

Opinion No. 75-76

December 30, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Manuel L. Salinas Corporation Department State Corporation Commission
P.E.R.A. Building Santa Fe, New Mexico 87503

QUESTIONS

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Section 51-13-12.1, NMSA, 1953 Comp., provides that the State Corporation Commission may refund franchise taxes which are erroneously paid and collected. Is the broad language of this section restricted by other laws pertaining to franchise taxes?

CONCLUSION

Yes.

OPINION

{*204} ANALYSIS

Section 51-13-2, NMSA, 1953 Comp., as amended, provides that nearly all domestic and foreign corporations engaged in business in New Mexico must pay an annual franchise tax which shall be assessed by the Corporation Commission. Section 51-13-6, NMSA, 1953 Comp., however, exempts from taxation property of any corporation situate without the State of New Mexico or used exclusively in interstate or foreign commerce. There appears to be no exception to the requirement of Section 51-13-7, NMSA, 1953 Comp., that franchise taxes be paid by June 1 of the year in which they are assessed. The same section establishes a penalty and interest for taxes not paid by June 1.

Section 51-13-8, NMSA, 1953 Comp., allows any corporation against which franchise taxes are assessed, if it believes such assessment to be "erroneous or excessive," to file a petition with the New Mexico State Corporation Commission within fifteen days from the date of the assessment. The assessment may also be reviewed, within one year of its date, upon a petition of the Attorney General or upon the motion of the Commission. There seems to be no prohibition against hearing the petition of a corporation which does not pay the disputed taxes by June 1. Of course, such a corporation risks paying penalty and interest upon taxes which are later found to have been properly assessed. Only when a corporation seeks certiorari from the district court to obtain review of a decision of the Commission is it mandatory that the corporation pay **at least** those taxes which it admits are due. In general, we believe that many

corporations will have paid the disputed taxes before or during review of the assessment.

Section 51-13-12.1, NMSA, 1953 Comp., provides for refunds of franchise taxes which are erroneously paid and collected. It reads as follows:

"Whenever any taxes mentioned under the provisions of sections 51-13-1 through 51-13-12 have been erroneously paid, or shall hereafter be erroneously {*205} paid and collected, the person having paid such taxes may apply in writing to the state corporation commission for a refund thereof. Upon approval of such application and refund by the state corporation commission and the state board of finance, the amount erroneously paid shall be refunded to the person who made the payment, out of current receipts of the franchise tax."

This section does not limit the number of prior years for which refunds can be made. Nor does it guide the Commission by providing a mechanism or procedure for approving refund applications. Also, there is no provision whatsoever for judicial review of a Commission decision denying a refund application.

Recently, a number of corporations claim to have been erroneously assessed and to have erroneously paid franchise taxes on property exempt under Section 51-13-6. Some claims are for as many as eight prior tax years. Pursuant to Section 51-13-12.1, these corporations now seek refunds of taxes. The question arises whether the broad language of Section 51-13-12.1 is restricted by other laws pertaining to franchise taxes? We believe it is. Those restrictions are stated in Section 51-13-8 and require that a corporation believing an assessment to be "erroneous or excessive" must file a petition with the Commission within fifteen days from the date of the assessment. Failure to file a petition for review of the assessment results, in effect, in the taxes being paid "without protest." Such a payment will prevent the corporation from obtaining review of the assessment and will eliminate the possibility of a refund. Of course, Section 51-13-8 also allows the Attorney General or the Commission to initiate a review under certain specified circumstances.

An important reason for our conclusion is that Section 51-13-12.1 refers expressly to "taxes mentioned under the provisions of Sections 51-13-1 through 51-13-12." Obviously, Section 51-13-8 is included within those sections. The reference to those sections must have some meaning. Courts attempt to construe statutes so that meaning and effect will be given to every part thereof. **State v. Herrera**, 86 N.M. 224, 522 P.2d 76 (1974). Therefore, it seems reasonable to interpret Section 51-13-12.1 to apply only to refunds of taxes which have been the subject of a hearing, and possibly court review, pursuant to Section 51-13-8.

The statutory requirement for filing a petition alleging an erroneous or excessive assessment is in accord with the general rule that taxes paid voluntarily to any officer authorized to collect the same shall not be refunded or rebated in any instance. **Jaynes**

v. Heron, 46 N.M. 431, 130 P.2d 29 (1942). Under Section 51-13-8, the taxpayer's petition serves as a protest.

"Public policy requires that all taxes be paid promptly where due, and it is the duty of every citizen to pay the taxes properly assessed against his property. . . . If a taxpayer questions his liability to the tax assessed against him or the validity of the statutes or proceeding pursuant to which it was assessed, the ordinary procedure is for him to make payment under protest in order to lay a foundation for recovery back of money by showing that payment was not voluntary." 72 Am.Jur.2d, **State and Local Taxation**, Sec. {206} 834, citing **Tondre v. Garcia**, 45 N.M. 433, 116 P.2d 584 (1941); **Jaynes v. Heron, supra**.

Further support for our conclusion is the probability that the term "erroneous" in Section 51-13-8 should be given the same meaning as the term "erroneously" in Section 51-13-12.1. In **Blatt, supra**, the term "erroneous" is defined, by example, as a clerical mistake, double or erroneous assessment, or where the taxing authorities have no right or authority to make the assessment. Thus, Section 51-13-8 provides a means for challenging erroneous assessments and Section 51-13-12.1 provides a means for refunding erroneous assessments. The relationship between the two sections seems clear.

A corporation now seeking refunds has suggested that Section 51-13-8 refers only to the question of tax assessments regarding the **amount** of tax imposed thereby. This corporation argues that the section is not intended to apply to situations where a corporation is not subject to any assessment at all. However, our previous reasoning in this opinion concerning the definition of "erroneous" has led us to conclude that the argument is not sound. By its terms, Section 51-13-8 contemplates Commission review of alleged errors involving questions of jurisdiction **or** amount ("erroneous **or** excessive").

We are aware of the fact that the Commission, without receiving petitions from the corporations involved, has approved of previous applications for refunds of franchise taxes alleged to have been erroneously assessed and erroneously collected. We are informed that those refunds were made in situation where the taxpayer was asked by the Commission to file an amended return, and based upon the amended return a refund was made. We believe that this opinion will probably prevent that practice from occurring in the future. In any event, prior Commission practice need not be controlling here. The Commission is free to change its practice on the basis of legal advice which it obtains from this office.

By: Bill Primm

Assistant Attorney General