Opinion No. 60-203

October 27, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Carl Folkner, Director School Tax Division Bureau of Revenue Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does the limitation of actions provided by Section 72-21-25, N.M.S.A., 1953 Compilation (P.S.) apply to taxes due under the Emergency School Tax Act [§§ 72-16-1 through 72-16-47, inclusive N.M.S.A., 1953 Compilation, as amended] as well as to those due under the Oil and Gas Emergency School Tax Act [§§ 72-21-1 to 72-21-25, N.M.S.A., 1953 Compilation (P.S.)?

2. As it applies to taxes due under the Emergency School Tax [§§ 72-16-1 to 72-16-47], is § 72-21-25 retroactive in effect?

3. Is there any statute of limitations limiting the time within which actions or proceedings may be brought to collect taxes under said §§ 72-16-1 to 72-16-47, which taxes became due before the effective date of § 72-21-25?

CONCLUSIONS

1. Yes

2. No.

3. Yes

OPINION

*{*613}* **ANALYSIS**

In broad terms, the purpose of this opinion is to determine the extent and scope of statutes of limitations affecting the collection of Emergency School Taxes.

The answer to your first question depends upon the interpretation given to Section 72-21-25, N.M.S.A., 1953 Compilation (P.S.), which provides as follows:

"No action or proceeding may be brought to collect any tax due under this Oil and Gas Emergency School Tax Act [72-21-1 to 72-21-25] or under sections 72-16-1 through 72-

16-47, New Mexico Statutes Annotated, 1953 Compilation, as amended, or House Bill No. 10, 24th legislature (being Laws 1959), after [5] years from the time that such tax became due."

Sections 72-16-1, et seq., constitute the Emergency School Tax Act, originally adopted in 1935. House Bill No. 10 was enacted as Chapter 5, Laws of 1959 and merely constitutes amendments of said Emergency School Tax Act. It is clear that, prospectively at least, the limitation of action provided by Section 72-21-25 is applicable to both the Oil and Gas Emergency School Tax Act and the Emergency School Tax Act. The language of the statute is not susceptible of contrary interpretation.

It remains to be determined whether the limitation imposed by Section 72-21-25 is retroactive in effect as applied to taxes which became due under the Emergency School Tax Act [§§ 72-16-1 to 72-16-47] prior to the effective date of the Oil and Gas Emergency School Tax Act. It is our conclusion that Section 72-21-25 does not apply to taxes which became due under the Emergency School Tax Act before said effective date. We will dwell at some length upon the reasons for this conclusion.

*{*614}* We rely heavily upon two characteristics of § 72-21-25 in reaching our conclusion. First, the legislature failed to clearly express the intention to make the statute retroactive. Second, the statute fails to provide a reasonable time within which suit may be brought on existing causes of action.

As a general rule, retrospective or retroactive legislation is not looked upon with favor. For this reason, it is a well established and fundamental rule of statutory construction that all statutes are to be construed as having only a prospective operation. The New Mexico Supreme Court has espoused the general rule in several cases including **Gallegos v. Atchison, Topeka and Santa Fe Railway Company,** 28 N.M. 472, 214 P. 579, wherein it was declared:

"The general rule is that statutes are presumed to have only prospective effect. They are not given retroactive or retrospective effect, unless such intention on the part of the Legislature is clearly apparent which cannot otherwise be satisfied."

See also **Board of Education of City of Las Vegas v. Boarman,** 52 N.M. 382, 199 P. 2d 998; **Wilson v. New Mexico Lumber and Timber Co.,** 42 N.M. 438, 81 P. 2d 61 and **Fulghum v. Madrid,** 33 N.M. 303, 265 P. 454. It should be noted that pursuant to the fundamental rule of construction referred to above, "statutes of limitation ordinarily will not be given a retroactive effect unless it clearly appears that the Legislature so intended . . ." **53 C.J.S. Limitations of Actions, § 4a.**

The above discussion should not be construed to mean that statutes of limitation may not be retroactive. The rule announced is one of construction and where legislative intent that the statute be applied retroactively clearly appears it will be given effect. However, all doubts in this regard should be resolved in favor of a prospective application of such statutes.

