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TAXPAYER — WHEN HE FILES APPLICATION FOR TAX EXEMPTION OF PROPERTY, SECTION 5616 G. C. — PAYS FIRST HALF OF TAXES ASSESSED AGAINST PROPERTY, BEFORE ACTION BY BOARD OF TAX APPEALS—VOLUNTARY PAYMENT MISTAKE OF LAW—CANNOT BE REFUNDED.

IF APPLICATION GRANTED, COUNTY AUDITOR SHALL CORRECT TAX LIST AND DUPLICATE, UPON RECEIPT OF FINDINGS OF BOARD OF TAX APPEALS—EXEMPTED PROPERTY STRUCK FROM TAX LIST AND DUPLICATE AND ADDED TO LIST OF EXEMPTED PROPERTIES—UNPAID PORTION TAX ASSESSED FOR THAT YEAR REMITTED.

SYLLABUS:

*When a taxpayer files an application for exemption of property from taxation as provided in Section 5616, General Code, and thereafter, but before determination of his application by the Board of Tax Appeals, pays the first half of the taxes assessed against the property sought to be exempted, such payment is a voluntary payment made under a mistake of law and cannot be refunded to the taxpayer. In the event the application of the taxpayer is granted, the county auditor, upon receipt of a certificate of the findings of the Board of Tax Appeals, shall correct the tax list and duplicate by striking such exempted property therefrom and adding the same to the list of exempted properties. Such portion of the tax assessed against the exempted property for that year which remains unpaid is thereupon remitted.*

Columbus, Ohio, November 1, 1940.

Hon. Henry J. Knapke, Prosecuting Attorney,  
Celina, Ohio.

Dear Sir:

Your recent request for my opinion is as follows:

“A tax payer files an application for the exemption of his property from taxation during the year 1939 with the Department of Taxation, such application for exemption being based on one of the applicable provisions of the General Code. On February 2, 1940, the tax payer voluntarily pays without protest the tax for

the first half year 1939. On April 1, 1940, the Department of Taxation issues its entry ordering such property exempt from taxation.

Is it permissible for the County Auditor to refund the tax paid for the first half year 1939 to the tax payer and is it permissible to remit the tax for the last half year 1939?"

Applications for exemption of property from taxation are filed under authority of Section 5616, General Code, which is as follows:

"Any person, board or officer authorized by this act to file complaints with the county board of revision may complain to the tax commission of Ohio at any time prior to the thirty-first day of December in any year, of the determination of a county auditor respecting the liability of any property to taxation in that year, or its exemption therefrom. The commission shall hear such complaint and determine whether the property complained of is subject to taxation and certify its findings to the county auditor, who shall correct the tax list and duplicate accordingly."

The application filed under authority of this section is, as provided therein, for a determination respecting the liability of the property in question to taxation in that year. The auditor is required, upon receipt of a certificate of the findings of the Board of Tax Appeals, to correct the tax list and duplicate accordingly. The facts stated in your inquiry show that the application of the taxpayer was filed in 1939. Accordingly, the exemption, if allowed, would be an exemption for 1939 taxes regardless of when the finding of the Board of Tax Appeals would be made. In your case the determination was made on April 1, 1940. Upon receipt of a certificate of such finding, it was the duty of the county auditor to "correct the tax list and duplicate accordingly." With the tax list thus corrected, there would of course no longer be any tax assessed against the property for 1939.

While the legislature under authority of Section 2 of Article XII of the Constitution of the State of Ohio has passed numerous acts whereby real property owned by certain types of institutions has been exempted from taxation, it has also enacted Section 5616, General Code, providing the means for having such properties placed upon the list of exempted properties. The mere fact that an institution is entitled to have its property placed upon the list of exempted properties does not ipso facto prevent such institution from paying taxes if it chooses. So long as property is listed on the tax list and duplicate, taxes are rightfully assessed and may be paid by the taxpayer. Furthermore, ownership alone does not necessarily determine the right of

property to be exempted from taxation. Section 2 of Article XII provides that "general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose." In *Jones, Treas., v. Conn*, 116 O. S., 1, the following rule is stated in the syllabus:

"Under Section 2 of Article XII of the Constitution of Ohio, in its present form, the personal property belonging to an institution of public charity is exempt from taxation only when used exclusively for charitable purposes, and, if such personal property is invested for financial purposes during the period before the charity was being dispensed by the institution, it is not exempt from taxation during such period."

