

Opinion No. 44-4447

January 28, 1944

BY: EDWARD P. CHASE, Attorney General

TO: Honorable G. T. Watts, District Attorney, Roswell, New Mexico

In your letter dated January 26, 1944, you state that a tax payer erroneously rendered property for taxes and erroneously paid the taxes without protest upon property owned by another person who also rendered and paid the taxes assessed.

The person paying taxes based upon the double assessment desires to obtain a refund of the same and you inquire whether the court under our statutes has the right to enter an order directing the Treasurer to refund the taxes paid on the double assessment.

Section 76-404 of the 1941 Compilation as amended by Chapter 27, Laws of 1943 provides in part as follows:

"Taxes paid voluntarily to any officer authorized to collect the same shall not be refunded or rebated in any instance."

This Section then provides that when taxes erroneously or illegally charged are paid under protest, the person making the payment may by proper procedure in the District Court obtain a refund thereof, provided he begins the legal procedure within sixty days from the date of payment.

This Section was discussed in the case entitled *In re Blatt*, 41 New Mexico, 269, 67 Pac. (2d) 293 and is further discussed in *Jaynes v. Heron*, 46 New Mexico, 431, 130 Pac. (2d) 29. In the *Blatt* case at page 280, the court uses this language referring to the above mentioned Section:

"Under chapter 143, if the charge or assessment be illegal or erroneous, as for example there has been a clerical mistake, double or erroneous assessment, or because the taxing authorities had no right or authority to make the assessment, then it becomes the duty of the taxpayer to pay the amount so assessed under protest, bring suit within the statutory time to correct the tax roll, and recover the amount paid. * * *"

On page 278 and 279 of the *Blatt* case the court discusses the right of the tax payer to pay taxes erroneously or illegally charged under protest and the remedy to obtain a refund upon presenting the matter to the District Court after payment under protest and uses this language:

"* * * The right is granted and the remedy provided if the action is brought within sixty days from the date of payment. Failure to bring such action within the time prescribed by statute withdraws the right. Without the right no remedy is available.

Compliance with those conditions is a necessary condition precedent to an exercise of the right thus conferred. *Dolenty v. Broadwater County*, supra.

No right and no cause of action exists after the sixty days provided by the statute have elapsed. The Legislature has prescribed the conditions under which a taxpayer who thinks himself injured can have his injury redressed. The court was without jurisdiction to even entertain the suit. It necessarily follows that any order it entered in respect to the 1933 taxes was void. * * *

In the case entitled *Jaynes v. Heron* above mentioned the court uses this language:

"The first sentence: Taxes paid voluntarily to any officer authorized to collect the same shall not be refunded or rebated in any instance, declares no new principle. It is merely declaratory of well known legal principles independent of statute."

In this case the court elaborates somewhat upon recovery of an illegal tax paid under duress as making the same involuntary, and thereby obviating the requirement of a formal protest at the time of payment. However, in such an instance the limitation of sixty days within which to bring an action to recover a payment made under duress, would still be controlling.

Such a payment as you describe is specifically covered by the statute above mentioned and unless the tax payer can successfully bring himself within the provisions thereof, in my opinion the District Court would be without jurisdiction to enter an order directing the Treasurer to refund such taxes erroneously paid.

By C. C. McCULLOH,

First Asst. Atty. General