

Opinion No. 62-115

September 12, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. John M. Lenko, City Attorney, P.O. Box 870, Las Cruces, New Mexico

QUESTION

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If the City of Las Cruces, under an ordinance duly passed pursuant to Section 14-43-1, collects a municipal tax from a distributor making gasoline sales to a retail dealer, all parties believing that the retailer is located within the City limits, and after substantial payments are made it is determined that the retailer is not now, and never has been, within the City limits, must the City refund such taxes?

CONCLUSION

Not if the taxes were paid voluntarily, but see Analysis.

OPINION

ANALYSIS

Pursuant to Section 14 - 43 - 1, N.M.S.A., 1953 Compilation (P.S.), the City of Las Cruces adopted an ordinance imposing a municipal gasoline license tax (the incidence of which is on the retail dealer, Opinion No. 60-118).

After substantial payments of this tax had been made by one retail dealer, even though it may have been remitted by the wholesale distributor, it was apparently discovered that the retailer's gasoline station is located outside the City limits. The retailer is now seeking a refund of these tax payments.

It is the general rule that in the absence of authorizing legislation there can be no recovery of taxes which have been voluntarily paid, even though the collection was erroneous. **People v. Orrington Co.**, 360 Ill. 289, 195 N.E. 642; **Culbertson v. Board of Commissioners of Fayette County**, 208 Ind. 22, 194 N.E. 638; **Rainey v. Tyler**, Tex. Civ. App., 213 S.W. 2d 57.

While there is a statute specifically authorizing the refund of any erroneous tax or license fees charged by the **State** on motor fuel (Section 64-26-30, N.M.S.A., 1953 Compilation), there is no such provision relative to the erroneous collection and

payment of municipal gasoline license taxes. Nor, we are informed, does the ordinance in question provide for any refund.

The critical determination in a case of this kind is whether the payment was "voluntary" in the legal sense, or whether there was "some coercion or compulsion which amounts to a duress of the person or the property of the payor." **Spencer v. Los Angeles**, 180 Cal. 103, 179 Pac. 162. And this determination turns on such factors as payment under protest, liens, penalties, and the like. See **Jaynes v. Heron**, 46 N.M. 431, 130 P. 2d 29; **Johnson v. Greiner**, 44 N.M. 230, 101 P. 2d 183.

Based on the facts presented to us, it appears that these payments were voluntarily made. It is true that the ordinance in question provides for a fine if payment is not made within a specified time period, but this would not seem to be the reason these taxes were paid. They were apparently paid because both the retailer and the City authorities believed that the retailer's establishment was in the City limits.

In the case of **Darby v. Vidalia**, 168 Ga. 842, 149 S.E. 223, it was held that the voluntary payment of taxes on property not within the municipal area which had been erroneously imposed by the municipality could not be recovered after the discovery of the error.

While some cases have allowed recovery when the payment is the result of a "mistake of fact," one eminent authority states that in the absence of statute, a tax paid by mistake may not be recovered back where the payment thereof was voluntary. 16 McQuillen, *Municipal Corporations*, § 44.180. At the very least the rule appears to be that there can be no recovery where the error or "mistake" giving rise to the tax could have been discovered by the taxpayer as easily as by the taxing authority. See e.g. **Maricopa County v. Arizona Citrus Land Co.**, Ariz. 100 P.2d 587, **Bridgeport Screw Co. v. City of Bridgeport**, 125 Conn. 593, 7 A.2d 649; **Ironton & Russell Bridge Co. v. City of Russell**, 262 Ky. 778, 91 S.W. 2d 1.

In view of the vital importance of the particular fact situation in these refund cases, as well as the lack of any definitive New Mexico precedent, this would appear to be an appropriate case for a judicial determination.