



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Hon. Sidney Latham
Secretary of State
Austin, Texas

Dear Sir:

Attention: Mr. W. Luther Estes

Opinion No. O-5982

Re: Does the Secretary of State have the authority to now voluntarily refund to the corporation involved the amounts paid under protest, suit for recovery of which was improperly filed, and subsequently dismissed on motion of the plaintiff?

Your request for opinion, dated April 24, 1944, has been considered by this department. We quote from your letter of request as follows:

"A domestic corporation paid under protest additional franchise taxes of \$74.40 in 1938 and \$78.60 in 1939, contending the additional assessments were computed on interstate business.

"The corporation filed suit for recovery within the time prescribed in Article 7057b, V. A. C. S., but in the 126th District Court instead of the Justice Court. On motion of the plaintiff, however, the case was dismissed October 23, 1942.

In 1941 agreed judgments were entered in a certain class action for the benefit of several manufacturing companies who had paid franchise taxes under protest on the same grounds. These judgments were agreed upon because of the decision in *Flowers v. Pan American Refining Company*, Civ. App. 154 S. W. 2d 982, error refused. The class action suit, of course, was properly filed in a court of competent jurisdiction, whereas, the individual action mentioned in the second paragraph above, was improperly filed.

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"Bearing in mind the foregoing facts, please advise on the following question:

"Does this department have the authority to now voluntarily refund to the corporation involved the amounts paid under protest, suit for recovery of which was filed but improperly, and subsequently dismissed on motion of the plaintiff?"

Section 1 of Article 7057b, V. A. C. S., allows any person, firm or corporation, that is required to pay to the head of any State department any occupation, gross receipts, franchise, license or other privilege tax or fee, which he does not believe he is lawfully required to pay, to accompany such payment with a written protest, setting out fully and in detail the grounds for which it is contended that such demand is unlawful.

Section 2 of this Article provides in part as follows:

"Upon the payment of such taxes or fees, accompanied by such written protest, the taxpayer shall have ninety (90) days from said date within which to file suit for the recovery thereof in any court of competent jurisdiction in Travis County, Texas, and none other . . . Provided, however, where a class action is brought by any taxpayer all other taxpayers belonging to the class and represented in such class action who have properly protested as herein provided shall not be required to file separate suits but shall be entitled to and governed by the decision rendered in such class action. . . ."

In opinion No. 0-4819 this department ruled:

"Consequently, it is our opinion that refund for taxes paid under protest may be accomplished only by compliance with the provisions of Article 7057b, and that such refunds may be made only after judgment favorable to the taxpayer is reached in a suit filed within ninety days from the date of payment in any court of competent jurisdiction in Travis County, Texas, and none other."

As stated in your request, the corporation involved did not obtain judgment favorable to its cause but rather voluntarily dismissed its action. Furthermore, suit was not filed within the prescribed time in a court of competent jurisdiction in Travis County, Texas.

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In opinion No. C-5876 this department ruled that it is necessary for one claiming the benefit of the "class action" provided in Section 2 of Article 7057b to be specifically named as claiming or intervening in such suit in order to recover franchise taxes paid under protest. We presume from reading your request that the corporation under consideration was not specifically named as a plaintiff or intervenor in the class action referred to in your letter, and as a consequence thereof, could not claim the benefit of this class action.

Based upon the foregoing, it is the opinion of this department that the Secretary of State does not have the authority to voluntarily refund to the corporation involved the amount of franchise tax paid under protest.

Yours very truly

ATTORNEY GENERAL OF TEXAS



By

Robert O. Koch

Robert O. Koch
Assistant

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APPROVED MAY 3, 1949
[Signature]
ATTORNEY GENERAL OF TEXAS