



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

(R75-660)

BRUCE E. BABBITT
ATTORNEY GENERAL

June 10, 1976

76-181

Mr. Jack Trimble, Director
Arizona Department of Insurance
1601 West Jefferson
Phoenix, Arizona 85007

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Dear Mr. Trimble:

In his letter of June 30, 1975 to this office, your predecessor asked the following question:

"Can surplus line brokers charge a 3 1/2% premium tax on Mexican automobile insurance policies and other surplus line automobile policies?"

The Department of Insurance has been collecting a tax of 3 1/2% of gross premiums on surplus line automobile insurance pursuant to A.R.S. §§ 20-416 and 20-224.01. A.R.S. § 20-416(A) states:

"A. On or before March 1 of each year, each surplus line broker shall remit to the State treasurer through the director a tax on the premiums, exclusive of sums collected to cover federal and state taxes and examination fees, on surplus line insurance subject to tax transacted by him during the preceding calendar year, as shown by his annual statement filed with the director. The tax shall be at the rate of three per cent of the gross premiums less premiums returned on account of cancellation or reduction of premium, and shall exclude gross premiums and returned premiums upon business exempted from surplus line provisions under § 20-420."

A.R.S. § 20-224.01(A) states:

"A. Beginning on July 1, 1959 and coincident with the filing of such tax report as required in § 20-224, each foreign or alien insurer and each domestic insurer who fails to



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maintain in this state a home office as defined by rules and regulations adopted by the director shall pay to the state treasurer, through the director, a tax of one-half of one per cent of such net premiums received from all insurance carried for or on vehicles as defined in § 28-101, in addition to other applicable taxes."

From a reading of the two sections, it appears that each section imposes a different tax on different subjects of taxation. While A.R.S. § 20-416 imposes a surplus line tax upon the surplus line broker, A.R.S. § 20-224.01 imposes an additional premium tax on certain insurers.

A similar situation was the subject matter of Attorney General Opinion No. 59-10. Among the questions presented in that opinion were the tax liability of a surplus line broker on Workmen's Compensation writings, and whether the tax imposed on the surplus line broker was affected by the retaliatory tax provision of A.R.S. § 20-230. After reviewing the statutory provisions involved, the opinion concluded that a surplus line broker was liable for a tax of 3% pursuant to A.R.S. § 20-416, regardless of the type of insurance involved, and that such broker was not subject to the tax imposed upon insurance carriers engaged in Workmen's Compensation insurance by A.R.S. § 23-961(E). The opinion held that the taxes levied by A.R.S. §§ 20-416 and 23-961(E) were two distinct taxes applicable to two separate entities. The opinion further concluded that since the retaliatory tax provision in A.R.S. § 20-230 applied to insurers, and not brokers, a surplus line broker was not subject to the retaliatory tax.

The reasoning of Opinion No. 59-10 is equally applicable in this situation. A.R.S. § 20-224.01 only levies an additional premium tax upon certain insurers. It does not purport to tax brokers. Since the taxes levied by A.R.S. §§ 20-224.01 and 20-416 are two distinct taxes applicable to two different subjects of taxation, a surplus line broker is not liable for the additional premium tax imposed by A.R.S. § 20-224.01. A surplus line broker is only liable for the tax imposed by A.R.S. § 20-416 regardless of the type of insurance involved.

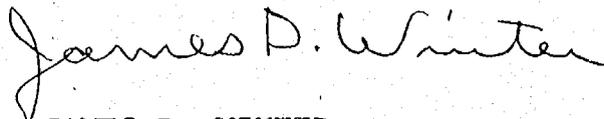
In his letter, he also asked what steps should be taken concerning this matter if the 3 1/2% tax rate was not according to law. The Department should refrain from imposing the 1/2 of one percent additional premium tax on any surplus line broker for any future tax year.

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Since the additional premium tax has been levied by the Department on certain surplus line brokers it is probable that claims for refund will be filed by such brokers. The insurance code does not contain specific statutory provisions relating to the refund of taxes paid. In the absence of adequate remedies in the taxing statutes, a taxpayer has a common law right to sue for taxes illegally and unconstitutionally exacted, provided that the taxpayer paid involuntarily under protest. State Tax Commission v. Superior Court, 104 Ariz. 166, 450 P.2d 103 (1969). On the other hand, taxpayers who paid their taxes without protest cannot recover any portion of the taxes paid. State Tax Commission v. Superior Court, supra; Maricopa County v. Citrus Land Co., 55 Ariz. 234, 100 P.2d 587 (1940); and Southern Pacific Company v. Cochise County, 92 Ariz. 395, 377 P.2d 770 (1963). Finally, in a common law suit to recover taxes paid under protest, the general four year statute of limitations provided by A.R.S. § 12-550 is applicable, and generally the statute begins to run at the time the taxes were paid. Merchants Dispatch Transportation Corp. v. Arizona State Tax Commission, 20 Ariz. App. 276, 512 P.2d 39 (1973).

Sincerely,

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Attorney General



JAMES D. WINTER
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