The second characteristic of the subject statute which encourages a prospective interpretation is that no period of time was provided within which proceedings could be initiated upon existing causes of action. The Oil and Gas Emergency School Tax Act was enacted by the 24th Legislature with an effective date of September 1, 1959. To immediately apply the limitation section would result in the destruction of some existing causes of action. On this subject, the following is stated in **53 C.J.S. Limitations of Actions § 4c:**

"If an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action **at once;** such an intent would be unconstitutional and it will be presumed not to have been in the mind of the legislature." (Emphasis added)

It will be seen that to employ § 72-21-25 retroactively or retrospectively could result in the impairment or destruction of the rights of the state government to proceed against delinquent taxpayers. Another rule of construction, stated in **53 C. J. S., Limitations of Actions § 15a (1),** discourages an interpretation which would lead to such results:

"Statutes of limitations must be strictly construed in favor of the sovereign where they prescribe a period of limitation against the government or it is sought to apply them so far as to bar the rights of government."

Again we point out that these are rules of construction. However, they appear to be determinative of this present problem because there is no evidence of contrary intent and no time was provided for the commencement of proceedings on taxes already due. For the reasons stated above we conclude that Section 72-21-25 is not retrospective or retroactive in effect but applies only to taxes which became *{*615}* due on September 1, 1959 or thereafter.

Turning to your third question, it is our determination that there is a statute of limitations which limits the time within which actions or proceedings may be brought to collect taxes which became due under § 72-16-1, et seq., prior to September 1, 1959. The statute that must be looked to is § 72-7-34, N.M.S.A., 1953 Compilation.

"In cases where taxes have been delinquent for a period of ten [10] years, same shall be presumed to have been paid, and in all such cases, the county treasurer is hereby authorized and directed to enter upon the tax rolls in his office where any such appears, and likewise upon any unassigned tax liens or tax sale certificate, the words "Canceled by Act of the Legislature," and shall take credit on the books and records of his office therefor, **and no action at law or suit in equity for the collection of taxes, or foreclosure of tax liens or tax sale certificates, or levy of any distraint warrant, shall be instituted, brought or had by the state, any of its subdivisions, offices, or agents or by any person, firm or corporation unless such action or suit or proceeding shall have been instituted, brought, or had within ten [10] years from and after the date of delinquency; . . ."** (Emphasis supplied.)

The above quoted provision appears to have general application to taxes imposed by the state. It was enacted in its present form in 1934, (Laws 1934 [S. S.], Chapter 27, § 33), and is presently in effect. A similar statute (§ 141-715, New Mexico Statutes Annotated, 1929 Comp.) which is deemed to have been superseded by the present § 72-7-34 was treated in a manner consistent with our present ruling in **Altman v. Kolburn,** 45 N.M. 453 at p. 462, 116 P. 2d 812:

"In view of what we have said upon the subject and the general distinction which most courts make between 'taxes' and 'special assessments' it is clear, also, that Sec. 141-715, N.M.S.A., 1929 Comp., providing that suits for the collection of taxes or for the foreclosure of tax liens shall be barred if not brought within ten years from and after the date of delinquency of such taxes, does not apply to special improvement assessments; **so there can be no reliance upon this ten year statute which applies to general taxes."** (Emphasis supplied.)

The court explicitly declined to apply the predecessor of § 72-7-34 because the "tax" under consideration was a special assessment and not a general tax. The tax imposed by the Emergency School Tax Act is a general tax within the rationale of the **Altman** case. Therefore, we conclude that all actions or proceedings to collect such taxes which became delinquent prior to September 1, 1959, must be commenced within ten years of the date of delinquency.

By: F. Harlan Flint

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