

## Opinion No. 52-5549

June 20, 1952

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** Mr. John E. Cragin Director Department of Courtesy and Information Santa Fe, New Mexico

{\*262} This is in reply to your request of March 17, 1952, regarding the possibility of refunding certain mileage tax payments made by Watson Brothers Transportation Company in 1949 for which the trucking company was not properly liable.

The facts, as you relate them, are that Watson Brothers Transportation Company obtained from the State Corporation Commission its Certificate of Registration as an interstate carrier on March 30, 1949. The Department of Courtesy and Information was not notified of the issuance of this certificate of registration until several months after the date of issuance. Subsequent to the date of issuance, the Department of Courtesy and Information continued to collect from Watson Brothers Transportation Company mileage taxes at the rate and in the amounts as previously collected and for which they would have been liable had they not been registered with the State Corporation Commission. As a result, mileage taxes were erroneously collected from Watson Brothers Transportation Company during the months of March, April, May, June and July of 1949, totaling \$ 4,397.00.

Our basic tax laws have no general provision for making refunds for overpayments or erroneous payment of taxes, excepting Sec. 76-404, New Mexico Statutes Annotated, 1941 Compilation for recovery of ad valorem taxes. There are, in certain specific tax statutes, provisions for refund but there is none in the mileage tax provisions under which the tax in question was collected {\*263} from Watson Brothers Transportation Company. It is my opinion that a refund cannot be made unless ordered by a court of competent jurisdiction. However, it is likely that such an order could be obtained.

It is possible that Watson Brothers could bring suit to recover the overpayment in question, since it was collected in error and was not a voluntary payment. As stated in 51 Am. Jur. 1005: "Provided the payment is deemed voluntary, a tax which is unlawful or collected under an unconstitutional statute may, nevertheless, be recovered back at common law in an action of assumpsit for money had and received."

Although Watson Brothers did not pay the mileage tax in question under protest, the payment could not be considered to have been voluntary. The fact that failure to have paid the tax would have resulted in the detention or turning back of Watson Brothers trucks at the Ports of Entry amounts to sufficient compulsion to have made the payment of the tax involuntary. In a New Mexico case, Jaynes v. Heron, 46 N.M. 431, 130 P 2d 29, our Supreme Court ruled that the fact that an illegal tax is or is not paid under

protest is immaterial, and, if payment of an illegal tax is made under duress, it need not be paid under protest to entitle tax-payer to recover it back.

Although you did not specifically ask whether the sums collected from Watson Brothers Transportation Company in error could be credited against that company's current liability for mileage taxes, I feel that it should be considered.

My examination of the case reveals that Watson Brothers would be likely to succeed in court in forcing a refund of the tax collected in error. To avoid the time, trouble and expense of litigation, it is my recommendation that the dispute be settled by administrative action.

I am advised by the Legal staff of the Bureau of Revenue that there are administrative precedents in several of the divisions of the Bureau for establishing credits in the event of overpayment of taxes due. It is my opinion that a credit could be established in the amount of the erroneous payments made by Watson Brothers Transportation Company to be applied against future liability of the Company for mileage taxes.