It thus appears that until the Board of Tax Appeals has determined the property to be exempt from taxation and certified its findings to the county auditor, the auditor is obliged to have the property listed on the tax list and duplicate and the treasurer is justified in receiving tax payments made in accordance with Sections 2649 and 2653, General Code.

In the situation you have suggested, the taxpayer is chargeable with a knowledge of all the facts. The only question is whether or not he is entitled to have the property in question exempted from taxation. This is a question of law. The taxpayer had his option of either submitting his question to the Board of Tax Appeals and awaiting a decision or voluntarily paying the tax. The Supreme Court so held in the case of *Mays v. Cincinnati*, 1 O. S., 268, wherein Judge Ranney on page 275 quoted with approval from the case of *Brisbane v. Dacres*, 5 Taunt, R., 143, in part as follows:

"I think that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute; he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right, by such voluntary payment, should be at liberty, at any time within the statute of limitation, to rip up the matter, and recover back the money."

In Ohio it is well established that voluntary payments, particularly when made under a mistake of law, cannot be recovered. This was the holding in *Mays v. Cincinnati*, *supra*. In *Whitbeck, Treas., v. Minch*, 48 O. S., 210, the court said:

"A party who pays an illegal assessment upon his property,

cannot recover it back in a suit against the treasurer, unless the payment was an involuntary one."

The third branch of the syllabus in *State, ex rel. Pulskamp, v. Commissioners*, 119 O. S., 504, reads in part:

"Where one claims to have paid an illegal assessment, he can not recover the amount so paid unless the payment was an involuntary one. A simple protest against the validity of the assessment is, even coupled with notice to the treasurer that the taxpayer will institute legal proceedings to recover back, not sufficient, but it must appear that payment was necessary in order to avoid the legal steps incident to tax collection."

The rule stated in *Cooley on Taxation*, Volume III, 4th Ed., page 2561, section 1282, and supported by the citation of many authorities is:

"It is well settled that if the payment of a tax is a voluntary payment, it cannot be recovered back."

In *Pomeroy's Eq. Jur.*, 4th Ed., 1740, section 851, the following appears:

"It is well settled at law, and the rule has been followed in equity, that money paid under a mistake of law with respect to the liability to make payment, but with full knowledge, or with means of obtaining knowledge, of all the circumstances, cannot be recovered back."

Applying these principles to the facts you have presented, it appears that the taxpayer having voluntarily paid the first half of 1939 taxes under a mistake of law, the county auditor has no authority to authorize a refund of such payment.

The second part of your question concerns the right to remit the last half of 1939 taxes when the first half has been paid. The complaint as to the 1939 assessment having been filed prior to the thirty-first day of December, 1939, the Board of Tax Appeals had the right to determine the liability of the property "to taxation in that year, or its exemption therefrom." The Board of Tax Appeals having once acquired jurisdiction, retained its jurisdiction until a final determination was made. After having heard the complaint and determined that the property was exempt from taxation for 1939, it was the duty of the Board of Tax Appeals to certify its findings to the county auditor, who, as provided in Section 5616, General Code, "shall correct the tax list and duplicate accordingly." The correction required consisted of striking the exempted property from the tax list and

duplicate and adding the same to the list of exempted property. The effect of this correction was to remit all unpaid taxes for the year in question.

Answering your question specifically, it is my opinion that when a taxpayer files an application for exemption of property from taxation as provided in Section 5616, General Code, and thereafter, but before determination of his application by the Board of Tax Appeals, pays the first half of the taxes assessed against the property sought to be exempted, such payment is a voluntary payment made under a mistake of law and cannot be refunded to the taxpayer. In the event the application of the taxpayer is granted, the county auditor, upon receipt of a certificate of the findings of the Board of Tax Appeals, shall correct the tax list and duplicate by striking such exempted property therefrom and adding the same to the list of exempted properties. Such portion of the tax assessed against the exempted property for that year which remains unpaid is thereupon remitted.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.