

Opinion No. 64-72

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BY: OPINION OF EARL E. HARTLEY, Attorney General Norman S Thayer, Assistant Attorney General

TO: Charles C. Brunacini, Commissioner of Revenue, Bureau of Revenue, Santa Fe, New Mexico

QUESTION

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Certain non-residents paid state income taxes under the state income tax law as it read prior to its amendment in 1961. This was held unconstitutional as applied to non-residents. Can the amounts paid be refunded to the taxpayers, or credited against income taxes due for a subsequent year?

CONCLUSION

No.

OPINION

ANALYSIS

The power of the state of New Mexico to tax that portion of the income of a non-resident earned from sources located within this state is firmly established. See, for example, **Jackling v. State Tax Commission**, 40 N.M. 241, 58 P.2d 1167 (1936).

However, in **State ex rel. McCulloch v. Ashby**, 73 N.M. 267, 387 P.2d 688 (1963) the state filed suit against a resident of El Paso, Texas to compel him to pay state income tax on his income earned as an employee at White Sands Missile Range, New Mexico. The years in question were 1958 and 1959, during which time our income tax laws allowed certain exemptions to residents that were not allowed to non-residents. Our Supreme Court held that this failure to extend the same exemptions to non-residents was unconstitutionally discriminatory, and denied to the citizens of the state of Texas the privileges and immunities guaranteed to all citizens of the United States by Section 2, Article IV of the Constitution of the United States. The Court noted that the Bureau of Revenue had attempted, by regulation, to extend the same exemptions to non-residents, but held that, since the statute did not expressly grant the exemptions to non-residents, the regulation was unauthorized and void.

The income tax statute was amended in 1961, while the Ashby case was pending, to provide the same treatment for non-residents as for residents. Therefore, by the time

the decision in the Ashby case was handed down, its effect was overcome for the taxable years 1961 and after. However, there can be no doubt that for taxable years prior to 1961, the State of New Mexico could not demand or collect income taxes from non-residents on their income earned in New Mexico.

During the late 1950's, in particular, many non-resident persons paid the state income tax on their income earned within New Mexico. This is particularly true of employees of White Sands Missile Range, many of whom reside in El Paso, Texas. From 1961 on, there is no question of their duty to pay the taxes. However, the question now is whether the state can and should refund the taxes that were paid under the unconstitutional statute, or credit those payments against current taxes.

There is a rule of law, universal and unanimous, that taxes paid voluntarily under a statute subsequently held to be unconstitutional cannot be recovered in the absence of a statute authorizing such a recovery. The question is annotated extensively at 48 A.L.R. 1381, citing cases from 19 jurisdictions, and at 74 A.L.R. 1301, citing more recent cases.

As the court said in **Yates v. Royal Ins. Co.**, 200 Ill. 202, 65 N.E. 726:

"It is immaterial, in such a case, that the tax has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and, if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as the reason why the state should furnish him with legal remedies to recover it back."

And, in **Dupre v. Opelousas**, 161 La. 272, 108 So. 479:

"Obviously, the proper course for a taxpayer to pursue, under such circumstances, is to investigate the legality and constitutionality of the tax before he makes payment, and, if he finds that it is illegal or unconstitutional, and is not willing to pay it, then to make use of the means provided by law to prevent the enforcement of the tax. If he fails to make such investigation, and pays the tax on the supposition that it is legal and constitutional, he has no right to come into court to recover it on the theory that he paid it in error."

It is clear that the taxes in question were paid voluntarily. An involuntary payment is something more than an unwilling, grudging payment. It is a payment under duress, or at least under protest. Section 72-15-41, N.M.S.A., 1953 Compilation, though poorly drawn, clearly provides an administrative review of tax questions, and a resort to the courts. Section 72-15-47 (B), N.M.S.A., 1953 Compilation, provides that taxes paid under protest will be held in the "income tax suspense fund" until their status is determined upon appeal to the Bureau of Revenue or to the courts, or for a period of sixty (60) days, if no such appeal is taken. Under these statutes, none of the taxes were paid under protest, or, if so paid, the time for appeal to the Bureau of Revenue, or to the courts, has long passed.

Does our statute permit a refund of taxes paid voluntarily under a law subsequently declared unconstitutional? Section 72-15-40, N.M.S.A., 1953 Compilation, provides, in part, as follows:

"72-15-40. EXAMINATION OF RETURNS -- ADDITIONAL TAX -- PENALTIES. -- A. As soon as practicable after the filing of any return, it shall be examined by the bureau of revenue to determine whether or not the tax has been correctly computed and reported.

