



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
ATTORNEY GENERAL

Honorable W. P. Herms, Jr.
County Auditor
Waller County
Hempstead, Texas

Dear Mr. Herms:

Opinion No. 0-7268

Re: Authority of the Commissioners Court of Waller County to issue a warrant for the amount erroneously collected for personal property taxes, under the facts stated.

Your letter requesting an opinion from this Department upon the above subject matter is as follows:

"The Commissioners Court of Waller County, Texas, has requested of me an advance opinion on the particular questions hereinafter set out and arising in connection with the following facts:

"During the regular meeting of the Board of Equalization of Waller County, in 1944, such Board considered the rendition sheet of one Frank Echol. It appears from the statements of Frank Echol, of the County Clerk and of two (2) present County Commissioners who were also commissioners in 1944 and present at such meeting, that the sworn rendition sheet originally executed by said Frank Echol reflected the rendition of real property only. It further appears from the statement of such County Clerk and such County Commissioners, that during its said 1944 meeting, proceeded to change such rendition sheet by adding thereto 'personal property---\$1,000.00'; Frank Echol was not notified of such meeting and did not appear thereat. Frank Echol first became apprised of the acts of the Board of Equalization changing the rendition sheet, on the 31st day of January, 1945 when he went to the tax collector to pay his taxes. He refused to pay such taxes that day but paid them the next day, February 1, 1945 by check, upon the

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face of which he wrote, 'paid under protest'. Frank Echol states that he did not own any personal property on January 1, 1944, but that he did have custody and possession of about fifteen (15) head of mother cows which belonged to his son who was a non-resident. The value of such cows was customarily fixed by the Board of Equalization at \$10.00 each. Mr. Echol claims that he made an over payment of \$18.66 for the year 1944; that such payment was illegally demanded of him; that he involuntarily paid the same and that the County of Waller now owes him such amount.

Mr. Echol also met with the Board of Equalization at its 1948 meeting, at which meeting his personal property was reduced in value to \$280.00, on which amount he paid taxes on January 31, 1948. At that time the members of the Board of Equalization agreed verbally that such sum of \$18.66 was illegally assessed against him for 1944, and should not have been collected, but through inadvertence or neglect no order to that effect was put on the minutes of such Board.

My questions arising from the above facts are as follows:

1. May the Commissioners Court of Waller County, Texas, lawfully issue a warrant in the amount of \$18.66 to the said Frank Echol in consideration for the execution, by the said Frank Echol, of a release of all suits or causes of action which he might have against Waller County based on the above transactions?

2. If the foregoing question is answered in the negative, may the Commissioners Court sitting as a Board of Equalization correct the minutes of said Board at this time, in such manner as to reflect the actual occurrence at its meeting in 1944, and if so, could a warrant then be issued for the purposes described in question 1?"

Both of your questions are answered in the negative.

From your statement of the facts, it indisputably appears that Mr. Echol, with a full knowledge of the exact situation, voluntarily paid the taxes in dispute. This is conclusive

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against his right to recover the same, and consequently it is conclusive of the right of the Commissioners Court to pay his claim, the same not being a valid enforceable demand against the county.

It has long been the rule that one who, knowing that a tax has been illegally assessed against him, voluntarily pays the same without any kind of duress or legal coercion, may not recover it upon the ground of such illegality. The fact that Mr. Echol paid the tax "under protest" does not change the situation, since he was in no wise coerced his actual payment was voluntary. His case would stand in a different light if his failure to pay such tax could legally have been followed up by a summary imposition of a penalty, forfeiture, or the like, against him, and he had made the payment to prevent such penalty or forfeiture. That would have been legal duress, entitling him to recover the payment, whether made under express protest or not.

In *Austin National Bank v. Sheppard*, 71 S. W. (2) 244, the Supreme Court said:

"(6) A person who voluntarily pays an illegal tax has no claim for its repayment. 26 R.C.I. p. 455, § 411; *City of Houston v. Feesser*, 76 Tex. 365, 13 S. W. 266; *Galveston City Co. v. City of Galveston*, 56 Tex. 486; *Gaar, Scott & Co. v. Shannon*, 52 Tex. Civ. App. 634, 118 S. W. 361 (writ ref.), and authorities cited on page 364. This case was affirmed by the United States Supreme Court, 223 U. S. 468, 32 S. Ct. 236, 56 L. Ed. 510.

"(7) A person who pays an illegal tax under duress has a legal claim for its repayment. * * *

"(8) Duress in the payment of an illegal tax may be either express or implied, and the legal duty to refund is the same in both instances. 26 R.C.I. p. 457, § 413.

"(9) When the statute provides that the taxpayer who fails to pay the tax shall forfeit his right to do business in the state, and have the courts closed to him, he is not required to take the risk of having his right to resort to the courts disputed and his business injured while the invalidity of the tax is being adjudicated. 26 R. D. I. p. 458.

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"(10) In the absence of a specific statute to the contrary, the fact that an illegal tax is or is not paid under protest is of no importance. 26 R.C.L. p. 459 § 414."

The same holding was made by the Supreme Court in National Biscuit Co. v. State, 138 S. W. (2) 687, and still again in Union Central Life Ins. Co. v. Mann, Attorney General, et al, 158 S. W. (2) 477.

The situation would not be any different if the Board of Equalization should now rescind its erroneous order (if indeed it would have the power to do so). That would be mere form, and it could not operate to galvanize the claim into a legal enforceable obligation of the county, for the rights of the respective parties were fixed at the date of the voluntary payment. One cannot do by indirection what he cannot do directly.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

Ocie Speer
Ocie Speer
Assistant

APPROVED JUN 24, 1946
[Signature]
FIRST ASSISTANT
ATTORNEY GENERAL

08-MR

APPROVED
OF FINANCIAL
COMMITTEE
BY *[Signature]*
CHAIRMAN