

## Opinion No. 38-2059

October 4, 1938

**BY:** FRANK H. PATTON, Attorney General

**TO:** Hon. James J. Connelly State Treasurer Santa Fe, New Mexico

{\*282} I have your letter of October 3rd regarding the 10% Administration Fund and the Income Tax Suspense Fund, and the manner in which distribution of funds derived from the Income Tax Law, Chapter 85, Session Laws of 1933, is to be made.

Section 47 of said Chapter 85 provides that the State Treasurer shall create a fund to be designated as the "Income Tax Suspense Fund." Into this fund he shall pay and carry all amounts paid under protest to provisions of the Act, until such time as their status is finally determined either by the Commission or by the courts, or for a period of sixty days from the date of receipt of such funds if no appeal be prosecuted by the taxpayer.

Also, 10% of all other income tax receipts shall be paid into the said "Income Tax Suspense Fund" until the total amount of said fund, less protested payments, shall amount to \$ 5,000.00

At all times when the amount equals \$ 5,000.00 none of said 10% shall be paid into said fund, the legislature expressing its intent to provide an undistributed reserve fund out of which refunds may be lawfully paid.

The State Treasurer is also required to create a fund to be designated as the "Income Tax Administration Fund" and into this fund he shall pay and carry 10% of all income taxes finally paid over for distribution and from which funds the costs of the administration of the Act shall be paid by the Tax Commission as other accounts are paid.

The said Section 47 then continues with further provisions for other distributions of remaining funds collected under the Income Tax Act.

Apparently, it was the intention of the legislature to provide for the "Income Tax Suspense Fund" and that said fund be maintained in an amount not to exceed \$ 5,000.00. The language of the further provision as to the creation of an "Income Tax Administration Fund" and providing for payment into same of 10% of all income taxes finally paid over for distribution would seem to be secondary to the first requirement and under this language it is my belief that the legislature intended to {\*283} create a fund for administrative purposes of 10% of monies which are finally paid over for distribution. I doubt seriously if the \$ 5,000.00 fund could be classed as monies "finally paid over to the treasurer for distribution."

This being true, I agree with the statement in your letter that the replacing of the Income Tax Suspense Fund and the protested tax payments undistributed are not chargeable for necessary expense under paragraph 2, Section 3, Chapter 232 of the Laws of 1937.