

Opinion No. 39-3254

August 23, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. Earl Stull, Director, Division of Field Administration, New Mexico State Police, Santa Fe, New Mexico.

{*95} We have your letter of August 17 stating that "some collections of mileage taxes, license and caravan fees have been erroneously made and should be refunded." You inquire whether such refunds may be lawfully made.

It has been consistently held by this office many times that, in the absence of a statute authorizing refund of taxes, no refund may be made, for, "in the absence of a valid statute, no executive or administrative officer has power to refund taxes." 61 C.J. 975, 985. It may be that taxes paid under compulsion or duress could be recovered by proper action against the officials so collecting the same, (61 C.J. 1002), but your question here is whether the department itself may voluntarily refund taxes which it becomes convinced were collected by its field division erroneously.

Chapter 73 of the Laws of 1939 authorizing the Field Division of the State Police to collect the taxes in question provides for a suspense fund under Section 6 of the act. Section 18 authorizes the keeping in this suspense fund of sufficient monies to re fund taxes erroneously collected, and authorizes their refund upon application made within six months, on recommendation of the Board of Supervisors. It provides for "refunds of all **such** mileage taxes or **license fees** imposed by this act which have been erroneously or wrongfully collected * * *." Mileage taxes are imposed by the act, but not license fees of any kind. The act does authorize the collection by the Field Division men of various license fees, including the license fee provided by Chapter 117 of the Laws of 1939 known as a caravan permit fee; and Section 18 permits claim to be made by any person who believes he {*96} has been erroneously "**charged a** * * * license fee under this Act."

It is my opinion that the intent of the legislature was to authorize "refunds of all such mileage taxes or license fees covered by this act which have been erroneously or wrongfully collected," and that it authorizes the refund of such only as are collected by the State Police Department under the provisions of the Act.

There is good reason why the legislature might refrain from authorizing refund of taxes collected by other departments, and yet permit the refund of the same class of taxes collected under this act. The taxes collected by the Field Division of the State Police are collected out in the field, summarily, usually under compulsion, and without the opportunity for careful consideration. Under those circumstances the legislature no doubt felt that refund should be authorized after thorough investigation. But I can see no good reason why the legislature should authorize the refund of mileage taxes collected

by this division of the State Police, and not authorize the refund of other taxes collected by the division in the same manner.

It is, therefore, my opinion that all taxes and license fees collected under that act by the Field Administration Division of the State Police, including all classes of mileage taxes, licenses and caravan fees collected under its authority by said division, may be refunded under the provisions of Section 18 of Chapter 73 of the Laws of 1939.

It is my understanding that for convenience collections made by the Field Division are deposited daily with the State Treasurer in suspense funds of the proper departments, from which suspense funds a certain percentage is later transferred to the Revenue Bureau's suspense fund created under Section 6, and the balance distributed permanently, thereby accomplishing the same result intended by Section 6 insofar as administrative monies are concerned.

It may be that refunds, to be made from the suspense fund mentioned in Sections 6 and 18, could likewise be transferred to such fund from the various department suspense funds wherein they have been temporarily deposited pending transfer, determination of their ownership, or final distribution, if the deposits in such "suspense" funds are so deposited for that purpose.

Unless moneys which may be subject to refund are required by law to be and are held as such in suspense, uncommingled with state moneys, a statute authorizing their refund might be invalid. See opinion on rehearing in McDoo Petroleum Co. v. Pankey, 35 N.M. 246, and compare Gamble v. Velarde, 36 N.M. 262. Clearly under these cases Section 18 of the Act is not an appropriation; that specific taxes, the validity of which is contested, may be placed in a suspense fund by direction of the legislature pending determination of their validity and refunded if found invalid, may be safely assumed; but whether receipts may be indiscriminately placed in a fund and refunded therefrom under the claim that they are not in the treasury is something else.

By: A. M. FERNANDEZ,

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