

OPINION NO. 70-118**Syllabus:**

If property is reclassified from personalty to realty, refunds may be paid only according to law and no refunds may be made of taxes paid voluntarily.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: Paul W. Brown, Attorney General, September 3, 1970

I have before me your request for my opinion asking:

Are taxpayers entitled to a refund for overpayment of personal property tax if a decision is made to reclassify formerly personal property as real estate?

I might first point out that prior determinations of property classification are not held to be binding as *res judicata* upon taxing authorities, as was decided in Standard Oil Co. v. Zangerle, 141 Ohio St. 505, 49 N. E. 2d 406 (1943). Thus, any given classification of property governs only the year in question and determines only the taxes due for that year. Any questions concerning such classification should be brought to a final decision at that time. Should circumstances dictate, taxing officials are free to classify the same property differently the following year and taxes owed would be computed accordingly. As the tax in each year is fairly owed and paid, there is no provision for refunding past taxes thus paid.

Section 319.36, Revised Code, provides in part:

"* * * If, at any time, the auditor discovers that erroneous taxes or assessments have been charged or collected in previous years, he shall call the attention of the board of county commissioners to such charge or collection at a regular or special session of the board. If the board finds that taxes or assessments have been erroneously charged or collected, it shall:

* * * * * * * *

"(B) In the event of erroneous charges that have been collected, order the auditor to draw his warrant on the treasurer in favor of the person paying them for the full amount of the taxes or assessments so charged and collected. The treasurer shall pay such warrant from the general revenue fund of the county."

The "erroneous taxes" in the statute have been consistently interpreted by the courts to refer solely to clerical errors of the bookkeeping and copying type (Christ v. Commissioners, 13 N.P. (N.S.) 457, 23 O. D. 125 (1912)) and are to be distinguished from fundamental errors which are made in the exercise of judgment and discretion by administrative officers. Should misclassification of property occur, it would clearly be an error of discretion; taxes paid by virtue of such a mistake could not be returned by the county commissioners.

Taxes collected as a result of a fundamental error can be recovered, if at all, only by applying to the courts under the authority of Chapter 2723 of the Revised Code.

Section 2723.01, Revised Code, provides:

"Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected."

It should be noted that such recovery is limited to the year immediately preceding the time that the action is brought and applies only to refunds of illegal taxes and assessments. Consequently, even if taxes were paid as the result of a mistake of fact they may

not be recoverable if the mistake is the taxpayer's and results from his own neglect. Specifically, if the taxes were paid voluntarily they cannot be recovered, King v. Cappellar, 42 Ohio St. 218 (1884).

It is therefore my opinion and you are hereby advised that if property is reclassified from personalty to realty, refunds may be paid only according to law and no refunds may be made of taxes paid voluntarily.