

## Opinion No. 39-3003

January 19, 1939

**BY:** FILO M. SEDILLO, Attorney General

**TO:** Hon. J. O. Gallegos, Commissioner of Revenue, Santa Fe, New Mexico. Attention: Mr. G. S. Carter, Director School Tax Division

{\*12} In your letter of today you request an opinion as to whether the taxpayer, under the Emergency School Tax Act, who is found by the Bureau to have paid an amount in excess of that properly due by him under the provisions of that Act, is entitled to a refund under Section 403, Chapter 73, Laws of 1935, (Section 141-1745, 1938 Supplement), or whether he is limited to refund by way of credit authorized by Section 308 of said Act.

When the Act was first passed in 1934 it provided for monthly returns, and also for a return, in the nature of a summary, to be filed within thirty days after June 30, 1935. See Chapter 7, Section 307, Laws of 1934. Section 308, hereinabove referred to, was exactly the same as Section 308 of that Act except that immediately following what is now contained in the present Act under that section, it also provided that if upon examination of the return required to be made within thirty days subsequent to June 30, 1935, an excess payment was found, such excess should be refunded in accordance with the provisions of Section 403, which, insofar as here material, is identical with Section 403 of the present Act above referred to.

On December 14, 1934, by Sales Tax Opinion No. 174 issued by this office to your department, it was held that refund of an excess payment, not paid under protest, could be refunded under the provisions of Section 403, Chapter 71, Laws of 1934. In other words, that excess was not covered by the latter part of that section expressly authorizing a refund under Section 403, since it was previous to June 30, 1935, but under the first part of said Section 308 was clearly subject to refund by credit.

Thereafter when the law was reenacted, Section 308 was cut short and enacted as it now appears in the Act.

When so reenacted it was with presumed knowledge of the Attorney General's ruling that refunds could be made under the authority of that portion of the Act now found in Section 308 of the Act and the provisions of Section 403, and presumably with that interpretation of that statute in mind.

In addition to this it will be noticed that all payments made under protest are placed in the same suspense fund, and {\*13} when the court determines that the taxes paid under protest were illegal, they are refunded from the same monies held in that fund under protest. Except for interest at six per cent on such protest payments, the Act does not authorize any other refunds except those mentioned in Section 308, and it is not to be

lightly presumed that the Legislature would provide a \$ 12,000.00 suspense fund for payment merely of the interest on protested payments. Section 403, creating the suspense fund, provides for refund of protest payments out of the money paid under protest, and then states:

"All other refunds approved by the Tax Commission as by this Act provided shall be paid out of the Emergency School Suspense Fund."

There are no other refunds which may be approved by the Bureau, except those mentioned in said Section 308.

It is my opinion, therefore, that, just as Section 313 of the Act provides that taxes due by the plaintiff in case of payments under protest shall be credited on any judgment requiring a refund from the protest money, so Section 308 must be read in connection with Section 403 and credit given where taxes are due at the time of the determination of the excessive payment, and that where there are no taxes due refund from the suspense fund may be made under Section 403.

By: A. M. FERNANDEZ,

Asst. Atty. Gen.