a finding of overpayment could have been made by the Bureau of Revenue. Additionally, no protest nor suit was filed as is otherwise provided by § 72-16-28, supra.

Accordingly, and in keeping with Attorney General's Opinion No. 6000, supra, it is our opinion no credit may be approved by reason of an erroneous tax payment as herein considered.

In light of our conclusion and response to the first question stated, no opinion is here rendered your second question.