B. If it is determined that the amount of the tax paid exceeds the amount which is lawfully due, the excess shall be refunded to the taxpayer in accordance with the provisions of section 72-16-47, New Mexico Statutes Annotated, 1953 Compilation. . ."

The duty imposed by the foregoing law on the Bureau of Revenue does not extend beyond the matters shown on the face of the return. Obviously, upon examination of the returns in question, the Bureau did not determine that any excess payment had been made. When a return bore an out-of-state address, but declared income earned in New Mexico, it was the duty of the Bureau's officials to enforce the taxing statutes that purported to impose a tax on such income. Those officials could not take the position that the statutes were unconstitutional.

The word "compute", as used in the statute, is defined by Webster's Third New International Dictionary as: "to determine or ascertain especially by mathematical means." The word "report" may have many meanings, but, as used in a tax statute, we can give it no other meaning than to set forth on the prescribed form that information required by the statute to be reported. Therefore, the requirement that the Bureau examine the returns to determine if the tax has been correctly "computed" and "reported" must be taken to refer to matters of fact only, not to matters of law. The taxpayer is in full possession of the facts, and is presumed to be familiar with the law; it is not the duty of the Bureau of Revenue to determine that a taxpayer is, as a matter of law, exempt from the tax, where the matters stated in the return of that taxpayer reveal income that is apparently taxable. It is our opinion that the income tax law does not authorize a refund of taxes paid under mistake of law (such as payment under an unconstitutional statute), but only of taxes paid under mistake of fact.

Therefore, we can reach no other conclusion than that the taxes in question, having been paid under a mistake of law, cannot be refunded. Though we have found no New Mexico case on this precise question, as to the general question of recovery of payments made under mistake of law, see **Territory v. New Hall**, 15 N.M. 141, and **Staplin v. Vesely**, 41 N.M. 543, 72 P.2d 7 (1937), holding that such payments may not be recovered.

We turn now to the question whether the taxes may be credited against current taxes. This question is important because some of the taxpayers paid taxes under the unconstitutional statute, then stopped paying in 1961 or 1962 after the **Ashby** case was commenced, even though the statute had been amended at that time to remove the defects revealed by the **Ashby** case.

This question has arisen often under the Federal Internal Revenue Code, which has particular provisions governing it. However, as noted by the annotator at 91 L. Ed. 301, 307:

"Upon a careful search, however, no case has yet been found in which a taxpayer attempted to set off a barred claim for refund of (state) taxes against a (state) tax deficiency." (Parenthetical wording inserted).

The annotator was writing about state taxes, and the possibility of setting off against a tax deficiency the amount of a claim for refund of taxes that had become barred by statute of limitations. As the annotator states, there is a paucity of authority on the question. However, one can hardly expect that such a claim would be allowed, because in the instances where unbarred claims for tax refunds have been asserted as set-offs against tax deficiencies, the claims have generally been disallowed. See **Gibson Co. v. Oklahoma Tax Commission**, 68 P.2d 87; **Wayne v. Savannah**, 56 Ga. 448; **New Orleans v. Davidson**, 30 La. Ann. 541, 31 Am. Rep. 228; and **People ex rel. Graff v. Chicago, B. & Q. R. Co.**, 247 Ill. 340, 93 N.E. 422.

Moreover, the allowance of such a credit pre-supposes the existence of a valid claim. The very heart of the ruling that taxes paid under mistake of law cannot be recovered is not that there is a claim that is somehow barred, but that **there is no claim at all**. To rule otherwise would be to subvert the provision of the statute that permits payments under protest, with resort to administrative appeal, and ultimate resort to the courts. This is the route that must be followed to assail the legal basis of a tax.

If some of the taxes in question were actually paid under protest, but the right to a refund has been lost through failure to appeal to the Bureau of Revenue, or to the courts, within the sixty (60) days allowed by Section 72-16-47 (B), *supra*, we still are not dealing with a valid claim that has become barred through the running of a statute of limitations, for, where a statute creates a substantive right, and prescribes the time within which an action must be commenced for its enforcement, the failure to institute such an action results in a loss of the right as well as the remedy. **United States et al. v. Bureau of Revenue**, 217 F. Supp. 849 (1963).

It necessarily follows, from what has been said, that non-residents who paid state income taxes have no claim at all for the refund of those taxes, even though the statute under which the taxes were paid was later declared unconstitutional. The statute having been amended in 1961, it is the duty of the Bureau of Revenue to collect the income taxes for 1961, 1962, and 1963, without refund or credit of taxes paid in prior years.