

Opinion No. 42-4056

March 31, 1942

BY: EDWARD P. CHASE, Attorney General

TO: Mr. C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*174} Receipt is acknowledged of your letter dated March 27, 1942, enclosing a letter to you from the county treasurer of Curry County, in which he states that he has found a number of errors and discrepancies in which the amount of taxes collected is less than the amount of taxes assessed and charged to the treasurer, due to errors in computation or in valuations, etc. In almost every instance a tax receipt in full has been issued where the tax rolls and records show, in fact, that full payment was not received. The Assistant District Attorney, Mr. Rowley, has advised the treasurer that where the correct amount of taxes was not collected, there can be no recourse on the taxpayer, nor can his property be sold for any shortage of the taxes collected. You request an opinion as to the correctness of the conclusion of the Assistant District Attorney relative to this matter.

I am forced to disagree with the Assistant District Attorney to some extent relative to this matter. Article IV, Section 32 of the Constitution, provides that no obligation or liability due to the state or any municipal corporation therein shall be extinguished except by payment thereof into the proper treasury or by proper proceedings in court. As to the lien of taxes, Section 141-412, New Mexico Statutes Annotated, 1929 Compilation, as amended by Section 1, Chapter 29, Laws of 1939, provides in part as follows:

"All taxes levied upon real estate shall be a lien thereon from the first day of January of the year in which the levy is made and continue as such until paid or foreclosed by sale."

Under Section 141-306, New Mexico Statutes Annotated, 1929 Compilation, it is provided:

"The tax roll when delivered to the county treasurer, properly verified by the affidavit of the county assessor and properly certified by the county commissioners, as required by law, shall constitute his authority to collect the taxes therein set forth * * *"

If a taxpayer makes a payment of taxes by check and the treasurer issues a receipt therefor, but through negligence of the treasurer in depositing the check, or for other reasons, the check is not paid, the transaction does not constitute a payment of the taxes and the treasurer can still go back and collect taxes from the taxpayer. Vial vs. Paradis, 255 P. 643, 44 Idaho 157, 53 A.L.R. 191.

In view of the amount charged to the county treasurer and the constitutional provision above quoted, the treasurer has no authority to diminish the taxes assessed

intentionally or unintentionally, and if, through a mistake, he issues a receipt in full, it appears to me that such receipt, insofar as the same is incorrect, would be invalid and is subject to correction. It is true that the taxpayer has relied upon the county treasurer's statement and paid all that has been demanded. In so doing, the Supreme Court of this state has held that the taxpayer does not lose his right to redeem property which may be sold as a result of the mistake. However, there is a distinction between maintaining the right to redeem by paying the balance that may be due, and considering the partial payment as being payment in full, regardless of the fact that a mistake has been made. In *Scudder vs. Hart*, 45 N.M. 76, 110 P. (2d) 536, the Supreme Court quotes from the opinion of the district court, in which it was held that a request for the amount of taxes due and payment of that amount constitutes a tender as to other taxes which were due but which, through a mistake, were not included in the treasurer's statement. The opinion further held that when the treasurer discovered the error and notified the taxpayer thereof that the prior {*175} tender, as a result of the erroneous treasurer's statement, thereupon became of no force and effect, and in that situation it was legally incumbent upon the taxpayer to pay or tender to pay or offer to redeem as to such delinquency. The Supreme Court quoted that part of the lower court's opinion with approval and, insofar as that case is concerned, assumed the same to be correct. Further, in the same case, this language is used:

"It is the duty of the proper officers to impart correct information to those seeking to redeem from tax sales, and an owner does not lose his right to redeem **by permitting the appointed time to elapse**, or paying less than the proper amount, or otherwise failing to comply with the directions of the statute, when this was caused **by the fraud of a public officer**, or by the latter's inability to furnish necessary information, or by his **mistake, negligence**, or miscalculation, **or by misleading advice given by him**; no act of misconduct by him can prevent the redemption."

To the same effect see *Kershner vs. Sganzini*, 45 N.M. 195, 113 P. (2d) 576.

In *Tondre vs. Garcia*, 45 N.M. 433, 116 P. (2d) 584, we find this language:

"The authorities consistently hold that a tender of taxes wrongfully refused is equivalent to payment where the tender and refusal is that it prevents interest or penalties from thereafter accruing on the amount tendered and that it renders a subsequent tax sale illegal if the amount tendered be included therein."

If, as stated in this case, the result of a tender is to prevent interest or penalties from accruing thereafter on the amount tendered, and also to render a subsequent tax sale illegal, if the amount tendered be included therein, then certainly such tender cannot constitute actual payment of the balance due. Upon discovery of the error, in view of the case of *Scudder vs. Hart*, supra, the treasurer should immediately notify the taxpayer of the amount of taxes remaining unpaid, and to surrender his receipt for correction. Such notice will cause the tender made by the taxpayer, as a result of the treasurer's mistake, to become of no force and effect, and if the taxes are not subsequently paid, a tax sale

held thereafter in the usual manner for the delinquency involved, in my opinion, will be a valid sale, and the taxpayer cannot be heard to complain under such circumstances.

Trusting that the foregoing sufficiently answers your inquiry, I am,

By C. C. McCULLOH,

Asst. Atty. General